

A
0
0
9
8
1
5
3
8
2



UC SOUTHERN REGIONAL LIBRARY FACILITY



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

Sacramento County Law Library

RECEIVED

JUN ? 1919

From

*Cayers Corp Co through
Boston BK Co*



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

THE
ENGLISH REPORTS

VOLUME CLXI

THE ENGLISH REPORTS

ECCLESIASTICAL, ADMIRALTY, AND PROBATE AND
DIVORCE

THE RIGHT HONOURABLE BARON FINLAY OF KAIRI,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

EDITED BY

LEE VOLK, ESQ., BARRISTER AT LAW,
OF THE MIDDLE TEMPLE

W. GREEN & SONS, PRINTERS, 15, ABchurch Lane, LONDON, E.C. 4.
STEVENS & SONS, 1, PATERNOSTER Row, LONDON, E.C. 4.

THE ENGLISH REPORTS
OF THE HOUSE OF COMMONS

AND OF THE HOUSE OF LORDS
IN PARLIAMENT ASSEMBLED

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE BARON FINLAY OF NAIRN,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE ENGLISH REPORTS

REPORTS of CASES ARGUED and DETERMINED
in the ARCHES and PREROGATIVE COURTS
of CANTEB **VOLUME CLXI** HIGH COURT
of DELEGATES: containing the JUDGMENTS
of the Right Hon. SIR GEORGE LEE. By

**ECCLESIASTICAL, ADMIRALTY, AND PROBATE AND
DIVORCE**

CONTAINING

**LEE, VOLS. 1 AND 2; HAGGARD (CONSISTORY), VOLS. 1 AND 2;
PHILLIMORE, VOLS. 1 TO 3**

**W. GREEN & SON, LIMITED, EDINBURGH
STEVENS & SONS, LIMITED, LONDON**

**AGENTS FOR THE UNITED STATES OF AMERICA
THE BOSTON BOOK COMPANY**

**AGENTS FOR CANADA
THE CANADA LAW BOOK COMPANY**

1917

ERRATA.—VOL. 160.

Page 25, line 30—for “annuitant,” *read* “accountant.”

„ 25, „ 32—for “accountant,” *read* “annuitant.”

„ 103, „ 9 from foot—for “1 Madd. 307,” *read* “1 Madd. 209.”

„ 226, „ 9—for “BIRMINGHAM,” *read* “SOUTHAMPTON.”

„ 440, „ 10—for “with remainder,” *read* “or.”

„ 540, „ 26—for “over,” *read* “to take.”

„ 949, „ 10—for “not unjust,” *read* “unjust not.”

On back of volume, 3 Y. & C. has been inadvertently omitted.

REPORTS of CASES ARGUED and DETERMINED
in the ARCHES and PREROGATIVE COURTS
of CANTERBURY, and in the HIGH COURT
of DELEGATES: containing the JUDGMENTS
of the Right Hon. SIR GEORGE LEE. By
JOSEPH PHILLIMORE, LL.D., Advocate in
Doctors' Commons, Chancellor of the Diocese of
Oxford, and Regius Professor of Civil Law in the
University of Oxford. Vol. I. Containing Cases
from Hilary Term, 1752, to Trinity Term, 1754,
inclusive. London, 1833.

[1] CASES IN THE ECCLESIASTICAL COURTS, 1752.

LAMKIN *against* BABB. Prerogative Court, Hilary Term, January 21st, 1752.—
Probate granted of an unexecuted will, the intention of the deceased being clear,
and the due execution of the instrument having being prevented by sudden
incapacity superinduced by the violent conduct of his wife, who was interested
in thwarting that intention.—Probate of a will of later date (i.e. the next day)
refused, because it had been extorted from the deceased by the importunity of
his wife.

Dr. Hay's opening for Babb. Thomas Lamkin died 1st June, 1751; made will
dated 28th May, 1751; left his estate equally between his wife and two children;
made William Bristow and John Babb executors; Bristow renounced; Babb a nude
executor; Cutlove, a schoolmaster, sent for on 28th May to make his will; wife said
no will should be made till a friend of hers was present; Bristow sent for by her;
none present at making it but Cutlove and his son and Bristow; deceased directed
his estate to be equally divided between his wife and two daughters; proof of
instructions; directed Bristow to be executor; named him himself; Bristow would
not take it alone; Babb was then proposed and agreed to, when the will was finished;
the family sent for to see him execute it. Wife said it would not do without setting
his name, and opposed its being executed. Cutlove said he had set his mark, and that
was sufficient, and so it was no further executed. 29th May wife sent for Allen, and
proposed to him to make deceased's will. Allen asked him if he should make his
will; [2] deceased said "Yes;" affection to daughters; deceased under custody of
his wife, when second will made. Clergyman who was with him immediately after
says he was not sensible.

Dr. Jenner's opening for Lamkin. Deceased made a will before his last marriage,
in which he leaves a great deal to his now widow, Mary Lamkin, the party; no proof
deceased had animus testandi on 28th May; he was under the direction of his daughters
on that day. Bristow and Cutlove differ: Bristow says deceased told Cutlove he
sent for him to make his will. Cutlove contrary; deceased gave no other instructions
but only said "All alike." Cutlove junior wrote the will, except the exordium, which

was written before Cutlove came ; deceased did not voluntarily appoint Babb executor ; witnesses differ about what deceased said concerning legacies to his executors ; admit Cutlove proves reading the will to deceased, and that he made his mark to it, and then rambled in his talk. Bristow says Mrs. Lamkin attempted to snatch the will out of Cutlove's hand, but he says otherwise himself. Bristow says deceased was of sound mind all the time ; Cutlove speaks only to the time of giving instructions ; last will reasonable ; both his daughters married and provided for by him ; gave 50l. to one daughter, and a 100l. to the other. Inventory about 200l. only ; affection to wife ; on 29th May deceased perfectly sensible ; Allen was not sent for, but came accidentally to visit deceased, and conversed with him several hours ; no evidence of deceased being in his wife's custody ; she asked him to make a will ; he said "Yes." Allen asked him if he would make his will to his wife ; he said [3] "Yes." Allen wrote it and read it to deceased ; he executed it, and delivered it to his wife, and soon after said, "Molly, if you are satisfied I am content." Deceased had no recollection that he had made a will the day before ; all the three witnesses to last will fully swear to capacity then ; exceptions to Jenkins upon his declaration to Marshall ; Marshall has evidently sworn false ; the will made on 29th May an hour before Allen the clergyman came to deceased ; he says deceased appeared stupid, but he had no discourse with deceased and only prayed by him.

Evidence for Babb.

1. Charles Cutlove. 28th May, 1751, deponent and his father went, being sent for, to make deceased's will ; Babb and others were present ; deceased's wife said no will should be made without a friend of hers being present ; she sent for Bristow ; Cutlove asked deceased if he knew what he was come for ; deceased said "No ;" Cutlove said, to make his will ; deceased said he would make his will with all his heart ; directed his estate to be given to all equally ; deceased named Bristow executor ; he declined being executor alone ; Cutlove asked him if he would make Babb executor ; asked him if he would leave executors any thing ; deceased said "Yes ;" Cutlove asked him if he would give them a guinea each ; deceased said it was too much ; will was read to and approved by deceased ; deceased said he was going to write his name to his will ; he made his mark to it as he lay on his side, but his senses then failing him, nothing more was done ; he was of sound mind till after he had made his mark.

5. Int. Will read to deceased by respondent's [4] father, and he expressly approved it ; respondent did not sign it.

2. Edmund Cutlove. Oesland came to deponent and told him deceased wanted deponent to make his will ; says deceased's wife made a great disturbance and opposed deceased's making a will ; deponent asked him if he intended to make a will ; he said "Yes ;" deponent asked him in what manner he would dispose of his estate : "Will you leave more to your wife than to your children, or the contrary ; or are you disposed to leave them all equal?" he replied, "All alike ;" deponent asked him who he would make executors ; deceased said, his father, Babb, and Mr. Bristow ; deponent made will accordingly ; read it distinctly ; deceased well knew the contents and approved of it ; the wife and others were called up, and then deponent sealed the will, and carried it to deceased to execute ; deceased then said it was his will ; he being weak, could not sit up in his bed ; somebody called out to deceased, and said, "What are you going to do?" he replied, "To write my name ;" he was asked to what ; he said, "My will," and then made his mark and then immediately said, "What am I going to do? is this Whitsunday?"—upon which deponent would do no more, thinking he was not then sensible, but he was sensible till he had made his mark.

2. Int. Oesland, who fetched deponent, said deceased was perfectly sensible.

3. Int. Respondent did not witness the will, because the wife opposed it. 4. Int. Deceased did not tell deponent he sent for him to make his will. 5. Int. Proves reading and approving the will.

3. William Bristow. Deponent was sent for by deceased's wife on the 28th May, 1751 ; she [5] said to deponent, "They have persuaded my husband to make a will," and desired deponent to be her friend, and do the best he could for her ; she and others made a great noise, upon which they were desired to go down stairs ; deponent then said to deceased, "You have a wife ;" he replied, "I know I have, and I have two

daughters ;" gives the same account of the instructions as the other witnesses, except that he deposes deceased said he would leave his executors nothing ; proves reading and approving will ; verily believes deceased would have executed his will, if his wife by her noise had not prevented him ; she attempted to snatch the will out of Cutlove's hand ; swears to entire capacity.

5. Int. Proves reading and approving.
Will read, dated 28th May, 1751.

Evidence for Lamkin.

1. Thomas Allen. 29th May, 1751, deponent went to deceased's house to ask him how he did ; staid with him some hours, and then deceased's wife asked deceased to make his will ; he said, " Yes ;" deponent asked him if he was willing to make his will to his wife ; he said " Yes ;" deponent wrote will dated 29th May, and read it to him ; he approved it, and executed it, and delivered it to his wife, but said nothing to her ; afterwards deceased said to her, " Molly, if you are satisfied I am content ;" deceased perfectly in his senses.

2. Int. Deceased's street door was bolted and locked while will was making, by his wife's order, and his daughters were refused admittance.

John Jenkins. 29th May, Allen Har-[6]-grave and deponent were with deceased ; deposes that deceased declared he knew nothing of his having made a will the day before ; she asked him if he was willing to make another will ; and he said, " I will ;" upon which she desired Allen to make a will in favour of her ; Allen then asked deceased if he was willing he should make a will in favour of his wife ; he answered " Yes ;" Allen then wrote the will and read it to deceased, and asked him if he approved thereof ; he replied he did, and said he would sign it ; he did then set his mark, and executed and published it, and then the witnesses attested it ; deceased perfectly sensible.

1. Int. Deceased said to deponent, " Jack, are you going to sign it ?" deponent said " Yes ;" deceased replied, " Very well." 2. Int. Street door was bolted by producent's order, and his daughters were refused admittance ; the parson staid some time at the door ; Parson Allen, when he was let in, said to his brother Thomas Allen, " I hope you have not been meddling in family affairs ;" and he answered, " No."

4. Int. Does not remember he declared to Marshall as interrogator.

3. Elizabeth Hargrave. Producent asked deceased if he would make his will to her ; deceased said " Yes ;" proves reading, approbation of the will and execution, attestation and capacity.

1. Int. Agrees with Jenkins. 2. Int. Respondent locked the street door without orders from producent, that she might have time to talk with deceased. 5. Int. Respondent is sister to producent.

Evidence for Babb on second allegation.

1. Robert Calvert. Proves deceased's affection-[7]-tion to his daughters, and that deceased said he thanked God he had lived to see them settled in the world.

2. Int. Believes deceased gave some portions to his daughters.

2. William Marshall. Proves affection to his daughters, and their dutiful behaviour ; deponent saw Read, Mr. Allen, and the deceased's daughters and their husbands, waiting at deceased's door, and a woman from the window said they were busy ; Jenkins told deponent, a day or two after deceased's death, that he had persuaded his mistress to get another will made, and to send for Mr. Allen for that purpose, and that he and Mr. Allen had done the trick, and, by God, they had flung them ; deponent said, " I suppose your mistress will pay you well for what you have done ;" he replied, Yes, she had promised so to do, but he could not tell what he should have, for it was to be given to his father the next Sunday.

2. Int. The daughters have a freehold estate. 3. Int. Jenkins said they had cooked them.

3. William Allen, clerk. Proves great affection to the daughters ; deponent waited for a few minutes at deceased's door, and was then let in ; deponent said to his brother, Thomas Allen, " What brings you here ? I hope you have not been interfering in family affairs ;" he replied, " No, I have been doing nothing ;" deponent then prayed by deceased ; he appeared very stupid, and believes he was incapable of doing any serious act ; deceased did not speak to deponent.

4. Int. Deponent asked him how he did, and then went to prayers; deponent had no conversation with deceased, and cannot say whether he was entirely senseless.

[8] 4. John Norris. Proves affection to daughters, &c.

2. Int. Respondent has heard deceased gave his daughter Clark 50l., and to his other daughter 100l., they have a small freehold by his death.

Dr. Hay's argument for Babb. Babb was not present when will of 28th May was writing; the motion for second will came from his wife; Allen says deceased only said he was willing to make his will to his wife, by which deponent understood he meant to give all to his wife.

Dr. Bettesworth, same side. No proof of alteration in deceased's intention; no declaration previous to the last will; Swinburne, part 2, (a) sect. 25, will not good made at interrogation of a suspected person; 7th part, sect. 4, the same.

Dr. Jenner and Dr. Smalbroke, contra, for Lamkin. The exordium of the will of 28th of May was brought ready wrote; proper question is, whether either of these wills are good? Deceased told his wife if she was satisfied, he was content. *Wilde v. Sir Brownlow Skerrard*. Will prepared by Wilde; nobody present but deceased and the writer; he deposed to reading, and two others to [9] execution; great weakness proved; Dr. Bettesworth, the judge, said he must pronounce according to the evidence for capacity. Deceased in this case looked on his daughters as provided for; Calvert says a month before his death deceased thanked God he had lived to see them married and settled.

JUDGMENT—SIR GEORGE LEE. I was of opinion that it appeared from the evidence that the first will of 28th May was made agreeably to deceased's intention, and that he was then capable, and approved of it, and would have executed it, if the noise and disturbance his wife made had not thrown him into a sudden incapacity; and I was of opinion that the will of 29th May was made merely by the pressure and importunity of the wife, (b) and was done clandestinely, at a time when it was at least very doubtful whether the deceased had sense enough to know what he did; and therefore I gave sentence for the first will, dated 28th May, 1751.

SHAUNESSY against ALLEN, Attorney of Melony. Prerogative Court, Hilary Term, January 21st, 1752.—Conclusion of a cause rescinded, to allow proof to be produced of the handwriting of a testator.

James Shaunessy, deceased, made his will 24th January, 1745; gave a legacy of 10l. and the residue to Brian Melony, and made him executor; deceased's widow opposed it; Allen, attorney for Melony, propounded it, and examined only two witnesses; the widow did not plead.

[10] 1. Josiah Mabert. The testator, the deceased, in this cause, told deponent he wanted to make his will, and gave deponent instructions to the purport of the will; proves reading, approving by deceased, and execution; believes the three other subscribing witnesses were present, but does not perfectly remember it; proves capacity.

2. Charles Hardy, Esq. Deponent was commander of the ship on board which deceased was; proves the name, "Charles Hardy," to the will subscribed as a witness to be his own handwriting; does not remember the transaction, but believes the will was signed in his presence by deceased.

(a) So it is if the testator being sick, his wife neglect to help him, or to provide remedies for the recovery of his health, and nevertheless in the mean time busily apply him with sweet and flattering speeches to make her executrix, or to bestow his goods on her, for in this case the disposition is ineffectual. Swinburne, part 7, sect. 4. And in another place the same author lays it down; the sixth case is where the testator had made another testament before, for then latter instrument made at the instigation or request of another person is not good in prejudice of the former. See also *Green v. Skipworth and Others*, 1 Phill. 53.

(b) If a man make his will in his sickness by the over importunity of his wife, to the end that he may be quiet, this shall be a will made by controul, and shall not be a good will. By Roll, C. J., in a trial at bar in the case of one *Hacker and Newborn*, Mich. 1654. The case is entitled *Hacker and Newborn*, a Sussex case. Styles, 427.

The counsel objected that the will was not sufficiently proved, there being only one witness to it; for Captain Hardy speaks only to his belief, and therefore makes no proof.

JUDGMENT—SIR GEORGE LEE. I rescinded the conclusion of the cause for the purpose of allowing Allen, the attorney, to plead the subscription to the will to be deceased's handwriting: he accordingly pleaded, and fully proved it, and I afterwards gave sentence for the will with costs.

LAUD *against* BROWNE. Prerogative Court, Hilary Term, January 28th, 1752.—
Administration granted to an uncle in preference to a creditor.

Dr. Paul, for Laud. Alexander Browne died in the "Tartar" sloop, in August, 1745; Laud, as a creditor, prays administration to him, and says deceased died without relations. Browne appears, and alleges deceased left an uncle at Rhode Island. [11] Wickham, agent for the sloop, entered a caveat 8th January. Court ordered Mr. Smith, proctor for Wickham, to exhibit a proxy; none exhibited, and he therefore cannot oppose administration being granted to Laud.

Dr. Simpson, for Browne. Deceased died a bachelor intestate, and left Samuel Browne his uncle. Wickham is agent for the "Tartar" sloop; Laud was the master of the "Tartar;" Laud has made a general affidavit of being a creditor; Wickham (who, as agent, has an interest to see he pays the prize-money belonging to deceased to a proper person) ordered a caveat on behalf of the uncle to be entered, and has sworn deceased left an uncle at Rhode Island, and prays it to be granted to him, and a commission to swear him.

Affidavit of William Laud, 14th January, 1752. Knows of no relation deceased had; deponent is a creditor to him; deceased left only prize-money in the hands of Wickham; believes caveat was entered by him; believes Samuel Browne is a feigned name.

Affidavit of Benjamin Wickham, 25th January, 1752. Deceased died in September 1745, a bachelor; left behind him Samuel Browne, an uncle, and other relations; Samuel was alive in February last, and believes he is now alive; has known him twenty years; deponent has paid most of the "Tartar's" prize-money.

JUDGMENT—SIR GEORGE LEE. I decreed administration to the uncle, and a requisition to swear him, returnable the last session of Trinity Term, 1752.

[12] TROTMAN *against* TROTMAN AND OTHERS. Prerogative Court, Hilary Term, February 5th, 1752.—The legatees in three testamentary schedules cited by the executor under a will to propound all or any of these schedules; schedules pronounced against.

Thomas Trotman, Esq., died 26th May, 1751; made his will dated 3d May, 1743; left three other papers: No. 4, dated May, 1751; No. 5, not dated; No. 6, dated Thursday before Whit-Sunday; deceased out of his senses when the three last papers were wrote. Samuel Trotman, Esq., executor of the will of 1743, cited all the legatees to propound all or any of the three schedules, &c. Mr. Abbot appeared and propounded No. 6, for two legatees, Thomas and Elizabeth Philips, but did not give in any allegation.

JUDGMENT—SIR GEORGE LEE. I pronounced against the three schedules, and decreed probate of the will in common form to the executor.

SULLIVAN *against* HAYDON. Prerogative Court, Hilary Term, February 5th, 1752.—Interest denied, but pronounced for.

Haydon, executor of a seaman, got probate of a will said to be deceased's. Sullivan, brother to deceased, called him to bring in probate, &c. Haydon denied his interest. Sullivan propounded, and fully proved it.

JUDGMENT—SIR GEORGE LEE. I gave sentence for his interest with costs.

PRICE *against* SCOTT, STAMP, AND COLE. Prerogative Court, Hilary Term, February 17th, 1752.—Memorandum for a will, written on the back of a letter, established as a will.

Benjamin Smith, attorney at law, wrote a memorandum for his will on the back of a letter, dated 3rd October, 1743; gave the residue to his [13] relations, as appointed in his father's will. James Cole, a residuary legatee in deceased's father's will, propounded this schedule as being a residuary legatee therein. The schedule was fully proved to be deceased's handwriting. No opposition.

JUDGMENT—SIR GEORGE LEE. Sentence for it, as deceased's last will.

CAROLUS *against* LYNCH. Prerogative Court, Hilary Term, February 17th, 1752.—Administration which had been granted to a creditor revoked on the production of a will.

Garrett Carolus made his will, dated 30th October, 1747, and appointed his daughter, Mary Carolus, executrix and universal legatee; deceased being indebted to Lynch 7l. 13s. 4d., gave him a letter of attorney to receive wages at the India House for payment of his debt. Lynch received from the company more than his debt amounted to; but, nevertheless, he, pretending to be a creditor, and that there were no relations, obtained administration. The daughter called him to bring in the administration, and to shew cause why probate should not be granted to her of the will. Lynch appeared and opposed the will. Mary Carolus propounded it, and has fully proved the execution, &c. of the will; and that Lynch knew she was deceased's daughter.

JUDGMENT—SIR GEORGE LEE. I gave sentence for the will, and revoked the administration, and condemned Lynch in full costs.

[14] CORNISH *against* CORNISH. Prerogative Court, By-Day, February 25th, 1752.—Administration which had been granted to an illegitimate son on a false affidavit, revoked.

Thomas Cornish, of the ship "York," died a widower, intestate, on 25th August, 1749. He left John Cornish, a minor, his only lawful child, and Thomas Cornish, his natural son by Elizabeth Bastard, whom he married on 18th August, 1729, and Thomas, the son, was born 26th March, 1729, preceding. After deceased's marriage to Elizabeth Bastard, he had by her John Cornish, the minor. 9th March, 1751, Thomas Cornish, the bastard son, took administration to deceased; swore he was deceased's natural and lawful son. 18th March, 1751, Thomas was cited to bring in the administration, &c., and to shew cause why it should not be granted to John Crank, as guardian to the minor son, &c. Thomas Cornish absconded; viis et modis issued 2nd sess. Trin. 1752; Cheslyn appeared for Thomas, and brought in the administration, and confessed John to be deceased's lawful son, but denied him to be the only next of kin to deceased; Major, John's proctor, propounded his interest as deceased's only next of kin, and fully proved it by six witnesses.

JUDGMENT—SIR GEORGE LEE. I pronounced for the interest of John Cornish, as deceased's only next of kin, revoked the administration granted to Thomas, and condemned him in 25l. costs.

TREGAYLE *against* MENNELL. Prerogative Court, By-Day, February 25th, 1752.—A will proved per testes.

Littleton Point Mennell, Esq., made his will, dated 20th September, 1751; appointed his son, Hugh Mennell (who is a minor) sole executor; [15] administration cum test. was granted to Tregayle, as his guardian; Tregayle, as guardian to the minor, cited Godfrey Mennell, deceased's eldest son, to see the will proved by

witnesses; Godfrey appeared; the will was propounded, and execution, handwriting, and deceased's capacity, were fully proved.

Sentence for the will.

TAYLOR against NEWTON. Prerogative Court, Hilary Term, By-Day, February 25th, 1752.—Where an administration has been granted to a guardian pendente minore estate of a widow, and the widow, on coming of age, renounces in favour of a creditor, the creditor has a right to call on the original administrator for an inventory and account.

William Taylor died intestate; left a wife who was a minor and one child an infant; in June 1751 administration was granted to Newton as guardian to the widow; in November 1751 the widow came to age, and then she renounced for herself and child and administration was granted to Isaac Taylor, a creditor; Newton refused to account to Isaac Taylor; Taylor called him to give in an inventory and account; Newton appeared under a protestation because his administration was expired, and Dr. Jenner, his counsel, insisted he was not liable to account now his administration is expired.

JUDGMENT—SIR GEORGE LEE. But I decreed Newton to give in an inventory and account by 17th of March, and condemned him in 1l. 6s. 8d. costs.

TEW against BAINES, ALIAS FORRESTER. Prerogative Court, Hilary Term, By-Day.

Will proved at Totness by Baines; subsequent will proved in Prerogative by Tew; Baines was cited to bring in her will &c.

[16] JUDGMENT—SIR GEORGE LEE. I revoked the probate granted to Baines and assigned her proctor to bring it in by 17th March following.

WALTON against RIDER.(a) Arches Court, Hilary Term, By-Day, February 28th, 1752.—A suit for jactitation of marriage not sustained. Sentence in favour of the marriage.

Dr. Hay for Rider. This is a cause of jactitation of marriage brought by the Rev. William Walton, Clerk, against Rachel Rider by letters of request from Ely. Jactitation confessed; Rider [17] justified, and pleaded marriage; the parties were intimate in 1724 and 1726; she was then aged about 24 and he about 20; she finding

(a) Suits for jactitation of marriage were of very familiar occurrence in the ecclesiastical courts of this country till the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy, before the House of Lords. In the year 1768 the Duchess, under her maiden name of Chudleigh, instituted a suit for jactitation of marriage in the Consistory Court of London, against Mr. Hervey (afterwards Earl of Bristol); he appeared to the citation, and ostensibly defended himself by pleading a marriage to have taken place between Miss Chudleigh and himself on the 4th of August, 1744, at Mr. Merrill's house, at Lainston (the marriage, in fact, had taken place in Lainston church), in Hampshire. A counterplea was given in on the part of Miss Chudleigh, and on the 10th of February, 1769, the judge of the Consistory Court of London (Dr. Bettsworth,) pronounced against the validity of the marriage, and, according to the usual formula of such suits, enjoined Mr. Hervey to perpetual silence on the subject. After this sentence, Miss Chudleigh intermarried with the Duke of Kingston, and on the death of the duke, the prosecution against her, for bigamy, was instituted in the House of Lords, Mr. Hervey having, in the interval, become Earl of Bristol. In the course of the discussions in the House of Lords, the proceedings in the jactitation cause, and the sentence of the ecclesiastical court were permitted to be produced and read de bene esse, and the counsel for the Duchess, Mr. Wallace (afterwards attorney-general), Mr. Mansfield (afterwards C. J. of the Common Pleas), Dr. Calvert (Dean of the Arches, 1778), and Dr. Wynn (Dean of the Arches, 1788), contended that the sentence of the ecclesiastical court was conclusive, as long as it remained in force, and that of necessity it must be received

herself [18] with child came to town and told a relation they were contracted; 7th November, 1727, they were married at the Fleet by Wagstaffe, a priest of the Church of England; Rider was delivered of a child in January, 1727, which by mistake was baptized by name of Watson; she then went down to Ely in 1727 and owned her marriage and was reputed his wife by his and her families; in 1734 he wrote to her to beg she would disclaim the marriage; he did the same in 1742 and 1744; there is a positive proof of a fact of marriage by Blackburn, and in 1728 he declared he was married to her; Walton was indicted twice in 1747 for bigamy; in August 1749 the bill was not found; in March following it was found but nobody prosecuted, and then he commenced the cause of jactitation.

Dr. Paul contrà, for Walton. Marriage 7th November, 1727; child born 11th January, 1727; baptized as the child of William and Rachel Watson; Blackburn the only witness to the marriage; he falsified in his deposition; the pleaded contract no proof of it; but with child long before the pretended marriage; has pleaded Wagstaffe was a priest in holy orders; no proof of [19] it; one witness against the answer of the party makes no proof; they never cohabited together from the time when they are said to be married; he never maintained her or paid any thing for her for twenty-three years; she has lived at Ely at her own expense and has received the rents of her own estate; in 1744 he married another woman publicly and has had children by her; Rider has cohabited with a tailor and appears to be a lewd woman; Walton did offer her an annuity if she would disclaim the marriage in order to satisfy his present wife; he wrote to her by the name of Rider.

in evidence in all courts, and in all places where the subject of that marriage has become a matter of dispute. On the other side it was contended by the attorney (afterwards Lord Thurlow) and solicitor-general (afterwards Lord Rosslyn), and by Mr. Dunning (afterwards Lord Ashburton) and Dr. Harris, that the sentence in the jactitation cause being collusive, was a nullity—that even if it were fair, it could not be admitted against the king, who was no party to the suit; that if admitted, it could not conclude a suit of this description, which put both marriages in issue—that these objections arose from the general nature of the sentence pronounced, which was never final; from the parties who could not, by their act, bind any but themselves, or those who are represented by them, or at most those who might have intervened in the suit; from the nature of the present indictment, which put the marriage directly in issue, and from the circumstances peculiar to the sentence, which proved it to be collusive.

After the argument had been brought to a conclusion, the following questions were put to the judges by order of the House:—

1. Whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive, if on such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

The Lord Chief Justice of the Common Pleas (Sir William de Grey, afterwards Lord Walsingham) having conferred with the rest of the judges present, delivered their unanimous opinion upon the said questions, and after stating the reasons of that opinion in considerable detail, concluded thus:

We are, therefore, unanimously of opinion:

First—That a sentence in the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the court from proving the marriage in an indictment for polygamy.

But, secondly—Admitting such sentence to be conclusive on such indictment, the counsel for the crown may be permitted to avoid the effect of such evidence, by proving the same to have been obtained by fraud or collusion.

These questions were put to the judges on one day (19th April, 1776), and answered on the day following. See trial of the Duchess of Kingston for bigamy, Howell's State Trials, vol. xx. pp. 355, 538.

Within my recollection only one suit for jactitation of marriage has been raised in any of the courts at Doctors' Commons. It was instituted by Lord Hawke against a person called Augusta Corri, who had assumed the name and style of Lady Hawke. See *Hawke v. Corri*, 2 Hag. 290.

Evidence for Rider.

1. Thomas Blackburn, Gent. æt. 70; deponent has known Rider about thirty-six years by marrying her aunt, and has known Walton about twenty-five years; Walton was the son of John Walton, victualler, at Ely, and Rider was niece of John Walton's second wife; publicly reported at Ely that they courted each other with consent of parents; he was then a student at Cambridge; the end of October 1727 Rider came to deponent's house in London, and told him she was with child by Walton; deponent went to Cambridge to persuade him to marry Rider and told him if he would not he must give security to keep the child; he did not deny she was with child by him; 7th Nov. 1727 they were married at a house near the Fleet, by the Rev. James Wagstaffe, *who deponent believes was a priest in holy orders*, in presence of deponent and his wife, who is since deceased, and of a person who officiated as clerk; deponent gave her in marriage to Walton; on the same day Walton desired deponent to let his said wife lodge and board at deponent's house till after [20] she had laid in; deponent and his wife consented; and she did lodge and board at deponent's house. On 11th January, 1727, she was delivered of a son begot by the said Walton as deponent believes; he was baptized by the name of John, in the parish of St. Dunstan, as the child of William and Rachel Walton, but by mistake is called Watson; about two months after she and her child went to father's at Ely and lived with him till his death; in 1728 deponent went to Ely to visit her father, and staid there about five weeks, during which time deponent was almost daily at Walton's father's house and was civilly entertained by him; deponent was frequently in company with Walton's father and mother and Rider's father when said marriage has been talked of, and they mutually declared their satisfaction at said marriage and at her having had a child, but John Walton said he would advise them to keep asunder for some time till his son could get preferment to support a family; their marriage has been publicly talked of by several at Ely in deponent's presence, and deponent then declared he was present at their marriage; they were commonly reputed at Ely to be husband and wife.

4. Int. Respondent made an affidavit upon an action brought against Rider for debt in which he was described as a barber. 5. Int. Rider has lived at Ely twenty-three years and has supported herself. 7. Int. Believes minister lives with a woman as his wife, and that Rider, before said woman married Walton, acquainted her that she was Walton's wife. 8, 9. Int. In or about August, 1749, Rider indicted Walton for polygamy, and respondent was examined as a witness before the grand jury in support of said bill, and the grand jury [21] *found said bill, (a) and respondent had a warrant for apprehending Walton, but he got out of Huntingdon, and respondent could not apprehend him*; does not know Walton pleaded to said indictment.

2. Cornelius Guy. Deponent knows the parties, and knew their parents; believes Rider is a sober, modest, virtuous woman; cannot say whether she is generally so esteemed, but never heard anything to the contrary; deponent always, from 1728 or 1729, esteemed producent to be Walton's lawful wife, because in one of those years Blackburn was at Ely, and then told deponent that producent was married to Walton, and that he gave her away in marriage to him; deponent has called her Walton, and she is generally reputed to be his wife by the best persons in Ely. Producent's son is now living at Ely, and goes by name of John Walton; deponent always esteemed him to be William Walton's lawful son by producent.

3. Matthew Eburn. It was a common report at Ely, about 1727, that Walton was married to producent, and Walton then told deponent *he had been forced to marry her at London, and seemed to be very uneasy about it*. Before Walton's marriage to Miss Wolfe, he wrote to deponent about it, and desired him to go to producent about it, and offer her an annuity of 10l. if she would sign the certificate mentioned in his letter, dated 2d February, 1744-5; proves said letter to be Walton's handwriting; deponent went thereupon to producent, and read said letter to her, and desired her immediate answer whether she would comply with the terms; she said she would consult with Mr. East, and send deponent an answer; she called on de-[22]-ponent, and refused to comply with said terms, for that she had a certificate of her marriage; deponent has often talked with Walton about his marriage to producent, but Walton

(a) All the passages of the text which are printed in italics are underscored in the original manuscript.

always said he looked on himself as a single man, *for that the ceremony at the Fleet between them was not binding, and that he was forced to it, or complied through fear.* Deponent, before Walton's marriage to Wolfe, asked him, if he thought his marriage to producent unlawful, *why he made any overtures to dissolve it; he replied that "it was to satisfy Miss Wolfe, and to prevent producent's giving them any trouble."*

2. Int. Walton was about 18 in 1727. 4. Int. Producent has maintained herself to this time, and has lived in Ely for 23 years, and Walton has all that time lived there, or in the neighbourhood, except when he was abroad. 5. Int. Knows nothing of Walton's courtship to Wolfe but by said letter, which deponent shewed to said Walton's father; Walton was publicly married to Wolfe, *and his father seemed very uneasy at it.* 6. Int. They have ever since lived together with reputation, and have had a son, who is since dead. 7. Int. Respondent has heard that producent, in August, 1749, preferred a bill for polygamy against Walton, and that such bill *was not found.* 8. Int. Heard and believes she preferred a second indictment against him in March, 1749, *which was found,* but in August, 1750, he pleaded not guilty, and he was acquitted and *declared not guilty.* 10. Int. Believes Rider is not a virtuous woman, and never esteemed her so to be, but does not believe she is a common prostitute; believes she has for many years kept company in a lewd manner with divers men, and it is well known in Ely. 12. Int. Producent had two brothers attorneys. 17. Int. Producent came to John Walton's house, and she was turned out by a constable; has often heard John Walton declare his detestation of producent and her infamous character, and called her a whore, and her child a bastard; believes John had a very bad opinion of her. 18. Int. John Walton twice entertained William Walton and his wife Martha Wolfe and child at his house, and behaved affectionately to them, and was fond of his grandson. 19. Int. Believes John Walton was an honest, religious man, and does not think he would have countenanced his son, if he had thought him married to producent. 20. Int. Respondent esteems William Walton to be a just and upright man, and does not believe he would on any condition forswear himself.

4. Mary Scott. Deponent has known producent 30 years, and Walton 20 years; believed from their behaviour there was a courtship between them; producent a virtuous woman; she and her son lived with her father, the son has always been reputed legitimate, and never heard to the contrary but that producent and Walton were married.

5. John Scott. Gives producent a good character, and has always esteemed her to be Walton's wife, and she is so reputed.

6. Sarah Whitehand. Deponent supped at John Walton's with producent and her relations, and he treated her very civilly; gives her a very good character; after she was brought to bed, she and her son lived with her father; the son was reputed legitimate, and her father always owned her to be Walton's wife.

7. Gotobed East. There was a current report of courtship between the parties in 1726; she was [24] frequently at Walton's father's house; gives producent a very good character; deponent has sold her goods, and gave her credit by name of Walton; deponent has received her rents, and she gave receipts by name of Walton, and for the use of her husband; but for three years last past, the tenant has refused to pay without security to be indemnified against William Walton.

5. Int. Believes Walton was publicly married to his present wife. 6. Int. They have lived together with reputation. 7. Int. Believes bill of indictment against Walton, in August, 1749, *was not found.* 8. Int. Has heard Walton was dismissed on second bill for want of prosecution. 9. Int. She always gave respondent receipts by name of Walton. 10. Int. Believes her to be a virtuous woman. 13. Int. Tenant refused to pay rent because of her marriage to Walton. 15. Int. In 1747 James Child brought an action of debt against producent by name of Rachael Walton, and she was carried to Cambridge gaol.

8. Rebecca Johnson. Gives producent a good character; believes she is accounted to be Walton's wife by the best inhabitants of Ely.

9. Francis Winter. Producent a virtuous woman, reputed to be Walton's wife; has constantly taken the name of Walton.

10. Oxenden Eburn. Read to interrogatories only.

4. Int. Producent has maintained herself. 6. Int. Walton and his present wife have lived together with reputation. 17. Int. Has heard Walton's father speak

ill of producent. 19. Int. Walton's father an honest man, and would not have countenanced his son if he had believed he had been married to producent. 20. Int. Gives Walton a very good character.

[25] 11. Charles Green, Esq. Producent was, in 1730, admitted to a copyhold tenement by the description of Rachael Walton, formerly Rider, wife of William Walton.

8. Int. In Aug. 1750, Walton put himself upon his trial, and was acquitted for want of prosecution.

12. John King. Proves producent's good character; says she was constantly reputed to be Walton's wife; deponent has talked with Walton's father about his son's marriage, and has heard him say his son was ruined, but cannot recollect the particulars of such discourse; producent's son reputed legitimate in January, 1746; producent gave deponent note, and she signed it by name of Walton; esteems her the wife of Walton.

13. Mary Cullen. Deponent is sister to Walton; *has heard he made offers to producent to disown her marriage with him.*

5. Int. Walton publicly married his present wife, and his father declared his liking of such marriage. 6. Int. Walton and his present wife have lived together with reputation, and have had a son, since dead. 10. Int. Does not believe producent is a modest, virtuous woman, nor ever esteemed her such, but believes she is a debauched woman, and has the character in Ely of being a common prostitute; and is reputed to live incontinently with one Petty, a tailor at Ely, and to have so done for two years past; once saw her on a table and a man's hand up her petticoats.

17. Int. Producent was once forced out of respondent's father's house. Respondent has heard her father express great aversion to producent, and call her whore, and her son a bastard, and said she had ruined his son. 18. Int. Walton, and his present wife and son, were well received by his father, and he owned Martha Wolfe as his daughter in law, and was very fond [26] of his grandson. 19. Int. Respondent's father's was an honest man, and believes he would not have countenanced his son if he had believed him married to producent. 20. Int. Gives Walton a very good character.

14. Sarah Nunn. Believes producent is a sober, virtuous woman, and is so esteemed; has always gone by name of Walton, and is commonly reputed to be his wife.

15. Jane Benton. Deponent has known producent twenty years; lived four years in the same house with her; gives her a very good character; she is reputed Walton's wife; she and her son lived with her father to his death, and believes he always esteemed her to be Walton's wife; her son is reputed legitimate.

16. William Rider. Deponent is producent's brother; in 1726 and 1727 William Walton made his addresses to producent in way of marriage, and she received his courtship in a public way, and believes their parents knew thereof; she was often at his father's house; deponent advised producent not to regard what William Walton said, but believes they did contract themselves, and that then she let him lie with her; gives her a very good character; believes she would not have suffered any man to have lain with her if she had not been married or contracted to him. She being with child, went to London to lie in, and afterwards returned to her father, and brought her child, and constantly was reputed to be the wife of Walton; deponent always esteemed her son to be legitimate. In September, 1728, Blackburn came to Ely; producent constantly went by name of Walton, and was admitted to a copyhold by that name, and as wife to William Walton in 1731.

17. William Atkinson. Gives producent a [27] very good character; she was esteemed the wife of Walton by the principal inhabitants of Ely.

18. John Bomont. Gives producent character of a very sober, virtuous woman; her father received her as the wife of Walton, and her son as legitimate. *John Walton has acknowledged to deponent that his son was married to producent, and once said he wished they were unmarried, for that they could not agree;* deponent always esteemed her son to be legitimate, and he is reputed so to be.

Exhibits. B. "21st January, 1727-8, baptized John, son of William and Rachael Walton, born 11th January."

C. dated 22d August, 1734. Letter from Walton to Mrs. Rachael Ryder, at Ely.

M, m. "At a certain time you unjustly brought me under a necessity of undergoing an evil, &c." Letter of threat to make her disclaim the marriage.

D. 16th August, 1742, directed to Rachael Ryder, to the same purpose. Letter to Eburn, dated 2d February, 1744.

N.B.—The letters make strongly for Rider; he did not plead.

Dr. Hay's argument for Rider. Her character fully established; courtship positively proved by William Rider, and other witnesses prove a general report of it; Blackburn, in 1728, declared to Guy that he was present at the marriage, and gave Rider away, which confirms the evidence which he has now given of the fact; she constantly affirmed the marriage; acknowledgments by Walton of his marriage, for by his letters he speaks of the ceremony that passed between them; offered her money to disavow her marriage. In the case of *Leeson and Lord Fitz[28]-maurice*, (a)¹ he made her declare in writing that she was not married to him; Delegates held that to be a strong circumstance in favour of the marriage: it is not necessary to prove the clerk that married them was in orders. (b)¹ Captain John Campbell, deceased: Jane Campbell pretended to be his wife, and pleaded her marriage to him on 9th Dec. 1725; Margaret, another woman, who pretended to be his wife, and pleaded that she was married to deceased in 1724; Jane insisted that Margaret was barred by not having ever claimed him; commissaries of Edinburgh admitted Margaret to plead her marriage; Jane appealed to the Lords of Sessions; they held she was barred, and reversed the sentence of the commissaries; Margaret appealed to the house of lords, and they affirmed the commissaries' decree on 6th Feb. 1728.

Dr. Smalbroke, same side. If this marriage is not established, the child will be bastardized.

Dr. Paul for Walton. Thomas Blackburn, single witness to fact of marriage, *Allom v. Jordan*, 1 Vern. 161, (c) but one witness against the answers of the party; held there could be no decree upon that evidence.

N.B.—Walton's answers were mentioned by his counsel, but were not read.

[29] In *Leeson and Fitzmaurice's case*, (a)² Lord Chancellor Talbot looked into his answers: Delegates case of *Arthur and Arthur*; (b)² the question was whether they were married; a Romish priest swore he married them; Archbishop of Dublin required him to exhibit his orders; he refused, and the Archbishop rejected his testimony; Delegates held he was not obliged to shew his orders, but must shew he was a reputed clerk. *Franklyn* against *Kelly*, 1724, upon a review before Lord Chancellor; *Kelly* married *Franklyn* in 1710; never cohabited or consummated; in 1720 he married another woman, and had children by her; sentence in Ireland for the first marriage, reversed in Delegates; *Franklyn* prayed a review; denied by Lord Chancellor; no cohabitation from the time of the marriage in the present case.

Dr. Bettesworth, same side. No step taken by her in twenty-two years to establish this marriage; no courtship, cohabitation, or consummation, subsequent to the marriage; clandestine marriage; his character good, and hers strongly attacked. *Cunningham and Cunningham*, one witness unsupported cannot make a full proof of a marriage.

JUDGMENT—SIR GEORGE LEE. In this case I pronounced for the marriage of William Walton with Rachel Rider, and condemned him in costs.

(a)¹ *Fitzmaurice alias Leeson contra Fitzmaurice*, Deleg., 4 March, 1732. The Delegates present at the sentence were the Bishops of Oxford and Bangor, Mr. Baron Comyn, Drs. Tindall, Audley, and Kinaston. This is the case cited by Lord Stowell in the case of *Dalrymple v. Dalrymple*, 2 Hagg. pp. 69, 100.

(b)¹ See Lord Stowell's observation as to this point in *Hawke v. Corri*, 2 Hagg. 288.

(c) Entitled in the Report, *Alam v. Jourdan*. The whole report is comprised in one sentence; viz. There being but one witness against the defendant's answer, the plaintiff could have no decree, 1 Vern. Case, 151.

(a)² In *The Dalrymple cause*, Lord Stowell claimed, and exercised his right as a judge, to look into the answers, 2 Hagg. 127.

(b)² *Arthur v. Arthur*, Deleg., 24 Nov. 1720. Judges Delegates present at the sentence: the Bishops of Worcester and Peterborough, Mr. Justice Dormer, Sir Henry Penrice, LL.D., and Drs. Wood and Andrews.

[30] *WHITMORE against WHITMORE*. Arches Court, Hilary Term, February 28th, 1752.—Suit for a divorce, by reason of cruelty.

Mabell Whitmore brought a suit in the Consistory Court of London against George Whitmore, her husband, for a divorce for cruelty; she pleaded great variety of facts of cruelty for a long series of years, and examined many witnesses, who made as strong proof as possible. The Chancellor of London, Dr. Simpson, gave sentence for a divorce, and settled an alimony on her of 70l. a year. I was originally counsel for the wife. The husband appealed to the Arches, but never pleaded in either court; the cause upon the appeal was heard before Dr. Pinfold, Surrogate to me as Dean of the Arches, who affirmed the sentence of the Chancellor, and Whitmore appealed to the Delegates.(a) As for the evidence, see my notes.

STRETCH, FORMERLY PYNN v. PYNN. Prerogative Court, Easter Term, April 22nd, 1752.—Creditors have no right to interpose in the grant of an administration between a widow and the next of kin: the practice is to grant administration to a widow, unless some objection exists against her.

Dr. Paul for Stretch. Henry Pynn died intestate in Oct. 1750, at Newfoundland; left a widow and ten children, three by his first wife, and seven [31] children by his second wife. The widow entered a caveat, and prays administration to be granted by her. Augustus Pynn, deceased's eldest son by his first wife, has also entered a caveat, and prays the administration to be granted to him; the son insists the creditors desire it may be granted to him; the widow offers undoubted security; the son has been advanced in the father's lifetime; she has greater interest in the estate than he; no objection to the widow, but that she is married again.

Dr. Simpson for the son. Six children, minors, under the care of the widow. Deceased was a merchant, and the eldest son was employed under his father. Stretch, her present husband, was a clerk in deceased's counting-house, and now carries on trade with deceased's effects: she possessed the effects without any authority; the estate about 11,000l. The son entered caveat against granting the administration to the widow; the creditors swear they believe they shall never recover their debts if administration is granted to the widow; she claims an estate under a settlement which may be a bar to her distribution.

The act of Court read.

Stretch, servant to deceased, at 30l. per annum wages; the widow took possession of the effects, without administration; Stretch, her husband, worth nothing; lives at Newfoundland, and will return thither without paying the debts; Augustus Pynn, well acquainted with deceased's affairs, and offers full security; six children, minors, live with their mother Stretch, and one is dead. Wi-[32]-dow has not applied any effects, but what she has made herself debtor for; Pynn, the son, has lived seventeen years at Newfoundland, and is settled there; the widow offers undoubted security, and names the persons.

Affidavits for the son.

1. Jacob Thrawle. Deponent well knew deceased, and his wife, and son, and Michael Stretch; deceased died in Oct. 1750, and left a widow and ten children in Newfoundland; widow soon after married Michael Stretch, and took possession of the effects, to amount of 5000l., and did exclude the son from the knowledge of the effects; Stretch and his wife have no estate; deceased indebted to persons at Bristol in 2000l.; Stretch lives at Newfoundland, and believes he and his wife will go back together as soon as they have got the effects, without paying the debts; son lived with his father, and is well acquainted with deceased's affairs, and is the fittest to have the administration.

2. Augustus Pynn, mariner, the son of the deceased, and party in this cause.

(a) *Whitmore v. Whitmore* was appealed to the High Court of Delegates, on 5th June, 1752, but did not proceed to a sentence in that court. It appears from the assignation books, that, on the 15th November, 1753, the proctors for the parties litigant alleged the cause to be agreed.

Deceased left estate of 11,000l.; deponent well acquainted with his affairs; Stretch and his wife possessed themselves of effects to amount of 5000l.; they have no substance; Stretch lives in Newfoundland; believes they will get possession of the effects, and go abroad without paying the debts.

3. David Peloquin, Esq.; 4. Samuel Ball; 5. James Ball. Peloquin says deceased was indebted to Mary Bell, to whom deponent is executor, in 200l. by bond, and there is now due to Ball's estate on that and other accounts, 420l. for principal and interest, &c.; believes the creditors [33] will be more secure if administration is granted to the son. Samuel and James Ball say to the same effect, and believe Stretch and his wife will go abroad; believe the son will duly pay the creditors.

6. Henry Dampier, Esq. Deceased indebted to deponent in 317l. and upwards; believes Stretch and his wife will go abroad without paying the creditors; believes the son will pay.

Affidavits of the rest of the creditors are to the same purpose, and their debts amount to 1052l.

Affidavits for the widow.

1. Robert Smith. Deceased left widow and ten children, one is since dead, but six live with their mother; the youngest not three years old; the son has been resident at Newfoundland for seventeen years past, when he is not at sea; deceased kept Stretch as his book-keeper, his son not being fit for that office; Stretch was entrusted by the deceased with the management of his accounts, and affairs in trade; Stretch capable of business in the Newfoundland trade, and has an honest fair character; his wife continued in possession of the deceased's effects after his death, there being no court in Newfoundland to grant administration, and she could not apply for it in England sooner; the son has frequently declared he would sink the whole estate to be revenged of his mother-in-law; widow married Stretch about five months after her husband's death, he being acquainted with deceased's affairs. The son has been preferred in deceased's lifetime, near equal to the shares of the remaining children, and has several of deceased's effects in his hands; [34] Stretch has often informed the son in the deponent's presence, of the deceased's affairs, and he has himself inspected deceased's effects. The widow has an estate in fee to her own use, of the value of 2000l.; Stretch has often told both the son and Jacob Thrawle that he would justly pay the debts; several large debts are due in Newfoundland, which will be in danger by Stretch's absence; has heard the son swear he would destroy the whole estate rather than those who are interested should have any benefit; son a drunken man, and is so reputed.

2. Michael Stretch; 3. Ann, his wife, Michael Stretch says "He lived with the deceased for several years as his clerk and book-keeper, and managed his accounts and wrote his letters of business; son was seldom suffered by the deceased to inspect his books; deceased's personal estate was not more than 6000l. clear, for there are about as much more desperate debts." Ann Stretch says "Deceased left ten children; six now under her care, the eldest not fourteen, the youngest not three years old; admits she has taken possession of some of the effects, and the son has also possessed himself of some; has never applied any of the deceased's effects to her own use, but such as she has made herself debtor for in deceased's books; never refused the son to inspect the deceased's effects, &c., except when he has been drunk; has heard son declare he would destroy the estate, to be revenged of the deponent; deponent married Stretch for protection against the son." Michael Stretch says "He has paid upwards of 2000l. of deceased's debts, and has often declared he would pay the just debts; son little acquainted with merchant's ac-[35]-counts, and did not know deceased's transactions; son lives at Newfoundland, and has a wife and three children there; was preferred by the deceased equal or nearly to the shares of the other children; son had several of the effects, and has disposed of some of them." Ann Stretch says "She has an estate of 2000l. to her sole use, exclusive of her distributable share."

Dr. Simpson for the son. Son preferable as a male; widow has married again; is poor. *Sayer v. Sayer*, Delegates, July, 1713; administration granted to the guardian of a minor son, preferably to the widow. *Blackhall v. Blackhall*, 1720: administration to the son, because the widow had barred herself of distribution. *Shaw v. Houghton*, 1720: the same. *Lewis v. Lewis*, 1724, administration granted from the widow, because she was a bad woman: administration ought to be granted

to a man rather than to a woman. 1719, a widower left a son and daughter, and two infants, the daughter guardian to the infants, but the administration was granted to the brother. *Churchman's case*: The son in this case has some effects in his hands, and he has a right to take them, as he is entitled to administration as well as she.

JUDGMENT—SIR GEORGE LEE. (a)¹ I was of opinion I could have no consideration of what the creditors had sworn, or to [36] their consent in this case; for the question being upon the grant of administration between the widow and the next of kin, the creditors had no right to interpose; that it had always been the practice to grant administration to the widow, unless some material objection appeared against her; but in this case I saw no objection at all against her; she did not appear to me to have misbehaved in any respect: and as there were six minor children, to whom she was the natural guardian, and they lived with her and were under her care, their interests were united to hers, which gave her also a great majority of interests, and therefore, in every light I thought the administration ought to be granted to her; and I accordingly decreed the administration to Mrs. Stretch, the widow of the deceased, she giving undoubted security.

PROUT *against* CRESWELL. Arches Court, Easter Term, April 22nd, 1752.—A churchwarden cannot prevent a minister appointed under a sequestration from officiating in the church.—Augmented curacies stand on the same footing with respect to sequestrations as presentative livings.

(Appeal from Exeter.)

The church of Fresmere, in the diocese of Exeter, is an augmented impropriate cure, which, being vacant, the Bishop granted a sequestration to Edmund Herring, clerk, to serve the cure and receive the profits of the benefice: this sequestration was granted on the 6th of June, 1751. On the 9th of June, 1751, Mr. Herring read the [37] sequestration to Prout, the churchwarden of the parish, and demanded admittance into the church to officiate; Prout refused him, and admitted George Thompson, clerk, to officiate there by his authority as churchwarden, without licence. On the 6th of September, 1751, a citation *ex mero officio* issued against Prout, to answer to articles for hindering the minister appointed by sequestration from officiating. On the 11th of October, 1751, Creswell was appointed promoter; articles were given in and admitted; Prout's proctor prayed security, but the Court did not decree it.

Dr. Jenner, for Prout, insisted that the principal grounds of appeal, were the want of security, and the articles not being agreeable to the citation, the citation being *ex mero officio*, and the articles being at the promotion of Creswell. But the præsertim of the appeal was from admitting the articles, and every thing following therefrom, and from all other grievances, without mentioning either the want of securities, or the diversities between the citation and the articles.

Therefore those objections were overruled.

Dr. Jenner then insisted that the bishop may compel the impropiator to nominate a curate, but cannot, as in this case, appoint a sequestrator. *Clarke's Praxis*. tit. 189. Sequestration shall be granted to the churchwarden to receive the profits and find a clerk; the sequestrator cannot, as such, maintain an action for tithes, but the churchwarden may; a licence to preach is different from a sequestration; it does not appear that Herring had a licence.

[38] JUDGMENT—SIR GEORGE LEE. I was of opinion that the bishop had power to grant sequestration; for this being an augmented curacy, was by stat. 1 Geo. 1, c. 10, put in many respects upon the same footing with presentative livings. (a)²

I therefore pronounced against the appeal, and remitted the cause.

(a)¹ *Ryan v. Ryan*, 2 Phill. 364; *Abbott v. Abbott*, 2 Phill. 578; *Webb v. Needham*, 1 Add. 494. Under peculiar circumstances administration has been granted to a creditor in preference to a grandfather. *West and Smith v. Wilby*, 3 Phill. 374. So also to a daughter who had succeeded in setting aside a will, in preference to the widow. *Dew v. Clark and Clark*, 1 Hagg. 311.

(a)² Undoubtedly this is so, but another point often lost sight of is that the cure of souls is, by the fifth section of the same statute, specially reserved to the incumbent of the mother church.

BUTLER *against* BUTLER. Arches Court, Easter Term.

(Appeal from St. Asaph.)

Suit by the husband against the wife for a divorce for adultery ; an allegation of faculties was admitted ; but before the husband's answers were given in, or any witnesses examined thereon, the judge, without any proof of the husband's estate, settled an alimony of twenty shillings a week on the wife ; the husband appealed therefrom.

Per Curiam. I pronounced for the grievance and retained the cause.

[39] DAME ELIZABETH COOKES WINFORD, ALIAS HELLIER, *against* HELLIER AND BARRINGTON. Prerogative Court, Easter Term, April 29th, 1752.—An application to compel the widow of a party deceased, to be examined on interrogatories, touching the cancellation of a will, rejected.

[See further, pp. 137, 274, post.]

Dr. Hay for Hellier, the son. Deceased, Samuel Hellier, Esq., died 22d Nov. 1751, left Lady Winford, his widow, and a son by a former wife, a minor. Widow prays administration to deceased, as being dead intestate. Barrington, guardian to the son, entered caveat, and prayed scripts and scrolls ; she gave in affidavit of scripts, &c. Four papers are brought in : No. 2, a will which is cancelled ; No. 1, a codicil unexecuted ; and No. 3 and 4 imperfect papers. We now pray she may be examined on interrogatories, concerning the cancelling of the will No. 2. In October, 1751, deceased told Mr. Harris that he had made his will, and it was then in his study ; gave instructions to Harris for a codicil. Harris drew the codicil, No. 1 ; deceased approved it, and appointed to execute it on 2d December ; Harris delivered it to deceased on 21st November, and it was found unexecuted in deceased's pocket. In the codicil there is a revocation of Lord Ward as executor and trustee for deceased's son ; Harris searched in vain for the will two days.

Affidavit of John Harris. Beginning of October, 1751, deceased gave him instructions to make a codicil to his will, and to get it settled in Lon-[40]-don ; and pointing to his upper study, told deponent he had made his will, which was there ; deponent drew the codicil, No. 1, on Thursday, 21st November, 1751 ; deponent carried the codicil to deceased, and deceased desired deponent to fix a day, as soon as possible, to settle the affair : deponent appointed 2d December, 1751 ; deceased died on 22d November ; codicil found in deceased's pocket unexecuted ; deponent searched for deceased's will, with two persons named by Lady Winford ; after two days' diligent search without effect, Lady Winford desired deponent to search in the scrutoire in the yellow room ; he searched there, and found in a drawer, schedules No. 2, 3, 4 ; No. 2 was cancelled, and No. 3 and 4, were imperfect papers ; from the circumstances, and from discourse with Lady Winford and others, he does verily believe No. 2 was uncanceled at deceased's death, and has been since cancelled ; in codicil No. 1 there is a revocation of Lord Ward either as a trustee to deceased's son, or as executor of his will ; whereas in the will No. 2 there is no mention of Lord Ward either as trustee or executor ; said revocation of Lord Ward in the codicil was made by deponent by mistake ; for deceased, talking of his will, told deponent, that "as there was like to be a dispute between him and Lord Ward, therefore, he would not have Lord Ward to be either executor or trustee to his will," and directed deponent to leave a blank for trustees and executors, and deponent, therefore thinking from such discourse, that Lord Ward was named in his will as trustee and executor, inserted said revocation in codicil No. 1. N.B.—Lady Winford's affidavit of scripts and scrolls was in common form.

[41] Dr. Hay's argument for Hellier. Coates and Meigh ; Prerog., 1745 ; Meigh and Dowce examined on interrogatories. We pray Lady Winford may be examined on interrogatories touching the cancellation of the will.

Dr. Jenner for Lady Winford. Prerog., *Ladies Hardwick and Williams against Cocks* ; Prerog., *Exton and Coe* ; a codicil of deceased's hand-writing contained specific legacies but not executed or signed ; Exton the executor burnt it ; Coe prayed he might be examined on interrogatories to set forth the full contents, but the Court refused it.

N.B.—He had set forth the contents in an affidavit, and swore he could not set them forth more fully.

Per Curiam. Nobody having seen this will No. 2 uncanceled after deceased's death, I refused to order Lady Winford to be examined on interrogatories; but as her counsel offered to give a further affidavit of scripts and scrolls I decreed accordingly.

[42] BAXTAR *against* BUCKLEY. (a) Arches Court, Easter Term, May 8th, 1752.—A contract of marriage proved. The husband enjoined to solemnize the marriage in church, within sixty days after he should be served with a monition for that purpose.

Dr. Hay for Baxtar. Susanna Baxtar has brought a cause of contract of marriage against Millington Buckley, Esq., by letters of request from St. Asaph. Contract was made on 26th May 1743; they lived in the same house; Buckley with his grandfather, Mr. Young, and she was a servant in the house; he aged seventeen and she about nineteen; he declared he should never be happy if she married any body else; he proposed a secret contract at a place called the Weeg, in the parish of Kerry, in Montgomeryshire; he desired Nathaniel Williams to contract; then Williams read the form of the Common Prayer and each party solemnly pronounced the contracting words; this proved by two witnesses who were present; Buckley pleads he was drunk at that time; but we have proved he afterwards twice declared he was married to her; we insist the drunkenness was subsequent.

Dr. Simpson *contra*, for Buckley. His estate an 100l. a year under the guardianship of his [43] grandfather, and a ward of chancery; she, a pert girl, had many sweethearts; Williams is an innkeeper; did not tell Buckley's grandfather; says the ceremony was performed at her father's house; admit her sister confirms Williams's evidence; no previous courtship; he was very drunk the day before and lay a-bed till twelve of the clock on 26th May, when Williams came to see him, and they drank together for two hours; went out with Williams drunk; returned home drunk; and so was drunk before, at, and after the contract; Williams declared he was drunk when he read the ceremony to them; at Poole, in 1747, she did not know Buckley; she constantly declared she was not married to him, and he declared the same; no claim for five years; this suit began in 1748.

Evidence for Baxtar.

1. Nathaniel Williams, Innkeeper. In May, 1743, Buckley was aged fifteen and Baxtar seventeen; both lived at his grandfather's, Mr. Young, and she was a servant there; Buckley declared great love for her and said he would marry her; in May, 1743, he came to deponent and acquainted him with his love for her and said he had prevailed on her to marry him, but he would not marry her publicly for fear of disobeying his grandfather, and that they had agreed to be privately married; earnestly desired deponent to marry them; deponent several times refused, and dissuaded him therefrom, but he persisted; Buckley told deponent his whole happiness depended on marrying her; in the morning of 26th May, 1743, to best of deponent's remembrance, Buckley came to deponent and told him he and Baxtar had agreed to meet together at her father's [44] house in order to be married, and then earnestly desired deponent would be there to marry them; deponent again advised against it, but Buckley insisted on it; deponent promised to go after him that evening. On 26th May, 1743, at five in the evening, deponent and Buckley and Baxtar being met at her father's house, and in presence of Mary Harper, her sister, deponent took a Common Prayer book and audibly read in a grave manner the whole form of matrimony, and they having then a mind to contract or marry, made their responses thereto in a grave and serious manner, he taking her by the right hand audibly and distinctly in the very words therein prescribed said, "I Millington take thee Susanna," &c., using the very

(a) In the year following the decision in this cause, this description of suit, than which none had been more fruitful in litigation, or had more abundantly exhausted the learning of civilians and canonists, was swept away, together with many of the most ancient provisions of our marriage law, by Lord Hardwick's marriage act (26 Geo. 2, c. 33). See Blackstone's Com. book 1, c. 15; and Hansard's Parliamentary History, vol. 15, p. 1; Hansard's Parliamentary Debates (New Series), vol. 6, p. 1325.

words of the Common Prayer; and then she taking him by the right hand in like grave manner repeated her response, and then he taking her hand put a ring on one of her fingers, but does not remember which hand or finger, and said, "With this ring I thee wed," &c.; deponent joined their right hands together, &c.; then deponent gravely and devoutly concluded the whole in the words of the Common Prayer, and pronounced them to be lawful husband and wife, and they then owned each other as such, and were reputed so by deponent; they continued to live for some time at Young's house and there owned themselves to deponent to be husband and wife; about a fortnight or three weeks after he expressed to deponent great satisfaction in his choice, and told deponent she did not seem so well pleased as he could wish, and he would endeavour to get a licence to marry her as soon as he could. Some time after said marriage deponent was informed Buckley was sent away.

[45] 2. Int. She is reported to have been a servant in London. 3. Int. He shewed affection to her. 4. Int. On 26th May respondent went to Young's house and enquired for Buckley and desired him to go into the fields with him after partridges. 5. Int. They went from Young's to her father's house and drank there together.

2. Mary Harper. Deponent is sister to Baxtar; heard Buckley say he would be married to Baxtar as soon as he could, but he was then much intoxicated with liquor. In May, 1743, Baxtar brought a letter to her father which she said was sent to him by Buckley, and deponent heard her father read out of it that Buckley desired his consent to marry his daughter Susan, but cannot say whether it was wrote by Buckley; the father wrote an answer to Buckley in three or four days, which he read to deponent, in which he said he could not give Susan a suitable fortune, but he would do what was in his power for them, which letter deponent delivered to Buckley, and he put it in his pocket; in the afternoon of same day in May, 1743, deponent was present at the house of John Baxtar with Williams, said John Baxtar, and the two parties in this cause, and saw Williams take a Common Prayer book, and heard him distinctly read over the whole form of matrimony to them; and they having then a mind to contract or marry, made their responses thereto in a grave and serious manner. Deposits they contracted, and did every thing according to the words and form of the Common Prayer; deposits the same as Williams exactly, word for word.

N.B.—They both depose exactly in the words of the libel, except as to the hand on which the ring was put; the libel says on the fourth finger of the [46] left hand, and they do not remember which hand or finger; says they lived in same house upwards of a month after, and deponent heard him afterwards own Susan to be his wife, and expressed great satisfaction in his choice, and said he would as soon as he could take a license to marry her in the church.

3. Mary Baxtar, widow. Deponent is mother to Susanna Baxtar; Buckley shewed great love to Susanna. In May, 1743, he was about seventeen years old, and she was about twenty.

4. Edward Jones. In June, 1743, Buckley asked deponent if he had seen any body about the house that night to ask for Susan; deponent said, "No." Buckley replied, "I think it is all over with them now;" deponent asked him if he was married to her; he replied he was.

5. John Oliver. Deponent was servant to Prosser, who lived in the house with young Buckley; declared often to deponent that he had great love for Baxtar, and made his addresses to her; he often inquired of deponent whether she entertained any sweethearts in his absence, deponent told him he did not know she did; he then expressed great love for her, and said when he was married to her he would present deponent with a pair of gloves; 13th June, 1743, Buckley gave him accordingly a shilling to buy gloves on account of his marriage to Baxtar.

Evidence for Buckley.

1. John Prosser. Deponent was tenant to Young and lived in the same house with him, the parties in this cause lived also in the same house with Young. Buckley has 100l. a year; the latter end of May, and believes 26th of May, 1743, [47] Nathaniel Williams came about noon, and inquired if Buckley was at home, deponent said, "Yes;" Williams went in and staid about two hours, and then they both went out with guns. The night before, and when they went out on said day, and also when he came home that evening, Buckley was so far drunk as to be disordered in his

understanding, and especially when he came home at night; deponent never heard Buckley own her as his wife; never heard her esteemed such, and does not know they consummated, but believes the contrary. Buckley and Young lay in the same bed together, and Miss Buckley lay with Baxtar. In June, 1743, Buckley denied his marriage in deponent's presence, and bid Baxtar begone from the house; and she also swore by God to Young that she was not married to Buckley. Same evening she left Young's service and went to her father's, and about a month after went to London.

2. Mary Prosser. Never heard Buckley express affection for Baxtar to best of her remembrance. On 26th May, 1743, Williams about noon came and inquired for Buckley, who she believes was asleep, occasioned by his being very drunk the night before; Buckley came down and he and Williams drank together for two hours or more, and then he went out with Williams with a gun, in appearance concerned in liquor, and they came home together in the evening both in liquor, very much. Never heard him own her for his wife; does not believe they consummated or were reputed to be married. In June, 1743, he denied he was married; she was then turned away, but declared to Young with an oath that she was not married. Baxtar went to her father's, and about a month after went to London.

[48] 3. Margaret Pugh. In the afternoon of 26th May, 1743, about six in the evening, says Buckley came to the Delvar ale-house, and fired off a gun in the kitchen where there were many people.

N.B.—Her counsel say this was after he came from Baxtar's house where the contract was made; but quære?

4. Mary Buckley. Never heard the parties intended to marry; Williams came to Buckley, about eleven at noon, on 26th May, 1743, and he returned home about seven in the evening very drunk; never heard they were reputed husband and wife, or consummated; deponent and Baxtar lay together, and Buckley lay with Young.

5. Mary Jones, wife of John Jones. Never heard Buckley express affection for Baxtar, &c.; on 25th or 26th May, Williams and Buckley came home together and he was very drunk; never heard him own her as his wife same as the other witnesses; heard Young ask Baxtar whether she was married; she swore by God she was not; she went to her father's and staid a month, and then went to London; never heard she claimed a contract.

6. Jane Gwynne. In June, 1743, deponent received a letter from Young, in which he told her Buckley denied marriage; deponent went to Young's house, where Buckley also lately denied marriage to deponent; but confessed he and Williams were at Baxtar's house and saw Susan there; said Williams carried him thither under pretence he was thirsty; in November, 1749, Williams came to deponent's house and inquired for Buckley, and Williams said to deponent that he could not, and would not swear anything to hurt Mr. Buckley by reason they were both in liquor, and it [49] was so long he could not remember; soon after deponent was present, when Buckley refused to see Susan, and he went to London about end of June, 1743.

7. Edward Jones. In summer, 1747, at Poole, Baxtar came to deponent's house, and Davis, who lodged in deponent's house, seeing Buckley in the street, called him in, and got him into the room to Susan Baxtar, where he did not stay above a quarter of an hour.

8. Mary Jones. Davis seeing Buckley in the street at Poole, in summer, 1747, called him into deponent's house, and carried him up stairs, and left him with Baxtar, where he staid about a quarter of an hour; said Baxtar was then handsomely dressed.

9. John Griffith, on another allegation. In June, 1750, notice was given by the proctors that no witness should go up stairs while any other witness was examining; Mary Baxtar nevertheless came up and stood at the door while Williams was examining, and might hear what he said.

10. William Morgan—the same.

Dr. Hay for Baxtar. Contracted after a year's courtship; a question only of fact; both capable of contracting; proof of courtship not necessary; Prosser and his wife and Oliver prove they lived in the same house together; two positive witnesses to the contract, shall shew the contract was before he came to the Delvar ale-house, for the contract was about five o'clock in the afternoon; and he did not come to the Delvar ale-house till after six o'clock; Buckley made several recognitions of the

contract; she denied her marriage to Young, because it was to be [50] a secret to him; she came to Poole in 1747, the time when he came to age, and she there sent for him, and did speak with him; her character is not impeached, and want of fortune is no objection; Buckley's declarations that he was drunk are not evidence; general opinion he was contracted; Mary Harper fully swears to the contract, and she is unimpeached; one witness is sufficient, if she is supported by circumstances.

Dr. Smalbroke, same side. At the time of the contract, Baxtar went for barm, and Buckley for drink; they both might have been supplied much nearer at the Delvar ale-house; Buckley was not drunk before six in the evening; it is not proved he came drunk to the Delvar ale-house.

Dr. Simpson contra, for Buckley. Contract between minors of very unequal condition; contracts unfavourable, and especially between minors, and therefore Court will expect the fullest evidence; no claim till 1748, which was two years after he came of age; witnesses not examined till seven years after the contract; to prove a verbal contract, no positive evidence of courtship; no evidence that he ever declared to her that he intended to marry her; must prove an *animus contrahendi*; not proved that Williams read the ceremony at the request of Buckley, though it was so pleaded; we pleaded drunkenness; they have not pleaded the contrary, or interrogated our witnesses concerning it; declarations to Jones and Oliver were made to keep off sweethearts.

Dr. Jenner, same side. Circumstances pre-[51]-cedent are material to be considered; an honourable courtship is necessary to be proved. In the case of *Jones and Gernon*, and of *Ward and Ashby*, written evidence from letters produced to prove courtship; the mutuality of the contract on her part does not appear; she disclaimed in *recenti facto*.

JUDGMENT—SIR GEORGE LEE. I was of opinion the contract was fully proved, and that his being drunk at that time was not proved; and therefore I gave sentence for this contract, and enjoined Mr. Buckley to solemnize marriage in the church with Susanna Baxtar within sixty days after he shall be served with a monition for that purpose.

HENDREN, ALIAS SHAW *against* SHAW. Arches Court, Easter Term, February 14th, 1752.—An administratrix with the will annexed called upon for a more full inventory, and then held to have fully administered.

John Shaw, deceased, made his will 30th Dec. 1739; gave legacy of 50l. to Ann his brother's daughter; appointed Sarah Shaw his wife, and John How, executors; Sarah proved the will in Easter Term, 1751; citation returned against her to answer to Ann Hendren, formerly Shaw, in a cause of subtraction of legacy; libel given; negative issue; executrix alleged plene administravit; she was assigned to specify 2d Sess. Trin. 1751; inventory and account exhibited, alleged all and singular, &c. to be true, and brought in vouchers; total of inventory 438l., account 199l. 4s. 10d. exclusive of this item, to wit, that before exhibitant's marriage with deceased, a messuage of hers in Arundel Street, was settled on her to her use, in the names of trustees, with all the furniture [52] that should be there at deceased's death. In the account she craved allowance of said house and furniture of 50l. a year for her life, and other sums, particularly 400l. covenanted to be at her disposal, and therefore insisted she not only had fully administered, but was a creditor to deceased; 1 Sess. Hill. 1752, Mrs. Hendren gave in answers, objected to as not full; Court assigned her to give in fuller answers; 1 Sess. Easter Term, 1752, Cheslyn, her proctor, exhibited a special proxy under hand and seal of said Ann Hendren and her husband, and confessed the inventory and account to be true.

Per Curiam. I pronounced that Mrs. Shaw had fully administered, and dismissed her.

LILLY v. HARDY. Arches Court, Hilary Term, February 14th, 1752.—Parishioners have no rule to guide them in making rates, but common estimation as to the value of property; mere inequalities in the taxation are not sufficient to set aside a rate.

Dr. Paul for Hardy. Hardy, churchwarden for Belchamp St. Paul's, in Essex, has brought a suit for a church-rate against Ambrose Lilly, in the Consistory of London; the lands for which he is rated lie in Belchamp St. Paul's, which is within the peculiar jurisdiction of the Dean and Chapter of St. Paul's, and Lilly lives at White Notley, within the jurisdiction of the Bishop; objection was made on the admission of the libel before Dr. [53] Andrew that the suit ought to have been brought before the Commissary of St. Paul's, where the lands lie: but he overruled the objection, and held that the suit ought to be brought where the defendant lives, for it is a personal action.

Hardy was churchwarden for the years 1744, 1745, and 1746; a rate of eightpence in the pound was made in vestry for the repairs of the church, and new casting the tenor bell, for 1744, in which Lilly was rated; the rate was made the 15th April 1745, for 35l. 1s. 4d.; Lilly was rated therein for his lands in Belchamp of the value of 71l. a year, at the sum of 2l. 7s. 4d., and in another rate, made for the year 1745, he is rated at the same valuation of these lands at 5s. 11d., at one penny in the pound, which sums of 2l. 7s. 4d., and 5s. 11d., amount together to 2l. 13s. 3d.

The suit was brought for this sum, which he refused to pay; they have pleaded a tender, and that Lilly is over-rated. The cause was heard before Dr. Simpson, Chancellor of London, on 5th of Dec. 1749, who was of opinion that Lilly was duly rated; and decreed him to pay 2l. 13s. 3d. demanded by this suit, to the churchwarden, and condemned him in costs. From this sentence Lilly has appealed, and the cause now comes on to be heard on the same evidence as below.

Dr. Jenner for Lilly. We don't insist it was a legal tender, for no suit was then commenced, we insist the rates were unequal, and that they are not proved; they do not charge every one according to their lands, but at discretion, and several persons are not rated at all; they say those persons are only cottagers; the witnesses are interested, for they are parishioners, and the suit is [54] carried on at public expense; a farm called Wood Barnes and the great tithes together are let to Lilly for 116l. a year; the tithes are 90l. a year, and we have proved the lands, without the tithes, are worth only 40l. a year; they urge that the lands used to be charged at 71l.; Erith, their witness, says, when he held the lands they were not worth 41l. a year.

Witnesses for Hardy.

Jeffery Erith, on the 25th April, 1746, was present when the rate for one penny in the pound was made, in vestry, for 1745; believes it was duly made; Lilly occupies lands of yearly value of 71l.; always so rated; he proves also that the rate for 1744 was duly made in vestry, pursuant to notice.

2. Int. The respondent is a parishioner of Belchamp, but does not pay to rates; Piper and Ball do pay to rates; Ball is rated under the value of his estate.

3. Int. The suit is carried on at the parish expense. 7. Int. Mr. Clark owns the great tithes.

2. Thomas Halls, æt. 81. The deponent has lived in the parish as long as he can remember, but Lilly's lands have always been rated at 71l. a year.

3. Decks Ball. Objection was taken to reading him. That the witness is interested as a parishioner; he is rated at 148l. a year, and is liable to pay his proportion of the costs, and therefore has a direct and consequential interest.

Answer: Clitherow and Smith, parishioners, have been held to be proper witnesses from necessity.

[55] Per Curiam. I was of opinion that they were good witnesses to prove notice in the church, and making the rate in the vestry, &c., but that they were not good witnesses to prove the value of the lands, or such things as may be proved by those that are not parishioners; I therefore overruled the objection, and ordered Ball's deposition to be read.

Decks Ball. Says that in 1744 the tenor bell was new-cast; a vestry was held in April, 1744, pursuant to notice, and a rate made for eightpence in the pound; in March, 1746, a vestry, duly called, made a rate for one penny in the pound; A and B are the said original notes.

6. Int. The respondent is charged at 148l.

4. Samuel Piper. Proves the due making of both rates.

4. Int. Respondent's lands are 75l. a year.

5. Samuel Unwin, æt. 70. The deponent has always lived in the parish ; Lilly's lands have been always rated at 71l. ; all but the cottages are rated.

6. Charles Diston. Knows Lilly's lands ; they have been always rated at 71l. per annum.

7. John Hickford. Lilly's lands are worth 71l. a year.

For Lilly, in May, 1748.

1. John Lilly. The deponent is brother to the producent ; he proves Lilly told Hardy that he was over-rated, but was willing to pay at the rate of 40l. a year, and then tendered five guineas, bidding Hardy take what was due for the rates, and said he would further pay him what-[56]-ever more might be due ; Hardy replied, there were law charges, and he would not take it without them ; he proves the lease to Lilly of land and tithes for 116l. a year, and he makes upwards of 90l. a year of the tithes ; the lands Lilly held in 1744, 1745, and 1746 were worth but 39l. 10s. a year, save what improvements Lilly has since made thereon ; the tithes in 1745 amounted to 91l. 2s. 6d., and they are worth more ; Robert Frost has an house, orchard, &c., which, in 1744, 1745, and 1746, might have been let for 4l., and the deponent would have given so much for them ; he is a maltster and shoemaker, and esteemed worth some hundreds of pounds, and yet he is not rated at all ; Molt and Bland the same ; Molt's premises are worth 4l. a year ; the deponent would give so much for them ; he is a blacksmith, and has good business, and yet he is not rated ; nor is Bland rated for a house, &c. of his own, which are worth 4l. likewise, and he is a master carpenter ; the deponent has heard great complaints against the rates of late, as not being made by a pound rate, and because all that ought to be are not rated ; the first rate is dated 15th April, 1745, for 2l. 7s. 4d. ; the second rate, 13th March, 1746, for 5s. 11d. —total, 2l. 13s. 3d.

2. Samuel Kemp. Proves the lease to Lilly of the lands and tithes together was for 116l. a year rent ; tithes worth 90l. a year ; though it has several times been attempted to get an equal pound rate, yet it never could be effected ; and it never has been the custom to charge cottages, and these rates are agreeable to former rates. Frost, Molt, and Brand never were rated, though they are worth money. The deponent is rated at 30l. a year, and his lands are let for 35l. a year ; the [57] deponent's lands have never been rated at more than 30l. a year ; he believes Lilly's lands were not worth more than 39l. 10s.

To the 4. Int. Rates A and B are conformable to usage. 5. Int. Lilly's lands have been constantly rated at 71l. 6. Int. It is not usual to rate cottages. 7. Int. The deponent has always been rated at the same he is now. 13. Int. He believes the parishioners are all rated as nearly as the vestry can judge.

3. John Bedder. Hardy pays the deponent 12l. rent ; before he rented the same premises at 10l. and paid fifteen guineas fine.

4. James Hall. The tithes in 1745 amounted to 90l. and he believes they are annually worth 80l.

4. Int. The present are as legal rates as could be made, and were made in the usual manner ; he believes Lilly's lands were worth 71l. and never were rated for less.

11. Int. The producent is rated only for the farm ; he never knew a cottage rated.

13. Int. All the parishioners are rated under their value.

5. Richard Jephson, Esq. Only proves the lease of the land and tithes.

6. Jeffery Erith. Proves the tender of five guineas to Hardy in the same manner as John Lilly does ; he knows the lands articulate were not at first worth 5s. an acre, but within four years have been much improved ; he believes the tithes were worth upwards of 90l. ; the rates were made as usual ; Molt, Frost, and Brand were never rated.

4. Int. A and B are legal rates and the persons therein named are legally rated ; Lilly's lands were always rated at 71l. and he believes they are now worth so much but were not when the de-[58]-ponent held them ; he believes the rates were fairly made.

The citation was dated 20th September, 1746, subsequent to the tender.

The libel was given in December, 1746.

Drs. Paul and Hay for Hardy. Hardy was churchwarden, both when the rates were made and the suit was brought.

Hartley, churchwarden of Windsor, charged in church rate for laying in water; the Spiritual Court would not allow it, but prohibition was granted.

Drs. Jenner and Smalbroke for Lilly. Cottages worth only 11. a year are charged, but several worth more are not charged. No one is rated to his full rent but Lilly.

JUDGMENT—SIR GEORGE LEE. It appearing that these rates were made in the usual manner; that Lilly's lands had always been rated at 711. and by the opinion of some of his own witnesses were worth that sum, and also that they thought the rates were as equal as could be made; and as parishioners could have no rule to judge by in making rates but common estimation; (a) if there were any small inequalities in the taxation, I was of opinion they would not be sufficient to set aside a rate; and therefore I confirmed the Chancellor of London's sentence with costs.

[59] WESCOMBE *against* DODS. Arches Court, Hilary Term, February 21st, 1752. —In a suit for jactitation of marriage, the woman admitted to her suppletory oath; the marriage, which had taken place in Scotland, established.

Appeal from the Consistory of London.

William Wescombe instituted a cause of jactitation of marriage against Rebecca Dods, in the Consistory of London, 29th April, 1748. He gave in a common libel of jactitation, 13th May, 1748. Mr. Cæsar appeared for Dods, who was then admitted a pauper, and confessed the jactitation, and asserted he gave an allegation pleading a marriage between Wescombe and Dods, 22d June, 1748. The allegation was admitted, pleading that they were married on 26th March, 1741, in the house of James Dow Gardiner, at Castle Barnes, near Edinburgh, in presence of ——— Dow, spinster, Mary King, and others, by David Patterson of the Scotch Kirk, and consummated that day, and at other times at the house of George Blyth, gardener, at Corstorphine, near Edinburgh, and owned each other as man and wife; that on 30th December, 1741, she was delivered of a female child, lawfully begotten by her said husband, which was baptized as their lawful child on 12th January, 1741; that in April, 1741, he came to England, and left her in Scotland, and he has ever since resided in England; that two or three days before he left Scotland, he wrote her a letter, in which he subscribed himself her "loving husband;" 23d June, 1749, he gave in an allegation, pleading that David Patterson is a person of an infamous life; that he is not a minister of any church in Scotland, or in orders, to entitle him to [60] marry any persons, and is deprived of his licence to preach, and is excommunicated; and about the time he was examined a witness for Dods in this cause, he was a candidate for the office of common hangman of Edinburgh, and that he objected against him at the time of his being examined; Wescombe lived about two years in Scotland, but quitted his house there about the end of April, 1741, and has ever since resided in England. Exhibited an extract of the presbytery of Edinburgh, by which David Patterson was deprived of his licence and was excommunicated.

N.B.—The extract is dated 29th December, 1742, by which it appears he was deprived of his licence to preach in 1737, for fornication; in January, 1738, he was declared contumacious, for not appearing before the presbytery, and laid under the censure of the lesser excommunication; was afterwards, in 1741, cited and admonished from the pulpit to undergo censure for clandestine marriages; and on 29th December, 1742, the presbytery passed the sentence of the great excommunication upon him.

27th February, 1749, Dods gave in a second allegation, pleading that in 1742 she commenced a suit in the Commissary's Court at Edinburgh against Wescombe, to prove her marriage; that he was a party thereto, and appeared by his attorney, John Watson, and denied the marriage; she gave in a plea to prove it, and examined several witnesses; and he gave an allegation in such cause to contradict her plea; that the Commissary's Court, on 3rd January, 1745, did pronounce that said William Wescombe and Rebecca Dods were lawful man and wife, and allowed him to 26th June, [61] 1745, to shew cause why such sentence should not be put in execution; that after said proceedings, Wescombe did prefer a bill of advocation against her before the Lords

(a) *Thomson and Sandford v. Cooper*, 3 Phill. 640, notis; *Lee and Parker v. Chalcraft*, id. 639.

of Session of Scotland, alleging that at the time she promoted the cause against him in the Commissary's Court he was resident in England; that the suit against him was a personal action, and must be determined by the Spiritual Court where he resided at the commencement of the cause, and, therefore, he was not subject to the Commissary's Court, and prayed their lordships to stop their proceedings therein; to which bill Dods put in her answer, and on 20th June, 1745, the cause was heard before Lord Minto, one of the Lords of Session, who having been informed by the Lord Ordinary as to the jurisdiction of the Commissary's Court, and considered the bill and answer, with the proof, did by his interlocutory decree dismiss said bill. Exhibits a copy of said interlocutory.

N.B.—Wescombe's proctor made the same objection to the jurisdiction in the Commissary's Court, but it was overruled.

That, on 26th June, 1745, Wescombe again appeared by his attorney in the Commissary's Court, and not shewing sufficient cause why the sentence of 3d January, 1745, should not be put in execution, the Commissaries did decree him to adhere to Rebecca Dods his wife, her society, fellowship, and company, and to treat, cherish, and entertain her at bed, board, and other conjugal duties, as became a husband to do and perform to his lawful wife, and that during the whole time of their conjunct lives together; and exhibited a true copy of the proceedings in said cause in the Commissary's Court; pleads that Patterson has a [62] good character; is a minister of the Kirk of Scotland; was not excommunicated in 1741, and was admitted a witness in the Commissary's Court, though he was objected to by Wescombe.

N.B.—It appears by the proceedings in the Commissary's Court that Dods examined most of the same witnesses there; that she was examined by commission to Scotland in this cause.

N.B.—This day this last allegation was admitted in the Consistory: Wescombe's proctor, for fear of suspension, confessed the copy of the proceedings in Commissary's Court, and the interlocutory decree of the Lord Minto, dismissing Wescombe's bill of advocacy to the Lords of Session. Wescombe did not produce witnesses in Scotland. 22d June, 1750, Wescombe gave in another allegation, pleading that in the copy of proceedings in the Commissary's Court, it appears that in the libel given in there, Dods did allege that the marriage was performed by David Patterson in the house of James Dow, at Castle Barnes, in the presence of Robert Dow and ——— Dow, son and daughter of said James Dow, and that David Patterson, on his examination on said libel, deposed that he did marry the parties, and that there were present a young man and a young woman, who were said to be the son and daughter of James Dow Gardiner, the landlord of the house; and also that Jane M'Nair, another witness on said libel, deposed, on 31st January, 1744, that Robert Dow, eldest son of said James Dow, left Scotland in the beginning of April, 1741, and went to London; that about the end of March, 1741, Wescombe, Dods, and Paterson, came to James Dow's house, and took said Robert Dow into a room with them; and deponent thought that Elizabeth, said James's [63] daughter, went into the room with them, but cannot be positive; alleges that said David Patterson and Jane M'Nair, examined in said cause in the Commissary's Court, and David Patterson and Jane M'Nair examined in this cause, are the same persons; and that no faith is to be given to the deposition of Jane M'Nair, for that Robert Dow and Elizabeth Dow, the son and daughter of James Dow, or either of them, was not present at any marriage between the parties on 26th March, 1741, at the house of their father James Dow, or at any other time or place; and that Robert Dow left Scotland in February, 1740, and resided at Kingston in Surrey on 26th March, 1741.

N.B.—Before the cause was concluded, Dods prayed to be admitted to her suppletory oath.

Witnesses for Dods, examined in Scotland, by requisition.

1. Lady Dunbar. Deponent knew Dods several years before she was reputed to be married to Wescombe, and since that time she had been frequently entertained in deponent's house; she had always a good and virtuous character, and behaved herself modestly, after it was publicly talked that she was married to Wescombe, and was reputed to be his wife; and while she was with child, deponent entertained her for some months in her family, where she was always called Mrs. Wescombe.

2. Barbara Oliphant. Knew Dods several years before she was said to be married;

knows that she resided some time in Lady Dunbar's house both before and after she was publicly reputed to be married to Wescombe; and she had always a good and virtuous character.

[64] 3. David Patterson. About the end of March, 1741, as far as he can remember, deponent did celebrate a marriage betwixt William Wescombe and Rebecca Dods, the parties, who took upon themselves the ordinary vows, which deponent administered to them, and declared them married persons; this happened in the house of James Dow, gardener, in Castle Barnes; there were witnesses present at said marriage, but deponent cannot, at present, recollect who they were; has heard that, after the marriage, they went to Corstorphine together, where they lodged in the house of George Blyth, and entertained each other as man and wife.

Int. Deponent acknowledges he is, and has been, a prisoner for five months, by a warrant granted by Mr. John Balfour, one of the Justices of the Peace of the County of Edinburgh, upon an information, as if he had been guilty of celebrating marriages irregularly, and acknowledges that he was suspended from his office as a preacher of the gospel before said marriage, and that he was afterwards, and posterior to the marriage, excommunicated by the church for contumacy, in not comparing before them; that he was licensed to preach and lecture, and was admitted lecturer in the Trone church of Edinburgh, but that he never was admitted minister to any particular parish.

4. Mary King. Some years ago deponent was servant to Mrs. Sinclair, in-dweller at Castle Barnes, which is near to the house of James Dow, gardener; deponent kept Mrs. Sinclair's child, and being with the child in Dow's garden she was desired to come into a room in the house; deponent then saw defendant Dods married to a gentleman who was called Mr. Wescombe; Mr. David Patterson officiated as minister and administered the marriage [65] vows to said parties, which they took, and the minister thereupon declared them married persons. So far as she remembers there were none present but the parties, the minister, deponent, and a man whose name she knows not, this was in March about seven years ago, but cannot be positive as to the year, only thinks it was about seven years ago; has seen Dods several times since and knows her, but does not remember she ever saw Wescombe before or since.

5. Jane Mc'Nair. Deponent knew James Dow, gardener, near Castle Barnes; deponent was a servant in his family, from Martinmas 1740 to Whitsuntide 1741; during that time in one afternoon, Rebecca Dods, who deponent now sees in Court, and one Mr. Wescombe, who deponent had frequently seen before, as he lived in Fountain Bridge, and who had often frequented Dow's house, and with them one Mr. Patterson, a minister of the Gospel, who deponent had occasion to see frequently before that time, and knew to be the son of Mr. Patterson, who was one of the ministers of the Gospel of St. Cuthbert's in the West Kirk, went into a room in Dow's house by themselves; after they had sat some time in the room they called for drink, which deponent carried into the room to them; a short time after, two men and a woman came to Dow's house and asked if two men and a woman were there, deponent answered, "Yes," and shewed them into a room where the company was. Soon after pen and ink were called for, which deponent carried into the room to them and shut the door. In a little time after they parted, and Wescombe and Dods went to the westward upon the Corstorphine road, and Patterson went eastwards towards Edinburgh. [66] (Vide the evidence which this witness gave in the Commissary's Court, which differs in several particulars from this.)

6. George Blyth. About the end of March, 1741, Wescombe and Dods came together to deponent's house, in Corstorphine, about four in the afternoon; after some stay he called for deponent's wife, and asked her if he could have a bed there that night; she answered, that they might have two beds; but said parties both agreeing that they were married together, and were man and wife, Mrs. Blyth made up one bed, where they lay that night together; before they supped deponent went up stairs to them, and asked Wescombe concerning Dods, who was sitting in the room, "Is this your lady?" he answered, "Yes," whereupon deponent drank to them and wished them joy, and she made a bow. A few days afterwards they came back to deponent's house, where they lodged a night in the same manner as before.

7. Lueretia Constable. About the end of March, 1741, Wescombe and Dods came to deponent's house in Corstorphine, in the afternoon, and after some stay he called for deponent and bespoke supper, and said that he and Dods were to stay all night,

and asked if they could get a bed ; deponent said, if the woman was to stay there they behoved to have two beds ; he answered that she was his wife and one bed would serve them ; deponent said, " You are constantly joking," he answered and swore that defendant was truly his wife, and he wondered deponent had not heard of his marriage before that time ; deponent said, " Mr. Wescombe, I thought you would have married one of you own country women ;" but he said he loved defendant better than any of his country-[67]-women. Wescombe called for deponent's husband and owned Dods for his wife before him ; they supped and breakfasted together ; a few days afterwards they came again to deponent's house, where they supped, and lay in bed all night and breakfasted next morning.

8. John Vicarage. Deponent heard from George Blyth and his wife that Wescombe and Dods came twice to their house, and lodged each time there all night, and then they entertained each other as man and wife ; proves Wescombe's letter to Dods, in which he subscribes himself, her most loving husband, to be Wescombe's hand-writing. Dods had been employed in deponent's family as a sempstress, for about twelve months before she was married ; she had a good character and behaved herself virtuously. Wescombe became acquainted with her in deponent's family, where he frequently was while she was there. It is most frequent in Scotland for a woman after her marriage to retain her maiden name instead of using her husband's.

9. Elizabeth Vicarage. In June, 1741, deponent heard that Wescombe and Dods had been married some time before, and that he was gone to London, and left orders for her to follow him ; deponent looked upon them as married persons, because she heard it so reported, and particularly by George Blyth and his wife, who said they had stayed two different nights at their house, and cohabited as man and wife. In January, 1742, Dods was delivered of a child, which was baptized by Mr. Kerr, at desire of deponent's husband ; deponent and her husband were present thereat. Dods was employed by deponent as a sempstress in her family for some time before her [68] marriage, she always bore a good character and behaved decently. Wescombe was often in deponent's house, where he saw and conversed with Dods, but deponent never heard him acknowledge his marriage, never having seen him since his marriage was publicly talked of.

10. George Kerr, clerk. About six years ago Mr. Vicarage came to deponent, and told him that Mr. Wescombe had been married some time to Dods, and that she was delivered of a child, which he desired deponent to come and baptize ; deponent accordingly baptized the child, and looked upon Mr. Wescombe and Dods as married persons, or else he would not have baptized the child, especially as Dods was not a member of deponent's congregation.

11. Mary Montgomerie. In June, 1741, Dods came to deponent's house and staid some days with her, and told deponent she was married to Wescombe, and that she had been at London with him ; while she staid at deponent's house that time, deponent heard from several, and particularly from the wife of James Smith, writer in Edinburgh, that said Dods and Wescombe were married together ; any people that called for Dods at deponent's house, enquired for her by the name of Mrs. Wescombe ; she was delivered of a daughter in deponent's house in January, 1742 ; the child was baptized by Mr. George Kerr, of the English chapel ; Mr. Vicarage, of the Exchequer, and his wife, were present at the baptism ; Dods was visited by several people of character, particularly by one Mrs. Horsburgh, and by Miss Peggy Oliphant, and they treated her as the wife of Mr. Wescombe ; and deponent looked upon her as such.

12. Clement Porter. Deponent knows Wes-[69]-combe and Dods ; has had frequent occasion to see Wescombe's hand-writing ; says that the letter exhibited, directed to Miss Becky Dods is, in deponent's judgment, the hand-writing of Wescombe ; deponent for several years past looked on Wescombe and Dods as married persons, as did the whole neighbourhood about Fountain Bridge, near Edinburgh.

Read Wescombe's letter to Dods, wherein he styles himself her " loving husband."

" P.S.—I beg you will make yourself easy till you hear my excuse for my behaviour."

Witnesses on Wescombe's first allegation.

1. Alexander Johnston, musician, examined 8th Dec. 1749. Deponent came to know Patterson about twelve years ago by seeing a great mob one evening about

said time, as he was passing by a reputed bawdy-house in the High-street of Edinburgh; upon asking what was the matter, deponent was told that Patterson had been there marrying a young couple, and that the mother of the woman had raised the said mob for his so doing; and soon after deponent saw said Patterson come out of the house, which was the first time deponent ever saw him, but had before heard his character, which was a very bad one; about two years after said time, said Patterson was confined in the Tolbooth, a prison at Edinburgh, for marrying people irregularly, without banns or licence, and without having a proper authority so to do, he being a minister of no kirk, or in holy orders, and for keeping lewd women company; and has heard he was excommunicated for said practices by the kirk of Scotland, before deponent [70] knew him; about eleven or twelve months ago, said Patterson then being an excommunicate person, and a prisoner in the Tolbooth, and under sentence of banishment, and the common hangman's place being then vacant, deponent saw Patterson among some other prisoners coming from the courthouse of Edinburgh, guarded by soldiers; on deponent's asking the serjeant of the guard what they were going to do with Patterson, he said that Patterson had been offering himself to be common hangman, but was refused, and was going back to prison; Patterson was in the Tolbooth in March last, and believes he was never in holy orders, or a minister of any church; Wescombe lived near Edinburgh about three years, and left it about nine or ten years ago; Robert Mackintosh is clerk to the presbytery of Scotland, and the proper officer to sign the extracts from the presbytery records; does not know his hand-writing; proves the hand-writing of John Watson, notary-public, to Exhibit A. N.B.—Exhibit A. is the sentence of excommunication against Patterson.

2. Lowry Bonner, ex. December, 1749. Deponent kept a public-house in Edinburgh for six years before he came to England, which was about a year and a half ago; during all the time deponent kept said house he very well knew David Patterson; has often seen him perform the ceremony of marriage between several couples at least ten in deponent's house, and always performed them by night; has heard he was excommunicated for his said irregularities long before deponent knew him, which made him afraid to come out in the day lest he should be taken and put in prison; he was not a minister of any church or in holy orders at [71] the time deponent knew him, but has heard he used to read lectures as a student in Trone church in Edinburgh, but never has done so since deponent knew him; said Paterson had so bad a character in Edinburgh all the time deponent knew him, that deponent would not take his word on any account, and believes he would not scruple taking a false oath if he could gain anything thereby.

3. Andrew Johnston, servant. Gives Patterson, whom he knew for eight years before October, 1748, a very bad character; says he used to marry people irregularly, and was in prison; while he was in prison Margaret Dayless and Margaret Primrose, two women of bad characters, came to Patterson and desired him to give them certificates of their being married to two men, but their names deponent cannot now recollect; Patterson in deponent's presence wrote two certificates according to said women's desire, for which they paid him two shillings, and then he confessed that he had never seen them to his knowledge before that time; deponent never heard that Patterson was in holy orders, but has heard he was, before deponent knew him, morning preacher at the Trone church; when deponent came to England Patterson was in prison.

Robert Mackintosh is clerk of the Presbytery in Edinburgh; it is his office to sign extracts from the presbytery records.

4. William Cauty, cabinet maker. Proves that Dods in August, 1747, followed one William Thompson into deponent's shop and called him Wescombe, and said he was her husband, and insisted that he was so, but on said Thompson and deponent assuring her his name was Thompson, [72] she lifted up his hat which was then flapped over his face and then confessed that she was mistaken, asked his pardon, but said he was very like her husband in the face; deponent has several times since seen said William Wescombe, and says there is a particular likeness in the face of the said William Wescombe to William Thompson.

6. Int. Thinks it possible to mistake Wescombe for Thompson, or vice versa.

6. Robert Biggar. Knows nothing of Patterson of his own knowledge, but hath heard that about nine or ten years since he was a lecturer in the Trone church, and

not a licensed minister, and therefore incapable of performing the office of matrimony, and that he was a person of a profligate life and conversation, and was turned out of his employment of lecturing for getting a young woman with child, and was afterwards, as deponent has been informed, confined a prisoner in the city gaol at Edinburgh for marrying people irregularly.

Read exhibit A., which was the sentence of the greater excommunication of Patterson, dated 29th December 1742.

Witnesses on Dods' second allegation.

1. Alexander Ross, Gent. ex. 19th March, 1749. Proves the exhibited copy of the proceedings in Commissary's Court of Edinburgh to be a true copy, sealed with the seal of that Court, and attested by the proper officer.

2. David Bruce, Gent. Proves the proceedings in the Commissary's Court to be signed by the proper officer; proves Wescombe's bill of advocation to the Lords of Session.

3. Henry Wardlaw, Gent. The same as Bruce.

[73] Read for Dods the proceedings in Scotland and the evidence there.

1. David Patterson. Swears he married the parties; there was present a young man and woman who were said to be the son and daughter of James Dow.

N.B.—In the Scotch proceedings Patterson is styled minister of the Gospel.

2. George Blyth. Deposes the same as on his examination in this cause.

3. John Vicarage. Proves Wescombe's letter to Dods in which he signs "loving husband."

4. Clement Porter. Proves said letter to be Wescombe's writing, and general reputation that Dods and he were married.

5. Lucretia Constable. Same as on her examination here.

6. Jane M'Nair. James Dow had a son named Robert, his eldest son, who lived with him from Martinmas till about the beginning of April, 1741, when he went to London; James Dow's eldest daughter Elizabeth was then servant in Edinburgh and was frequently in her father's family, but after Whitsuntide, 1741, she went to London; never heard said Robert or Elizabeth returned to Scotland; about end of March, 1741, Dods, Wescombe, and Patterson came to Dow's house and said Robert Dow being there; Wescombe carried him with his company into a room; Elizabeth Dow was there in the house and deponent thought she went into the room with them but cannot be positive; after shutting the door they remained together about half an hour, and then Wescombe called for pen and ink, and after some time they parted; Patterson went towards Edinburgh, and Wescombe and Dods towards Corstorphine.

[74] 7. James Dow. Deponent had a son called Robert, and daughter Elizabeth, who are now in England.

N.B.—The libel in Commissary's Court says, Wescombe and Dods were married in presence of Robert Dow, and ——— Dow, son and daughter of James Dow.

Sentence in Scotland 3d January, 1745, which was made absolute on 26th June, 1745, decreed Wescombe to cohabit with Dods as his lawful wife.

Witnesses on Wescombe's second allegation examined in the Consistory.

1. Robert Dow, gardener. Deponent was eldest son of James Dow, late of Castle Barnes, near Edinburgh; proves in contradiction to Jane M'Nair's evidence in the Commissary's Court that he came from Scotland to London in February, 1740-1, and continued in and about London for several years after, and was never present at any marriage between Wescombe and Dods; and deponent's sister Elizabeth Dow, now Bostell, came to London in September or October, 1741; deponent had a brother also named Robert, who is about fifteen years old; but deponent and his sister Elizabeth are the persons said to be present at said marriage.

Int. 2. When deponent left Scotland he left a brother Robert at home.

2. Elizabeth Bostell, alias Dow, examined 31st Oct. 1750. Deponent is daughter of James Dow, of Castle Barnes; deponent came to England in Oct. 1741, where she has continued ever since; deponent's brother, Robert Dow, came to England about eight months before deponent, and [75] has continued in England eight or nine years without going to Scotland; deponent was not present at a marriage between Wescombe and Dods, nor did she ever hear of such marriage till within three years

past, when Wescombe called upon her and asked her about said marriage, which deponent knew nothing of; she and her said brother Robert are the persons sworn to be present at said marriage.

8. Int. Never knew of any marriage performed at respondent's father's house; cannot speak to Jane M'Nair's character; deponent's father had three sons; Robert, one, is dead.

3. Jane Morison. Deponent is daughter to James Dow of Castle Barnes; deponent was not present at any marriage between Wescombe and Dods, nor did she ever know of any marriage performed in her father's house; deponent's brother, Robert Dow, left Scotland in February last; was nine or ten years since, but cannot be particular which; deponent lived with her said father from her birth till 1743; her brother Robert and sister Elizabeth are the persons sworn to be present at said marriage; Jane M'Nair behaved honestly in deponent's father's house.

8. Int. Deponent's father had three sons named Robert; Jane M'Nair is a great liar.

Dr. Simpson, Chancellor of London, was of opinion Dods ought to be admitted to her suppletory oath as prayed by her, and she being present in court immediately took the oath and swore to her marriage with Wescombe; whereupon the court pronounced for the validity of the marriage between Wescombe and Dods, and gave sentence accordingly on 19th Feb. 1750-1.

[76] Wescombe appealed from this sentence to the Arches, where the cause was heard upon the same evidence on this day, the 21st of Feb. 1752, when I ordered the suppletory oath to be read as part of the proofs, and confirmed the sentence given by the Chancellor of London, pronouncing for the marriage.

GRACE *against* CALEMBERG. Prerogative Court, Easter Term, May 9th, 1752.—Will set aside on the ground of fraud and for failure of proof with respect to handwriting.

Dr. Paul's opening for Grace. General Frampton died 23d September, 1749, his will, dated 2d May, 1749, gives all his estate to Mary Grace, and makes her sole executrix. The will is opposed by Henrietta Calenberg, deceased's cousin and next of kin; will found in his bureau; he became acquainted with Grace in 1743, at Speenhamland's, where she kept a grocer's shop; he promised to provide for her, and in Oct. 1744, she came to London; the General took lodgings for her, she dined and supped with him, and managed his affairs, and was in great favour with him; deceased died in the country; she sent notice thereof to a Mr. Joshua Sharpe who said he was well assured there was a will. 28th Sept. 1749, she came to town; search made for a will that night, but none found; on 8th November, 1749, the will was found in his study, among papers of moment, pinned in a book which was in his bureau. The [77] great question is whether the paper is deceased's handwriting; we have proved it to be so by five witnesses on the conditit; an exhibit marked A is admitted to be his handwriting; we have examined several witnesses who, by comparing the will with exhibit A, swear they believe both papers were wrote by the same person; we have proved the will to be deceased's handwriting by fifteen witnesses; they the contrary by eight. Affection to Grace proved; exhibit A, which is a draught of a will wrote by deceased, shews he intended to give all his fortune to one person, and that a woman; they have pleaded that paper A related to one Mrs. Dean, who died in 1744, but it was wrote in 1747; promises of providing for Grace proved; in June, 1749, the General told her he had settled his affairs, and provided for her.

Dr. Jenner, *contrà*, for Calenberg. Calenberg is cousin-german, once removed, and one of the next of kin to deceased; he died at Battley Abbey in Suffolk, 23d September, 1749. On 28th September Grace and Captain Rooke came to town together. Mr. Joshua Sharpe, Rooke, and Grace searched that night, but could find no will; next morning Sharpe and Rooke searched again for five or six hours. Two of her witnesses swear they did not search on the 29th. Mrs. Calenberg applied for administration 17th October. Sharpe told Grace, a caveat was entered; she replied, "I will oppose Calenberg's having administration." They have examined witnesses to prove the finding of the will on 8th November; but some say it was found in the bureau, and some in the cupboard, and vary in other particulars. Grace is a common

prostitute, and is a married woman; she did not [78] live with deceased when the will bears date, but lived in an house of her own, yet the will recites that she then lived with him. They have pleaded that deceased was in a bad state of health when he declared in favour of Grace in June, 1749, but yet her own witnesses prove he was then in good health. 2d May, 1749, Gibbs says deceased sent for him to buy him some coolers, that he waited some time before he saw deceased, and then deceased made excuse for keeping him so long, and said he had been making his will; these coolers were sent to Battley Abbey in April, 1749. The main question is whether the will is deceased's handwriting; deceased was major-general in 1743 and lieutenant-general in 1747. Mrs. Dean died in October, 1745, while he was a major-general; he styles himself so in paper A. We insist the will pleaded is a forgery; every thing that is given to Grace will vest in her husband.

Evidence.

3d Article of Grace's condidit, read by Calemberg's counsel, pleads finding the will in deceased's bureau on 8th of November, 1749, with papers of moment pinned to a leaf of military orders.

Witnesses for Grace.

1. Gibbon Jones, Clerk. Beginning of June, 1749, deceased came to live at Battley Abbey, near deponent, and then they became intimate together, and deponent often saw deceased write, and is acquainted with his writing; verily believes the whole of the will pleaded was wrote by deceased; deponent has transcribed papers from deceased's writing.

[79] 4. Int. Has often seen deceased write, particularly on 2d August, 1749.

2. George Wright, Esq. Deponent first saw deceased in October, 1748; often saw him write; verily believes the whole will is deceased's handwriting.

2. Int. Respondent was not intimate with deceased.

3. Joseph Littlewood. In May, 1747, deponent became servant to deceased; has often seen him write; verily believes the whole will is deceased's writing; 8th November, 1749, Mr. Lechmere, Sherman, Gibbs, and deponent, searched for a will, and Gibbs found the will pleaded in a book of orders; Gibbs shook the book, nothing fell out then; he then threw it down on the back, and it opened in the place where the will was pinned; it was in the bureau.

1. Int. He, respondent, is not yet discharged from deceased's service. 4. Int. Respondent almost daily saw deceased write. 6. Int. They were about an hour searching for the will before it was found. 7. Int. They were not instructed to look into the book where the will was. 13. Int. Grace had the key of the bureau at deceased's death, deceased having delivered it to her before his death. 5. Int. Grace came frequently to deceased, and when he went out of town he left his house in her care; she dined at deceased's table.

4. John Gibbs, broker. Deponent first came to know deceased about ten years ago, in camp at Hounslow, when deponent was servant to Colonel Lee; deponent has bought many things for deceased, and has received several notes from him, and has often seen him write; verily believes the will is all of deceased's handwriting; [80] deponent being sent for by Grace on 8th November, deponent, Lechmere, Sherman, and Littlewood, searched for the will; did not find it in the bureau, but found it in a cupboard or slip adjoining to the bureau; deponent shook several books; no will fell out; deponent said he had heard of wills pinned into books, deponent turned over the book of orders leaf by leaf, and when he had turned over near half the book, he found the will; deponent read it in their presence, and then delivered it to Lechmere, and went up to tell Grace of it.

5. Int. Deceased held Grace in great esteem. 7. Int. Was not instructed to look into the book of orders, but to search in general. 9. Int. The pin with which the will was fastened was bright; a few days after the fire-works in April, 1749, deceased sent for deponent, and kept him some time waiting, and then deceased sent for deponent in, and said, "Gibbs, I beg your pardon for making you stay, for your time is precious, but I have been writing a little will." 14. Int. Grace was not present when the will was found, but was in great surprise when she was told of it.

N.B.—There is nothing in the ninth interrogatory to lead Gibbs to speak to the declarations he says deceased made to him, that he had been writing a little will.

5. Thomas Lechmere, attorney at law. Deponent was present on the 8th November at the search for a will; deponent was carried thither by Sherman; Grace was in bed, and gave them the key of the bureau, and they began the search; before Gibbs and Littlewood came, they looked over several bundles of papers and books, &c.; deponent proposed to look over deceased's MS. books, and desired them to turn the books over leaf by leaf; [81] believes the search made by Sharpe was a slight one, because, on 13th November he told deponent he had only shook the books; the will was found by Gibbs pinned to a leaf.

6. Int. Will found after about an hour's search. 14. Int. Do not remember what emotions Grace shewed on the will being read to her. 15. Int. Deponent is solicitor for Grace; is not obliged to answer what meetings he has been at relating to this cause. 16. Int. Expects no reward for his evidence.

6. John Sherman. Deponent was many years employed by deceased as upholsterer; Grace desired deponent to bring an attorney and search for a will; deponent went on 8th November with Lechmere; Grace gave them the key of the bureau, and deponent and Lechmere, in presence of Littlewood, searched, and then Gibbs came, and they searched the books, and Gibbs cried out hastily, "Here is something," and presently said, "it is the will;" some papers of consequence found in the same cupboard with the will.

2. Int. Respondent was intimate with deceased as one of his tradesmen for six years before his death.

7. William Hancock. Deponent was servant to deceased; often saw him write; but has not seen him write his name as he remembers; verily believes the whole will is deceased's handwriting.

The will read, and also exhibit A, a draft or copy for a will with blanks.

Witnesses for Calemborg.

1. Thomas Henshaw. Mary Grace bears a [82] bad character at Newberry and that neighbourhood.

2. John Carey. Has known Grace twenty years; she had a general bad character, but knows no facts.

3. John Lonsdale, Esq. Nothing material.

4. John Spackman, clerk. Grace had a bad reputation at Newberry; kept company with the officers, and was esteemed an adulteress; her general reputation very bad.

2. Int. Respondent had no acquaintance with Grace. 3. Cannot believe she would forge a will; knows no crime she was guilty of, save some follies and extravagances he believes she was guilty of, with respect to her husband.

5. Thomas Penrose, clerk. Knew Grace thirteen years ago; she was commonly esteemed a whore to the officers at Newberry, but cannot infer from thence that she would forge a will.

6. Richard Halt, Esq. Grace reputed a whore to the officers.

7. Richard Quilling. In 1743-4 deponent went to live as servant with deceased, and left him in March, 1748; first knew Grace in 1744 at Reading races, where she lodged in the same house with deceased; she dined at the Pelican at Speenhamlands with deceased and his officers, and no other woman was present; she was generally reputed to be whore to the officers at Newberry; she came to London in October, 1744, and came to deceased's house; she staid with him about an hour, and then they went out together and returned and supped with deceased at night, and went away by herself; she often came to deceased's house to dinner and supper; but when gentlemen of rank dined with deceased she was [83] not present; in July, 1745, Grace came to deceased in the country, and staid with him one night; in January, 1746-7, deceased ordered deponent to take in no letters or parcel that came from Grace, and gave the same orders to the rest of the servants, and ordered him not to let her in; a letter from her was refused, and she was denied admittance; but she forced her way in, and in the struggle at her getting in at the door she said she was hurt; deceased, angry at her coming, ordered Sherman not to give her credit for goods; Grace did not live in deceased's house while deponent was his servant; deceased shewed Mrs. Dean great regard; she died in October, 1745.

7. Int. Grace had not the management of deceased's affairs.

8. Elizabeth Quilling. Deponent went to serve deceased in 1744, and continued with him till April, 1748; in 1744 Grace came to deceased's house with her servant

and baggage; gives same account as the last witness; deceased told deponent she need not make any addition to his dinner for Grace; deposes the same as Richard Quilling about not receiving letters from her, and her forcing herself into deceased's house, &c.; deceased talked angrily to her; Dean died in October, 1745; Grace did not manage deceased's affairs.

4. Int. Believes she, Grace, breakfasted with deceased the morning she made a disturbance at his door and forced herself into deceased's house.

9. John Spencer. Deceased had a great regard for Mrs. Dean, and advised with her about his affairs, and allowed her an annuity of upwards of 20l. a year; declared he would provide for her, [84] but did not say he would leave her his whole fortune.

6. Int. Dean refused to dine with Grace.

10. Lybiat Bodmyn. 3. Int. Deponent does not believe Grace would be guilty of any manner of crime.

11. Thomas Cowslade. 3. Int. The same. N.B.—These two witnesses were only read to the 3 Int.

12. Joshua Sharpe, Gent. Deponent well knew deceased about twelve years before, and to his death, and did business for him; Grace took possession of deceased's keys and effects at his death, particularly of his bureau; 28th September, 1749, deponent went to deceased's house at Grace's desire to inspect his papers to see for a will; deponent, Grace, and Haman Rooke, Esq., searched the bureau and bookcase in deceased's study where he kept his papers of moment; they searched said bureau with great care, and found many papers relating to his regiment and stock, but the draft of a will marked A was not found at that time, but was found the next day; deponent did carefully search all the papers and MS. books, but not so particularly as to go over the books leaf by leaf, and shook said books but found no will, &c.; deponent made appointment to search by daylight the next morning at nine o'clock. On 29th September, 1749, deponent went accordingly next morning, but Rooke not being come, deponent and Grace again inspected said books and papers; Rooke then came and searched with them, and deponent did then carefully, circumspectly, and minutely, inspect all the papers and MS. books found in said study, and bureau, and cupboard, aforesaid; [85] in examining said books, deponent looked at each end of them, and also into many of the leaves, to see if he could find any loose papers therein, and shook many of said books and laid them open with their backs downwards, and held the leaves up loose and run his hand over them in such manner as they might easily open if there were any papers between the leaves, and such papers as he found in the books he did carefully peruse; he spent a considerable time in this search but found no will; if the will pleaded in this cause had been then pinned to any of the books and stuck out beyond the leaves, he should certainly have found it; believes he should have seen it if the will had been then pinned to any leaves of those books, but cannot depose with more certainty that it was not there; found draft A, in a travelling case which deceased had in the country, but not in the same condition it now appears, great part of the paper having been torn off from the bottom with part of the indorsement, and with addition at the top "a copy of my will." which words were not there when it was found, and they are not deceased's handwriting; deponent delivered it to Grace in the condition it was found; 17th October, 1749, after deponent had directed a caveat to be entered, deponent acquainted Grace therewith, and that Calemberg applied for administration; she asked deponent if he had heard of any will of deceased's; deponent said no, and did not expect to find one; she replied she had searched everywhere and not find one, and asked deponent what she should do; deponent told her Colonel Lyttleton, for Calemberg, had applied for administration; she expressed great emotion at the thoughts of Calemberg having deceased's estate; deponent said he [86] did not see who could hinder it; she replied with warmth that she would oppose her having the estate; deponent has often seen deceased write and subscribe his name, and is well acquainted with his writing; verily believes the will pleaded is not deceased's handwriting, and was not made or signed by him, which deponent thinks is clear by comparing it with papers deponent knows to be deceased's writing; verily believes no part of said will was wrote by deceased; thinks the will and the papers exhibited, viz., Nos. 1, 2, 3, 4, and 5, are materially different; proves those exhibits to be deceased's writing; believes the will, and exhibits A, and Nos. 1, 2, 3, 4, and 5, were not wrote by the same person.

1. Int. Has often seen deceased write in presence of several persons. 5. Int.

Thinks it clear the will is not deceased's handwriting. 9. Int. Respondent searched five or six hours in the two days.

13. Haman Rooke, Esq. Deponent well knew deceased five or six years; was with him when he died, and came with Grace to town, she possessed herself of deceased's keys and effects before deceased was buried, Grace told deponent deceased had frequently told her he had provided for her, and she sent for Joshua Sharpe to search for a will; 28th September, 1749, deponent, Sharpe, and Grace searched deceased's bureau and bookcase in his study; they diligently searched his bureau and cupboards, &c. and carefully inspected all the papers and shook all the MS. books; next day Sharpe went again to deceased's house, and they all three searched again all the papers and written books, but could find no will, &c.; verily believes, if any will had then been pinned to any leaf of a book, they must certainly have seen the [87] same; they found draft A in a writing-box; said paper A has been torn and altered since; verily believes deceased had not an intention to make any will, and did not write or sign the will pleaded; and it is not like deceased's handwriting, and verily believes it was not wrote or signed by him; and it clearly appears to be a different handwriting from the six exhibits, and was not wrote by the same person.

9. Int. Refers to his deposition. N.B.—He is asked how long time it would take up carefully to examine all the papers, &c. 10. Int. They made a search on 29th September. 13. Int. Heard deceased say Grace was of great service to him in the country, but does not remember to have heard him say directly he would provide for her or leave her anything; in coming to town Grace said deceased told her he had provided for her.

14. Thomas Fisher, Esq. Deponent was agent to deceased's regiment; knows his handwriting; verily believes the will pleaded is not deceased's handwriting, and was not subscribed by him, and he thinks it clear upon view of the will; deceased always wrote a free hand; will is wrote in a very stiff manner; the will and the exhibits do not appear to deponent to be wrote by the same person; believes the will is a counterfeit imitation of deceased's writing, for most of the words in the will and draft A begin with letters in the same form, and therefore believes it was copied from the draft A.

3. Int. Esteems himself skilful in writing.

15. John Parker, Esq. Deponent knew deceased twenty years; knows his handwriting; verily believes the will pleaded was not wrote or subscribed by deceased; several letters, particularly the great *E*'s, differ from deceased's hand, [88] and the small *t*'s and *v*'s; the word "revoke" is misspelt, being wrote "rovoke," and deceased was a better scholar, and deponent is well satisfied he would not have described Grace his loving and affectionate friend, and is assured he would have benefited some of the Calemberts, to whom deponent has heard him declare he was related, and from whom he and many English officers, and deponent in particular, in Flanders, received great civilities, in respect to deceased; it appears to deponent, beyond doubt, that the will is not deceased's handwriting.

1. Int. Respondent almost daily received written orders from deceased. 5. Int. The exhibits 1, 2, 3, 4 and 5 agree with one another, and widely differ from the will.

16. John Williams, writing-master. Believes the exhibits A, and Nos. 1, 2, 3, 4, 5 were wrote by the same person, but the will is not wrote by the person who wrote them; mentions many variations; the several persons who were present with respondent to inspect the will and said exhibits agreed they were different hands.

N.B.—The exhibits A, and No. 1, 2, 3, 4, 5, are agreed on both sides, to have been wrote by deceased.

17. Charles Gardiner, engraver. Deposits the same in all respects; mentions several letters, and the word *and*, which he says, differ in the will from the exhibits.

3. Int. Respondent has no doubt but that the will and the exhibits were wrote by different persons.

18. William Chinnery, writing-master. The same as the others; is clear the will and exhibits were wrote by different persons; no one letter in the [89] subscription to the will appears to be the same hand as the subscriptions to the exhibits.

19. John Spencer. Deponent knew deceased about sixteen years; deponent well acquainted with his handwriting; verily believes deceased did not write or sign the will pleaded; the exhibits and will, he verily believes, are wrote by different persons.

Witnesses for Grace.

1. Anne Phillips. Grace and her husband lived together in reputation at Speenhamlands, and she had a good character, and took care of his affairs, and behaved with circumspection; the husband hurt himself by his own extravagance; deponent and Grace have dined together with deceased at Newbury, and he seemed to have great regard for Grace, and he often pressed her to come to London and live with him; solemnly declared to her he would provide for her handsomely so long as she lived; Grace came to town upon deceased's offer.

2. Martha Reeves. Grace used to be much with deceased; she always bore a good character; deceased was in a good state of health when he went to Batley Abbey, where he died; Grace breakfasted with him that morning; when he was going, she cried, deceased said, "Molly, what do you cry for?" she answered, "To think you are going so far;" he replied, "You have no need to cry, I have taken care of you, for I have settled my affairs, and provided for you to your satisfaction;" deponent understood he meant his will.

N.B.—12th art. of Grace's allegation pleads he was in a bad state of health.

[90] 1. Int. 3tio. loco. Grace has always borne the character of a modest woman. 4. Int. Has heard some people say she was deceased's mistress. Respondent is servant to Grace.

3. Thomas Skuce. Proves Grace often, almost daily, went to deceased's house, and she behaved as mistress of his house; believes deceased had a good opinion of her, and trusted her; she went to Batley Abbey in July, 1749: deceased treated her as a beloved friend and wife, she did not lie at deceased's house in London.

N.B.—4th art. of Grace's allegation pleads she on 9th of June, 1749, went and lived at deceased's house in Berkeley Square, till 14th July, 1749.

5. Int. Does not believe any man can swear to papers being wrote with the same ink.

1. Int. 3tio. loco. Grace always bore a good character.

4. Jane Sparrow. Deponent has known Grace from a girl, she and her husband kept a grocer's shop, and she had a good character, and was esteemed a prudent woman; to make her husband's affairs easy, she parted with her jointure of 2000l.; she managed her affairs with prudence, and had a good reputation; deponent once dined with deceased and Grace at his house in town; knows she had the keys of his plate.

5. Jane Kite. Has known Grace from a child; she bore a good character, and was so esteemed to do at Newberry; in Nov. 1744, she came to London; deponent has often dined with her at deceased's house in town.

1. Int. 3tio loco. Grace behaved in a chaste and virtuous manner. 4. Int. Has heard people say she might be deceased's mistress.

[91] 6. John Kite. Grace was esteemed at Newberry, and bore a good character, and was not extravagant, but behaved with prudence; believes she paid many debts after her husband left her.

5. Int. 2do loco. Does not believe the will and the writing in the pocket-book were wrote with the same ink.

7. Ebenezer King. Never heard Grace was the occasion of her husband's ruin, but she always behaved as a prudent wife, and paid some of his debts.

1. Int. She behaved with freedom, which made her chastity suspected. 3. Int. Believes she may have wronged her chastity, but not till since her husband left her.

4. Int. Has heard she was deceased's mistress.

8. Benjamin Collins. Grace bore a good character in respect to her dealings; she paid debts of her husband's.

9. George Phillips. Gives Grace a good character; believes her husband was ruined by his own extravagance, and not by her neglect.

10. James Brown. Gives Grace a good character.

11. Bartholomew Price. Grace always had a good character, and was well esteemed in her neighbourhood.

12. James Johnston. Mr. Grace carried on a great grocer's trade with credit; never heard but that producent bore a good character in the neighbourhood.

Witnesses for Grace on another allegation.

1. John Gibbs, examined before. Grace, to [92] deponent's knowledge, lived with

deceased about five years before his death, and managed his family, and dined with him; and deceased spoke of her with great esteem; and believes such esteem continued to his death; 28th April, 1749, deponent sent to deceased's country-house sundry household goods of various kinds, and particularly coolers; on 2d May, 1749, or thereabouts, deponent received a message from, and went to deceased in the morning, and waited some time, but at length was called up, and then deceased said, "Gibbs, I ask your pardon for making you wait, for I know your time is precious; but I have been about some material business, writing a little will," or to that effect; and then gave deponent orders to go to Batley Abbey to get the goods put up, which deponent did on 5th of May.

N.B.—7 art. of Grace's allegation read, pleads deceased on 2d of May sent for Gibbs to buy some coolers.

4. Int. Cannot be exact to the day when such discourse passed; but it was about 2d of May. 5. Int. Believes the writing in folio 11 of pocket-book, and the will, were not wrote with the same ink. 8. Int. Believes the will was wrote with the free hand as the exhibits are.

2. Thomas Lechmere, Gent. Bolt and deponent, as commissioners for appraising deceased's effects, were two days employed above four hours in inspecting deceased's papers; proves exhibit marked C, signed Charles Frampton, entered in the auditor's office.

N.B.—8th art. of Grace's allegation pleads the 11th folio of pocket-book was wrote with same ink that was in deceased's standish on 2nd May, [93] 1749, with which he wrote the will; and the said 11th leaf was wrote by deceased, and that and the will were wrote with the same ink.

5. Int. Believes folio 11 and the will were wrote with same ink, for Littlewood told deponent deceased complained of the paleness of his ink, but cannot be certain. 8. Int. Subscription to exhibit C is wrote stiffer than the other subscriptions, but the name to the will appears as if it had been amended.

3. Lancelot Craven. Deponent was intimate with deceased from 1744; Grace was often with deceased, and he once said to her, "Mrs. Grace, why do you fatigue yourself so;" his value for her seemed to increase.

5. Int. There seems to respondent to be an apparent difference in the ink of the will and of the 11th folio of the pocket-book.

4. John Hill. Proves exhibit C and saw deceased sign his name to it.

5. Int. Believes the ink and writing of the pocket-book and will are different.

7. Int. Thinks there is a diversity between some of the letters of the will, and of the exhibits, &c.; but, upon the whole, believes they were wrote by the same person; all the exhibits seem to be the same hand, and believes the will was also wrote by the same hand, but with more care.

5. Martha Hughes. Deponent was servant to Grace, and is so now; Grace was very ill when Sharpe and Rooke searched for a will, and they did not then make a diligent search, not staying above half an hour, as deponent remembers; and deponent heard Sharpe say he would defer the search till Grace was better, saying he was sure there was [94] a will in the house, and he would come again and make a further search, but he never did, though Grace sent for him several times for that purpose, so that there was only a search by them on the night Grace came to town, when she was better, a fresh search was made by other persons.

3. Int. Deponent constantly attended Grace, and does not believe she was out of her chamber during her illness.

6. Martha Prior, formerly Reeves. Deponent was housekeeper to deceased at his death; says search was made for a will by Sharpe and Rooke on the evening of the day Grace came to town, and she was then very ill; they searched about half an hour; Sharpe told her, when she was better he would come and make a further search, but he never did; believes she was not out of her room for six weeks; no further search was made till 8th November.

2. Int. Respondent was with Grace all the day of 29th September, when she kept her bed.

7. Henry Macdonald. Deponent was coachman to deceased at his death, and is now coachman to Grace; deponent carried a letter to Sharpe on deceased's death, Sharpe told deponent the deceased, about twelve months before, had taken his will from him and threw it in the fire, and said deceased then wrote something which he apprehended

might be his will ; and Sharpe said, "Sure, there must be a will, and it must be at Berkeley Square house ;" the night Grace came to town, she sent deponent for Sharpe [to search for a will.

N.B.—Sharpe's declaration, which this witness deposes to, is not pleaded.

[95] 8. John Sexton. Grace sent for deponent as her apothecary, on or about 30th September, 1749, and she was very ill, and continued so all October.

5. Int. Believes folio 11 and the will are wrote with different ink.

9. Joseph Littlewood. Grace lived with deceased for some years, and acted as mistress of deceased's family, and believes deceased had great value for her ; about May, 1749, deceased complained his ink was thin ; proves deceased wrote the particulars in folio 11 of pocket-book, in deponent's presence, with the ink then in his standish, which was the same he had had from April before, proves exhibits A and C.

5. Int. Cannot swear the will and folio 11 were written with the same ink.

7. Int. Believes the will and exhibits were all wrote by the same hand.

10. Henry Rand, clerk. Deponent has known Grace five years ; has often dined with her and deceased at his table, and he treated her very civilly ; deceased was offended with deponent, who was chaplain of deceased's regiment, for asking leave to be absent of a superior officer, and deceased ordered deponent to his regiment in Ireland ; Grace interceded for deponent with deceased, and he then consented deponent should stay in England ; from thence deponent concludes deceased had affection for Grace.

11. Thomas Johnston. Nothing material.

8. Int. The will is wrote better than the exhibits.

12. Edward Thoroughgood, engraver. The will and exhibits, and the folio 11 of the pocket-book, and the subscriptions were all wrote by the same person.

[96] 5. Int. The ink in the pocket-book is more yellow than the will. 7. Int. Believes the will and all the exhibits are the same hand, and seem to be wrote with equal swiftness, and the subscriptions Cha. Frampton, to all of them were wrote by the same person ; believes deceased amended name Cha. at a different time, and the witness adds several suppositions. 8. Int. Respondent thinks the will was wrote with the same ease as the exhibits, and believes it impossible to have imitated deceased's hand better than the will appears to be.

13. Emanuel Austen. Verily believes the will and exhibits were all wrote with the same hand, but will seems to be wrote with more care.

5. Int. Does not believe the folio 11 and will were wrote with same ink. 7. Int. Believes the exhibits and names thereto, and will were all wrote and signed by same person. 8. Int. Believes will was wrote with more care, but with the same freedom as the exhibits ; the same as the last witness.

14. Thomas Kitchin, engraver. Deposes same as former witness ; thinks it impossible to imitate the exhibits so exactly as the will does.

5. Int. Does not believe the will and folio 11 were wrote with same ink. 8. Int. Same as the last witness ; will seems to be wrote with same freedom as the exhibits.

15. Charles Grignion, engraver. Same as the former witnesses ; believes the will and exhibits were wrote by the same person.

5. Int. Thinks the will and folio 11 might be wrote with the same ink. 8. Int. Believes will was wrote with same freedom, but more care than the exhibits.

[97] 16. Joseph Champion, writing-master. Deposes the same as the other witnesses.

5. Int. Will and folio 11 are not wrote with the same ink. 8. Int. Same as the other witnesses.

17. Thomas Undeshagen, school-master. Verily believes the will and exhibits were all wrote by the same person, but the will was wrote slower and with more care.

5. Int. Believes the will and folio 11 were not wrote with same ink. 8. Int. Does not believe the will was wrote with the same freedom as the exhibits.

Dr. Paul's argument for Grace. Grace has a good character ; proved by Phillips that deceased declared he would provide for her ; she came daily to deceased's house, and conducted his affairs ; Rand says she had great influence over deceased ; exhibit A allowed to be deceased's handwriting, and shews he intended to die testate, and to leave all his fortune to one woman only ; Grace sent to Sharpe to give notice of deceased's death ; Sharpe said, "Surely there must be a will," and added, "He had a will which he destroyed about a year before ; Rooke told her he would give her 2000l. for what she would get ; Sharpe did not search very carefully. Lord Gerard

of Brandon's will; he was dead twenty years before it was found; administration twice granted; will attested by Judge Raymond and others; sentence for it both in Prerogative and Delegates; Compton, one of the witnesses, swore he never did attest it; but Lord Gerard's hand and Judge Raymond's were proved, upon which the will was established. Chancellor Freeman's will not found till fifteen years after his death: then found in [98] Theodosian Code; held to be a good will. This will not found on first search; 8th November, a second search made, will found in his study by Gibbs and three others; they differ in nothing material; the grand question is, whether the will is deceased's hand-writing? We have examined twelve witnesses, who agree it is his writing; eight witnesses, contra, that it is not deceased's writing. Where witnesses differ, credibility is to be considered; their witnesses swear so positively and strongly that credit cannot be given to them; Martha Reeves deposes that in June, 1749, deceased said he had provided for her, &c.

Dr. Pinfold, same side. Grace's character in general well supported; she behaved well in her trade; their witnesses do not believe she would be guilty of forgery; deceased shewed great affection for her; the Quillings prove affection for her till the end of 1748; afterwards it encreased and continued to his death; no proof of more than one quarrel between them, and that made up immediately; Rooke believed she had an interest in deceased; no proof of affection to Calemberg throughout the evidence, nor any proof of intercourse between them; clear, deceased intended to die testate; exhibit A was wrote between 1743, when he was major-general, and 1747, when he was made lieutenant-general, because he describes himself therein as major-general; declaration to Gibbs on or about 2d May, that he had been making his will; this declaration corresponds with what Reeves swears the deceased declared to Grace on the day he went out of town, viz., that he had provided for her; the search on 28th September was a slight one; there is a contrariety as to the [99] search on 29th September; two witnesses swear against Sharpe and Rooke that there was none; her servants swear she kept her bed all day on 29th September, and on 30th the apothecary swears she had a violent fever. Fisher believes the will was a copy from exhibit A, and therefore believes the will is not his hand; but if deceased copied it, he would naturally write with the same initial letters.

Dr. Hay, same side. Calemberg is by herself alleged to be only one of the next of kin; the will is opposed as a forgery merely; they attempt to prove it, first by collatio literarum; our writing-masters (a) say, "It is an original hand, there is a sameness between the will and exhibits." Secondly, by opinion of deceased's acquaintance; Rand's evidence respects the time between February, 1748, and May, 1749. Martha Reeves proves a recognition of the will on 9th June; Gibbs speaks strongly to deceased's declaration on 2d May; Gibbs must be perjured if the will is set aside; deceased went to Berkeley-square in the spring, 1745; Dean died in October, 1745; Spencer swears Dean would not dine with Grace, and Grace dined there every day, and was therefore in more favour than Dean; it is probable there was no search on 29th September, because Grace was extremely ill; she sent for Sharpe several times, and he would not come near her; improbable that Grace should [100] put the will into a place that had been searched before; forged wills have all been attested; no care taken to prevent the husband's having the estate, which shews it was deceased's act, for a forger would have known that what is given to a wife absolutely would vest in her husband.

Dr. Jenner's argument for Calemberg. Shall chiefly insist on the internal evidence from the paper itself; they pleaded it was found in the bureau, but it was found in a cupboard, in a book where there is no entry later than 1740; very improbable he should put his will in such a place; she purchased a house in London, which she must have done with the deceased's money, and therefore he had provided for her; paper A has been altered; the words at top, "A copy of my will," not deceased's hand; the will is a transcript of A so far as it goes; but A is prepared for execution with an attestation; the will says, "have put my hand and seal," but no seal, no attestation, though real estate is devised; if deceased made his will in 1748, A cannot be a copy of that will;

(a) *Reilly v. Revett*, Prerog. 28th July, 1792, 1 Phill. 80, notes; *Heath v. Watts*, Prerog. 29th November, 1798, *ibid.* 82, notes; *Beaumont v. Perkins*, Prerog. 26th April, 1809, *ibid.* 78.

they have pleaded that the will must be deceased's writing, because he wrote another paper with the same ink, but the witnesses prove the contrary.

Dr. Smalbroke, same side. The only method to detect a forgery is from circumstances; Grace impatient to find a will, but yet no search made from 17th October to 8th November; to shew there was a second search, Sharpe and Rooke produced it; contradicted by Hughes and Prior, formerly Reeves; incredible he should carry the draft A with him into the country, and [101] yet should leave the will at home; but one receipt produced by Grace to compare with the will.

Dr. Bettesworth, same side. The will unsealed and unattested; Martha Reeves swears the apothecary advised Grace to have a physician; he swears he did not advise her so; evidence of the forgery arises from the paper itself.

JUDGMENT—Sir George Lee. Upon the evidence above stated, and view of the will, which appeared to me not to be the same handwriting as the exhibits, which were acknowledged to be wrote by deceased, on 4th Session, Easter Term, 9th May, 1752, I gave sentence against the will, and pronounced, that as far as appeared to me, General Frampton was dead intestate, and decreed administration to Mrs. Calemberg, from which decree Grace's proctor appealed to the Delegates, ad statim.

19th February, (a) 1754, this sentence was affirmed by the Delegates, with 200l. costs.

[102] BARON VON SOLEND AHL *against* DR. HAMPE. Prerogative Court, Easter Term, May 9th, 1752.—A physician not entitled to call for an inventory, as a creditor, for fees due from the deceased.

Baron von Solendahl, late Envoy from the King of Denmark, made his will, and appointed his brother executor; a requisition was prayed to swear the executor in Denmark. A caveat was entered by Dr. Hampe, as a creditor, who prayed an inventory; the caveat was entered on the 18th February, 1752. On the 17th March, his proctor prayed an inventory, and was assigned to make oath of his debt. On the first session of Easter Term, Dr. Hampe gave in an affidavit, and therein swore that the deceased was, at his death, really indebted to the deponent 2000l. for attending him day and night, as a physician, for two years and a quarter; and annexed to his affidavit a certificate signed by Dr. Mead, Sir Hans Sloane, and Sir Edward Hulse, upon a case stated by Dr. Hampe, in which they say that they think an eminent physician who gives up his whole time for two years and a quarter to one particular patient and neglects all other business, will well deserve 2000l. for such attendance.

The proctor for Solendahl alleged that the affidavit does not ascertain any debt; that Hampe is not naturalized, and cannot legally practise here as a physician, and denied him to be a creditor.

Dr. Hay for Solendahl. A physician cannot sue for fees; he must have them at the time of his attendance, or not at all. Hawkins' Pleas of the [103] Crown, 1st part, fol. 87, an unauthorized physician is guilty of felony if the patient dies.

Dr. Smalbroke *contra*. Fees are recoverable. *Dr. Doon v. Lady Blount*, Dr. Doon prayed an inventory as a creditor for fees, for attending Sir Harry Blount, as a physician; he swore to a debt of upwards of 100l. This Court granted him an inventory. 1st Roll's Abridgment, fol. 517.

JUDGMENT—Sir George Lee. I was of opinion that fees to physicians or lawyers were by the civil law merely honorary, and were not to be demanded, or recovered; but supposing they were recoverable at common law, it must be upon a quantum meruit, to be settled by a jury, which must depend upon the eminence of the physician, and the loss he suffered by giving up his other patients; and though Dr. Hampe estimated his attendance at 2000l., yet a much less sum might be thought a sufficient compensation by a jury, and consequently that here was not such a certain fixed debt as would entitle him to an inventory; and as to the certificate of the physicians upon a case stated by Dr. Hampe, it was not evidence, and I could not take notice of it.

(a) The Judges Delegates present at the sentence were—The Earl of Northumberland, Bishop of Oxford, Bishop of Bangor, Lord Sandys, Mr. Justice Forbes, Mr. Baron Smythe, Dr. Walker, Dr. Simpson, and Dr. Collier.

I therefore rejected Dr. Hampe's petition, and decreed probate to pass under seal to the executor, and a requisition to swear him.

[104] THOMAS *against* EVANS AND OTHERS. Prerogative Court, Trinity Term, May 26th, 1752.—Administration cum testamento annexo, decreed to the next of kin.

John Thomas, deceased, made his will, 3d May, 1743. James Thomas, executor, cancelled it, but afterwards deceased wrote on another paper, I will have my will stand as to the legacies, but not as to the executor. Evans, a trustee in the will, entered a caveat; several next of kin; James Thomas claimed administration cum testamento as residuary legatee.

The Court ordered him to be called to propound his interest as such, if he thought proper, otherwise decreed administration cum testamento to three of the next of kin.

SPENCER, FORMERLY WAPPING *against* HAWKINS AND LONG.(a) Prerogative Court, Trinity Term, June 29th, 1752.—The capacity of a testator established.

Dr. Hay for William Hawkins. William Hawkins, executor of Eliza Wapping, who died 12th [105] Dec. 1745. Deceased was cook of the "Prince Frederick," privateer, which took the two great prizes, the "Marquis d'Antin" and the "Louis Erasme." "Prince Frederick" arrived at Cork in Sept. 1745; deceased sold his share, and then married Eleanor Carrol; they lived together about three weeks; in October she made him drunk, stript him of everything, and left him; he was so distressed, he was forced to beg; deceased was recommended to Hawkins to endeavour to set aside the sale of his share in the prize; and Hawkins did relieve and assist him, and boarded him at Ellis's, where he fell ill of the small-pox, and died; made his will on 6th December, 1735; divided his effects amongst William Hawkins, John Long, Eliza Ellis, and Joan Slack; deceased declared his wife used him very ill; and she should have nothing of his; the will attested by three witnesses, one of whom is dead; instructions, execution, and full capacity, proved; Hawkins proved the will 25th April, 1746; Wise bought deceased's share of the prize; and it appears in evidence that he has bought off Long, Ellis, and Slack; and it is probable he is at the bottom of opposing the will, for which a citation did not issue till September, 1749; deceased, as cook to the "Prince Frederick," had two shares, one [106] only of which was sold to Wise; the wife has endeavoured to prove she had the small-pox; and therefore left her husband; we have proved she had it long before her marriage.

Dr. Simpson for Spencer alias Wapping, the wife. Hawkins filed a bill against Wise to set aside the sale; deceased's two shares were worth 1200l.; deceased was a black Moor; he and his wife kept a public-house, and lived very affectionately together for about eight weeks, as some of the witnesses say, which was in November, 1745, at which time she was taken ill, and deceased advised her to go to her father's, to be

(a) This case and some others which will be found in this collection, seem to involve questions of fact rather than of law, and on this account it was my primary intention to have altogether omitted them; but upon consideration that the cases of this description are but few in number, and that the omission of them would break in upon the entirety of the work, which, as it is now presented to the public, comprehends all the MS. notes of Sir George Lee, on all the cases that were submitted to his judgment during the six years that he filled the chair of the two highest Ecclesiastical Courts of the country, I have yielded to the opinion of those who have been anxious that these cases should also fill their respective places in this publication. Undoubtedly they must augment our admiration of the accuracy, the precision, and the extraordinary diligence, of the learned person whose judicial habits they unfold; and I am also willing to hope that the traces they exhibit of succinct pleading, and consequently of pertinent evidence, may not be without their use in furnishing suggestions to those who are conversant with the diffuse style of pleading, and the masses of cumbersome evidence which more recent practice has introduced into the proceedings of the Ecclesiastical Courts.

taken care of; she went from the cove of Kinsale to Cork, and she then had the small-pox; deceased sent several times to her father's, to inquire how she did; and expressed concern that he could not go to her, because he had not had the small-pox; when she was up he went to Cork to see her at her father's, there he got the small-pox of her, and died in November, 1745; two of the witnesses persuaded deceased to apply to Hawkins to get him his prize-money; Hawkins then sick in bed; 16th November, 1745, deceased gave him a letter of attorney to recover his prize-money; Long and Keeff witnesses to it, and Keeff is one of the witnesses to the will; when Hawkins had got this letter of attorney, he then boarded deceased at Ellis's, at six shillings a week; Hawkins boarded several other seamen at Ellis's; the will bears date 6th December, 1745, the day Hawkins set out for London; Elizabeth Ellis declared to her son that Wapping was in the height of his sickness, "and we must contrive to get a will from him." We have proved he was then insensible; no instruction for [107] this will; deceased could neither write or read; no declarations of deceased that he had made his will; the writer of the will says Hawkins, sen. was present at giving instructions; Hawkins himself swears he was not present; their witnesses swear he was perfectly sensible all his illness, but it will appear he was very raving; their witnesses contradict one another as to deceased's wife making him drunk in October, 1745, and then running away from him with his effects.

Witnesses for Hawkins.

1. Dennis Keeff. Deponent went with Alderman William Hawkins and John Long to deceased at Ellis's house; deceased then gave deponent instructions for his will; deponent took them down and made a will; deponent read it to him; deceased made some alterations therein; deponent drew it over again at Long's office; deponent and Long went again to deceased; Long read it to deceased, and he approved it, and was at both times of perfect mind; 6th December, 1745, deceased executed it in presence of deponent, John Boote, and John Ellis; Boote was a surgeon, and is since dead; he attended deceased as his surgeon in his illness; was a person of good credit; proves his subscription to the will.

1. Int. Respondent knew deceased two months before his death; had lodged at Ellis's about three weeks; died three or four days after the date of the will. 9. Int. Only one shilling left to deceased's wife, by his order, because she had used him ill; believes the motives for making the will were the care Hawkins and the others had taken of him, and he had great dislike to his wife. 4. Int. Hawkins was empowered to recover de-[108]-ceased's prize-money, but believes he did not recover it. 5. Int. Deceased's two shares were worth about 1000l.

2. John Ellis. Proves execution of the will and deceased's capacity; Boote was surgeon to deceased; he is dead, but was a person of good credit; deponent saw Boote sign his name to the will as a witness; says the will was read over to deceased in deponent's presence, and deceased approved it.

4. Int. Has heard Long has received 25l. from Wise. 8. Int. Deceased was of sound mind all his illness. 9. Int. Deceased declared his wife had robbed him, and therefore he left her only one shilling.

3. Lucy Boote. Says her husband, John Boote, told her he had witnessed deceased's will, and well remembers he told her that when deceased was giving his directions about his will, John Long asked him what he would give Dr. Boote in his will; deceased replied, "If I live, I will pay him, and if I die, he must be paid;" Boote was deceased's surgeon in deceased's illness; proves Boote's hand-writing as a witness to the will.

4. Hovell Farmer, M.D. Proves Boote's hand-writing, and gives him a good character.

3. Bartholomew Braham. Deponent was on board the "Prince Frederick" with deceased before Christmas, 1745; deponent saw deceased sick at Ellis's, and he thanked God for raising to him such a friend as William Hawkins was, and expressed high regard for Hawkins for his great care of him, and then said he was well pleased with what he had done for them, the legatees, which deponent understood to relate to his will; deceased then cursed the whore (meaning his wife) for rob-[109]-bing and leaving him in his then distressed condition, and said they might have lived happy together.

The will read.

Witnesses for Spencer.

1. Catherine Liddell. Deponent is intimate with producent; deceased shewed great affection to her whilst they lived together; Hawkins and Long are solicitors for sailors; about a week or fortnight before deceased was taken ill, deponent was with him at producent's father's house, when deceased told her said father he must live near Hawkins, who was to recover his prize-money; deceased was a stranger to Hawkins till near his death; believes deceased had no acquaintance with Long; deceased had no knowledge of Ellis or Slack till he went to lodge at Ellis's; deceased and his wife lived together from their marriage till producent was taken ill in November, 1745; deceased then advised her to go to her father's to be taken care of; producent and deponent went by deceased's advice to her father's; the small-pox came out, and she was removed into the country about four miles from Cork, and deponent went with her, and she there had the small-pox in a violent manner; deponent attended her, when she was better, to her father's at Cork, where deceased came to see her, and expressed the greatest affection to her; producent was then very weak; about two or three days after, deceased got the small-pox, of which he died; her father and mother often sent her word deceased inquired kindly after her, and wanted much to see her, but did not dare to come to her while she was ill; [110] deponent was going to see deceased, and saw him run out into the street with a blanket on him raving, when he had the small-pox on him; producent never did misbehave to deceased; deponent lived with them, and they were very loving.

2. Mary Harrington. Deceased was delirious in the small-pox, and was so for several days, and to his death; deponent was servant to John Ellis, and was informed of every thing that passed at Elizabeth Ellis's; the second day of deceased's illness, he took to his bed; deponent every day saw him; one morning Elizabeth Ellis, in deponent's presence, told John Ellis, her son, that they must contrive to make a will for Eliza Wapping that day, for that he was in the height of his distemper; she there-upon went out, and soon after, same day, John Long and Dennis Keeff, Elizabeth and John Ellis, went into deceased's room, and soon after John Ellis went out and fetched pen, ink, and paper, but what passed in the room deponent knows not, but is sure deceased was incapable of making a will from the second day of his illness, which happened in the beginning of December, 1745.

3. John Bryan. Deceased was cook in the "Prince Frederick;" deponent was with deceased at his wife's father's in November, 1745; deceased could not read or write, and was a very ignorant man.

4. Julian King. Deponent was intimate with deceased and his wife, and lived in their house at the Cove, in Kinsale, and they lived very affectionately together, till she went to her father's on having the small-pox; deceased eagerly inquired after his wife, and expressed great love for her after she went home; deponent has gone by Ellis's door [111] when deceased was ill, and heard him then calling for his wife.

5. Timothy Denhayly. Says that deceased one day came to producent's father's house in his illness when he was quite raving, and had only one shoe on, and threw stones at the house, and demanded his wife; came again the next day in same manner; Ellis's house is in Cork.

6. Margaret Gogan. A little before Christmas, 1745, deceased went to live at Ellis's; deponent saw him twice in his illness; he was then raving, and deponent saw him in the street in his blanket, calling for his dear Ellen; deponent saw Ellen near her father's about that time in a very weak condition, and she was then with the marks of the small-pox on her.

7. John Eustace, clerk. Proves that he married deceased and producent in September, 1745.

8. Edmund Wade. Before his illness deceased appeared to be crazy; deponent has seen him almost naked; while he was sick at Ellis's, deponent went to see him, and believes he had then no more senses than a stone; deponent heard the maid of the house say he was constantly talking of his wife; and it was reported he was always talking of her affectionately, and was mad at that time; knows nothing of the will; but one day, as deponent was going by Ellis's house after deceased's death, heard said maid in an angry manner say to somebody in the house, "It is not all one as making a will for the deceased, Wapping, after his death."

9. Sarah Sterely. Knew deceased and producent; was deponent's servant, and

deponent was present at their marriage ; heard him express affection for his wife, and she for him.

[112] 10. Joseph Popham. Hawkins is a solicitor for prizes, and has heard Long is the same.

N.B.—Long was one of the executors, and was excommunicated for not giving in his answers, but he did appear.

Witnesses for Hawkins.

1. Robert Watson. Deponent well knew deceased and his wife ; in October, 1745, as deponent was informed, she left him, and removed some of deceased's goods ; she sold deponent a tea-kettle, and desired deponent would not tell her husband ; deceased told deponent the next day that his wife had robbed him and taken all he had, and that if he should ever be worth any thing again, she should never be the better for him ; deceased was reduced so low that he begged about the streets, and declared she had robbed him ; deceased made diligent search for his wife ; she was marked with the small-pox.

2. Elizabeth Beacher. In October, or beginning of November, 1745, deceased begged in the streets at Cork, and exclaimed against his wife, and said she had robbed him and stript him of all he had ; has heard him say, if he had the world, she should never be the better for it.

3. Thomas Alder. In October, 1745, deceased told deponent that his wife had robbed him of all he had, and left him ; deceased begged in the street ; deponent relieved him, and gave him two shillings ; deponent and others, at deceased's request, searched for her and his effects, but did not find either ; deceased expressed great aversion to her ; Hawkins was a merchant, and sold wines, &c. at Cork ; deponent gave Hawkins a power to sue for deponent's prize-money, and deponent advised deceased to do the same, and he went to Hawkins for that purpose in November, 1745 ; deceased's wife was marked with the small-pox ; deceased in November went to lodge at Ellis's ; deponent went several times to see him in his last illness ; he expressed great kindness for Hawkins, and said he paid for his board and lodging and clothes ; and said he must have perished if it had not been for Hawkins and Long ; deponent saw him within three days of his death, and never saw him insensible ; Boote was his surgeon ; Hawkins went to England about a week before deceased died.

8. Int. Never heard deceased lost his senses.

4. Thomas Bathews. Deponent heard deceased say he had been robbed by his wife of all he had ; 26th October, 1745, deceased told Alder and others that he heard his wife was concealed at a certain house ; they went and searched, but could not find her or the goods ; deponent went to see deceased in his illness, and he appeared in his senses.

5. Jeremiah Line. Deponent was often with deceased in his illness ; often heard him complain his wife had robbed him ; heard him in his last illness express great regard for Hawkins, Ellis, and Slack ; never heard him say anything delirious, but the night before his death, to the best of deponent's knowledge ; deponent was with deceased the day of making his will, and he was sensible, to the best of deponent's knowledge ; heard deceased say he had made his will.

6. George Cowdee. Deponent saw deceased begging, and he then said his "wife had robbed him of all he had in the world."

7. Catharine Line. Deponent saw deceased [114] in the streets like a beggar before he lived at Ellis's ; has often heard him say his "wife had robbed him ;" Hawkins paid for deceased's board and lodgings ; and deponent has heard there was an agreement between Hawkins and deceased about his prize-money ; has heard deceased express great regard for Hawkins, Long, and Ellis, and he desired Slack to attend him ; deponent saw him several times, and he was not delirious in his illness, and was then capable of making his will.

8. Mary Shehan. Deponent saw Ellen at her father's house, in October, 1745, and deceased was about said house ; believes she went from thence to avoid her husband, for deponent heard him say "she did not like him, because he was a black ;" has seen him in a very poor condition, but did not hear him beg ; Ellen deemed to be in good health when she came to her father's, and believes she had not then the small-pox, for she had as great marks of the small-pox fourteen or fifteen years ago as now, and soon after deponent saw her, and she had no redness.

9. William Wood. Heard Tim Carroll advise his daughter to get deceased's effects, and then leave him; and they consulted deponent and others thereupon; but cannot tell whether it was before or after marriage; has heard her say she would do so; and since her marriage, she said she "married only with an intention of getting his money, and then leaving him." Deponent saw in her custody some of deceased's effects; she told deponent "she had left him, and she had not left him a pin's worth that she could bring away;" deceased came in search of his wife, and deponent gave him victuals; deceased went to see for her at [115] her father's, and she told deponent she went out at the back-door to avoid him; believes he had then no love for her; deponent saw deceased begging in Cork; deceased several times searched for his wife at deponent's and other houses, and she hid herself; deponent saw her going with her sister into the country to sell pedlar's ware before he came to search for her.

10. James Fitzgerald. In October, 1745, deponent saw deceased on horseback with good clothes; about a month after he appeared very shabby, and he then said, he was "robbed and stripped by his wife;" in November and December, 1745, deponent lived opposite to Ellis's, and two or three times saw Hawkins, the party in this cause—at Ellis's.

(N.B.—Hawkins was then sick in bed.)

Deponent, in deceased's illness, often heard him express great regard for Hawkins, and appeared to be in his senses.

11. Philip Murphy. Deponent heard deceased declaim against his wife, because she had stript him of all he had; deceased used to beg ale and drams; believes she went to Cork to abscond from her husband; deponent saw deceased about three or four days before his death; he seemed to be in his senses; believes the will pleaded is Long's hand-writing.

12. Mary Wood. Before Ellen married, and on the night of the marriage, she told deponent she married deceased for the sake of his money, and if she could get it she would quit him; she shewed deponent some of his effects after she had left him, and then said, as he had spent all his money, she secured what she could; proves Ellen hid herself from deceased at her father's; heard [116] deceased say she had robbed him; deceased begged at Cork, and said he was so reduced by his wife's robbing him; verily believes she had not the small-pox after her marriage.

13. Robert Travers. Heard deceased say his wife had robbed him, he begged in the street, and was extremely poor; Hawkins was a merchant at Kinsale.

14. John Baker. It was the common report at Kinsale that deceased was made drunk, and then his wife ran away with his effects; has heard deceased declare so, and he begged in the street.

15. Colbert Wood. Deposes to report as the former witness; deceased complained to deponent that his wife and her friends had robbed him of all he had.

16. Catharine Dent. Deponent lodged in deceased's house when his wife left him; deponent bought a bed of her, she believes without deceased's knowledge; about October, 1745, deponent saw deceased and his wife's father and family drinking punch, and about an hour after, deponent came down and found the house stripped, and Ellen and her friends gone, and deceased lying drunk; deponent awaked him and told him he was robbed, and made a great noise, and said he was robbed of everything he had, and used to swear he would murder her if he could find her; he left his house because he had lost everything, and he begged in the streets; verily believes she had the small-pox before her marriage.

17. Martha Baker. Deceased told deponent his wife robbed him of all he had, and expressed great anger against her.

18. James Leary. Common report that deceased's wife had robbed him and reduced him to beg.

[117] 19. James Harling. Common report his wife had robbed him and he begged.

20. Prudence Wood. The same; and says deceased told her his wife had robbed him of all he had but the clothes on his back, and said if he could find her he would murder her.

21. Eleanor Kerrigham. Deceased and his wife lived together about seven or eight weeks; deceased told deponent he was drunk the night before, and his wife had robbed him of everything, and said she had taken his handkerchief from his neck, and his buckles from his shoes, and expressed great resentment against her, and he

was reduced to beg; verily believes she did not leave Cove on account of illness, for she was very well the day before.

22. Abraham Dent. The night deceased and his wife were married, deponent heard her say she would not have married him if she could have compassed his money before, and said she would soon compass it, and then she would quit him, and said she did not marry the black son of a bitch for his person, but for his money; and some time after deponent told deceased of her said declaration and he seemed not to credit it; one day said Ellen proposed to deponent to go away with him, and said "Mr. Dent, you have some money in your wife's keeping, and I have pretty well compassed Wapping's money, and if you will take your money from your wife, I will put mine to it, and we will go away together, for I have lost my shame by him, and we can do very well together;" deponent asked her where she would go; deponent refused; she begged he would keep it a secret; swears he missed several goods out of the house; three or four days before she went away she sold a bed to [118] deponent's wife; the night before she went away deponent was in company with deceased, his wife, her father and others; he believes her friends and they pressed deceased to drink, and he soon got drunk, and about nine or ten at night deponent was standing at deceased's door, and saw Ellen going out with things in her lap; deponent asked her where she was going, she answered, "I have lost my shame by that black devil, Wapping, I have now got all I can get, and I will leave him to shift for himself and be damned;" then deponent went into a little room, where he lay in his clothes, and could not awake him he was so drunk; then deponent went out and saw horses with panniers, on which he believes she carried away every thing; nothing was left in the house; two or three hours after, deponent came and waked deceased, and on finding he was stript he was in a very great passion; he had from that time great resentment to her.

(N.B.—He fully proves the robbery.)

A few days after, deponent went with deceased to search for his wife at her father's; deponent asked for her; her father would not own her being there, and would not let them in.

23. Julian Duncan. Ellen told deponent she believed she should soon be rid of her husband; heard deceased declare his wife had robbed him.

24. James Baldwin. Believes deceased sold his share of his prize money to Wise.

25. Francis Woodley. The will is the hand-writing of Keeff, and the signature is the hand-writing of Long.

26. Margaret Baldwin. Has heard deceased declare his wife had robbed him, and had reduced him to begging; deponent recommended deceased [119] to apply to Hawkins to recover his prize-money; Hawkins was then sick in his bed; deponent went again with deceased to Hawkins, and afterwards deceased told deponent he had given Hawkins a letter of attorney; Ellen has no fresh marks of the small-pox; deceased expressed the greatest regard for Hawkins.

27. Thomas Allen, gent. Believes the will is the hand-writing of Keeff, and that the signature is Long's hand-writing.

28. Rebecca Briggs. Deponent saw deceased a day or two after he was taken ill, when the poek was filling, and about two days before his death; at both said times he talked sensibly, and was able to make a will.

29. James Murphy. Says deceased told him his wife robbed him of everything, and he might starve but for Hawkins and Long, and often mentioned his obligations to them in his illness; he was in his senses till the day before his death, whenever deponent saw him, and talked sensibly.

30. William Hawkins, alderman. William Hawkins, the party, is deponent's son, and is a merchant; deceased and others applied to him for assistance in recovering prize-money, and deceased gave him a power; deceased requested producent, in deponent's presence, to board him at Ellis's; producent went to London on 6th December, 1745, early in the morning, and was then very lame, and had been so a month before; deponent did not see deceased during his illness, and was not present when instructions were given by him for making his will, nor knows to whom he gave them; believes the will was wrote by Keeff.

[120] (N.B.—The letter of attorney from deceased to Hawkins is dated 16th November, 1745.)

Dr. Hay's argument for Hawkins. The wife never came to see him in his illness;

a strong circumstance to infer she ran from him ; King, their witness, proves deceased did not know where his wife was ; fully proved he begged in the streets, and yet Liddell swears her father pressed deceased to live with him ; good ground of affection to Hawkins, Long, and to Ellis, and Slack, who took care of him in his illness ; Keeff is positive to all the material requisites of the factum of the will ; the presence of Alderman Hawkins is a collateral, and not a material, circumstance.

Dr. Simpson contra, for Spencer. From the nature of deceased's distemper, he could not be in his senses all his illness ; Long's only merit was drawing the letter of attorney ; no previous declaration of making a will, and benefiting the legatees.

JUDGMENT—SIR GEORGE LEE. 20th June, 1852, I gave sentence for the will, but without costs.

BRANSBY *against* HAINES. Prerogative Court, Trinity Term, June 19th, 1752.—

Will of a wife, made on the presumption that her husband was dead, revoked.

Dr. Bettesworth for Samuel Bransby. Margaret Bransby deceased made her will, described herself widow, made John Haines executor and residuary legatee ; will dated 2d September, 1742 ; [121] Samuel Bransby, as husband, called in the probate ; alleged he was married to deceased on 14th July, 1724, by licence, at Hoxton Chapel. We have examined one witness who was present, and have proved cohabitation, with reputation, for six years ; in 1731 he fixed at Birmingham, and she went to service. He was informed by her brothers that she was dead ; 7th October, 1731, he married another woman, which is the sole objection to us ; identity of persons proved ; both deceased and Bransby thought each other dead.

Dr. Pinfold for John Haines, the executor. Deceased died in October, 1750 ; will is all of deceased's own hand-writing. We denied Bransby's interest ; admit he has proved his interest, but hope there is no room for costs.

Per Curiam. Sentence for the interest, but without costs.

BURGIS, BY HIS GUARDIAN *against* BURGIS. Prerogative Court, Trinity Term, June 19th, 1752.—The interest of a minor son being established, an administration granted to a brother is revoked.

Dr. Pinfold for Joseph Burgis, a minor. Joseph Burgis died intestate ; Richard his brother took administration as next of kin ; the minor, as deceased's son, called in the administration ; Richard denied his interest. The minor has proved deceased was married at the Fleet to Jane Matthews his mother, and has proved owning and cohabitation in St. Giles's parish in 1737 ; the marriage was in 1730 ; we have pleaded an affidavit of deceased's that he was married, and that the [122] minor was his child, and we have pleaded a letter from Richard to deceased, in which he speaks of deceased's wife and child.

Witnesses for the Minor.

1. Richard Burman. Well knew deceased from 1728, and also Jane Matthews, who was servant to deceased's father ; proves cohabitation and owning as husband and wife in Wardour-street, and she was then delivered of Joseph, the minor in this cause ; they removed into St. Giles's parish, and lived there as husband and wife for several years ; afterwards he went beyond sea, and the child lived with his mother ; the child was admitted into Covent Garden charity school as the son of Joseph and Jane Burgis his wife.

2. James Knight. Proves exhibit A to be Richard Burgis's handwriting, and that it was wrote to deceased ; Richard therein mentions deceased's son being in the free-school.

3. John Springer. Proves the exhibits B and C.

N.B.—The brother pleaded, but did not examine any witnesses on his allegation, and no counsel appeared for him at the hearing.

JUDGMENT—SIR GEORGE LEE. I gave sentence for the interest of the minor, and condemned the brother in costs upon taxation the by-day, and revoked the

administration granted to the brother, and decreed it to the guardian for the use of the minor.

- [123] DR. PRINGLE, Attorney of M'Guire *against* BROWN, IN THE GOODS OF JOHN CONNELL, Deceased. Prerogative Court, Trinity Term, June 19th, 1752.—The interest of a sister being established, an administration granted to a more distant relation is revoked.

Dr. Pinfold for M'Guire. John Connell, deceased, died intestate in April, 1750, a bachelor; left Mary M'Guire, James Connell, Catherine and Elizabeth Connell, his brother and sisters. 10th May, 1750, James Connell took administration to him and is dead intestate. 22d July, 1751, Mathew Browne took administration to James as cousin and next of kin, and on 26th July, 1751, took also administration de bonis non to John Connell; M'Guire has cited Browne to bring in the administration of John Connell, &c. Browne denied M'Guire's interest as sister to deceased; we have fully proved her interest.

Witnesses.

1. Judith Bullen. Deceased left one brother and three sisters; Mary M'Guire was one of his sisters; deponent was present at the marriage of Barnaby Connell and his wife, the father and mother of John Connell, deceased, and Mary M'Guire, and of James Connell, &c.; believes Mary M'Guire was born about forty years ago.

JUDGMENT—SIR GEORGE LEE. I pronounced for Mary M'Guire's interest, as sister and next of kin; revoked the administration de bonis non of John Connell, and decreed it to the attorney of Mary M'Guire, and condemned Browne in costs, to be taxed moderately, because he was not by the evidence affected with knowledge of M'Guire's being alive, and had not pleaded.

- [124] BIGG AND OTHERS *against* KEEN. Prerogative Court, Trinity Term, June 19th, 1752.—A will propounded and established; administration cum testamento annexo, granted to the residuary legatees, the executors having renounced.

Dr. Hay for Thomas and Frances Bigg and Mary Bayley. John Bigg died 20th July, 1750; left John and Edward Keen his nephews and only next of kin; made his will 17th July, 1750, and appointed executors who renounced. Will propounded by residuary legatees; opposed by John Keen the nephew; full proof of instructions, capacity, and execution. The nephew has pleaded incapacity, but his witnesses prove the contrary, and also deceased's disaffection to his nephews.

Dr. Pinfold *contra*, for John Keen. Deceased has made only a mark to the will; Francis Bigg, *senr.*, one of the residuary legatees, died four years before deceased, and he knew of his death; admit they have proved capacity and execution, but hope the Court will not give costs.

The adverse proctor declared he should not ask costs.

Witness.

James Lowther. Deponent took instructions for the will; fully proves them, and capacity and deceased's approbation of the will, and due execution; deceased attempted to write his name, but was not able, and then he made his mark, and sealed and published it.

Other witnesses agree.

JUDGMENT—SIR GEORGE LEE. Sentence for the will, and administration cum testamento decreed to the residuary legatees.

- [125] BRISCOE *against* BRADISH. Prerogative Court, Trinity Term, June 19th, 1752.—A will propounded and proved.

Dr. Smalbroke for Briscoe.

James Tate, Esq., deceased, made will 16th December, 1751; Honor Briscoe, sole executor. Caveat entered by Carew Bradish, his daughter and only child; caveat

warned 1 Sess. Hil. 1752; daughter opposed the will 2 Sess. Trin. 1752. Fanshaw, proctor for the daughter, declared he would proceed no farther; no opposition.

Witnesses.

1. John Hill. Knew deceased twenty years; gave him instructions for his will; deponent drew it, and read it to deceased; he approved it, and duly executed it in presence of deponent, and two other subscribing witnesses; deceased was of sound mind, &c.

2. William Mulliners. Knew deceased twelve years, swears deceased in his presence declared the will was to his mind, and duly executed and published it, and was of sound mind; deponent was a subscribing witness to the will.

JUDGMENT—SIR GEORGE LEE. Sentence for the will, in pœnam of the proctor, and party not appearing.

[126] THE GOVERNORS OF ST. THOMAS'S HOSPITAL IN SOUTHWARK, ACTING BY LEESON, THEIR SYNDICK *against* TREHORNE AND COVE. Arches Court, Trinity Term, June 22nd, 1752.—The patrons of a church have no right to controvert the election of churchwardens; unless it can be shewn that the parishioners have no right to elect churchwardens, and that the churchwardens of the particular parish are exempt from the jurisdiction of the ordinary.

(An appeal from the Commissary of Winchester upon a grievance in rejecting an allegation.)

Trehorne and Cove were chosen churchwardens of St. Thomas, Southwark; they were cited to appear at the bishop's visitation, to be sworn in; they offered themselves, ready to be sworn; but a caveat was entered on behalf of the mayor and corporation of the city of London, as governors of the said hospital of St. Thomas. They alleged that by letters patent from king Edward 6, the hospital and parish church was granted entirely to them; and that the same were absolutely exempt from all manner of ecclesiastical jurisdiction; and that the churchwardens of that parish were not to be sworn in by the Ordinary. They gave in an allegation, pleading the exemption, which Dr. Simpson, sitting for Dr. Pinfold, Commissary for Surry, rejected; from which Leeson, syndick for the city of London, appealed to the Arches.

Dr. Paul for the Governors, &c. Letters patent, 12th August, 5 Edw. 6, give an exemption from all ecclesiastical jurisdiction. The question is whether the ordinary has any right to swear in the churchwardens. By the 28 Hen. 8, c. 10, all the pope's authority is granted to the crown; repealed, 1 Mary, but revived 1 Eliz. sec. 7, which [127] declares the supremacy to be in the crown. Hob. 146, *Colt and Glover's case*; (a) 25 Hen. 8, c. 21, dispensations were vested in the archbishop. The king may grant dispensations also; the same case. 1 Croke, 542, *Armiger v. Holland*; (b) Moore, 542, the same case; this is an appeal from rejecting our allegation pleading an exemption.

Allegation read.

1st art. Pleads Edw. 6th's charter.

2d art. Exhibits it.

3d art. Pleads that all authority is vested in mayor, &c. of London.

4th art. Pleads exemption.

7th art. Pleads that Trehorne and Cove are not duly elected churchwardens of St. Thomas's parish.

8th art. Pleads that opinions of counsel were given that a visitation ought not to be held in St. Saviour's church, it being exempted from ecclesiastical jurisdiction by the said letters patent.

9th art. That Dr. Bramston declared in a public act that he had not jurisdiction

(a) *Colt and Glover v. The Bishop of Coventry and Lichfield*, Hob. 140. It is there designated as the Great Case of the Commendam in the Chequer Chamber, adjourned thither out of the Common Pleas.

(b) *Armiger v. Holland* is also a case of Commendam and is reported both by Sir Francis Moore and Sir George Croke.

in St. Saviour's church. Read as part of the allegation three decisions of Drs. Lane and Oldys, that the church by the patent is exempt from the ordinary.

Dr. Smalbroke for Trehorne and Cove. The value of the estate given to the city of London is 154l. 17s. 1d. per annum. The 28 Hen. 8, c. 28, sec. 1, the king shall have the religious houses, under 200l. value. 31 Hen. 8, c. 13, sec. 23, [128] religious houses and churches, &c. shall be subject to the ordinary of the diocese, or of those the king shall appoint. They found themselves solely on being patrons, and therefore say they have the whole jurisdiction; the caveat is founded solely on that title. By further papers, it is alleged that the churchwardens are not subject to the bishop, and that they were not duly elected.

The general objection to the allegation is that it does not appear this church was exempt before the dissolution. The charter makes it a parochial church. If the charter has exempted it, yet the statute 38 Hen. 8 subjected it to the ordinary.

Dr. Paul *contrà*. Opinions of counsel have been received as evidence, or at least have been laid before the Court.

Dr. Hay on the same side. This church is a donative: Degge's Parson's Counsellor (part 1, c. 13 (ed. 1703)), p. 197, the office of churchwardens in this parish is superseded.

JUDGMENT—SIR GEORGE LEE. I was of opinion this allegation was not admissible, because it did not shew that the parishioners had not a right to elect churchwardens, and that the churchwardens as parochial officers were exempted from the jurisdiction of the ordinary in this parish, to whom of common right they are subject; and the question before me was only whether Trehorne and Cove were duly elected churchwardens by the parishioners, and as such ought to be sworn in? and unless the charter had declared [129] there should be no churchwardens in this parish, except they were appointed by the mayor and commonalty, they as patrons of the church had not any right to controvert the election of the churchwardens.

I further observed that churchwardens are parochial officers for several purposes, and are to inspect the morals and behaviour of the parishioners, as well as to take care of the goods and repairs; and therefore whether in this parish, the churchwardens had any thing to do with the church, or not, they were necessary parish officers: and whether the churchwardens had all the powers of churchwardens in other parishes, or not, was not the question before me, and I said I would declare no opinion concerning the exception of the church and the ministers, because that question was not properly before me.

I therefore affirmed the sentence below, rejecting the allegation, and remitted the cause with 10l. costs.

N.B.—The syndick of the city of London acquiesced in my decree and paid the costs.

[130] MARTIN *against* WOTTON. Prerogative Court, By-Day after Trinity Term, June, 23rd 1752.—A will made in extremis established.

Dr. Simpson for Wotton. Mabella Millechamps made her will 18th February, 1750; had the palsy and died 9th March, 1752; by will 18th February, 1750, Martin made executor and had a legacy; 8th March, 1752, deceased made another will; she was taken ill in the night between 7th and 8th March, 1752; declared she was dissatisfied with her will, and ordered her maid to send for Mrs. Wotton to make her will; Wotton wrote three or four legacies, and then she went to fetch Mr. Baldwin, an attorney, with whom she was not acquainted; deceased gave instructions to Baldwin, of which he took minutes; drew a will from those instructions, read it to deceased in presence of witnesses; she approved it and attempted to execute it, but she had the palsy so much in her hands that she could not write or hold her pen, and therefore could not execute it; the writer says she did not execute it because she was not capable; the other witnesses say she was sensible.

Dr. Paul for Martin. By will 18th February, 1750, Martin made executor; in will 8th March, 1752, Ann Wotton, executrix; the last will not executed because deceased was incapable; instructions deficient; Baldwin brought to make the will; deceased said Wotton would tell him what to write, and from Wotton he took the

instructions. [131] Admit it was read to her; but the grand question will be whether she had capacity; Martin has not examined any witnesses.

Witnesses for Wotton.

1. Ann Tate. Deceased lodged at Mrs. Le Fitz., in Craven Street, on 9th March, 1752, when she died a widow without children or relations. Deponent has heard deceased say she had known Wotton thirty years, and had great affection for her; deceased had the palsy; deponent sat up with deceased in the night between the 7th and 8th March; in the night she bid deponent send for Mrs. Wotton at six in the morning; deceased impatient for that hour to come; expressed dissatisfaction at her will; deceased very impatient for Wotton to come; as soon as it struck six deceased bid deponent go to Mrs. Wotton's and desire her to come; deceased told deponent what legacies she would give; deponent fetched Wotton; asked deceased if she should fetch any body else, she said "No;" deceased bid deponent fetch a box and set it by Wotton and said her will was there, which she bid Wotton take out, and then desired Wotton to set down several legacies, which deponent heard, and deceased said Wotton should be executrix; Mrs. Wotton said she could not make a will; deceased consented she should bring somebody else; Wotton went for an attorney; deceased very impatient for her return, and said Wotton was gone to fetch a person to make her will; about nine in the morning Wotton returned with Baldwin; Baldwin asked deceased what he should write in her will, she said she had told Wotton; Baldwin told her he must have it from her own mouth; deceased declared she was [132] fully in her senses; deponent heard deceased give instructions to Baldwin for some of the legacies, and then deponent went down, but soon after deponent was called up again, and Baldwin was then reading a paper to deceased; Baldwin asked her if she liked it, she said "Yes;" he asked her if she would sign it, she said "Yes;" wax was not immediately found; deceased then bid deponent look in the bureau, where deponent found wax; deceased raised herself up to sign her will, and she bid deponent sit at her back to support her, and then Baldwin bid deponent fetch Mrs. Blondy and Mrs. Le Fitz to be witnesses; deceased asked what Blondy came for, Wotton told her she must have two witnesses, she replied, "that is true;" deceased attempted to execute the will but was not able through weakness of her hands; she two or three times attempted it, but could not do it; Baldwin went away, but left directions for sending for him if she became capable; deceased said she believed it would do; she was perfectly sensible.

2. Letitia Wotton. Deponent has renounced her interest under the will; gives account of a message from deceased to deponent by Tate on 8th March, 1752; agrees therein with Tate; deponent went to deceased; gives exactly the same account as Tate of what then passed between them concerning making her will, and mentions the legacies deceased bid her write; the first five lines of paper A are wrote by deponent; deponent desired she might fetch somebody else to make deceased's will; deceased consented; deponent went to fetch Baldwin, who was an entire stranger to deponent; he came; deceased seemed pleased; deponent asked her if she would tell Baldwin what she would do; Baldwin asked deceased several questions; latter part of paper A was wrote by Baldwin; believes the will in question was wrote by Baldwin from deceased's instructions, the former will, and what deponent told him; he read the will to deceased and she approved it; gives same account of deceased's attempting to execute it as Tate does; deceased perfectly in her senses; deponent asked deceased if she should send for Mr. Joseph Martin; she replied "No."

3. Samuel Baldwin. About eight in the morning of 8th March, 1752; deponent went to deceased, pursuant to Mrs. Wotton's directions; deponent took instructions from Wotton by deceased's desire, in deceased's presence, she being very weak; from such minutes he wrote the will, and read it all over to deceased, and asked her if she liked it, and she said either "yes," or, "it is very right;" does not remember any body was in the room but deponent and Wotton; deceased raised herself up to execute her will, but she was so weak she could not write, and then her senses were so low that she seemed not to know what she was about, and she threw herself on her knees very eagerly, but believes it was from pain; when deponent first came to her she was fully in her senses, and believes she well understood the will when deponent read it to her, and she did approve it, but before execution he believes she lost her senses; deponent left orders to send for him in case she became capable.

4. Jane Blondy. Proves deceased's affection for Mrs. Wotton!; heard deceased say the will was to her liking, and that she would sign it, but her hand shook so much that she could not write; deponent and her aunt were twice afterwards called to see deceased execute it, which she at-[134]-tempted with earnestness, but was not able; deceased at said times of attempting to execute appeared to be very sensible.

5. Louisa le Fitz. Proves deceased's affection to Wotton and her children; agrees exactly with Blondy; says deceased endeavoured for ten minutes to write her name, but could not do it, she did make a scratch, but Baldwin said it would not do; swears deceased was perfectly in her senses.

JUDGMENT—SIR GEORGE LEE. I gave sentence for the last will dated 8th March, 1752, which was not executed.

RICH *against* CHAMBERLAYNE. Prerogative Court, By-Day after Trinity Term, June 23rd, 1752.—Administration decreed to a guardian elected by the free consent of a minor.

Dr. Simpson for Rich. John Chamberlayne died intestate and insolvent; left a son, Wells Chamberlayne, and two sisters; deceased boarded at Mrs. Carstairs, at Bristol; the son ten years old; by desire of Mr. Rich, as creditor, a letter was wrote to deceased's sister, Mrs. Wescomb, to desire she would not intermeddle, but would let the creditors take administration; Rich took the minor and put him to school at Bristol, and took care of him; the child averse to choosing his aunt Wescomb guardian; Wescomb prays the administration for the minor's use, but is not chose guardian by him; we have affidavits to prove Wescomb is very poor, and cannot give security.

Dr. Hay, same side. Rich is elected guardian by the minor.

[135] Dr. Pinfold *contra*, for Wescomb. Rich at first cited the minor to shew cause why he should not accept or refuse administration, &c.; Wescomb has sworn Rich has taken the child from her.

JUDGMENT—SIR GEORGE LEE. It being admitted that Rich was elected guardian by the minor, freely and without force or imposition; I decreed the administration to him for the minor's use.

APPLEBY, BY HIS GUARDIAN *against* APPLEBY AND JACKSON. Prerogative Court, By-Day after Trinity Term, June 23rd, 1752.—An administration cum testamento annexo, decreed to a grandmother during the minority of an executor, she being also testamentary trustee.

Dr. Paul for the minor. John Hervey deceased, by his will dated 11th December, 1751, devised his lands to his nephew, Thomas Appleby; gave him most of his personal estate, and constituted him executor and residuary legatee; and appointed Elizabeth Appleby, the minor's grandmother, and Richard King, his guardians and testamentary trustees; Hervey had not power to appoint a guardian to the minor; he is above eight years old, and has chosen his mother, Hannah Appleby, to be his guardian, and she prays administration cum testamento to be granted to her during the minority; the grandmother, Elizabeth Appleby, prays it may be granted to her as testamentary guardian; she is greatly indebted to the estate. At common law there are four sorts of guardians: 1st, in chivalry; 2dly, by nurture, which are parents; 3dly, in socage; 4thly, guardians for [136] nurture, which the ordinary may appoint. By stat. 12 Car. 2, c. 24 (sec. 8), a father has power to appoint guardians to his minor children: 3 Levinz, 395, *Clench v. Cudmore*.(b) In case of *Villareal*, in chancery, the Court decreed the guardianship of her children to Mrs. Villareal, and took them from Mr. Da Costa, their grandfather.

Dr. Hay for Elizabeth Appleby. 2nd January, administration cum testamento was decreed to the testamentary guardians; 22nd May, the minor chose his mother

(b) The only point decided in this case was that copyholders were not within the provisions of 12 Car. 2, c. 24, s. 8, consequently that it was not competent to them to dispose of the custody of their infants, but that the custody was in the lord or others according to the custom of the manor.

guardian. The question is whether deceased had not a power to appoint a trustee for the managing the estate he has given to the minor.

Affidavit read for Hannah Appleby.

Richard Williams. Elizabeth Appleby is indebted to deceased's personal estate in 350*l.* by mortgage, and by note in 50*l.*

Dr. Paul for the minor. No instance of a limited administration. Chancery Precedents, 597, parents are guardians of their children by nature. *Carlisle and Wells*, the guardian appointed by this Court, can be only with respect to the personal estate.

Dr. Pinfold, same side. Stat. 12 Car. 2 has been always taken strictly, and therefore a mo-[137]-ther cannot appoint a guardian to her children. Shower's Reports, 293, Court cannot revoke a probate, or refuse one to an executor.

JUDGMENT—SIR GEORGE LEE. I decreed administration cum testamento during the minority of the executor, to Elizabeth Appleby, the grandmother, not as guardian to the minor, but as testamentary trustee named in the will.

DAME ELIZABETH COOKES WINFORD *against* HELLIER AND BARRINGTON. Prerogative Court, By-Day after Trinity Term, June 23rd, 1752.—In a suit touching validity of a will, the Court refused to make an order on the party propounding the instrument, to oblige him to declare that he never would hereafter propound any other of the testamentary papers then before the Court.

[See p. 39, ante, and p. 274, post.]

Samuel Hellier, Esq. deceased, left four testamentary papers, No. 1, 2, 3, and 4, which were brought in with an affidavit of scripts and scrolls; No. 2, a cancelled will, was propounded on behalf of Hellier, a minor, son of deceased, and opposed by Lady Winford, deceased's widow. Lady Winford now moved that the guardian and proctor for the minor might be obliged to declare in acts of Court that they never would at any time hereafter propound any other of the papers but the said will, No. 2.

JUDGMENT—SIR GEORGE LEE. But I was of opinion they were by law at liberty to propound any of the other papers hereafter, if they thought proper; and that I had no power to make such order as prayed, and therefore rejected the petition.

[138] HIGGINSON *against* COLCOT. Prerogative Court, June 30th, 1752.—Will set aside because it was not the free and voluntary act of the deceased.

Dr. Simpson for Higginson. William Hibberd, widower, deceased, died 24th May, 1750; left three children, Alice, George, and Ann, all under seven years old; Colcot, their aunt, assigned guardian to them; she entered caveat against granting probate of deceased's will; will dated 15th May, 1750; recites that deceased was indebted to Higginson about 200*l.*, and for securing it deceased gives all his estate real and personal to Higginson, in trust to pay his own debt, and then to distribute the residue to his children, share and share alike, and made Higginson sole executor; attested by two witnesses; Glass, one of them, says deceased was not in his senses; he contradicts himself so much that no credit can be given to him; no proof of incapacity at the time of the execution; depose only to incapacity on the next day, viz. 16th May, 1750.

Dr. Hay for Elizabeth Colcot, the guardian. Uncertain on what day deceased died; he was a wheelwright; bought timber of Higginson; was indebted to him in 200*l.*; he frequently pressed deceased for the money; threatened to arrest him for it, and frightened him; deceased declared his aversion to Higginson; deceased's illness was a fever, with convulsions; he was insensible seven or eight days before his death; 15th May, 1750, in the morning, deceased was very ill; was quite delirious in the evening; Platt, one of the witnesses, says he went with Higginson to deceased; proves a fact of execution, but no proof of instructions; Glass swears he does not think deceased [139] was in his senses; capacity at best but doubtful; deceased was constrained to make the will.

Witnesses for Higginson.

1. Elizabeth Freeman. Deponent was servant to deceased to his death, which happened on 17th May, 1750; on 15th May deceased very sensible, and capable of making a will, and continued so to be till between twelve and one o'clock in the morning following, when he became insensible, and from thence continued so to his death.

2. John Platt. Deponent went to deceased with Higginson, found him ill in bed; producent asked how he did; answered he was better than he had been; producent told him he had brought a will according to his desire, and then produced the will pleaded, ready wrote; deponent asked deceased if he should read it over to him; deceased consented thereto; deponent read it, and deceased approved it; deceased then executed it in presence of deponent and Glass, and published it, and they attested it; believes deceased was then of sound mind, and talked sensibly, and desired producent to remember his, the deceased's, wife and family after he had satisfied his own debt; this was on the 16th May.

3. Benjamin Glass. Producent called deponent up into deceased's room, and asked him if he could write his name; deponent said "No," but could make his mark; deponent's master, the deceased, wrote something at the foot of the paper, but he does not know what, and laid a shilling on the wafer fixed to said paper writing, and then said something of delivering it as his deed or will, and then Platt wrote something to said paper, but he does not know what, and deponent put his [140] mark thereto; deceased was in so bad health that deponent does not think he was capable of doing any serious act; will was not read over while deponent was present.

Will read.

Witnesses for Colcot.

1. Benjamin Glass. Deceased died on a Thursday, in May, 1750, but does not know the day of the month; deceased died a widower, and left three infant children; deceased indebted to Higginson, could not pay it; Higginson continually pressed him for it; deceased told deponent he hated Higginson, and wished he could buy timber of any other person; he told deponent so about a fortnight before he died; was delirious for eight days before his death, during that time, not capable of making a will; when deponent saw him on the Friday before deceased died, Higginson and Platt came together in a chaise to deceased's house, and went into his room; Higginson called up deponent, and bid him make his mark to that paper, which was the will, but deponent did not know what it was, but believed it to be a note for a load of timber which was then to be sent for deceased's use; does not think deceased was then capable of making a will, or giving such note or order, and cannot say whether deceased said any thing, or spoke to any body during all said time; deponent saw deceased once in his illness, when he was light-headed, go to his necessary-house; don't know what day; the beginning of the week next before his death deceased's head was shaved for laying on a blister; his speech left him three days before his death; immediately after de-[141]-ceased's death, Higginson took possession of his effects.

4, 5. Int. Has not been instructed or rewarded. 9. Int. Has not been paid any thing for his trouble in coming to give evidence.

2. John Woolward. Deponent was servant to deceased; knows Higginson, to whom deceased was indebted upwards of 200l.; deceased expressed dislike to him; was light-headed the day before he died; deponent did not see deceased the day the will is dated; deceased was speechless a few hours before he died; Higginson took possession of deceased's effects.

2. Int. Gives Glass a good character. 4. Int. Glass received half-a-guinea by order of the Court for coming to be sworn.

3. John Hibberd. Deceased was deponent's brother; he dealt with Higginson for timber, and was greatly indebted to him; within two months of deceased's death, he declared he hated Higginson, and would not deal with him if he was not in his debt; such dislike continued to his death; deceased was ill about a fortnight; for eight days before his death he was delirious and incapable of making a will, and for five days was speechless, but before was raving, and tore off his blisters; on a Friday night, about nine days before his death, deceased was with great difficulty kept in his bed, and cried out there were two men come to take him away; a blister was applied to his head three days before he died; Higginson took possession of deceased's effects.

Int. Believes Glass to be a very honest man.

4. Dinah Ford. Deceased was deponent's son ; he died on Holy Thursday, 24th May, 1750 ; deceased told deponent he was afraid Higginson [142] would arrest him ; and therefore was obliged to deal with him ; but if he could get out of his debt, he would never have anything to do with him again ; deceased was taken ill on 11th May, viz. the Friday se'ennight before his death, and after the three first days he became quite insensible, and continued so to his death ; on the Monday se'ennight before he died, blisters were put on his back and arms, but he tore them off the Sunday morning before he died, he being quite raving ; said there were three men at his bed's feet come to take him away, and then a blister was laid on his head ; Higginson sent every day to enquire after deceased : knows nothing of the will.

2. Int. Glass a very honest man.

Higginson took possession of deceased's effects.

5. John Cock, apothecary. 15th May, 1750, between six and seven in the morning, deponent was called out of his bed to attend deceased ; deponent immediately went and found him in a strong fever ; and was then informed he had had a very bad night, and had been delirious ; he complained of pain in his head ; deponent ordered him a blister on his back ; deceased gave proper answers, but does not think he could then have given instructions for a will ; this was the first time deponent attended him ; in the evening of said day deceased was much worse, and he continued to grow worse to his death, which, as deponent thinks, happened on 22d or 23d day of May ; on the 16th May deceased was very bad ; from the evening of the 15th May deponent is positive he was not capable of giving instructions for a will.

Witnesses for Higginson.

1. Moses Bradley. Deponent has known [143] Platt seventeen years ; gives him a very good character ; does not believe he would be a witness to any will that was not duly executed.

2. Joseph Willett. Has known Platt nine years ; gives him same character.

3. John Dwight. Has known Higginson thirty years ; says he believes him to be a very honest man, and would not obtain a will fraudulently.

4. John Jackman. Has known Higginson twelve years ; the same.

5. John Adams. Has known Higginson twenty years ; the same.

N.B.—Above twenty other witnesses were examined to Higginson's general character, who all speak well of him.

1st art. of Higginson's allegation read.

Alleges deceased did not deal only with Higginson for timber.

6th art. Deceased in his senses all day of the 15th and 16th days of May.

7th art. Higginson was but once in deceased's room besides the time when the will was executed.

8th art. Deceased said he was better on 15th May.

9th art. Deceased gave instructions for the will.

Note.—He did not attempt to prove any of these articles.

Witnesses for Colcot.

1. Richard Earl. Deponent has known Higginson upwards of fourteen years ; knows nothing of his character, save that, in September, 1748, deponent was present when ten chaldrons of coals, [144] delivered by Higginson for the alms-houses at Hoxton, were measured by the city meters, who found them wanting upwards of twenty bushels ; the Court of Assistants of the Haberdashers' Company ordered Higginson should never serve them again with coals.

5. William Mackerness. Deponent is of the Court of Assistants of the Haberdashers' Company ; deposes to the same fact as the last witness.

3. Fotherby Baker, gent. Has known Higginson from May, 1742 ; cannot speak to his character of honesty ; gives a very particular account of the transaction relating to the coals ; says, upon measuring the coals, twenty-four bushels were wanting out of ten chaldrons ; they were again re-measured in Higginson's presence, and were then also found very deficient ; he would have been prosecuted if he had not made friends with the Court of Assistants ; the governors have not paid him for them.

Dr. Simpson's argument for Higginson. Admit instructions were not proved, but it is sufficient if we prove fact of execution and sanity ; Platt swears it was executed

on 15th May, and that he was sensible; Freeman swears the same; Glass swears contrary to his act, and contradicts himself, nobody but he says deceased was insensible on 15th May; Glass and Hibberd swear he was insensible for eight days before he died; he died on 24th May, and therefore did not become insensible till the 16th; the will only secures a just debt; the children must pay it whether the will subsists or not; we pray costs against the guardian, who has unreasonably opposed it.

[145] Dr. Bettesworth, same side. It is still in dispute whether Higginson gave short measure of coals or not; counsel advised against prosecuting him; we do not suggest this will was made out of kindness to Higginson, but merely to secure his debt; could not prove subsequent declarations, because none of our friends were about him.

Dr. Hay contra, for Colcot. We oppose this will on two points; 1st, because deceased was not mentally capable; 2d, because he was not a free agent. Freeman, their witness, proves deceased was insensible in the night of 15th May. A person may be a good witness who contradicts his own act; so held in *Butler and Parmenter's case*,^(a) 1 Deleg. Uncertain whether it was executed on 15th May; a will must be a voluntary act. Swinb. 453; (b) a will made through fear is void, particularly fear of imprisonment, p. 455; threats void a will. No reason to believe deceased would prefer Higginson to all his other creditors, who are hurt by such preference; if Higginson is executor, who can inquire into his debt? Higginson pleaded his own character, which led us to plead his bad character; no declaration of deceased in favour of Higginson.

Dr. Smalbroke, same side. They undertook to shew capacity at the time of the execution; deceased was in so weak a state as to be liable to [146] be imposed on; *Adams and Adams*,^(a) 2 Deleg., Cauldwell, the parson, was received as a legal witness, though he deposed contrary to repeated acts of his own.

Dr. Simpson's reply. No proof of terror at the time of executing the will.

JUDGMENT—SIR GEORGE LEE. I gave sentence against the will, as not being the free and voluntary act of the deceased, who had constantly declared an aversion to Higginson; and yet if this will should stand, deceased had thereby given him an undue preference to the other creditors, by making him executor, and decreed administration to Colcot as guardian, for the use of deceased's infant children.

LINE v. HARRIS. Arches Court, July 7th, 1752.—Of common right the incumbent has the nomination of a minister to a chapel of ease within his parish. Exception proved in the present instance.

[Discussed, *Lee v. Fagg*, 1874, L. R. 6 P. C. 43.]

(An appeal from Exeter.)

Dr. Pinfold for Harris. In 1746 the mayor and corporation of Saltash nominated John Line, clerk, to be curate of St. Nicholas of Ash. Mr. Harris, the vicar of St. Stephen's, took out a citation on the 15th August, 1747, to call Line to an-[147]-swer in a cause of invading and encroaching on Harris's office, by officiating in this chapel without his leave, to shew cause why his licence should not be revoked, &c. Line appeared; Harris gave an allegation, which pleaded that he was vicar of St. Stephen's,

(a)¹ *Butler v. Parmenter*, Deleg. 23 Nov., 1750. This case appears to have undergone considerable discussion, and to have been argued on the 26th and 31st of Oct., and on 2d, 8th, 9th, and 15th of Nov. The Judges Delegates present at the sentence were Lord Chief Baron Parker, Mr. Justice Birch, Dr. Chapman, Dr. Hay, and Dr. Ducarel.

(b) Swin. part 7, sec. 2, 3, and 4 (ed. of 1803).

(a)² *Adams v. Neville*, calling herself Adams; Deleg. 13th Feb., 1749. The Judges present at the sentence were Mr. Justice Wright, Mr. Baron Clarke, Dr. Walker, Dr. Chapman, Dr. Collier, and Dr. Salusbury.

that the chapel was in his parish, and belonged to him. Line gave in his answer, and alleged his right under his nomination and licence. By an entry, dated the 4th August, 1351, in an ancient book in the bishop of Exeter's registry, called Grandison, it appears that the endowment of the vicarage of St. Stephen's gives all the tithes, &c. of St. Nicholas to the vicar of St. Stephen's. This cause was heard below on 17th August, 1750, on the allegation and answer, and sentence was given, revoking Line's licence; Line appealed, and has pleaded in the Arches. It now appears the chapel of St. Nicholas, and town of Saltash, is in the parish of St. Stephen's, and the vicar has nominated one of the chapelwardens, and has administered the sacrament there. The dean and chapter of Windsor are impropiators of St. Stephen's, and Mr. Buller, their lessee, receives the great tithes of Saltash; and the inhabitants of Saltash pay Easter offerings, &c. to the vicar of St. Stephen's. They have pleaded that the corporation of Saltash have always nominated the curate of St. Nicholas.

Dr. Paul contrà, for Line. This chapel is a chapel of ease, which stands on the corporation's ground; we insist it is a free chapel. Line was licensed by the bishop on the 27th March, 1746, upon the nomination of the mayor and corporation. Harris was instituted vicar in 1744. The corporation repairs the chapel, and maintains the curate and [148] clerk. The institution to the vicarage should have mentioned the chapel, if it had been annexed to it. The corporation has nominated for above eighty years. The communion plate is kept by the mayor; and the mayor and burgesses have sometimes appointed the chapelwardens. The vicar has officiated only three times in a year; the licence was improperly revoked; we insist it is a free chapel, and by prescription a corporation may nominate to a chapel. Book Grandison is erased, and not proved to be authentic.

Witnesses for Harris.

1. Edmund Herring, clerk, ex. 18th December, 1751. Harris has been vicar of St. Stephen's seven years; deponent inducted him, and he is entitled to all benefits as vicar; the town of Saltash is in the parish of St. Stephen's; there is a chapel in Saltash; believes the vicar has a right to nominate to the chapel; in 1740 deponent was nominated curate by the then vicar of St. Stephen's for his vicarage, and did duty for the vicar in the chapel of St. Nicholas, three Sundays in a year, and has done all offices there except publishing banns; has heard Line had a licence from the bishop, and proves he did, and does officiate in St. Nicholas; the vicar has constantly nominated one of the chapelwardens, who have been sworn as sidesmen of St. Stephen's; as deponent believes, the vicar or his curate has always administered the sacrament three times in a year in St. Nicholas's chapel; Easter offerings and mortuaries are paid to the vicar by the inhabitants of Saltash.

2. William Duede, clerk. Deponent was vicar of St. Stephen's; Harris succeeded deponent; [149] Saltash is in the parish of St. Stephen's; Harris has a right to officiate in said chapel, or to appoint a curate; deponent did officiate there when he was vicar, and Herring nominated a chapelwarden yearly, as curate to deponent; inhabitants of Saltash pay tithes to the vicar of St. Stephen's, and Easter offerings, &c.

3. John Darton. Harris is vicar of St. Stephen's; Saltash is in the parish of St. Stephen's; St. Nicholas chapel is in the parish of St. Stephen's; the chapelwardens are named by vicar and mayor jointly; Line has officiated in St. Nicholas, and does, except when the curate of St. Stephen's is there; vicar appoints one warden of the chapel; he or his curate administer sacrament at St. Nicholas; the Sundays next after Easter, Whitsuntide and Christmas, Saltash pays tithes to the vicar of St. Stephen's.

4. Dorothy Darton. St. Nicholas is in the parish of St. Stephen's; Line, for several years past, has officiated in said chapel; has never known him christen, marry, or bury there; deponent has often heard her father say the vicar always nominated one warden of the chapel, vicar preaches, &c., three times a year in St. Nicholas's chapel; the whole town of Saltash pays tithes and offerings, &c. to the vicar of St. Stephen's.

5. Ferdinand Jago. The same as the other witnesses; says he received the sacrament from Herring, the Sunday after Christmas, 1751, at St. Nicholas.

6. Stephen Hicks. St. Nicholas, as deponent believes, is a chapel of ease to St. Stephen's; Line officiated in said chapel, and christened and buried there, by virtue of a licence, of which Harris complained, and Line has from that time, [150] by the

mayor's advice, promised to forbear christening, &c., if Harris would not oppose his officiating there; otherwise, as to the rest, agrees with the other witnesses.

7. Catherine Dingle, æt. 80. Has lived in St. Stephen's from eighteen years of age; deposes the same.

8. John Dingle. Deponent has been parish clerk of St. Stephens thirty-four years; Mr. Needler, vicar, was about thirty years ago refused by the mayor to officiate at St. Nicholas; the vicar brought a suit in the Consistory of Exeter, and prevailed; and afterwards the vicar would not suffer any christenings at St. Nicholas, and for about a year the christenings were all at St. Stephen's; but Mr. Millet, the curate of St. Nicholas, being named with the vicar's approbation, he allowed him to christen, but the entries were made in the parish register; vicar nominates one warden yearly; vicar himself or his curate preaches three times in a year at St. Nicholas's.

9. John Monk. Deponent was nominated warden of St. Nicholas's chapel, for the year 1751 by the vicar's curate, and was sworn in the same as the other churchwardens.

10. Thomas Webb. The same as the other witnesses.

11. Henry Carew, clerk. The same; in 1726 deponent was recommended to be curate of St. Nicholas; deponent applied to the vicar, Mr. Needler, and he told deponent no one should officiate there without his licence, and deponent did serve there about ten years, with consent of Needler, and Mr. Buller, the patron; and deponent, by leave from Needler, buried, married, and baptized, in said chapel, and took fees to himself.

12. John Cudlup. For fifty years past, the [151] vicar has administered the sacrament three times a year in St. Nicholas chapel.

13. Joseph Webber. The inhabitants of Saltash pay small tithes and offerings, &c. to the vicar of St. Stephen's, and Mr. Buller receives the great tithes.

Witnesses for Line.

1. James Vesper, æt. 85. Deponent was born at Saltash; for sixty years never heard the vicar claimed a right to nominate the curate of St. Nicholas; deponent and another, fifty years ago, nominated wardens of the chapel by the corporation; verily believes the mayor, &c. have always for sixty years nominated the chaplain; names several who have officiated there as chaplains; the chapel is built on the corporation ground; the chapel is maintained and repaired by the corporation, and the chaplain and clerk paid by them; Saltash pays nothing to the church rate of St. Stephen's parish.

2. Jane Gaboriam. Never heard any vicar before the present attempted to nominate a chaplain; no church rates, poor's rates, or land tax, have been paid to St. Stephen's; about twenty-seven years ago deponent sent for the key of the chapel to have a child baptized, but the mayor refused her; Hill, the mayor, removed Millet from being chaplain, and put in another; deponent's husband, as receiver of the corporation, paid the chaplain's salary.

3. Ann Harrison, æt. 80. Deponent has lived at Saltash forty-four years; never heard any vicar claimed nomination, &c. before Harris; Hicks was nominated chaplain by the corporation; the chapel has always been repaired by the corpora-[152]-tion, and the salaries paid by them to the curate and clerk; no church rates, &c., have been paid to St. Stephen's, &c.; curate always has been paid by the corporation.

4. Peter Jago, æt. 67. Deponent was born at Saltash, and has chiefly lived there; never heard any vicar before Harris claimed the nomination of a curate; for forty years the corporation has nominated; names several who were nominated by the corporation; the chapel is situated on the corporation ground, and nobody buries there without the mayor's leave, and deponent asked such leave for burying one Webb in the chapel; chapel is repaired, &c. by the corporation, and they find the utensils, &c. of the chapel, and pay the clerk's salary, &c.

5. John Elliott, æt. 79. For sixty years deponent never heard the vicars before Harris claimed a nomination of the curate; fifty years since, deponent and Vesper were named wardens of the chapel by the corporation; has always heard the corporation nominated the chaplain.

6. Catharine Lurk, æt. 67. Deponent has lived in Saltash forty years; deponent's husband and son were appointed chapel-wardens by the corporation.

7. John Geace. Proves exhibits, from No. 1 to No. 12 inclusive, to be copies of institutions and admissions of the vicars of St. Stephen's to the institution of Stephen

Harris, the present vicar, on 22nd August, 1744; there were fourteen vicars in that time, and the chapel of St. Nicholas in Saltash is not mentioned in any of those institutions.

Dr. Pinfold's argument for Harris. Every [153] chapel is subject to the mother church, unless a special exemption is shewn. We have proved that the inhabitants of Saltash pay tithes to the lessee of the impropiators of St. Stephen's parish, and the small tithes, Easter offerings, &c., are paid to the vicar. The corporation is a public body, and their nominations must be under seal, and entered in the corporation books, but they have shewn no such entry. The institutions to the vicarage are in general words to the vicarage with its members and appurtenances. This chapel being situated in the parish of St. Stephens, must stand under the general law.

(N.B.—From exhibit No. 6 it appears that the corporation did nominate John Line to be curate of St. Nicholas, and No. 7 was also a nomination by the corporation in 1730 of one Hancock to be curate.)

Dr. Paul contra, for Line. Guildhall Chapel was granted by Edward 6 to the Mayor, &c., of London; Bridewell, the Rolls, and Mercers' Chapel, are all exempt from the parishes within which they stand. 4 Leonard, 24, *Sayer and Bland*, prohibition on the suggestion of paying part of the tithes to the curate of a chapel of ease. Othobon, 3 Antiq. Constit.; Coke, 1 Inst. 344. Vesper says the Vicar of St. Stephens never nominated for sixty years. We have proved the corporation chose chapelwardens till within thirty years. Preaching no more than three sermons in a year shews he has only a limited right.

Dr. Hay on the same side. The question is whether Harris the vicar has a right to nominate a chaplain to St. Nicholas. Secondly, suppose he [154] has, whether the license is to be revoked. There are many chapels with which the rector or vicar has nothing to do; a chapel of ease is where the rector or vicar may remove the curate at pleasure, such chapels cannot bury, or have sacraments. Parochial chapels are exempt from the rector or vicar. Kennet's Parochial Antiquities, (a) p. 590, having sacraments makes a parochial chapel. 2 Inst. 363, if a chapel has sacraments it is a church, 2 Rolle, 340. (b) It is fully proved that sacraments are administered in this chapel. It does not appear that the vicar ever nominated. This chapel has been constantly repaired by the corporation. Reparation and paying salary to the curate, make the corporation patrons. No church rates have ever been paid by the inhabitants of Saltash to the parish of St. Stephens. The vicar is not instituted to the chapel of St. Nicholas. We insist that this is a parochial chapel, and if so, other persons besides the minister of the parish may have a right to nominate the curate; and this chapel has been always nominated to by the corporation: but, secondly, suppose the right of nomination is in the vicar, yet Line's license ought not to be revoked; if a man has institution by usurpation, he cannot be removed after six months; the license was granted to Line in 1746; Harris was vicar in 1744, but made no opposition till August, 1747.

Dr. Pinfold, in reply. It is not proved that the corporation has always nominated; parochial chapels have not a distinct minister unless by cus-[155]-tom; if the corporation has not a right to nominate, the bishop was deceived in granting the license.

JUDGMENT—SIR GEORGE LEE. I took time to consider this case, and on this day, 7th July, 1752, I gave judgment thereon. I said that this appeared to me to be a chapel of ease; that its having sacraments and burials did not make it cease to be such, for though in Coke's 2nd Inst. 363, it is said that when the question was whether it was ecclesia, or capella pertinens ad matricem ecclesiam, the issue was whether it had baptisterium et sepulturam, for if it had the administration of sacraments and sepulture, it was in law judged a church, yet I did not take that to be law. The fact was evidently otherwise. Noy, 127, *Buck v. Amcotts*, it appears that Rumford and Havering chapels are chapels of ease to Horne Church, in Essex, and yet those chapels have sacraments and burials. So, to my own knowledge, Uxbridge and Brentford in Middlesex are chapels of ease; the first to Hillingdon, the second

(a) These and many other authorities on this point are collected under the head Chapel, in Burn's Ecclesiastical Law, vol. i. p. 295 (ed. 1824). See also Gibson, vol. i. p. 209.

(b) Probably 2 Rolle, 265.

to Ealing. And Totteridge, in Hertfordshire, is a chapel of ease to Hatfield; and yet in all those three chapels, sacraments are administered, and marriages, burials, and all other ecclesiastical rites are performed. And this appears from the case of *The Parish of Aston v. Castle Bromwich Chapel*, Hobart, 66. Castle Bromwich chapel was in the parish of Aston, the inhabitants did resort to the chapel, and there married, christened, and received sacraments and sacramentals, and had churchwardens there, and a perambulator of the precinct, but they buried not there, but at Aston; and the vicar found them a [156] curate, at his charge, to serve them in the chapel. It was held that this chapel was subject to the mother church, and liable to the repairs thereof, and that the vicar of Aston might serve the cure himself. 2nd Rolle's Reports, (a) 265, the inhabitants of a chapel which had sacraments and sacramentals suggested a prescription not to repair the mother church; the Chief Justice said it was against common right, that those of a chapel of ease in a town should be discharged from repairing the mother church. I therefore concluded that this chapel of St. Nicholas was merely a chapel of ease to the church of St. Stephen's, and consequently, as the vicar of St. Stephen's had the cure of souls throughout the parish, he might officiate in this chapel himself, as it appeared he did three times a year to preserve his title, and of common right as vicar had the nomination of the curate, as the rectors or vicars of parishes have where there are curacies augmented by Queen Anne's bounty, which, in many particulars, are put upon the footing of presentative benefices. But though of common right the nomination of the curate of a chapel of ease is in the rector or vicar of a parish, yet by custom or composition it might be in other persons. Cowell's Interpreter, word "Chapel:" a chapel of ease is built for the ease of one or more parishioners that dwell too far from the church, and served by some inferior curate, provided at the charge of the rector, or of some that have benefit [157] by it, as the composition or custom is. Statute 1 Geo. 1, chap. 10, sect. 4, capacitates curates of chapels belonging to a mother church, to be augmented by the Queen's bounty. Sect. 5 provides that the rector or vicar of the mother church shall have cure of souls and all other parochial rights, as they had before the augmentation; and sect. 6 enacts that, in case such augmented cures be suffered to remain void by the space of six months, without any nomination within that time of a fit person to serve the same (by the person or persons having the right of nomination thereunto) to the Bishop, or other ordinary within that time to be licensed for that purpose, the same shall lapse to the Bishop, &c., which statute, by saving the rights of the rector or vicar of serving the cure notwithstanding the augmentation, shews that, of common right, the cure is in the rector, &c., and that he consequently, may nominate the curate. But the 6th sect. likewise shews from these words, by the person or persons having the right of nomination thereunto, that the right of nomination may be in other persons than the rector or vicar. These observations, then, with respect to the law bring the present case to a question of fact, whether the vicars of St. Stephen's or the corporation of Saltash have nominated the curates of St. Nicholas; for if the corporation have, without interruption, nominated them, the law will presume that they have a right to do so, by composition originally, though the composition does not now appear, but by usage is turned into a prescriptive right. I observed that from the evidence, not one instance appeared of any vicar's having attempted to nominate the curate of St. Nicholas. John Dingle, a witness [158] for Harris, says that Millet was named curate, with the vicar's approbation; (not that the vicar nominated him; and yet it cannot be supposed but that Mr. Needler, the then vicar, who had had contests with the corporation, would have insisted on his right to nominate if he had had any pretence for so doing: on the contrary, many instances appear in evidence of nominations by the corporation. It is further to be remarked that the chapel is built on the corporation ground—that it is supported and maintained in every thing, and the curate and clerk paid by the corporation solely, and not by the inhabitants of Saltash in general, who have in common the benefit of it, from whence it is reasonable to conclude that the chapel was originally built at the charge

(a) For (the Chief Justice continues) it may be that the mother church, being built of stone, may never have needed reparation within the memory of man; and again, that would not discharge them without special cause of discharge shewn. *Anonymous case*, 2 Rolle, 265.

of the corporation, and that then the right of nominating the curates of St. Nicholas was, by composition, granted to the corporation.

I therefore pronounced for the appeal, reversed the sentence of the judge below, confirmed the license granted to Line, and dismissed him from this suit by interlocutory, but without costs.

BETHUN against DINMURE. Prerogative Court, Caveat Day, July 7th, 1752.—A will withheld by a creditor ordered to be brought in on the application of the executrix.

John Craggs made his will and appointed his sister, Bethun, executrix, and gave his will to her to keep; Bethun left it in the hands of Mrs. Dinmure; Craggs is dead, and Dinmure refuses to [159] deliver back the will to Bethun, the executrix, till she has paid her a debt she says Bethun owes her.

A decree has been personally served on Dinmure to bring the will into Court.

JUDGMENT—SIR GEORGE LEE. I ordered her to bring it in peremptorily by the 28th of July, 1752.

BURRELL against EASTLOW. Prerogative Court, Caveat Day, July 7th, 1752.—

An administration improperly granted in the Court of the Archdeacon of Norwich, called in and revoked.

Robert Burrell, died a widower intestate, left one child an infant; Frances Burrell, the grandmother of the child, was assigned guardian in the Prerogative Court, and took administration as such to deceased for the use of the infant; Nathaniel Eastlow, uncle to the minor, was on 4th March, 1752, assigned guardian to the infant in the Court of the Archdeacon of Norwich, and he took administration there for the use of the infant; the grandmother cited him to bring the administration into the Prerogative Court, and to shew cause why it should not be revoked, for want of jurisdiction in the Archdeacon's Court: it appeared to be a prerogative case, and I decreed the administration to be revoked, and condemned the uncle in 3l. 6s. 8d. the usual costs.

[160] **HERVART against GENERAL GUISE.** Prerogative Court, Caveat Day, July 22nd, 1752.—An imperfect testamentary schedule pronounced against.

Dr. Pinfold for Hervart. William Guise, Esq., son of General Guise, died on 10th April, 1751, a bachelor, æt. 22; left his father and two uncles and an aunt by his mother. Deceased had an estate by his mother's will; and by his father's marriage settlement the mother had power to make a will; she died in 1749, and gave by her will all to her son if he came to age, and if he did not, she left all to her own relations. Deceased with his own hand wrote his will or testamentary schedule, in which he left an annuity of 60l. to Mrs. Assaily, and the rest to his father, and in case of his death, to the testator's two uncles by his mother. Maximilian Hervart, one of the uncles, has propounded this paper (which is not dated, signed, or executed), as substituted residuary legatee therein named; the General opposes it. The paper was found by Mrs. Assaily, who delivered it to Mr. Aufrere; deceased had great affection for Mrs. Assaily; in September, 1750, one Mr. Guy, at the desire of Mrs. Assaily, spoke to deceased about making a will, and he then declared he would give Assaily 50l. a year, and the rest to his father. No. 2 is a draft made by Guy pursuant thereto, and was approved by deceased in November, 1750. Hervart has examined three witnesses, but the General has examined none.

Dr. Simpson for General Guise. After deceased's death, Mr. Aufrere brought the papers, Nos. 1 and 2 to General Guise. Hervart is not by the paper a substituted residuary legatee, since the [161] General did not die before his son. I shall make that a point to shew Hervart has no interest to propound this paper; 3d May, 1751, General Guise took administration to his son as dying intestate; 1 sess. Trin. 1751, the administration called in by Hervart; Guise appeared by his proctor, and denied his interest; the General took out citation contra omnes to come into judgment; 1 sess. Mich. 1751, Hervart propounded the will; none of the others appeared. They have not proved the General's marriage settlement, or his wife's will; they have

proved that deceased declared to Guy that he would do something for Assaily; but Guy swears he believes deceased so declared at his importunity merely. Guy several times solicited deceased to execute draft No. 2, but he constantly refused. It is not proved that No. 1, the paper propounded, was wrote subsequent to No. 2, and No. 1 is not proved to be deceased's writing; they have pleaded that Assaily found No. 1 wrote in a book, and she tore it out and gave it to Mrs. Robothon, and she delivered it to Mr. Aufrere, but the fact is that Assaily shewed it to Robothon, and said she shewed it her as a proof of deceased's affection to her. The day deceased died, Assaily came with a message from deceased to his father, to inform him deceased had no will, and desired his father would give certain things to persons deceased named.

Witnesses for Hervart.

1. Susanna Robothon. Deponent well knew deceased and his relations; he died in April, 1751, æt. 22; left his father, and two uncles and an aunt by his mother; deceased was in a declining way [162] for three years before his death; his fortune was left him by his mother's will, but he could not dispose of it till he was at age; but if he died under age, it was to go to his uncles and aunt; Assaily was governess to deceased's mother, and her sister, Mrs. Guise, died in October, 1749; Assaily had the care of deceased, and he often declared affection for her, and declared he would make his will, and leave Assaily 60l. a year; deponent has heard deceased desire Mr. Guy to draw a will for him. No. 2 is that draft which was delivered to deponent by Assaily the day deceased died; deponent never saw deceased write, but has received notes from him; says No. 1, the will propounded, is different from the letters or notes she has received from deceased, and therefore cannot take upon her to say No. 1 is his handwriting, although she is greatly inclined to believe it is; deponent received said paper No. 1 from Mrs. Assaily about three or four hours before deceased died; and she desired deponent to deliver it to Mr. Aufrere from him, to shew it to General Guise; Assaily told deponent she took it out of a book belonging to deceased.

8, 9, 10. Int. Respondent first saw No. 1 about three or four hours before deceased's death, and about an hour after his death. Assaily gave it to deponent; about four months after she told respondent she took said No. 1 from some papers of deceased's lying on a table, but before she said she had taken it out of a book, and said she tore it out unknown to deceased; and there was other writing on the same paper, but she had destroyed that part. 11. Int. Assaily told deponent she declared to the General the day deceased died that he had made no will, but he desired Miss Hervart might have his tea kettle, &c. and others might have [163] certain specific legacies, and the General said what he desired should be complied with, and bid Assaily tell him so, and she acquainted deceased therewith, and she returned with deceased's thanks to his father thereon.

2. Israel Anthony Aufrere, clerk. Deponent is an executor to deceased's mother; deceased very sickly; his fortune came to him by his father's settlement and his mother's will, but if he died under age, his fortune was to go to his mother's relations; deponent has heard that Guy drew a will for deceased, by his own desire; deponent believes the schedule No. 1 is deceased's handwriting, as it very much resembles his subscription, but deponent never saw him write anything but his name; the day deceased died Robothon brought No. 1 to deponent, and desired him to carry it to General Guise; he did, and the General said, "It signifies nothing;" deponent replied, "I beg your pardon, for it is his handwriting, it is a declaration of his will;" General Guise said, "He would think of it." The General did not say it was not deceased's handwriting.

Read for Guise part of Hervart's allegation.

4 art. Pleads that deceased told Guy, "He would make a will for benefit of Assaily, &c." Guy drew a will pursuant.

6 art. Pleads that deceased wrote No. 1 in a book of consequence.

3. William Guy. Deponent knew deceased from his infancy; deceased had been very ill some months before his death. Believes deceased had a regard for Assaily, but never heard him declare so; at Assaily's request, deponent at several times pressed deceased to make a will in her favour, but he put deponent off, and deponent again mention-[164]-ed it to deceased the September before his death, and he then

said, "He would do it, and that it would be but short, and that his intention was to give Assaily 50l. a year, and the rest to his father;" and he then gave deponent other instructions relating to said annuity, and desired deponent to make a draft of a will pursuant thereto, but told him he need not be in a hurry about it; deponent accordingly made a draft from said instructions, and about six weeks afterwards carried it to deceased, and read it over to him, and he seemed to approve thereof, and said, "That's well," and he then locked up said paper, and told deponent he would appoint another time for his writing it over fair; deponent several times spoke to deceased about finishing it; but he always put deponent off, and said, "He would do it another time;" explains initial letters in said draft No. 2; never saw deceased write any thing but his name, and cannot depose whether No. 1 is deceased's handwriting or not; Assaily told deponent she tore No. 1 out of a book the day after deceased died; deponent was present when Aufrere brought No. 1 and No. 2 to General Guise, who said he would take counsel's opinion on them.

1. Int. Deponent spoke to deceased about making his will, at the repeated solicitations of Assaily, and he did not at first give deponent directions for making a draft, and deponent pressed him to do it, but he several times declined giving deponent orders for a will, and said, "We will think of it another time," and believes he at last gave directions, not from his own motion, but because deponent pressed him thereto. 2. Int. When the directions were given, deceased seemed to waver. 3. Int. Draft was carried to deceased [165] about November, 1750; deponent read it over to deceased, and he then refused to look thereon, and said, "Give it me, we will put it to rights another time." 4. Int. Deponent afterwards, at Assaily's request, spoke to deceased to finish his will; but at all such times deceased refused to proceed, and put deponent off to another time; he last spoke to deponent about it about three months before his death. 5. Int. Deponent was at General Guise's house the Sunday before deceased died, and deponent then sent deceased word he was ready to assist him in finishing his will; deponent sent the message by Assaily; she brought answer that he could not see deponent then, he was so ill, and that he would defer it to another time; deponent never saw him afterwards. 6. Int. Deceased never told deponent, "He would write his will himself;" and believes if deceased had had any settled intention to have made his will, he would have employed deponent to finish it.

Read the schedules No. 1 and 2.

Dr. Pinfold's argument for Hervart. There can be no doubt but that Hervart is a substituted residuary legatee; the words carry it, and it is agreeable to the settlements, and to the schedule No. 2. This point was determined by the Court when the allegation pleading the will was admitted. Deceased had intention to die testate, and declared to Robothon that "he would leave Assaily 60l. a year;" the schedule is clearly deceased's handwriting.

Dr. Hay, same side. General Guise took administration, though he knew of schedule No. 1; Hervart's interest was denied by Guise. The ob-[166]-jection was argued and over-ruled, and the allegation was received by the Court. Two points; 1st, whether the paper propounded is the act of deceased; 2nd, whether he has done any act to destroy it, or whether it is destroyed by act of law. He deferred finishing his will from indolence; No. 1 is agreeable to the draft No. 2; Aufrere clearly proves the schedule No. 1 is deceased's writing; Robothon believes it, but Guy is doubtful. Prerog., case of *Martin and Michell*; imperfect paper kept many years, but established as a will. Departure from intention must be proved; Deleg.(a) *Cunningham and Smith*, an unexecuted paper established.

(N.B.—A fixed resolution of the testatrix that that paper should operate as her will was in that case fully proved.)

Dr. Simpson for General Guise. It does not appear when or where the paper No. 1 was wrote; none of the witnesses have seen deceased write more than his name, and therefore they have not made a sufficient proof of the handwriting of will No. 1; no recognition of that paper. Robothon, indeed, says she has heard deceased say, both before and after he was of age, he would make a will in favour of Assaily. Deceased locked up No. 2, which shews he considered that as a paper which was to

(a) *Cunningham v. Smith*, Deleg., 24th May, 1750. The Judges Delegates present at the sentence were—Mr. Justice Burnett, Mr. Justice Denison, Dr. Chapman, Dr. Salusbury, and Dr. Jenner.

be finished ; No. 2 appears to be wrote subsequent to No. 1, by deceased's desiring the day he died his father to give plate to Miss Hervart, which the General could do by No. 2, but [167] he could not by No. 1, for by that paper all that was given to him was only for life.

Dr. Bettesworth, same side. No proof that this paper, No. 1, is the act of deceased. Swinb. part 7, sect. 13 ; imperfect papers depend on circumstances.

JUDGMENT—SIR GEORGE LEE. It not appearing how long before deceased's death No. 1 was wrote, nor where it was found, and it being very imperfect, and no evidence that deceased intended it should operate as his will, on the contrary, he having declined to carry No. 2 into execution, which was wrote on the same plan, and having on the day of his death desired his father to give specific legacies to certain persons, I gave sentence against the schedule No. 1 so far as related to Hervart, who propounded the will, and pronounced deceased to have died intestate ; and continued the cause to the next term as to the non comparentes, but did not give costs ; and on the first session of Michaelmas Term, 1752, it appearing that a citation was taken out against the non-appears, and was personally served on those in England, and by public edict against those abroad, and no appeal having been interposed by Hervart, I, upon motion, extended the interlocutory sentence, given against Hervart on 28th July, 1752, to the parties not appearing, and confirmed said decree against them.

BAKER *against* RUSSELL. Prerogative Court, Caveat Day, October 17th, 1752.—
An administration revoked on the production of a will.

George Russell died in March, 1752, he made his will, and appointed Robert Baker executor ; Thomas Russell, deceased's father, took adminis-[168]-tration to him as dying intestate, and described himself of Chancery-lane. The executor took out citation against the father to bring in the administration ; the father could not be found where he described himself to live, and therefore could not be personally served ; the executor took out a citation viis et modis against him, and advertised him, but could not hear of him. The executor made affidavit of the above facts, whereupon I revoked the administration, and gave 4l. 6s. 8d. costs, there being a citation viis et modis and an affidavit in this case.

HURRELL *against* HURRELL. Prerogative Court, Caveat Day, October 17th, 1752.—
Administration of a nuncupative will, decreed to one of the principal legatees.

A father was personally cited, pursuant to the statute, to see administration decreed, with his son's nuncupative will annexed ; the father did not appear. The will being attested according to the statute, and made in due form, I decreed administration cum testamento to one of the principal legatees. The attestation proving that the will was duly made pursuant to the statute of frauds, was read.

GRANT *against* ATKINSON. Prerogative Court, Michaelmas Term, November 5th, 1752.—A suit carried on by the attorney of an executor does not abate on his death, a proxy having been originally exhibited for one of the executors, as well as for the attorney of the executors.

Dr. Hay for Atkinson. William Atkinson, deceased ; administration to him as dying intestate was granted to Abraham Atkinson, his cousin and next of kin, in August, 1749. Grant as attorney for Cane Mahony and William Browne, executors of a will of deceased, took out citation against Atkinson to bring in the administration, &c., and shew cause why probate should not pass to [169] Grant, as attorney, to the executor's. Citation returned, and Atkinson appeared and opposed the will ; 6th February, 1749, Hughes, as proctor, propounded the will in the name of the attorney, and not of the executors ; from Hilary Term, 1749, Hughes has only produced one witness ; 23d June, 1752, Hughes was assigned to prove precisely by 28th July, 1752 ; no letter of attorney from the executors to Grant exhibited ; the suit could not legally be carried on by the attorney ; Grant is now dead, and therefore we insist the suit is abated, as the executors were not parties.

Dr. Smallbroke for Cane Mahony. Mich. 1749, Shepherd appeared for Atkinson ;

3d sess. Hilary, 1749, Hughes exhibited a proxy signed by John Grant and Cane Mahony, one of the executors, and Mahony the same day gave in an affidavit of scripts and scrolls; 1 sess. Trin. 1750, Smart appeared for Atkinson; 5 sess. Mich. 1750, a witness produced and examined; 3 sess. Trin. 1752. Bellas appeared for Atkinson; we then exhibited an affidavit of the absence of a witness.

JUDGMENT—SIR GEORGE LEE. There being a proxy originally exhibited for Cane Mahony, one of the executors, as well as for John Grant, the attorney, I was of opinion the cause was not abated by the death of Grant, and ordered the cause to be described for the future, *Mahony against Atkinson*, and assigned Hughes to prove by next Court.

Note.—I was confined to my house all the rest of this Michaelmas Term by the gout, and Dr. Simpson sat in Court for me.

[170] IN CHAMBERS.

THOMAS *against* DAVIS AND OTHERS. Prerogative Court. December 15th, 1752.—A person who had been party to a prior suit, touching the grant of an administration cum testamento annexo, held to be barred from instituting here proceedings for the purpose of claiming the administrator as residuary legatee.

Dr. Paul for Davis and others. John Thomas made his will 3d May, 1743; appointed James Thomas, executor, residuary legatee; deceased cancelled this will by tearing off his name and seal, and afterwards wrote on a separate paper a memorandum in these words: "I cancelled my will the day of May, 1743, notwithstanding that it is my will and purpose that the several legacies therein specified shall stand good and valid, excepting my appointment of my kinsman, James Thomas, as executor; having provided for him otherwise, as also Mr. Thomas Davis, since deceased." After deceased's death, the cancelled will and memorandum were found together in deceased's closet. Mr. Thomas Evans, a trustee named in the will, took possession of the will and memorandum. In April, 1751, caveats were entered; in July, 1751, James Thomas took out monition against Evans to bring in the will; in September, 1751, Mr. Tyndall, proctor, alleged Davis to be cousin and next of kin to deceased. Cæsar alleged James Thomas to be executor and residuary legatee. The Court assigned all parties to answer to each other's interest; 1 sess. Easter Term, 1752, motion was made for administration with the will annexed to be granted to the next of kin. Mr. Cæsar then declared he had no instructions from his client. The Court decreed administration to the next of kin, in case Thomas did not propound his interest as residuary legatee. By the 3d sess. of that term Thomas did not propound his [171] interest, and on 15th June, 1752, administration cum testamento passed under seal to Davis, the next of kin. In the letters of administration cum testamento, it was recited that deceased had made no executor or residuary legatee; whereas it is usual in the like cases to recite in the letters of administration that the pretended residuary legatee had been assigned to propound his interest, but had not done so, and therefore administration cum testamento was granted to the next of kin. 28th July, 1752, Thomas cited the next of kin to bring in the administration cum testamento and to shew cause why it should not be revoked as surreptitiously obtained and under false suggestions. There are two points; first, whether James Thomas is by the memorandum residuary legatee. Deceased expressly revokes the appointment of him as executor, because he had provided for him otherwise, which reason extends to revoking the bequest of the residue to him, and if the will operates as to the residue, the cancellation has no effect, for all the other legacies are expressly revived; and if Thomas is residuary legatee he ought to have administration, cum testamento which is the same in effect as executor. The second point is that Thomas had knowledge of, and was a party to, the former proceedings, and had opportunity to propound his interest, but did not, and thereupon the administration was well granted to the next of kin; and being granted to the next of kin it cannot be revoked, because when an administration is granted according to the statute, the Court never revokes it. Prerog. 21st Feb. 1724, *Knapp against Fellows*. Robert Fellows, bachelor, died intestate; left a father, who died before he took administration to his son; the father made his will, and appointed his daughters residuary legatees, who thereby had the interest [172] in

Robert, the deceased's, estate ; a brother of Robert's took administration to him ; the sisters called him to see the administration revoked, on suggestion that the interest in Robert's estate was in them, as residuary legatees to the father, in whom all Robert's estate vested ; but the Court refused to revoke the administration, as being well granted under the statute. Prerog., *Lord Chancellor Freeman of Ireland's case* ; he left a will which was not found till many years after his death ; his widow took administration to him as dying intestate, and then she died, leaving effects unadministered, administration de bonis was then granted to Mary Edwards, a married daughter of Chancellor Freeman's ; her brother cited her to see the administration de bonis revoked, and suggested for cause of revocation that she had received from deceased's estate by advancement, in his life, more than her share would amount to, and he gave in an allegation to prove that fact ; but the Court rejected the allegation, because the administration de bonis was well granted to the next of kin ; this administration cum testamento was granted in foro contradictorio.

Dr. Hay, same side. The cause began by a monition taken out by Thomas, on 26th July, 1751, against Evans, to bring in the will. Thomas was a party throughout that cause, had opportunity to propound his interest as residuary legatee, but did not ; might have appealed from granting the administration to Davis, but did not ; it thereby became a res judicata. In September, 1552, Mr. Tyndal appeared to the present citation, under a protest, that the matter was a res judicata, and has continued his protest all along. I shall therefore make that the first point for determination, for if [173] by his being a party in the former cause he is barred from controverting the grant of the administration, it is not material to consider whether he is residuary legatee to deceased or not.

Dr. Pinfold for Thomas. James Thomas was a near relation to deceased ; deceased died 22d April, 1751. James Thomas, then in Ireland, he came to England on deceased's death, entered a caveat, and then went back to Ireland ; left a letter of attorney with one Johnson, who neglected his affairs, which was the cause his interest was not propounded. Tyndall never denied Thomas's interest. We have cited the next of kin to shew cause why the administration should not be revoked, as surreptitiously obtained, and on false suggestions, because the administration recites that deceased made no executor or residuary legatee, whereas we now undertake to plead and shew Thomas is residuary legatee, and as such ought to have the administration cum testamento, and we have an affidavit to shew that Thomas gave power to Johnson to take care of his affairs, but he neglected them.

Act dated 4th sess. Easter Term, 9th May, 1752, read.

Tyndall alleged the appointment of James Thomas as executor and residuary legatee to deceased, was revoked by deceased, and no proctor for Thomas alleged the contrary.

Act 4th sess. Mich. Term, 1752, read.

Tyndal appeared under protestation.

JUDGMENT—SIR GEORGE LEE. I was of opinion the administration cum testamento [174] was well granted to the next of kin, upon Thomas's not setting forth his interest as residuary legatee, according to the assignation of the Court, and though the recital in the administration was not according to the common course in like cases, as it did not set forth that it was granted to the next of kin upon Thomas's not propounding his interest ; yet I thought that not material, for the suggestion was not false, because, so far as appeared to the Court, he was not residuary legatee, since time was given him to shew that he was, and he had not attempted to do it, and he might have appealed from decreeing the administration ; but as he had not, and was clearly a party throughout the former suit, and originally began it, I was of opinion the grant of the administration was a res judicata, and that Thomas could not now controvert it, and therefore I rejected his petition that he might now be at liberty to plead, and shew he was residuary legatee in deceased's will ; and dismissed the next of kin, but did not give costs.

(IN CHAMBERS.)

HARRIS against JONES. Prerogative Court, December 19th, 1752.—A trust under a will held to have expired, because it had not been filled up according to the direction of the testator.

Dr. Hay for Harris. John Butterworth, deceased, made his will on 10th April, 1730; gave to his wife all his estate for her life, and gave her power to dispose of one-fourth of it by her will, or otherwise; the remaining three-fourths he gave to Eleazer Edwards, Samuel Stanley, and William Bentley, in trust to subdivide said three-fourths into four equal parts; three-fourths of the said [175] four equal parts he gave to Thomas Jones, husband of deceased's sister Elizabeth, and to deceased's own two sisters, Hannah and Mary, equally to be divided among them, and to hold for their respective lives, and on their or either of their deaths, to go to their issue, and expressed his meaning to be that the trustee should take out of the share of Jones and the deceased's two sisters ten pounds yearly, to be divided amongst the three trustees, to continue till the trust is fully discharged; the other fourth part he gives to the trustees, to be distributed as they think proper, paying out of it ten pounds to deceased's nephew, Joseph Atkins, and five guineas to Joseph Pottinger; and then devises in these words: "And in case it shall happen that either of them (the trustees) shall depart this life during the life of my wife, or before the trusts hereby reposed in them are fully discharged, that the survivors of them shall nominate any other as they shall mutually agree upon, in case the party dying shall not have named one to supply his place, which said person shall, immediately upon taking upon him the burthen of the trusts hereby created, be esteemed as the person so dying, and shall be entitled to a proportionable share of the legacy hereby bequeathed to the trustees." Deceased made Mary Butterworth, his wife, executrix for her life, and then substituted the three aforesaid trustees, his executors. The wife proved the will, but took no notice of a codicil which bears even date with the will; Samuel Stanley died before deceased's wife, and made no appointment of a successor: Edwards and Bentley, after the wife's death, took probate, and appointed one Dennison in the place of Stanley; Dennison died, and they, in like manner, appointed Peter Davenport, who died [176] without making any appointment. 19th February, 1739, the wife being then dead, Edwards and Bentley took the probate; Edwards, by writing under his hand, appointed William Harris his successor, and Edwards died in January, 1751; Bentley died in May, 1751, without making any appointment. 3rd June, 1751, administration de bonis non, cum testamento was granted to Thomas Jones, one of the three substituted residuary legatees, on suggestion that the trustees had not appointed any successor. 25th August, 1752, Fanshaw brought in the codicil and appointment of William Harris, and took out citation against Jones, to bring in the administration, and to shew cause why it should not be granted to Harris, and to exhibit an inventory. The decree was personally served, and returned 14th September, 1752, and continued to the first session of Michaelmas Term, 1752. Cæsar appeared for Jones, and denied Harris's interest. We have proved Edwards's appointment of Harris.

Dr. Pinfold for Jones. Agreed the facts were truly stated by Dr. Hay; insisted that deceased intended always to have three acting trustees; that Harris did not pretend to any right, either upon the death of Edwards or Bentley. The question is whether the appointment of Harris is agreeable to the will.

JUDGMENT—SIR GEORGE LEE. I was of opinion the appointment of Harris was not agreeable to the will; he ought to have been appointed by Edwards and Bentley jointly to act with them in the stead of Stanley, and that then Edwards might regularly have appointed some [177] person to have acted as his successor upon his death, so that there might have been always (pursuant to the intention of the will) three acting trustees; and this appeared to be the testator's meaning, by giving to every new appointed successor a proportionable share of the legacy left to the trustees. But as Harris never had accepted the appointment, either by acting jointly with Edwards and Bentley, or after Edwards's death by acting with Bentley as successor to Edwards, I was of opinion the trust had not been regularly filled up, and that therefore it expired with Bentley, the last surviving trustee; and therefore I pronounced against Harris's interest, and confirmed the administration cum testamento granted to Jones, but gave no costs.

CARDALE *against* HARVEY AND OTHERS. Prerogative Court, Michaelmas Term, December 19th, 1752.—The Court is not obliged to grant an administration de bonis non to the person having the largest interest in the personal property of the intestate.

William Rawlins died in 1735, a widower, intestate, left two sons, Thomas and William, and three daughters—Mary, who married Harvey, Catherine, who married Dennis, and afterwards married William Cardale, clerk, and Ann, who married George Bell. In January, 1735, administration was granted to all the five children jointly; 9000l. of the estate was soon after distributed. Thomas and William Rawlins and Mary Harvey died; Catherine Dennis and Ann Bell the surviving administrators gave letter of attorney to Harvey, their brother-in-law, to manage the affairs of the intestate's estates, but he not acting to their liking, they in 1738 appointed one Borlace to manage their said affairs in Harvey's room. Catherine Dennis [178] married Cardale, and she and Ann Bell are since dead, leaving goods unadministered. One of the brothers left two or more children, to whom he by will bequeathed his estate, and made Borlace his executor and testamentary guardian to his children. Cardale took administration to his wife, Catherine, and as such prays administration de bonis non to William Rawlins the intestate in this cause, and George Bell, the husband of Ann Bell, one of deceased's daughters, and administrator to her, joins with him. George Borlace, as testamentary guardian of William Rawlins, grandson to the deceased, and who under his father's will is likewise entitled to a share of the intestate's estate, also prays administration de bonis non, and Harvey, husband and administrator of Mary, one of deceased's daughters, joins with him.

Dr. Pinfold, counsel for Borlace. Insisted that the Court must grant it to the grandson's guardian for his use as next of kin to deceased, and relied on the case of (*a*) *Kindleside and Cleaver* in the Delegates, where the judges held that an administration de bonis non is within the statute of 31 Ed. 3, ch. 11, and must be granted to the next of kin, as well as a simple administration.

JUDGMENT—SIR GEORGE LEE. But I think that case does not extend to other grants of administration de bonis, for there the case was that a feme covert died intestate, leaving a daughter, Cleaver, by a former husband; *Kindle*-[179]-side, deceased's husband, took administration to her, made his will and appointed his son by a former wife, William Kindleside, his executor, and died; William Kindleside took probate of his will, and then prayed administration de bonis of his mother-in-law's estate as having the interest; Cleaver, the daughter of the intestate, likewise prayed it, and the Judge of the Prerogative held she as next of kin to the intestate was entitled to it, though the interest was in the representative of the husband, and the delegates were unanimously of the same opinion, but in that case the daughter was next of kin to the mother at the time of the death of the intestate, and if she left choses in action, the property of which the husband had not altered, she also was beneficially entitled to them, though the husband as such by special privilege was entitled to the administration and her other effects; whereas the grandson was not next of kin at the time of the intestate's death, though he was now become so. However as the grandson had an interest in the intestate's estate under his own father's will, and was a lineal descendant of the intestate, and now at the time of granting the administration de bonis was the intestate's next of kin, I decreed the administration de bonis to George Borlace, the guardian of the minor grandson, and for his use, notwithstanding Cardale had somewhat a greater interest, and I think the administration de bonis non is well granted, because wherever it is granted to one, who at the time of the grant is next of kin, it is granted agreeably to the statute, and therefore is legally granted, and in this case the grandson had an interest in the intestate's estate, and though it is a good general rule to grant administration to the largest interest, yet that is [180] only introduced by practice, not by any positive law, and the Court is not obliged to grant it to the largest interest. I did not give costs.

(*a*) *Kindleside v. Cleaver*, Deleg. 1st July, 1748. Delegates: Mr. Justice Wright, Mr. Justice Birch, Drs. Walker, Simpson, Pilford, jun., Chapman and Collier. This appeal was from a decision of Dr. Bettesworth, Prerog. 1745, see 1 Hagg. E. R. 345.

(IN CHAMBERS.)

SEEMAN *against* SEEMAN. Prerogative Court, December 22nd, 1752.—Not necessary that a testator should be in his senses at the time, alterations are made in his will, provided he was so when he directed the alterations.

Dr. Pinfold for Magdalen Seeman. Isaac Seeman died 4th April, 1751, at a quarter past seven in the evening. He had made his will on 6th August, 1735, executed and attested by three witnesses, and he had appointed his wife sole executrix and residuary legatee; he gave several legacies to his relations, amongst them a legacy of one hundred guineas to his sister, Magdalen Seeman, my client. Almost all the legacies now appeared to be obliterated, and particularly that of one hundred guineas to his sister Magdalen.

Phillips for Magdalen Seeman, entered a caveat against proving the will. Hughes appeared for Elizabeth Seeman, the widow, and gave an affidavit of scripts and scrolls. Hughes denied Magdalen's interest; she gave an allegation propounding it, and has examined one witness to shew that the obliterations were not made till after the deceased was dead. Hughes, for the widow, has given an allegation to prove the contrary, and has examined two witnesses. It is proved that the deceased declared affection for his wife, and that he would strike out the legacies in her favour, but he did nothing till the day he died; he then [181] called for his will, and ordered his wife to strike them out, but she would not; he then sent for his apothecary, Badon, and one Caton, a neighbour, who says the deceased was dying when he came in, and that Miss Johnstone, the widow's niece, struck out the legacies after the deceased was dead; it is certain the will was not read to the deceased after the obliterations were made. The question will be whether the obliterations were made before or after the deceased was dead.

Dr. Hay *contra*, for Elizabeth Seeman, the widow. The deceased died at a quarter past seven in the evening of 4th April, 1751. His circumstances had decreased, and therefore he intended, for the benefit of his widow, to leave out the legacies. About six in the evening on which he died, he expressed great uneasiness that his will was not altered, and desired his wife to do it, but she would not, because there were not witnesses present; the deceased then ordered his maid to fetch Mr. Badon, his apothecary, and Mr. Caton, a neighbour, to be witnesses; when Caton came in, the deceased said to him, "I am full in my senses;" immediately after Caton came in the legacies were struck out by Miss Johnstone and the widow together; the deceased died soon after, and Miss Johnstone left off as soon as Caton or somebody in the room said the deceased was dead.

Witness for Magdalen Seeman.

George Caton. "The deponent had no acquaintance with the deceased; only knew him by sight, but the day he died the deponent was sent for to go to his house; he went into the de-[182]-ceased's chamber; he was then dying, and, as the deponent believes, entirely insensible; the widow was then in the room; a paper, which he believes was the deceased's will, lay on a table in the said room, and was then fair, and without any obliterations as the deponent saw; after he had been in the room three or four minutes, somebody said the deceased was dead, and thereupon Miss Johnstone, niece to the widow, made several scratches on the will with a pen and ink, and then the widow did the same; and she then offered to read the will to the deponent, but he refused to hear it; the widow then went to the fire to dry the will; the apothecary and several others were then present; the deponent cannot say what legacies were struck out, but verily believes the several legacies now appearing to be obliterated were so obliterated after it was said the deceased was dead."

Witnesses for the widow.

Jane Baptist. The deponent has several times heard the deceased say some of the legacies should be struck out of his will; she heard him say so within a year of his death; the deceased had a great affection for his wife.

Jane Johnstone. The producent is the deponent's aunt; the deponent has known the deceased for twelve years before his death, and has frequently heard him say he

had made his wife executrix and residuary legatee ; and often said his circumstances grew worse every day. A short time before his death, the deceased said he would alter his will, and put out the legacies ; the deponent told him she had heard he said so ; he replied, "Aye, there is not so much to leave," [183] and said it peevishly. The deceased had a great affection for his wife, and shewed it on all occasions ; he had had the gout for three weeks before he died. About six in the evening of the day he died, he declared he apprehended his death was near, and ordered his wife to fetch his will, and to put out the legacies ; she replied she could not do it, as there were no witnesses present ; but she fetched the will ; the deceased seemed very uneasy that his apothecary had not staid, and speaking to his wife, said, "Do you do it, or let Jenny do it, or any body do it," or to that effect ; and immediately ordered the maid to send for Mr. Badon, the apothecary, and to go herself to Mr. Caton, a near neighbour and intimate acquaintance of the deceased's, in order, as the deponent apprehended, to be witnesses to his altering his will ; the deponent sent the maid for Badon ; and went herself for Caton, and met him in the street ; he went with the deponent to the deceased's house ; the deceased was sitting up in a chair by the bedside, when he ordered his will to be fetched ; but afterwards turned himself off the chair on his bed. Caton came into the room with the deponent, and went to the deceased's bed and asked him how he did ; he replied, "I am in my full senses." The will then lay on a table, and pen and ink by it ; and the deponent, immediately after Caton came into the room, and before Badon came, struck out several of the legacies, and the producent darkened them by making the scratches broader, but the deponent was in so much hurry, because the deceased was then dying, that she cannot say whether she struck out all the legacies, or whether the producent struck out some. The deceased died about [184] a quarter after seven in the evening ; all the legacies were obliterated by the deceased's own hand, and the deceased was sensible till after Caton came in.

1. Int. The obliterations were made in the deceased's room ; he was dying while the respondent made them ; he was sensible when the respondent began ; Caton was in the room all the time while the respondent was making the obliterations ; Caton said the deceased was dead, and then the deponent stopt. Caton and Badon both saw what was done ; Caton told the respondent she did not know what she was about. 2. Int. None of the obliterations were made before Caton came in ; she believes that on Caton's coming in, the producent said that the deceased was dying.

The will was read.

Dr. Pinfold's argument for Magdalen. Caton is entirely disinterested ; Johnstone is niece to the producent, and therefore under some bias ; Caton and Johnstone widely differ as to the deceased's being sensible. The deceased did not voluntarily speak to Caton, and he says the deceased was, he believes, entirely insensible. It does not appear that anybody told Caton what was the occasion of his being sent for ; Caton says he had not been in the room above three or four minutes before somebody said the deceased was dead ; if the deceased was not in his senses, he was the same as dead ; for the alterations must be made in the testator's presence, and the presence of one who knows not what is doing, is the same as if he was absent.

[185] Dr. Hay for the widow. The question is whether the deceased was dead before the alterations were made, not whether he was insensible ; if it is not certain that the deceased was dead before the alterations were made, but it is only doubtful whether he was then dead, or alive, the Court will follow the deceased's intentions, which are clearly proved to have been that the legacies should be struck out, and will decree probate of the will to pass to the widow with these obliterations as they now stand.

JUDGMENT—SIR GEORGE LEE. I was of opinion that the deceased's intention to have the legacies struck out was fully proved ; and that it was his settled desire to his death ; that his intention was founded on good reason, or the decrease of his fortune, and the regard he had for his wife, to whom he could not leave a sufficient maintenance.

I thought the weight of the evidence, both from positive testimony, and from circumstances, was greater in support of the assertion that he was alive when the alterations were made in the will, than in support of the contrary assertion ; and I agreed with Dr. Hay that if it was doubtful whether the testator was alive, or not,

when the alterations were made, the Court ought to go as far as it could by law, to support the testator's manifest intention.

I likewise thought it was not necessary that the deceased should be in his senses at the instant the alterations were made; it was sufficient that he was fully in his senses when he directed the alterations to be made, and that they were made in [186] his lifetime; in the case of *Garnet v. Sellars*,^(a) Delegates, the only questions were whether the deceased was in his senses when he gave instructions for his will; and whether the will was reduced into writing before the testator was dead; and the [187] Court being satisfied in those two points, pronounced for the will without enquiring whether he remained in his senses during the time the will was writing.

I further observed that though Magdalen was the only legatee who prayed that her legacy might be reinstated in the will, yet she had offered no evidence in support of her particular legacy; but her evidence equally extended to reinstating all the other legacies which were struck out; and yet nobody prayed them to be reinstated, and it would be going too far for the Court *ex officio* to order all the legacies to be replaced in the will.

Upon the whole I rejected Magdalen Seeman's petition, and decreed probate to pass to the widow, of the will with the obliterations as they then stood: but I did not give costs.

(IN CHAMBERS.)

FRANCO AND FRANCO *against* ALVERENZA AND DE PINNA. Prerogative Court, January 30th, 1753.—Although the Prerogative Court cannot try a debt, yet it can try whether the affidavit of a debt is sufficient.—A commission of appraisement decreed in the presence of the adverse proctor, without any objection taken on his part, held to be final, although the commission was ordered not to issue under seal for ten days.

[See further, p. 659, post.]

Upon a motion for a commission of appraisement.

Dr. Paul for Alvarenza and De Pinna. Daniel de Flores alias De Prado, deceased, appointed his two daughters, and Abraham and Jacob Franco his executors; the

(a) *Garnett v. Sellars*, Deleg. 23d November, 1751. The Judges Delegates present at the sentence were Mr. Baron Clive, Mr. Justice Birch, Dr. Simpson, Dr. Pinfold, jun., Dr. Collier, Dr. Ducarel, and Dr. Drisdale.

This case is again referred to by Sir George Lee in his judgment of *Helyar v. Helyar*, Prerog. Jan., 1754, where the circumstances are given more in detail. One peculiarity, however, which occurred in the cause, is not stated (nor was it necessary for the point then under consideration that it should be), viz. that there was a failure of proof as to one clause of the will, as will be seen from the following extract of the sentence as it stands recorded in the Assignment Book of the High Court of Delegates:—"The judges pronounced, &c. &c. that the judge from whom the cause is appealed had proceeded wrong in pronouncing for every part of the will, or testamentary schedule, pleaded and propounded on the part of Hughes' client, in the first instance of this cause, and in decreeing probate thereof, for that it did not appear by the proof in this cause that the deceased in this cause gave direction for that clause in the said testamentary (so in the original: doubtless the word "schedule" is omitted), whereby the said deceased is declared to stand a purchaser for the leasehold estate, late belonging to William Tuffnell, in trust for George Garnett, but that in all other respects he had rightly and duly adjudged and decreed. Wherefore, the Judges Delegates aforesaid revoked the decree of the judge from whom this cause is appealed, so far as the same pronounced for the said clause containing the declaration of trust as to the estate purchased of the said William Tuffnell; but in all other respects they confirmed the said decree, and decreed probate of the said will, or testamentary schedule, so as aforesaid pleaded and propounded on the part and behalf of the said Hughes' client, in the first instance of this cause, dated 14th April, 1749, to the executor therein named; omitting the said clause containing the declaration of trust as to the estate purchased of the aforesaid William Tuffnell; but gave no costs to either party; and, lastly, the judges, at the petition of Hughes, decreed a monition for transmitting the said original will, or testamentary schedule, bearing date 14th April, 1749."

Francos have taken probate; he was at his death indebted to De Pinna, 585l. 5s. In June, 1743, De Pinna [188] was insolvent, and was afterwards discharged on the Insolvent Act of Parliament. Alvarenza, as assignee of De Pinna's effects, prayed a commission of appraisement of De Flores' estate; 6th November, 1752, De Pinna's affidavit of said debt being exhibited, the Court decreed commission of appraisement to pass under seal in ten days from that time, and ordered each party to name commissioners; 15th November, 1752, within the ten days, H. Farrant, proctor for the Francos, alleged that De Pinna was indebted to deceased, instead of deceased being indebted to him, and offered to confess sufficient assets; De Pinna's affidavit is full.

Dr. Hay, same side. We have an affidavit of Alvarenza as well as of De Pinna, to prove the debt; the only question is whether the commission which is decreed shall go under seal.

Dr. Simpson for Francos. Caveat being entered and warned on 17th October, 1752, Tyndall appeared for De Pinna, and prayed commission of appraisement.

1 Sess. Mich. 1752, Crespigny appeared for Alvarenza, and alleged him to be a creditor to deceased in 585l. 5s., and exhibited De Pinna's affidavit in proof of the debt, and prayed the commission before prayed by Tyndall to go under seal. Farrant then in Court, and did not oppose, believing there was a proper affidavit. The affidavit is general; does not set forth cause of debt, and Alvarenza did not say he had not received satisfaction; Francos admitted assets, declared they would not plead plene administravit, and al-[189]-leged that De Pinna was a debtor to De Flores. Crespigny now insists that the decree of the 6th November was final, and that the commission ought to pass the seal.

8th December, 1752, Alvarenza and De Pinna gave in further affidavits. De Pinna swears that at the time of his insolvency, De Flores owed him 585l. 5s. for which he has had no satisfaction, and Alvarenza swears he believes De Pinna has sworn true. De Pinna was insolvent in June, 1743; in February, 1744, De Flores swore in Chancery that De Pinna was debtor to him before his insolvency above 1000l. upon the balance of an account. 10th November, 1741, Lord Chancellor decreed that an account should be taken by a master of what De Pinna owed to De Flores; that suit is still depending, and this pretended debt is upon a matter of an unsettled account. By said decree in Chancery of 10th November, 1741, 200l. bank stock was ordered to be transferred by De Pinna to trustees, as a security for Flores.

Evidence for Alvarenza.

Act of Court of 17th October, 1752.

Farrant prayed probate; Crespigny assigned to set forth Alvarenza's interest; Tyndall for De Pinna alleged him to be a creditor to deceased, and prayed commission of appraisement and monition to shew deceased's effects, which the judge decreed, and assigned Tyndall to extract it by first session next term, his client making oath of his debt; probate decreed, undergoing monition, &c. in case De Pinna makes oath of his debt.

1st Session Michaelmas Term, 5th Nov., 1752, Crespigny alleged Alvarenza to be a creditor in 585l. 5s. and brought in affidavit of his debt; [190] commission returnable last session of this term; commissioners to be named in ten days, otherwise to go ex parte; present Farrant and Tyndall, praying nothing.

2d Session, 5th November, 1752, Farrant alleged it does not appear by the affidavit exhibited by Crespigny, that deceased was indebted to his client; and therefore that he is not entitled to commission, &c. and prayed to be heard.

Affidavit for Alvarenza.

Isaac Lusitano de Pinna, sworn 3d November, 1752. Swears positively that deceased was indebted to him in 585l. 5s., no part of which he, or, as he believes, his assignee, has received.

Offered to read Alvarenza's affidavit, which was made and exhibited since 6th November, 1752, and at same time objected that the affidavits of Francos could not be read, because this Court could not try the validity of the debt; it must be taken upon the affidavit of the creditor, and could not be controverted.

Dr. Paul, on that point, cited *Rupert Brown's case* and *Hughes and Bulkeley*, (a) in the

Delegates; [191] there must be a certain sum sworn to; May, 1748, Prerog., *Smart and Cross v. Mitchell*, Smart and [192] Cross, as creditors, made oath of debt, and prayed commission, Mitchell confessed assets, but Court decreed commission.

JUDGMENT—SIR GEORGE LEE. I was of opinion that if they read Alvarenza's affidavit, the affidavits of the Francos, in answer, ought to be read; for though this Court cannot try the debt, yet it can try whether the affidavit of the debt is a sufficient one; for though De Pinna has sworn to a certain sum, yet if it shall appear from the counter-affidavits that his demand arises upon an unsettled account, his affidavit, according to the settled determinations of this Court, was not [193] sufficient to obtain a commission. But I suggested to the counsel for Alvarenza, that if they read the affidavit of Alvarenza which was made subsequent to 6th November, they would give up thereby their first point, viz., that the decree of the 6th November was final, and consequently that the matter was *res judicata*; which point I thought ought first to be determined, for it would be to no purpose to go into the affidavits if I had already made a final decree which I could not alter; and thereupon that point was argued, and the counsel for Francos insisted that they were in time to oppose the commission issuing

(a) Hughes, I think, is clearly a misnomer, or rather, owing to a clerical error, the name of Hughes has been written for that of Lewis. Subjoined is an exact transcript of a very valuable note of the case of *Lewis v. Bulkeley*, Deleg. 1732-3, which I have found amongst the MS. papers of Sir George Lee. The internal evidence is such as to leave no doubt but that it is the case alluded to.

Delegates, Serjeants' Inn, Fleet-street, February 13, 1732-3, coram Judges Page, Probyn, Fortescue, Thompson, Lee; Doctors Tindall, Pinfold, Strahan, Audley, Kinaston, Isham, Bramston, Cottrell.

Lewis et Lewis contra Bulkeley per Carem.

[See p. 513, post.]

This cause began originally in the Consistory Court of Bangor, upon the will of one Mary Williams, alias Hampton, and was appealed from thence to the Arches, where the first sentence was affirmed, and from thence to the Delegates.

In the first instance William Lewis, Esq., was examined as a witness, who, in an interrogatory put to him, deposed that he was a legatee in the said will, in a piece of plate which he had since received, and was worth about eight pounds, and added that if the will should be set aside he would be entitled to an equal share of the deceased's effects with Ann Lewis, the opponent in this cause. The deposition of this witness was read in the Court at Bangor, but in the Arches it was objected that he had a specific legacy, which, if the will should be set aside, might be recovered again from him by the administrator, and, therefore, he having an interest under the will, could not be a witness to support it. Dr. Bettesworth, dean of the Arches, was of opinion the objection was good, and would not suffer his deposition to be read; and this rejection of him was not appealed from; but afterwards, when the cause was heard in the Delegates, on the 5th December, 1732 (the rejection of this witness not having been entered in the minute book of the Arches Court), the counsel for the will offered to read his deposition there, upon which the counsel for the other side made the same objection to him that had been before made in the Arches; and after much debate, the Court was divided in opinion; to wit, Judge Page, Judge Fortescue, Dr. Tindall, and Dr. Pinfold were of opinion that he was a good witness: Judge Lee (afterwards Lord Chief Justice Lee, brother to Sir George Lee), Dr. Audley, Dr. Bramston, and Dr. Cottrell, were of the contrary opinion: whereupon a commission of adjuncts was obtained, and on 13th February, 1732, this point was solemnly argued before the whole commission, as above-named, the majority of whom were of opinion he was a good witness, and that his deposition ought to be read.

It was agreed by all the judges of the common law that if the will should be set aside, the administrator might recover the legacy by an action of trover, and they seemed to agree that there was no difference between this and a pecuniary legacy, for in that case also, if the will wherein such legacy was devised, was set aside, the legacy might be recovered from a legatee who had received it by an *indebitatus assumpsit*;

under seal; (a)¹ for though it was decreed on 6th November, yet the decree was not complete till it was under seal, and before the ten days given for naming commissioners was expired, they had objected to the affidavit of the debt, and therefore the decree of the Court was not yet final, since the seal was not yet affixed to the commission.

But I was of opinion the decree for a commission of appraisement made on 6th November, in presence of H. Farrant, proctor for Francos, who neither objected to the affidavit or to granting the commission, was final, though the commission was not to pass under seal till ten days after, because the Court was to make no further order thereon; for it was then decreed to pass under seal, and the actually putting the seal to it was a ministerial act of an under officer, in consequence of that decree; that if they had not appealed from the decree, they could not appeal from setting the seal to the commission, no more than a man who has [194] not appealed from a decree of excommunication can appeal from a significavit, which is consequential upon the excommunication; so if the Court pronounces against a will and decrees administration to the next of kin, but orders it not to pass under seal till fifteen days after, if the adverse party neglects to appeal within the fifteen days from that decree, he cannot afterwards appeal from setting the seal to the letters of administration; and in this case, if the decree on 6th November was complete and final, I was functus officio, and was not at liberty to consider the affidavits, or any thing that has been done subsequent, and therefore I rejected Farrant's petition, and ordered the commission of appraisement to pass under seal; but the time for naming commissioners and for the return being elapsed, I allowed ten days de novo for naming commissioners on the part of Farrant's clients, and directed the commission to be returnable on the 15th of March, 1753.

Appealed, but my decree was affirmed (a)² by the Delegates, 25th June, 1754, and the cause remitted.

so that they seemed to agree that the objection would lie, with regard to their being interested, against all witnesses that were legatees of any sort, unless they renounced their legacies in proper form; but those of the commissioners who were of opinion that he was a good witness seemed to found their judgment on his answer to the interrogatory, in which Lewis swore he was entitled to share in the distribution under an intestacy, and from thence argued that he could be under no bias, because he must have a better interest to set this will aside than he could have under an eight pounds legacy to support it. The judges who were of the contrary opinion argued that the rule of law that no person could be a witness where he had an interest, was clear and determined; and that the smallness of the interest did not alter the general rule; that the interest under the will was clear and certain, whereas that under an intestacy was uncertain, there being no constat of the quantum of the estate, nor of the degree he stood in as to distribution, and, therefore, an uncertain interest could not be set in competition with one that was certain.

The judges who were of opinion that the deposition of Lewis ought to be read were Judge Page, Judge Fortescue—Tindall, Pinfold, Strahan, Kinaston, Isham, Bramston, Doctors. The judges of the contrary opinion were Judge Probyn, Baron Thompson, Judge Lee—Audley, Cottrell, Doctors.

In this case I was of counsel: vide my notes. (MSS. Cases of Sir George Lee.)

(a)¹ A similar point was raised in the case of *West and Smith v. Wilby*, 3 Phill. 379.

(a)² The Judges Delegates present at the sentence were Mr. Justice Foster, Mr. Baron Smythe, Dr. Walker, Dr. Collier, Dr. Smalbroke, and Dr. John Bettesworth.

The minute in which the sentence is embodied shews that a question was raised before the Delegates as to the nature and extent of the appeal; it is as follows:—

“Crespigny alleged that the appeal interposed in this cause did not extend to the acts or decree of the judge from whom this cause is appealed, of the 6th and 15th Nov., 1752, and that the judges were limited to enquire into the act of the judge of the 30th January, 1753. Farrant alleged that the appeal by him interposed did extend to the acts of the 6th and 15th Nov., 1752; and prayed that the judges would enquire into and determine the said acts.

“The judges, having heard advocates and counsel and proctors on both sides, were of opinion that the said appeal did not extend to the acts of the 6th and 15th Nov.,

[195] SUDYER AND SUDYER *against* MAN. Prerogative Court, January 30th, 1753.—A witness produced and examined who had a legacy of a ring under a will, without renouncing or receiving his legacy. Application before publication that his deposition should be suppressed, and that he should renounce his interest and be re-examined, acceded to.

Dr. Paul for Sudyer. John Sudyer, deceased, has made his will, and appointed James Sudyer his son, and William Suyder his brother, executors, who have propounded the will; Elizabeth Man, deceased's daughter, opposes it. The executors produced and examined Samuel Whitbread as a witness, who has a legacy of a ring in the will, without renouncing or receiving the legacy; he has been cross-examined by Man, but the depositions are not published, nor is the term probatory expired. We pray that his deposition may be suppressed, and that he may be at liberty to renounce or receive his legacy, and may then be re-examined; a witness examined without renouncing may afterwards renounce and be re-examined. Prerog. *Hill and White*, Lewis Ormsby, a witness, examined to prove General Sannay's will, without renouncing; did afterwards re-[196]nounce, and was re-examined. Prerog. *Hughes and Voxley*, one of the proctors in the cause examined the witnesses; Court suppressed the depositions, and ordered the witnesses to be re-examined.

Dr. Hay for Man, chiefly urged that Whitbread ought not to be re-examined, because he had been cross-examined, and thereby, knowing the interrogations, might frame his new deposition accordingly.

JUDGMENT—SIR GEORGE LEE. But as the witness was examined only upon a common condidit, I thought there could be no danger of that sort, and ordered the deposition of Samuel Whitbread to be suppressed, and that he should renounce or be paid his legacy (see *Cooper v. Derrienic*, 1 Hagg. E. R. 483), and then should be examined again; and ordered Cheslyn, proctor for Sudyer, to pay 1l. 6s. 8d. to Adderley, proctor for Man, for costs; whereupon Adderley declared he would consent in acts of Court that the present deposition should be read, and that he would not object against the witness at the hearing of the cause as interested; which consent of the proctor was entered in acts of Court; but for the greater security, I directed he should exhibit a proxy from his client, authorising him to give such consent.

[197] (IN CHAMBERS.)

HARRISON BY HER GUARDIAN *against* RHODES. Arches Court, Hilary Term, February 8th, 1753. A legacy held to carry interest from three months after the death of the testator.

On admission of a libel in a cause of legacy.

Mary Rhodes made her will, dated 30th Aug., 1748; appointed Samuel Rhodes, executor, who took probate; she gave a legacy of 100l. to Elizabeth Harrison, her niece, a minor, "to be paid her by my executor within three months after my decease." Harrison is a minor about eight years old. Ann Harrison was appointed guardian to her in June, 1752. Deceased died in 1748. The guardian sued for the legacy with interest from the expiration of three months from the deceased's death.

Dr. Paul for Rhodes, the executor—opposed giving interest longer than from the time when the legacy was demanded, and moved that it might be specified in the libel, when it was demanded; said his client was ready to tender the legacy with interest, from that time cited. Precedents in Chancery, 161, *Jolliff v. Chew*, legacy shall not carry interest till it is demanded.

1752, and that they were restrained from enquiring into, or determining upon, any other act than that of the 30th January, 1753.

"Crespigny and Farrant produced definitive sentences in writing which for their respective parties they prayed to be read, signed, and promulged, and given.

"The judges ordered the sentence porrected by Crespigny to be read, which was read accordingly (the clauses which related to costs being first struck out), pronouncing, remitting, declaring, and doing in all things as are therein contained, there being many witnesses present."

Dr. Hay contra, for Harrison. 2 Salkeld, 415. [198] *Snell v. Dee*, (a) if a legacy is devised generally, interest shall be paid to a minor from the end of the year from the testator's death; but a major shall have interest only from his demand; where a legacy is left from a day certain, interest shall accrue from that time.

JUDGMENT—SIR GEORGE LEE. I admitted the libel as laid, and declared my opinion that interest was due from the three months after the testator's death, because it was a legacy to a minor and her niece, and because, by limiting a day for payment she had expressly shewed her intention that the executor should have advantage of the money only for a short time, while he could collect in the effects, and it must be presumed he had made interest of the money; but as a guardian was appointed but in June last, I thought he was not in mora.

Mr. Cheslyn, proctor for the executor, prayed till next court to consult with his client whether he should tender the legacy with interest from the three months; which I granted, and condemned his client in 1l. 6s. 8d. costs for the motion.

[199] PATTEN *against* CASTLEMAN. Arches Court, Hilary Term, February 8th, 1753.—A sentence of excommunication reversed because it was clear from the process that the party had complied with the order of the Court, for the alleged neglect of which he had been excommunicated.

[See further, p. 387, post.]

Appeal from the Consistory Court of Bath and Wells upon a grievance.

Dr. Pinfold for Patten. The Rev. Mr. Castleman brought a suit against Patten for a marriage fee; gave in his libel in April, 1752; lays that Patten's wife was his parishioner, and was not married at his church, and therefore sued for the customary fee of five shillings.

5th of May. Patten gave a negative issue. Decree for his answers.

16th of June. Patten sworn and admonished to answer next Court, 23d of June; he did not appear, was pronounced contumacious; his pain reserved to the 3d sess. 14th July.

4th of July. Patten is assigned to give in his answers this day, and the term probatory is continued; in the morning only witnesses produced; Judge adjourned till four in the afternoon, and then at four adjourned immediately to the Chancellor's house; at his house the Chancellor admonished Patten to give in his answers immediately. The minutes do not carry what further was done.

21st of July. On its being alleged that Patten's answers were not given in, the Judge pronounced him contumacious, but reserved his pain to next Court.

28th of July. Judge decreed publication, and Castleman's proctor alleged Patten's answers were not given in; Patten's proctor alleged that on the 14th of July, Patten delivered a paper at the adjournment of the Court, and owned them to be his [200] answers, and subscription thereto, and left them with the register. Castleman's proctor denied the said allegation. The judge decreed Patten to be excommunicated. We appeal from this excommunication. Patten's answers are transmitted in the process, in these words: "The tenor of the paper alleged by Gell, proctor for Patten, on the 28th of July, to be exhibited by Patten on an adjournment of the Court to Mr. Chancellor's house, and owned to be his answers, and his subscription, and left with the Deputy Register," and then follows the personal answers signed by Patten.

Dr. Paul contra, for Castleman. 14th April, 1752, citation returned; 14th July, Patten was to give in his answers; it does not appear by the process that answers were given in on 14th July.

JUDGMENT—SIR GEORGE LEE. I was of opinion, though it did not appear from the act of 14th July, that Patten's answers were given in; yet it appeared clearly

(a) The point decided by Lord Chancellor Cowper in the case of *Snell v. Dee* was that wherever the time is annexed to the legacy itself, and not to the payment of it, it becomes a lapsed legacy, if the legatee dies before the time expires. 2 Salkeld, 415. See also 1 Brown, 298, and 3 Brown, 473.

from the process under the judge's seal, and the Register's certificate as above that they in fact were given in, because they were transmitted in the process, and it was certainly a grievance on Patten to be decreed to be excommunicated for not doing what he had done. I therefore pronounced for the appeal, reversed the decree, and condemned Castleman in 20l. costs.

[201] HARRY *against* LITTLETON. Arches Court, Hilary Term, February 8th, 1753.— If a person has lands in the parish in which he has cattle for the plough and pail, he is not excused from paying tithes for unprofitable cattle depasturing in another parish. The vicar having insisted on a modus for a less sum than he would be entitled to for tithes of common right, it is not necessary for him to prove the modus in the fullest manner.

(An Appeal from the Consistory Court of Llandaff.)

Dr. Jenner for Littleton. Westcot Littleton, clerk, vicar of Goldcliff, in the diocese of Llandaff, brought a suit for tithes against Edward Harry; sued for a modus of 2d. an acre per annum, for the years 1747 and 1748, amounting in the whole to 3s. 4d., for ten acres of pasture ground in the parish of Goldcliff, fed by Harry with unprofitable cattle. Alleges of any other sum a quantity of tithes, &c. No tender by Harry, but he gave in his answers. Littleton has examined four witnesses; James James, one of them, is proprietor of the said ten acres, which he lets to Harry for five guineas a year; and James also keeps ten other acres in his own hands, for which he paid the vicar 2d. per acre. Harry pleaded that Littleton is vicar of Goldcliff, with the parish or chapelry of Nash thereto annexed, and that he held lands in Nash, and other lands to the amount of nine acres and a half in Goldcliff, which last he fed with cattle, for which he paid tithes in kind at Nash, and sets forth an ancient modus or custom in Goldcliff, that if has paid tithes in one parish, he is not to pay in the other. Littleton was instituted and inducted only to Goldcliff, and sues as vicar thereof. Nash is a separate parish, though Littleton happens to be vicar thereof, and it appears so in Ecton's Valor. 10th September, 1751, sentence at Llandaff, condemning Harry to pay 2d. [202] an acre, as a modus, in lieu of tithes for ten acres of ground in the parish of Goldcliff, which he depastured with unprofitable cattle in the years 1747 and 1748, amounting to 3s. 4d., and condemned Harry in 16l. costs. From this sentence he has appealed.

Drs. Paul and Bettesworth contra. No proof of the modus, nor that the land was depastured with unprofitable cattle.

Witnesses for Littleton.

1. James James, yeoman, æt. 40. Deponent has twenty acres of land in the parish of Goldcliff; ten acres thereof he let to Harry in 1747 and 1748, at five guineas a year, which Harry depastured, and for each acre grazed with dry cattle; 2d. an acre is due by custom to the vicar, and the deponent has paid such modus, and did in the said years pay 2d. an acre for the ten acres he held himself, and presumes Harry ought to pay the same, in case he grazed them with dry cattle. The deponent does not know with certainty that he did.

2. Edmund Harry, æt. 49. Harry held ten acres in Goldcliff, in 1747 and 1748, which he grazed in those years with dry cattle of several sorts, for which lands 2d. an acre is due by custom, as the deponent has been informed, and he believes Harry ought to have paid so.

1. Int. Does not know whether Nash is annexed to Goldcliff. 3. Int. Cannot swear Harry fed the said lands wholly with unprofitable cattle.

3. Thomas Bevan, æt. 40. Proves Harry held ten acres in Goldcliff, which he grazed with dry [203] cattle of several sorts, and there is due by custom 2d. an acre for each acre so fed, as he is informed and believes, and the deponent thinks he ought to have paid such sum to the vicar.

2. Int. Knows of no custom between Nash and Goldcliff. 3. Int. Does not know whether the cattle fed on the said acres were bought for his farm, or to be sold again.

4. Catherine Bevan, æt. 40. Proves Harry had ten acres in Goldcliff in 1747 and

1748, which he fed with dry cattle, for which 2d. an acre by custom is due, as she has been informed and believes.

2. Int. Respondent is not well acquainted with the custom of paying tithes in either of the parishes of Goldcliff or Nash, and knows nothing of a custom between the parishes. 3. Int. Does not know to what use he applied the cattle fed on the said ten acres.

Harry's allegation read.

2. Harry paid all his tithes for 1747 and 1748.

3. Proponent held in Goldcliff nine acres and a half, which he grazed with cattle he bred for the dairy, for which he paid tithes in kind at Nash, and also with dry cows, and with colts and fillies bred for his farm at Nash, for all which he paid the usual moduses at Nash.

4. Denies modus of 2d. an acre is due in Goldcliff for cattle bred paying tithes in Nash.

5. Proponent fed ten acres in Goldcliff with the cattle he bred for the farm at Nash; no sum is due for grazing ten acres in Goldcliff, because proponent lived in Nash, and paid all tithes there in kind, for both parishes.

[204] Witnesses for Harry.

1. Lydia Williams. Harry lived in Nash in 1747 and 1748; deponent was a servant to him in 1747, and then he fed ten acres in Goldcliff with cattle, he fed for the plough and pail, and with some dry cows and colts, for which he paid the usual modus at Nash.

2. David Jenkin. Deponent says Harry lived at Nash; he held nine acres and a half in Goldcliff which he fed with cattle for the plough and pail, for which he paid the usual modus, as the deponent verily believes.

3. William Jones, æt. 58. Harris lived in Nash in 1747 and 1748; deponent formerly held lands in Nash, and at the same time held seven acres in Goldcliff, which deponent grazed with cattle bred for the plough and pail, and with colts and dry cows for which he paid the usual modus to the vicar of Nash, but he paid no such modus as 2d. an acre, or any other sum for such land as he held in Goldcliff, and never heard that 2d. an acre was ever paid or demanded of any occupier of lands in Nash, who held at the same time lands in Goldcliff, on account of such lands in Goldcliff.

4. William Jones, æt. 40. Deponent lived formerly at Nash and at the same time grazed lands in Goldcliff; no modus of 2d. is due from any inhabitant of Nash, who grazes land in Goldcliff.

Dr. Jenner's argument for Littleton. These lands brought no profit to the vicars of Goldcliff, fed with cattle for the farm at Nash. Littleton sues as vicar of Goldcliff; he is instituted and inducted to Goldcliff only, not with Nash annexed, and therefore payment of tithes at Nash will not [205] excuse tithes at Goldcliff (lib. 3, tit. 16); *Lindw. de Decimis*, cap. quoniam. 1 Rolls, 641, tithes shall be paid for cattle which are bred for the plough in another parish. *Hardres*, 184, *Holdbech v. Wadcock*, tithes shall not be paid for the agistment of cattle for the plough in the same parish; but they shall pay for agistment in another parish where they are not used for the plough or pail. No tender was made. Sentence pronounces for 3s. 4d. due as a modus. It lay upon Harry to prove that Nash and Goldcliff were united, and are to be considered as one parish.

Dr. Harris, same side. Three points—1st. Whether there is such a modus as is claimed by the vicar; 2d. Whether the lands were grazed by unprofitable cattle; 3d. Whether the custom alleged by Harry is legal, viz. whether cattle paying tithes in Nash shall thereby be excused from paying tithe of agistment to the vicar of Goldcliff, while they are unprofitable to him. *Swales v. Lowther*, 5 Mod. 96, a layman cannot prescribe in non decimando; and a parish being a collection of laymen cannot prescribe in non decimando. *Hicks v. Woodson*, B. R. 8 W. 3, Lord Raymond's Reports, 137, an hundred cannot prescribe in non decimando with respect to things titheable de jure. *Levinz*, 116, *Bandog v. Bushell*.

Dr. Paul for Harry. Single point, whether a modus is proved. A sequestrator cannot sue for tithes after six months; a custom ought to be proved in the Spiritual Court for forty years back. James, who is but forty years old, is the only wit- [206]-ness to prove the custom; the other witnesses only speak to hearsay.

Dr. Bettsworth, same side. Insisted that the modus of 2d. an acre was not proved.

nor that the ten acres occupied by Harry were fed with unprofitable cattle and that Nash was annexed to the vicarage of Goldcliff, and therefore that the sentence pronouncing for the *modus* ought to be reversed with costs.

JUDGMENT—SIR GEORGE LEE. But I was of opinion the sentence ought to be affirmed; for Harry had put his defence upon a custom that if a man has land in Nash in which he has cattle for the plough and pail, and which pay tithes there he is excused from paying tithes for unprofitable cattle depasturing in Goldcliff, which custom he had not proved; and it would be an absurd and unreasonable custom, unless Nash was a part of the parish of Goldcliff which he ought to have proved, but had not; on the contrary, it appeared clear from Ecton's Valor, that Goldcliff and Nash were distinct parishes, though they now happened to be enjoyed by the same incumbent, and therefore he had totally failed in the proof of his defence. On the contrary it did appear that he had, in 1747 and 1748, depastured barren cattle on the ten acres he held in Goldcliff, for which some tithes were due to the vicar; and if there was not a *modus* he would be entitled to tithes *ad valorem*: that it did not seem to be denied that there was a general custom of paying 2d. an acre in Goldcliff for barren cattle fed there, for Harry had only insisted that he was not subject to such custom, because [207] he paid tithes in Nash: that though the custom or *modus* was not proved by the vicar in the fullest manner, yet I thought a less evidence would be sufficient in this case, because the vicar sued by insisting on the *modus* for a less sum than he would be entitled to for tithes of common right, and therefore was diminishing the legal demand he would have, if there was no *modus* in the parish, and it was clear he was entitled to tithes, or something in lieu thereof, for the ten acres of pasture which Harry held in the parish of Goldcliff in the years 1747 and 1748; and therefore I affirmed the sentence, and remitted the cause, and condemned Harry in 20l. costs.

(IN CHAMBERS.)

SUTTON *against* SMITH AND OTHERS. Prerogative Court, Hilary Term, February 10th, 1753.—An application for an administration *pendente lite* rejected because no special cause for granting it was set forth.

[See further, p. 275, post.]

(On a grant of an administration *pendente lite*.)

Dr. Hay for Ashbury Sutton. Samuel Sutton died in November, 1749; made a will 6th November, 1749, and named Philip Smith executor, who take probate. Deceased left a brother and several nephews and nieces. Ashbury Sutton, one of his nephews, was at Maryland when deceased died; he is since come home, took out process against the executor to bring in the probate, and prove the will by witnesses, &c. Pro-[208]cess returned last Michaelmas Term. Smith has brought in the probate and given in a common *condidit*, and has examined the four subscribing witnesses. The will is in these words:

"I, Samuel Sutton, citizen and brewer, make this testament relating to my niece, Mrs. Elizabeth Edwards, and do give her five pounds a year, for eight years, if she live, to be paid by Mr. Philip Smith, my executor to this will, to be paid on May-day every year. "SAMUEL SUTTON.

"She shall have no more of my effects.

"Signed, sealed, published, and delivered in the presence of us,

"Witness, Elizabeth Sutton,

"John Sutton,

"Joseph Sutton,

"Adam Critch."

Smith has possessed himself of all deceased's effects. The question upon the merits will be whether the executor has any other interest than for the use of Elizabeth Edwards; the present question now is whether an administration *pendente lite* shall be granted. Smith has received several large sums, and several other large sums are now due to deceased's estate. Deceased had an exclusive patent for fourteen

years for extracting foul air out of ships by fire, ten years of which are expired ; and pending the suit, nobody has a right to use the patent. We propose John Prestwick, of London, merchant, to be administrator, and offer £10,000 security.

Dr. Paul *contrà*. Probate granted in common form to Smith, who executed the patent. A great deal of money is due from the government ; [209] the cause now stands *ex priora*, and may be heard this term ; copies of the depositions are delivered to both parties. Administrations *pendente lite* are never granted, but when the estate is perishable, or the cause likely to depend long ; deceased left a brother, who was content with the will.

N.B.—The motion was made only upon the act of Court, and two or three answers to interrogatories, put to the witnesses on the *condidit*, were read, but no affidavits (as usual) were exhibited to shew the estate was perishable, or that the money in Smith's hands was in danger of being lost.

JUDGMENT—SIR GEORGE LEE. I was of opinion that administrations *pendente lite* ought never to be granted without special cause ; and in this case, there being no evidence to support the motion, and the cause being soon to be heard, I rejected the petition for an administration *pendente lite*.

BIRD, ALIAS BELL *against* BIRD. Arches Court, Hilary Term, February 19th, 1753. —In a suit for nullity of marriage brought by the husband, a *de facto* marriage being admitted, the husband is to bear the expences of the wife.

[Followed, *Foden v. Foden*, [1894] P. 307. See further, p. 345, post.]

Bird brought a suit against his wife, Bird, alias Bell, for nullity of marriage, by reason of a former marriage, in the Court of the Commissary of St. Paul. The wife appealed upon a grievance, in admitting certain articles of the husband's libel ; and now she prays the Court will decree the hus-[210]-band to pay her a sum of money to pay her expenses in hearing the cause upon the grievance, which the husband opposes, and insists that she is not his lawful wife, and therefore he is not to bear her expenses.

The act of Court sets forth—that it appears from his libel that she and Bird were married together, by licence, at the parish church of St. Bennet's Wharf, on 7th February, 1835, and lived together as husband and wife till 9th October, 1750, when he, without any cause, turned her out of doors without any money ; that she has had eight children by him under the said marriage ; that her first husband was dead before her second marriage, and that Bird, in order to obtain a licence for their marriage, swore her to be a widow. Bird, on the contrary, only alleges that her first husband was alive at the time of his marriage to her, that therefore such marriage was null *ab initio*, and he is not bound by law to pay her expenses.

Bell made affidavit on 16th February, 1753, that Bird turned her out of doors on 9th October, 1750, without any money ; that she has nothing to pay the expenses of the suit, or to support herself.

Dr. Paul for the wife. She cannot be admitted to sue as a pauper, because she has a husband who is not a pauper. When he took the license he swore she was a widow. Clarke's *Praxis*, tit. 206, Oughton's edit., in suit between husband and wife she is entitled to alimony and costs ; they admit a marriage, but object that it is null.

Dr. Hay, same side. It is sufficient for us upon this point to shew a marriage *de facto* ; if a [211] woman brings a suit for impotency against her husband, she is to have alimony and costs during the suit, and that is a much stronger case than this ; for there the woman who prays the alimony and costs affirms the marriage was null *ab initio* ; whereas in this case the man affirms and the wife denies it.

Dr. Pinfold *contrà*, for Bird. At present it is a question whether there is any marriage at all ; for if she had a husband living at that time, the transaction with Bird was not a marriage, but a profanation of marriage. To entitle to alimony and costs, there must be a marriage proved or confessed. No case cited where costs have been allowed to the woman in a cause of this sort ; giving her costs is determining against us upon the merits, for it is declaring Bird to be her husband ; he swore her to be a widow in the warrant for the licence upon her information.

JUDGMENT—SIR GEORGE LEE. I said I had never met with a question of this sort before, and as no case had been cited, I supposed it never had been determined, though it seemed strange to me that it had not; but as there was no precedent, I must determine it upon the (a)¹ general principles of law and reason. The man by [212] his suit admitted that he was married to her *de facto*, and it was alleged and not denied that he had lived with her as his wife for many years, and had eight children by her, and under that marriage he had a right *jure mariti* to possess himself of whatever she had, and must be supposed to have done so, and consequently she could have no money of her own to defend herself against his suit. I must presume till the contrary appeared in evidence, that she was his wife *de jure*, as well as *de facto*, for otherwise she must be guilty of bigamy, and is a felon by statute of Jac. 1, (stat. 1 Jac. 1, c. 11); but the law presumes, on the contrary, every body to be innocent till they are proved guilty. I must therefore suppose her at present to be his lawful wife, and as such entitled to have costs, as she prays to defend herself in this suit, and she cannot be admitted a pauper, because she is at this time a married woman and her husband is not a pauper; I therefore decreed Bird the husband to pay her 10l. for the expences of hearing the appeal.

RILER ALIAS RYLER against COZEN. Arches Court, Hilary Term, February 19th, 1753.—The same faith cannot be given to copies as to original deeds.—If the Court sometimes orders original deeds to be delivered out, which are wanted for other purposes, it only does so on a registration being made of the instruments, and on an undertaking from the party requiring them, that they shall be attended with at the hearing of the cause.

Appeal from Norwich on a grievance.

Dr. Pinfold for Richard Riler. In March, 1749, the Rev. Mr. John Cozen, as lessee and farmer of the tithes of the vicarage of Cherry Markham, in Norfolk, under the vicar, Mr. Chappelow, cited Riler, in a cause of subtraction of tithes and Easter offerings, and gave in a libel for many species of tithes with a schedule annexed, [213] which was admitted 3d April 1750; on 24th April, negative issue given and decree for answers; 22d May, tender of 4s. 4d. for all tithes made in court on behalf of Riler which was refused; 10th July, answers given in, denying Cozen to be lessee and farmer; same day Cozen gave allegation pleading the lease of the tithes, which was admitted; 31st July, he gave in another allegation, pleading articles of agreement, which was admitted; 14th Jan., 1752, Riler gave an allegation in answer to the libel, pleaded stat. 13 Eliz. c. 20, and 18 Eliz. c. 11,^(a) and that Chappelow the vicar and lessor has not resided on his vicarage, but has been absent above eighty days in each of the years in which tithes are demanded, and that therefore the lease is void by said statutes; 25th Feb., 1752, the judge rejected this allegation, and decreed the original lease and articles of agreement to be delivered out of court, being first registered, and that the same faith should be given to the copies as to the originals. Cozen's proctor propounded all acts, and the judge assigned to conclude next court. 5th March, appeal interposed from the whole of this decree.

Riler's allegation read.

1st art. recites 1st and 2nd articles of the libel, viz. that Cozen is lessee and farmer of Markham vicarage, and as such entitled to tithes, &c.; alleges it is false, for by statute, 13 Eliz. chap. 20, lease of benefice is not good longer than while incumbent is resident, and not absent above eighty days in one year, and the incumbent in that case forfeits one year's profits to the poor, and stat. 18 [214] Eliz. c. 11, enacts that, upon conviction of the incumbent, the ordinary shall grant sequestration of the

(a)¹ I apprehend that this decision, which seems to have been in a case *primæ impressionis*, has descended to our times with the authority to which it is justly entitled. In all matrimonial causes where a fact of marriage is established, and the parties have not separate incomes, the husband is liable during the progress of the cause to pay for the maintenance of his wife and the costs of the suit. But in a case of gross fraud, it would, I presume, be competent to the judge to condemn the asserted wife in costs, at the termination of the suit.

(a)² These two statutes were repealed by 57 Geo. 3 c. 99.

benefice; and in case he neglects to do so for two months, the occupiers may retain their tithes; alleges that Chappelow did lease said vicarage to Cozen for three years; alleges the lease is void by said statutes; and therefore nothing is due to Cozen.

2d art. pleads that, during the lease, and for the time tithes are demanded, Chappelow, the vicar, has been not resident in each year above 80 days, and is now non-resident.

3d art. pleads identities of parties, lease, &c.

4th art. that Riler is not subject to pay tithes to Cozen, and that this suit is improperly brought by him.

Dr. Paul for Rev. John Cozen. This is a civil cause for tithes; the vicar, Chappelow, is not a party; they cannot enquire into his non-residence; there should, before this plea was given in, have been a prosecution against him, but there has not, stat. 18 Eliz. c. 11, s. 7, Clark's Praxis, tit. 104, Oughton's edit.(a)

Dr. Pinfold contra, for Riler. Cozen's title is under the lease, and our allegation is to shew that the lease is void; the allegation is not offered to affect Chappelow, but to oppose a demand in a civil cause. The original lease ought not to have been delivered out till the cause was ended; the practice as well as the reason of the thing is so. The [215] judge assigns to propound all acts on one side only, and then at the same time concludes the cause, which is irregular.

JUDGMENT—SIR GEORGE LEE. I was of opinion the allegation ought to have been admitted, for it was offered to shew the lease was void, which would be a bar to the suit, for then Cozen could have no title to the tithes, and consequently could not sue for them; but Chappelow's right to the tithes was not at all affected by this suit, nor could he in this cause be punished with the loss of a year's profits of his benefice. I thought the judge had done wrong in decreeing the original lease and articles of agreement to be delivered out, and ordering that the same faith should be given to the copies as to the originals; for many observations might arise on original deeds which would be lost if only copies were before the court; indeed, when it has appeared that original deeds were wanted for other purposes, this court had sometimes ordered them to be delivered out, *factâ registratione*, and upon the party praying it undertaking that they should be attended with at the hearing of the cause, which was not done in this case; and lastly, I thought the judge had done wrong in assigning Cozen's proctor only to propound all acts, and at the same time assigning to conclude the next court; whereas he should have assigned both proctors to propound all acts the next court. I therefore pronounced for the appeal, reversed the whole decree of the 25th February, 1752, admitted the allegation given by Riler, and condemned Cozen in 25l. costs.

[216] RENAULT ALIAS HERDMAN *against* SAULNIER. Prerogative Court, Hilary Term, February 22nd, 1753.—The forgery of a will not established.

Dr. Hay for Herdman. Horatio Herdman, alias John James Renault, is executor in a will of Elie Berthon, widower, who died on 9th August, 1749; this will is dated 4th April, 1749, in which the residue is given to Herdman. Caveat by Saulnier, which Herdman warned. Saulnier is executor of a will, dated 28th April, 1740, and of a codicil, dated 6th February, 1746; by Saulnier's will, deceased has given him 50l.; to Louisa Saulnier, deceased's housekeeper, 20l. for mourning, ten guineas for rent, and a quarter's wages and his linen and furniture, &c.; gives 200l. to Elias Crespín; 15l. annuity to the ministers of the French church in Leicester Fields; 2000l. to the minister and two of the elders of said church; directs 30l. a year to be paid out of the interest thereof to Louisa Saulnier, and the surplus to the minister; and the poor of that congregation to have the residue of his estate, to be placed out at interest by the ministers, and if that church should be dissolved, then said legacies to go to the French church in the city of London.

The codicil contains nothing but a revocation of the legacy to Crespín.

Herdman's will gives 40l. a year to Louisa Saulnier, or 500l. at her choice, and

(a) The citation from Clark must have been with reference to the exhibits, the title referred to being, "*De exhibitione instrumentorum coram iudice, facientium ad probationem contentorum in propositis actoris sive rei.*"

10l. for mourn-[217]-ing; 30l. to Mary Ann Saulnier; 100l. to the poor of the French church, residue to his dear cousin and good friend Horatio Herdman, and makes him executor. This will is executed and attested by Jane Chevalier and Francis Blythe, and was wrote by Herdman; they depose that on 4th April, 1749, Herdman came and desired them to come to his house; they found deceased there, and the will lying on the table; he declared the paper on the table was his will, which he had desired Herdman to write, it was read over in their presence; deceased approved and duly executed it. Saulnier insists this will is a forgery, and alleges deceased had a great aversion to papists. Deceased returned from protestant countries to reside at Tours, where the whole town are papists; he conversed with papists at Slaughter's coffee-house; Herdman was originally a papist, but he soon became a protestant, wrote against popery, and was forced to fly from France; deceased was intimate with Herdman sixteen years before his death, and lent him money; Herdman was serviceable to deceased in 1747; declarations of affection to Herdman within six weeks of his death; they pleaded that in July, 1749, Herdman got receipts of deceased's from Mr. Demissy, to learn thereby to counterfeit deceased's hand-writing. Demissy swears Herdman took a copy of the receipt to rectify a mistake; have examined several persons upon similitude of hand; declarations insisted upon by them that deceased intended to leave his fortune to the poor; deceased a great usurer, a great hypocrite, and a great churchman; Herdman's character attacked; have proved he has a wife in France, but lives with another woman in England; another fact in 1721, that he de-[218]-frauded his master, Mr. Heames, and carried off 700l. to Holland, but there he paid about 400l. of it back to Heames, and he forgave him, and upon that occasion, Heames advised him to change his name to Horatio Herdman, and Heames recommended him as tutor to Lord Euston, at Eton, afterwards to Mr. Barrat, and in 1740, he became major domo to Marshal Wade, who left him 100l. legacy in his will. Character of the witnesses: Blythe, chaplain to the Portugal minister; Mrs. Chevalier parted from her husband by consent, both bear good characters.

Dr. Paul contrà, for Saulnier. Deceased abided by first will entirely: till 1746; eighteen years before made a will to the same charitable uses; the question will be whether there is sufficient evidence for the last will to revoke the former, it does not appear the last will was ever in deceased's custody; deceased thought popery a crime; improbable he should take papists to be witnesses to his will; affection for Saulnier in 1745; deceased said Herdman was a gamester; deceased ill seven weeks; Herdman went often to see him; deceased uneasy at it; said, "If he thinks to get anything from me, he deceives himself;" two months before his death, declared he had left his money to the poor; said he would not buy an annuity, for that would be sacrilege to take the money from the poor; this was said after Herdman's will bears date; nine days before his death gave Saulnier his watch and cane for Saulnier's sons; Saulnier put him in mind he had his will; deceased desired him faithfully to execute it; many witnesses swear the subscription to last will is not deceased's writing; their witnesses do not swear [219] positively to the subscription; Herdman cheated Heames of 700l. in 1721, he did repay part, but there is above 200l. still due to Heames's estate; his changing his name from Renault carries an imputation; he now lives in open adultery.

Dr. Simpson, same side. We have shewn deceased always intended to benefit the poor, and continued in that mind to his death. The question is whether the evidence of the two subscribing witnesses under the circumstances of the case will be sufficient to establish the last will.

Witnesses for Herdman.

1. Francis Blythe, gent. Deponent knew deceased by sight several years, but did not know his name till a year and a half before his death, when, seeing him walking in the park with Herdman, who deponent knew, deponent inquired and was told his name, and deponent became acquainted with him, and often walked with him in the park, and has heard him call producent cousin; producent spoke only French. 4th April, 1749, producent, who is deponent's neighbour, came to deponent, and desired deponent and Jane Chevalier, who lodges at deponent's, to step to his house; deponent had company, and desired to be excused, but producent pressing him, he and Chevalier went to producent's house, and found deceased there, who made excuse for troubling them, and said he was desirous of making or signing his will, and as they understood French, and he did not understand English, he should be obliged to them if they

would be witnesses to it; the will propounded then lay on a table where deceased then was, and he, pointing to it, said that was his will, which he [220] had troubled his cousin Herdman to write, and that he had already read it, but nevertheless, he desired producent would read it over again, and that deponent and Chevalier would hear it read; producent read it in their presence; deceased signed and published it in their presence, and then deponent and Chevalier attested it; deceased of sound mind, &c.; proves identity of will and persons.

3. Int. Deceased an enemy to popery; Herdman's true name is Renault; said he took name of Herdman to be a tutor to one who did not like a foreigner. 5. Int. Producent lives with a woman, whose name was Stevens, by whom he has two children, and they live with reputation as husband and wife. 6. Int. Respondent was born in London, his parents English; deponent is a papist, and lives on his substance; not bound to answer further. 8. Int. Chevalier a married woman; her husband a bad man, separated by consent, she lives with respondent and maintains herself as a midwife.

2. Jane Chevalier, æt. 44. Deponent well knew deceased eight or nine years before his death; came to know him by frequently seeing him at producent's house; 4th April, 1749, producent came for Blythe and deponent; they went to producent's house; deceased there; he took up the will, and said he had desired his cousin Herdman to write it; agrees exactly with Blythe as to execution, sanity, &c.

1. Int. Has known producent about fourteen years, by attending his wife as a midwife. 4. Int. Has heard producent speak of children he had in France by a former wife. 5. Int. Says producent lives with a woman as his wife with reputation, [221] and has two children by her. 7. Int. Blythe a man of letters, and is a papist. 9. Int. Respondent and her husband voluntarily separated, and she has ever since lived with Blythe, who maintains himself by his pen.

Will of 4th April, 1749, read.

Evidence for Saulnier.

Read will of 28th April, 1740, and codicil of 6th February, 1746, which were admitted to be proved.

Witnesses.

1. John Treble. Deponent in 1733 first came to know deceased; he was a member of the French Church in Leicester Fields; believes deceased looked on it to be a crime to be a papist; soon after deceased came to England, deponent drew a will for him, which he executed, and in that will he gave his fortune to the poor of said church; well knows Peter Saulnier, who was intimate with deceased; in April, 1749, deponent having money of deceased's at interest which deponent would have paid in, deceased desired him to keep it; deponent said he did not care to have to do with a vestry; deceased replied, "You will have to do with one of your friends whom you see often;" deponent understood he meant Saulnier; believes he meant to intimate to deponent that Saulnier was his executor; deponent thereupon continued to borrow deceased's money; 13th July, 1749, in discourse with deceased, he said, "You know who are my heirs; they are the poor, but I cannot leave them so much as I would, as I have had so many losses." Deponent, at Herdman's [222] request, about seven years since, twice spoke to deceased to do something for him in his will, but he did not give deponent any encouragement to think he would do any thing for him, but said he owed him 50l., that he was an extravagant man, and played away his money at Slaughter's, and was of a Romish family.

6. Int. Deceased conversed at Slaughter's with papists. 9. Int. Does not know any charities deceased gave in his lifetime. 12. Int. Deceased has told deponent Herdman and he were not relations. 19, 20, 21. Int. Herdman was serviceable to deceased. On Crespin's bankruptcy, deceased having made an usurious bargain with Crespin. 15, 16. Int. Herdman visited deceased. 26. Int. Deponent and Herdman intimate sixteen years. 27. Int. Believes him to be an honest man. 28. Int. Never knew him play but for diversion. 30. Int. Herdman was tutor to Duke of Grafton's sons, and was major domo to Marshal Wade. 35. Int. Louisa Saulnier was present when deceased made said declaration in July. 46. Int. Respondent is surprised Herdman is suspected of forgery.

2. Louisa Saulnier. Deponent was housekeeper to deceased for thirty years

before his death; deceased a protestant, and came to England for his religion; he was seventy-eight years old at his death, and was a member of the French Church in Leicester Fields; deponent has delivered charity for him; has heard him speak ill of papists, and no papists ever visited him; twelve or thirteen years ago deceased told deponent that Treble had made a will for him; deceased had great affection for producent; deceased delivered his will of 1740 to producent, in deponent's pre-[223]-sence; has told deponent he had left her an annuity of 30l.; three weeks before his death, deceased, in discourse with Mr. Bourdillion about his losses, said, "It is not I that lose, it is the poor that lose; God gave it me, and God has taken it away;" deceased had then lost money by one Crespin, who was a bankrupt. Nine days before deceased's death, he said to Saulnier, "As I esteem you, so I esteem your sons; I have a watch and a gold-headed cane, I desire you will accept them for your sons; and as to my other watch, I give it to Louisa;" producent declined to accept them, but deceased insisting, he did accept them, and said to deceased, "Sir, you remember I am the bearer of your last will; have you any directions to give me?" deceased replied, "As it is well made, nothing is wanting in it, and you have not lost it?" producent answered, "No, sir, it is in my chest;" deceased replied, "Well, then, all that I ask is that it may be executed as it is therein ordered;" producent replied, "It shall be executed to the last farthing." Deceased did then, in deponent's presence, tell producent he had 400l. or 500l. in his cupboard, and desired he would take the same, but producent refused, saying it was as safe there as at his house; deceased was ill about seven weeks; Herdman came two or three times a day to see deceased; deceased said his visits were tiresome, and if he came with any thoughts that the deceased would do him any service, he deceived himself; Herdman has a wife in France, and, since deceased's death, he read deponent a letter, which he said he had from his wife in France, wishing him success in this cause; he lives now with a woman, by whom he has two children.

[224] 3. Int. The inhabitants of Tours are mostly papists, to which place deceased returned to reside after he had lived in protestant countries. 9. Int. Deceased used to give money in charity. 13. Int. Deceased and Herdman intimate, and has heard them say they were related. 14. Int. Herdman was a protestant in France. 16. Int. Believes Herdman dined with deceased six or seven times. 17. Int. In deceased's last illness he reproached Herdman for not dining with him. 18. Int. Believes one or two letters passed between Herdman and deceased while Herdman was in Flanders. 19, 20. Int. Herdman was serviceable to deceased on Crespin's bankruptcy. 21. Int. Deceased's demand on Crespin was reduced from 1700l. to 1200l. 22. Int. When deceased complained of his losses, Herdman made him an offer of living at his house and table, which deceased did not accept, but expressed that he thought himself obliged to him. 23. Int. Herdman visited deceased every day in his last illness, and deceased sometimes asked him to pray by him, which he did, and often asked him to stay dinner. 34. Int. Herdman was present when deceased made his declaration, three weeks before his death, to Mr. Bourdillion.

3. Augustine Courtard. Deceased a constant member of the French Church, and went thither most days; was a strong protestant; has often heard him say he had made his will in favour of the poor, they were his heirs, and said they would suffer by his losses; said he had given his fortune to the poor of Leicester Fields.

4. John Pomiez. Knew deceased ten years; was a protestant, and an honest man; had a dislike to popish priests; frequently expressed re-[225]-gard for the French Church; within two months before his death, told deponent he had made his will in favour of the poor members of the French Church in Leicester Fields; believes he has heard him say so an hundred times; has heard deceased express a great dislike of Herdman, and say he was a man of a very bad character.

5. Isaac Lacam. Knew deceased about eighteen years; in 1745 he expressed dislike to papists; in June, 1749, as deponent best remembers, deceased came to deponent, and told him he had about 300l. to place out at interest, and begged deponent would take it; deceased complained of his great losses by Crespin; deponent advised him to buy an annuity of Saulnier, but deceased said, "How can you make such a proposal, since you know I have given my estate to the ministers and poor of Leicester Fields; I should think it would be committing sacrilege."

Deposition of Jacob Bourdillion, clerk, was offered to be read, but it was objected

that he is minister of the French Church in Leicester Fields, and as such is interested in Saulnier's will, and that it so appears by 34. Int. which was read, in which he says he has been ever since 1731, and now is minister of said church.

Per Curiam. I was of opinion he was interested, and rejected his deposition.

6. Francis Floreau. Knew deceased; he was a protestant and an honest man; Herdman has but an indifferent character since he robbed Heames.

[226] 7. John Chevalier. Herdman lives with a woman in England as his wife, and has had several children by her; has heard he has a wife in France; Blythe is a Romish priest, and Chevalier is a midwife.

8. Elizabeth Turquand. Knew deceased 38 years ago in France; has heard Herdman defrauded his master.

14. Int. Respondent was present when Herdman renounced and abjured the popish religion at the Savoy Chapel. 45. Int. Herdman was pardoned by his master.

9. William Fitzpatrick. Blythe a popish priest, and chaplain to the Portuguese minister; Chevalier is a papist.

10. Chamberlayne Godfrey, Esq. Never heard any thing bad of Herdman since he left Heames; has heard he applied a quantity of moidores of Heames's to his own use; deponent finds by entries in Heames's books that Herdman owes him 283l.

23d article of Saulnier's allegation read.

11. Rev. Cæsar Demissy. The six receipts exhibited were all signed by deceased; a short time before deceased's death Herdman came to deponent and desired him to let him see the receipt marked No. 6, to see whether there was not a mistake in the date, and desired to take a copy of it, which he did, and was no longer in taking the copy than was necessary to write it.

39. Int. When respondent paid the interest for which said receipt was given; the money was not due. 40. Int. Herdman only asked to see receipt No. 6.

41. Int. Copy taken for deceased's satis-[227]-faction; respondent did not observe Herdman took any care to copy the receipt in imitation of deceased's hand. 43. Int.

Do not remember Herdman said he wanted to compare deceased's subscription. 44. Int. Does not believe Herdman had any intention of learning to counterfeit deceased's hand.

(N.B.—The counsel admitted the exhibits on both sides to be proved.)

12. Peter Plant. 19, 20, 21. Int. Deceased lowered his demand on Crespin to 1200l.

13. Adam Barber. Nothing material.

14. Elizabeth Le Clerk. Deceased and Herdman intimate; nothing material.

15. Abraham Thomas, writing master. Never saw deceased write; verily believes the nine exhibits are all signed by same person, but believes the subscription to will 4th April, is not wrote by same hand, particularly says the letters *E*, *B* and *h* differ.

16. Paul Garron, engraver. Does not believe the will and the nine exhibits are subscribed by the same person.

17. Thomas Pingo, engraver. The same as the last witness.

18. Ellis Webster, schoolmaster. The body of the will and the subscription are not the same hand, or at all alike; believes nine exhibits and subscription to will are not wrote by the same person, but the nine exhibits are.

19. George Bickham, engraver. Agrees exactly; the subscription to will a much more regular hand than to exhibits; *E* in the exhibits is made without a loop, in the will it is made with a loop; *B* has a breaking off in the exhibits, not in the will.

[228] On another allegation.

20. Abraham Thomas. Believes the names subscribed to the first will and codicil were wrote by the same person who wrote the exhibits, but does not believe the two wills were signed by the same person.

21. Paul Garron. The same.

22. Thomas Pingo. The same.

23. Ellis Webster. The same, great difference between the subscriptions to the two wills.

25. George Bickham. The same.

Witnesses for Herdman.

1. John Maples, writing master. Believes subscription to will of 4th April

is a different hand from the body of the will; the writer of the exhibit used to write his name in a different manner according to the pen, and his health, and posture; believes the subscription to the last will and the nine exhibits are same hand; believes the signing of the exhibits and the two wills is the same hand.

7. Int. Has heard Herdman say he privately went to Holland, because he had lost his master's pocket book with notes in it.

2. William Greyhurst, engraver. Says the nine exhibits differ in the subscriptions, and if they were all wrote by same hand, the difference must arise from pen, health, and position. Agrees.

3. Thomas Hughes, æt. 25. Believes the will of 4th April and exhibits are wrote by same hand.

(N.B.—The witnesses swear in the words of the allegation.)

4. Richard Griffith, æt. 27. Agrees exactly.

5. Thomas Hutchinson, æt. 45. The same exactly.

6. William Fitzpatrick. The same.

[229] 1. Int. Respondent is a papist, he teaches school and was married by a popish priest.

7. Peter Duton. Deponent well knew deceased to his death, and has known Herdman 27 years; he renounced the Church of Rome, and was tutor at the Duke of Grafton's; great intimacy between deceased and Herdman; deceased often conversed with papists; lived at Tours after he had lived in protestant countries; Herdman became a protestant in France, in 1717; abjured popery in the Savoy Chapel; was tutor to Lord Euston, from 1724 to 1737, when Herdman went abroad and travelled with Mr. Barrat; behaved very honestly, and in 1740 was major-domo to Marshal Wade, and attended him in his campaigns, and was greatly intrusted by him, and believes he acted with fidelity; Wade left him a legacy of 100l., and Wade's sons were well satisfied with his conduct; deponent was very conversant in the Duke of Grafton's family, and knows the facts aforesaid; believes Herdman would not on any account forge a will, &c.; deponent knows deceased's handwriting; verily believes the subscription to will, 4th April, is deceased's writing; he wrote his name in a different manner; deposes as to the handwriting; exactly the same as the other witnesses; Herdman assisted deceased upon Crespins' bankruptcy, and made it up for him, and deceased told deponent he thought himself very much obliged to Herdman; has heard Lord Euston to his death allowed Herdman 100l. a year.

3. Int. Believes Herdman has a wife in France. 4. Int. Herdman now lives with a woman as his wife, and has children by her. 5. Int. Has heard good character of Blythe, who is almoner to Por-[230]-tugal Minister. 6. Int. Chevalier has a good character. 10. Int. Believes subscriptions to both wills and to exhibits were wrote by deceased. 7. Int. Believes he took name of Herdman when he went to Duke of Grafton's in order to be received there the better; has heard he carried some of Heames' cash to Holland, and Heames forgave him. 8. Int. Saulnier has a good character.

8. Francis Stevens. Has known Herdman from 1727, and was intimate with him in 1747 and 1748; often saw deceased at producent's house, and there appeared great friendship between them, and they called cousins; producent a protestant; he travelled with Mrs. Barrat, and was major-domo to Wade; behaved honestly; Wade left him 100l. legacy; Wade's sons satisfied with him; believes he would not on any account forge a will; has known Jane Chevalier sixteen years; maintains herself in great credit and reputation; Blythe, a man of learning and lives by his pen, has a good character; believes deceased several times dined with producent.

9. Esther Perreau. Knew deceased eighteen years, and Herdman from 1717; he is a Protestant; producent was book-keeper to Heames; has heard Heames had a regard for him; producent was a loser in 1720, and went away with Heames's money in 1721, and has heard producent repaid the money, and Heames forgave him and supplied him with money; he was a tutor in the Duke of Grafton's family; travelled with Barrat; was major-domo to Wade; behaved well and honestly; verily believes he would not be guilty of forging a will, &c.; has heard producent has pressed his wife to come to England, but she has refused.

3. Int. Has heard, and believes, he has a wife [231] in France; he keeps a woman in England, and has children by her.

10. Jacques Lewis Marmet. Has known producent from 1724; he then lived in

Duke of Grafton's family ; travelled with Barrat ; behaved honestly ; gives him a very good character ; does not believe he would forge a will, &c.

11. Mary Kirby. Deponent was servant in 1743 to producent, and lived there three years ; deceased often came to visit producent, and seemed very friendly to him ; deceased gave a coral to one of producent's children ; producent had four children by his housekeeper Stevens ; gives him a good character ; does not believe he would forge a will, &c.

4. Int. The children were baptised as producent's children.

12. Mary Poitier. Deceased told deponent he had a great kindness for producent ; and said he was sorry he had lost Marshal Wade ; gives producent a good character ; deponent thinks him an honest man ; deceased went often to producent, and spoke kindly of him ; deponent heard him say he had a letter from producent in Flanders.

9. Int. Louisa Saulnier has a good character.

13. Stephen Boujion. The same ; deposes to deceased's regard to producent, and to his good character ; believes him to be a very honest man, and would not forge a will, &c. ; has heard, and believes, producent settled deceased's affairs about Crespin's debt, and did him great service ; has heard Heames forgave producent, and recommended him to the Duke of Grafton.

Int. Producent's wife refused to come to England.

14. Richard Parsons. Gives producent a very [232] good character, and believes he acted very honestly in Wade's service, and would not be guilty of forging a will, &c.

15. George Wade, Esq. Deponent first knew producent in 1740, when he came into Marshal Wade's service, who reposed great trust in him, and he behaved with great honesty ; deponent has trusted him largely ; esteems him a very honest man, and one who would not forge a will, &c. ; producent was recommended to Marshal Wade by Lord Euston.

16. John Wade, Esq. Deposes the same ; gives producent a very good character.

17. Peter Calmell, Esq. Deceased seemed to have great friendship for producent, and they called cousins ; gives producent a very good character ; deceased much obliged to him for his care in settling Crespin's debt, and deponent believed he would leave producent a handsome legacy.

2. Int. Three or four years before his death, deponent heard deceased say the poor of the French church should be his heirs.

18. Paul Crespin. Great intimacy and friendship between deceased and producent ; deceased told deponent producent was going to Flanders with Marshal Wade, and he should be glad if deponent would let him have 50*l.*, part of deponent's debt to him, in order to lend it to producent, and deponent paid said sum to deceased ; gives producent a good character ; while producent was abroad deponent often went with deceased to producent's house to enquire after him ; deponent became bankrupt ; believes producent was assisting in settling deponent's debt to deceased.

3. Int. Believes producent has now a wife living in France, and he lives with a woman in Eng-[233]-land. 9. Int. Gives Louisa Saulnier a very good character.

19. John Justeman. There appeared to be great friendship between deceased and producent ; about six weeks before deceased's death, producent being present, deceased said to deponent, "There is my cousin, who is not only a relation to me, but a good friend, and acts to me like a father or an own brother."

20. Gerard Howard, Esq. Proves deceased's affection to producent, and gives him a very good character.

21. William Poitier. Producent often came to deceased, and he often went to enquire after producent when he was abroad, and once said he had a letter from him ; does not believe producent would forge a will.

3. Int. Has heard producent say he has a wife and children in France ; he now lives with another woman, by whom he has children.

22. Peter Warren, Esq. Believes producent was very useful to deceased in settling Crespin's debt.

23. Francis Duroure, Gent. In February, 1746, deceased had difficulties about Crespin's debt, and producent attended that affair for deceased.

24. Francis Duvall. Deceased behaved kindly to producent ; producent bears a very fair character, and deponent does not believe he would forge a will.

5. Int. Blythe is chaplain to the Portugal minister.

25. Robert Quarm. Wade's executors gave producent a note of 50l. for his service to them, besides what Marshal Wade left him; gives him [234] a very good character; Chevalier is a midwife; she and Blythe are persons of reputation.

26. Thomas Knight, tailor. Deponent has heard Mr. Heames speak very well of producent; but in 1721 producent left Heames's service, and carried away with him about 700l., but soon after, Heames told deponent he had paid back best part of the money; Heames forgave him the rest, and advised him to take the name of Herdman, and Heames expressed great friendship to producent after he returned to England, and sent him some money in a letter; deponent often carried letters between them; in 1724 Heames recommended him to the Duke of Grafton to be private tutor to his sons, with whom he lived till 1737, and afterwards travelled with Mr. Barrat; he bore a very good character in the Duke's family, and afterwards was Marshal Wade's servant, who left him 100l. legacy; verily believes he is a very honest man.

3. Int. Heard producent speak affectionately of his wife in France; never heard of any wife he had in England.

27. Michael Connell, M.D. Heard Lord Euston express great regard for producent; says producent bears the character of a very honest man; Marshal Wade often told deponent he believed producent was as honest a man as lived; deponent has known Jane Chevalier nine or ten years; her husband was a very worthless fellow; they are separated; she maintains herself very well by business; she and Blythe are persons of very good characters.

3. 4. Int. Producent lives with a woman, and has children by her.

28. Joseph Rochford. Gives producent a very [235] good character; gives Jane Chevalier and Blythe the very good characters, &c.

29. Jane Fletcher. Has known Chevalier seventeen years; she is a very honest woman.

30. Ruth Hartwell. Has known Jane Chevalier twenty-seven years; she has a very honest, fair character.

31. Ann Shouder. Has known Chevalier twenty-four years; gives her a very good character.

32. Elizabeth Bradstreet. Has known Chevalier twenty-four years; gives her a very good character.

33. James Nelson. Has known Blythe fifteen years, and Chevalier seven years; gives both very good characters.

5. Int. Blythe is a Romish priest.

34. William Duncan. Knows Blythe and Chevalier; gives them both very good characters, and never heard anyone speak against them.

35. George Adams. Gives Blythe a very good character.

36. John Sharpine. Knew deceased and producent; great intimacy and friendship between them; deceased often conversed with papists; says producent is esteemed a very honest man, and deponent believes he is so.

Dr. Hay's argument for Herdman. If the will of 4th April was the deceased's act, it must be established, for it is not pretended he did any after act to destroy it; if the subscribing witnesses are not perjured, the will is good; the law will not presume fraud; characters of witnesses are most fully established; Blythe being in service of a foreign minister is legally acting as a Popish [236] priest. Objections to Herdman that he lives in adultery, and in 1721 ran away with his master's money; Martin Bucer's "Kingdom of Christ," Maliciosa Desertio, party deserted may seek another consort if it be needful. Herdman guilty of no offence in living with another woman, since his wife will not live with him; fact relating to Heames to be attributed to the misfortunes of the times, and he very soon repaid the greatest part of the money. Godfrey says that 1st June 1725 Herdman stood debtor in Heames's books only 283l. Legacies are left to Louisa and Ann Saulnier in the last will, and yet Herdman never saw the first will, and therefore the instructions for those legacies, and consequently for the last will, must come from deceased; they pleaded that the body and subscription to last will were the same hand, but their own witnesses prove they are of a different hand. Clark's Praxis, (a) tit. 225, tit. 226, (b) comparison of hands ought to be made

(a) De comparatione literarum quæ communiter habetur in Curiâ Prærogative Cantuariensis, ad probandum manum testatoris.

(b) Tit. 226. De modo probandi testamentum in judicio contradictorio ut sententia

only when there are no witnesses to the will, or the subscribing witnesses are dead. If deceased's declarations could not be accounted for, yet they would not set aside a will proved by positive witnesses; they are parol de-[237]-clarations only, which cannot set aside a will in writing.

Dr. Smalbroke, same side. Herdman paid back the greatest part of Heames's money in three or four days after he came to Holland; it is probable deceased might desire to have these popish witnesses to his will, for he would not let the French church know he had made a new will; several reasons why deceased might more favour Herdman after 1747; 1st. Because Herdman had lost his friends Lord Euston and Marshal Wade, and was out of business. 2ndly. Because Herdman had assisted him in Crespin's affair. 3dly. Because Herdman offered to let him live at his house; the declarations either are not relative or incredible, or consistent with the last will, or to be accounted for from deceased's conduct.

Dr. Paul for Saulnier. They are mistaken in saying there are no objections to the subscribing witnesses; Chevalier says Blythe maintains himself by his pen, but it appears he is maintained by being chaplain to the Portugal minister; she conceals his being a popish priest; deceased had a series of intentions for many years to benefit the French church; the will propounded by Herdman, wrote by himself, by the Civil law this was criminal; no declarations previous or subsequent to this will in favour of it. Poppin and Rhodes, Deleg. three witnesses swore to execution, but the will was set aside. Deceased's desiring Saulnier to take his money shews he considered him as his executor; the subscription to the will is likely from the evidence not to be deceased's handwriting; it is probable Herdman might set up [238] a false will, from his cheating Heames, living in adultery, and changing his name, which bring a strong blemish on him.

Dr. Simpson, same side. French church supported by voluntary contributions; we question the factum of the will, whether it is sufficiently proved; two wills made by deceased in favour of the French church, and constant declarations to the same purpose to his death; if deceased was a bad man, Herdman becomes so by his friendship to him. Knight swears, improbably, that Heames should bid him call Renault by name of Herdman; he debauched the woman that lives with him at the Duke of Grafton's; the living publicly with her with reputation will legitimate the children born here in prejudice to his lawful children in France, which greatly affects his character. A bare execution of the will is proved; the will read over to the witnesses not likely, as it was to be a secret. No English subject can by law officiate here as a popish priest; therefore Blythe is at least diminished in his character. Party opposing a will may plead and examine to falsify the subscribing witnesses as to the subscription of the testator. A will wrote by a man for his own benefit is unfavourable (a)—by the civil law it was highly [239] criminal. Dig. Lib. 48, L. 6, de Lege Cornelia.

possit fieri pro viribus ejusdem, quamvis nulli testes fuerint adhibiti tempore conditionis ejusdem. (Deque subsidio comparatione in hoc casu.)

On the general question of the weight to be attributed to evidence of handwriting, see the authorities cited p. 99, notes; and *Saph v. Atkinson*, 1 Add. 213; *Robson v. Roche*, 2 Add. 79; and *The King v. Cator*, 4 Esp. 119; and *Cary v. Pitt*, Peake's Law of Evid.

(a) In this case it appears that Herdman, who was the executor and residuary legatee in the will, was also the person who had prepared and written the instrument; of course, therefore, there could be no proof of instructions, and the learned judge seems to have rested his decision on the general good character of Herdman, and the testimony of the two subscribing witnesses to the will. By the civil law, as is correctly stated in the arguments of Dr. Paul and Dr. Simpson who contended against the validity of the will in this case, it was highly criminal for a person to write a will in his own favour; by such an act he rendered himself liable to the punishment of the Cornelian law, and, moreover, the bequests written by himself in his own favour, to use the language of the digest, "perinde habebantur ac si insertæ testamento non fuissent."

This maxim has been transfused from the civil law to a greater or less extent into the jurisprudence of many of the states of Europe. In several of them, as in Naples and Sicily for example, the prohibition is carried at least to the full extent of the parent law, for every such bequest is null and void. I do not find, however, that this prohibition has been incorporated into the Code Napoleon. The rigid formalities which are rendered essential to the validity of every will which is not holograph may

Prerog. 1713, *King and Putland* against *Annesley*, [240] King wrote himself executor; Sir Charles Hedges said that proof of the factum of a will does not destroy the rules of the civil and canon laws.

[241] JUDGMENT—SIR GEORGE LEE. I was of opinion that Herdman's general good character was too well established for me to presume he would forge a will, and as two witnesses (against whom there was no material exception, and whose good characters were fully proved), had sworn to reading the will in the deceased's presence, his approving it, and desiring them to witness the [242] due execution, and the

have been thought to have rendered such a prohibition unnecessary, but to the same source (i.e. the civil law) is doubtless to be traced the prohibition which exists in the Code Napoleon as received in France, against bequests made by minors under the age of 16, in favour of their guardians, or even if they shall have attained their majority, to those who have been their guardians, unless there has been a final settlement for the sums expended during the minority (*si le compte définitif de la tutèle n'a été préalablement rendu et apuré*) with the exception of cases in which the guardians are the relations of the testator in the ascending line; and the annulling also of all legacies to priests and medical persons of all descriptions who shall have attended the deceased during the last illness. (See Code Napoleon, liv. 3, c. 2.) In England we have not adopted these provisions of the civil law, but the circumstance of a person making a will, or writing a legacy in his own favour, whenever it occurs, is always considered as a fact which ought to excite the watchful jealousy of the judges to whom the administration of testamentary law is entrusted, and few questions in our own times have been more discussed than the nature and extent of the scrutiny which ought to be instituted into cases of this description.

In *Henshaw and Hadfield v. Atkinson and Atkinson*, Thomas Henshaw, the testator, made his will, on 14th November, 1807, disposing of real and personal property to a very considerable amount. Mr. John Atkinson was one of the executors in the will, and had a legacy of 2000l. for his trouble. On 9th January, 1808, the testator executed a short codicil, and on the 14th Jan., 1808, two other codicils. He died on the 4th March, 1810, having in the interval between the making of the will and his death, experienced a paralytic attack. After his death the executor, Mr. John Atkinson, produced a codicil, dated the 9th May, 1808, by which the deceased bequeathed him 18,000l. (duty free) in addition to 3000l. stated to have been given to him, and the 2000l. he left him as executor, to purchase an estate in Staffordshire. This codicil was in the handwriting of the legatee, and had been in his custody from the time of its execution. The cause originated in the Consistorial Court at Chester, where sentence was given in favour of the codicil. This sentence was affirmed with costs, by the Chancery Court at York, and thence an appeal was prosecuted to the High Court of Delegates. The cause was argued on the 20th, 21st, 23d, 24th, and 25th February, 1815; and on the 8th of May following the Judges Delegates present, viz. Mr. Baron Wood, Mr. Justice Bayley, Mr. Justice Dallas, Dr. Arnold, Dr. Phillimore, and Dr. Dodson, being equally divided, gave no judgment. It was understood that Mr. Justice Bayley, Dr. Arnold, and Dr. Phillimore, were against the validity of the codicil, and Mr. Baron Wood, Mr. Justice Dallas, and Dr. Dodson, in favour of it.

A commission of adjuncts was granted, and the cause was again argued on the 30th Nov., and 1st, 2d, 3d, 4th, 5th, and 6th of Dec., 1815; and on the 13th Dec., 1815, the Judges Delegates present, viz. Mr. Baron Wood, Mr. Justice Bayley, Mr. Justice Dallas, Mr. Baron Richards, Dr. Burnaby, Dr. Daubeny, Dr. Phillimore, and Dr. Gostling, being equally divided, gave no judgment.

A second commission of adjuncts issued. The cause was argued a third time, on the 4th, 5th, 6th, 8th, and 9th of July, 1816: and on the 19th July following the Judges Delegates present, Mr. Baron Wood, Mr. Justice Bayley, Mr. Justice Dallas, Mr. Baron Richards, Mr. Justice Park, Mr. Justice Holroyd, Sir Christopher Robinson, Dr. Arnold, Dr. Parson, Dr. Burnaby, Dr. Daubeny, Dr. Phillimore, Dr. Gostling, and Dr. Dodson, being equally divided, gave no judgment.

A third commission of adjuncts was then granted; the cause was argued a fourth time on the 9th, 10th, and 11th Dec., 1816. The Judges Delegates present at the sentence, viz. Mr. Baron Wood, Mr. Justice Dallas, Mr. Justice Park, Mr. Justice Holroyd, Mr. Justice Abbott, Mr. Justice Burrough, Sir C. Robinson, Dr. Arnold,

deceased's capacity, I was bound by law to give greater regard to their testimony than to declarations of the deceased, which might be made to deceive the members of the French church, which I could much more easily suppose than I could suppose that Herdman, who has a good character, would be guilty of forgery himself, and would get another person to join with him in the forgery (which he must have done, because it was proved that the body of the will was wrote by him, and that the subscription of the testator's name was of a different hand), and that two witnesses who had unblemished characters should be guilty of flat, gross perjury. I therefore gave sentence for the will dated 4th April, 1749, propounded by Herdman, but without costs.

ANDREWS *contra* POWIS. Serjeant's Inn, Fleet-Street, between Hilary and Easter Term, 1728.

[For former proceedings between the same parties in Chancery see *Andrews v. Powys*, 1723, 2 Bro. P. C. 504.]

Judges Delegates—Marquis of Tweedale; Earl Lincoln; Wilcox, Bishop of Gloucester; Waugh, Bishop of Carlisle; Page and Reynolds, Justices of the King's Bench; Hale, Baron of the Exchequer; Sir Henry Penrice, Judge of the Admiralty; Dr. Tindall and Dr. Audley.

Mr. Powell, deceased, made his will the 6th of June, 1720, by which he appointed his nephew, Mr. Powis, executor and residuary legatee; subsequent to that, viz. on the 10th Feb., 1720-21, he made another will, by which he appointed Mr. Andrews nude executor, and made his children residuary legatees. The testator died the 11th Feb., 1721-22, and Andrews took probate of his will [243] the next day, and possessed himself of the estate. Mr. Powis took out process to call him to bring in the probate and propounded the will, made in favor of himself, in June, 1720, as the last will of the deceased, and alleged that Andrews' will was obtained by fraud and deceit, when the testator was insane and incapable to dispose by will or otherwise. Mrs. Collyer and other relatives of the deceased appeared and opposed both wills, and prayed the deceased might be pronounced to have died intestate, alleging that he was under an insanity previous to the making even of Powis' will, which continued to his death.

In the run of this cause in the Prerogative Court, the original will of Andrews

Dr. Parson, Dr. Burnaby, Dr. Daubeny, Dr. Phillimore, and Dr. Meyrick, reversed so much of the sentence of the Chancery Court at York as condemned Sarah Henshaw, widow, and Ann Hadfield, in costs, but in all other respects pronounced that the judges of the courts below, as well in the first as in the second instance, had proceeded rightly, justly, and lawfully, &c.

A question characterized by the same leading feature, but infinitely diversified by other circumstances from that of *Henshaw and Hadfield v. Atkinson and Atkinson*, has been raised in *Ingram v. Wyatt*, Prerog. 1828; the case is reported at great length, 1 Hagg. 38. In that case Sir John Nicholl pronounced against the validity of the will and codicil of John Clopton. An appeal was prosecuted to the Delegates, the cause was argued on the 13th and 17th July, 1829, and on the 7th, 8th, and 9th Jan., 1830; and on 20th Jan. the Judges Delegates present, viz. Mr. Justice Littledale, Mr. Justice Gaselee, Mr. Baron Vaughan, Dr. Burnaby, Dr. Daubeny, Dr. Gostling, Dr. Addams, and Dr. Blake, being equally divided in opinion, gave no judgment. A commission of adjuncts has since been granted, and the cause is again in the course of hearing. It is understood that Mr. Baron Vaughan, Dr. Burnaby, Dr. Gostling, and Dr. Blake, were in favor of the sentence of the Prerogative Court, and Mr. Justice Littledale, Mr. Justice Gaselee, Dr. Daubeny, and Dr. Addams, *contra*.

See on this point, *Barton v. Robins*, Prerog. Deleg. 1769, 3 Phill. 455, notes. *Billinghurst v. Vickers*, 1 Phill. 189. *Paske v. Ollat*, 2 Phill. 323. *Kinleside v. Harrison*, 2 Phill. 559.

Amongst the manuscript papers of Sir George Lee I find a very full note in his own handwriting, of the case of *Andrews v. Powis*, in which the same question was raised and much discussed before the High Court of Delegates in 1728. The case is too long to be added to this note, but the importance of the points discussed will fully justify me in giving it a place in the text of this work.

was mislaid in the office, whereupon motion was made to examine the witnesses to the engrossed copy, to which the Court assented; before publication of their depositions, the original will was found; this motion was pleaded in an allegation by Andrews, who prayed that he might be at liberty to re-examine the said witnesses to the original will, and to their own subscription thereto, which the Court admitted, and Powis appealed from it to the Delegates as a grievance. The Delegates were of opinion that the Judge of the Prerogative Court had done right; and remitted the cause. Some time after, upon motion by Powis, and suggestion that the estate was not safe in the hands of Andrews, the Judge decreed he should bring into Court 1000*l.* and be subject to the further order of the Court as to the rest. Andrews appealed from their decree to the Delegates; then Powis filed a bill in Chancery, to oblige Andrews to lodge the estate there; the Lord Chancellor King made a decree that the money should be lodged in Chan-[244]-cery in aid of the Spiritual Court, he having been misinformed that the Delegates were of opinion that the Judge of the Prerogative Court had no power to order it into his court. Andrews appealed from this also to the House of Lords, the Lords confirmed the Lord Chancellor's decree, and Lords Harcourt and Trevor declared that every Ecclesiastical Judge had a full power to decree any money that was under litigation before him to be deposited for safe custody in his court. The Delegates were of opinion that the Judge of the Prerogative Court had not done right in ordering the money into court, because he had not sufficient evidence that Andrews misemployed the estate, and therefore they retained the cause, but afterwards on more full proof required the 1000*l.* to be lodged in the registry.

It appeared from the evidence on all sides that the deceased was a man of very odd temper, great humoursomeness and positiveness, and very covetous—that before the making of Powis' will, he was seized with a paralytic fit, by which his understanding was impaired—that he did extravagant actions, and appeared sometimes like a man frantic, but it did not appear that he was out of his senses at the time of the execution of the said will, which was made with deliberation, and signed by witnesses of reputation and credit; there were duplicates of the will, one part kept by the testator, and the other by the writer, and proof was made that the deceased declared affection to Powis at that time. In order to set aside this will, the next of kin insisted that he was under an absolute insanity, or weakness of mind, and was not capable of doing any serious act from the 17th Nov., 1719, till his death.

On behalf of Andrews' will, it was insisted [245] that he was perfectly capable, at the time, of making Powis' will, which was fully and duly executed, and that he continued so till his death; that at the time of making the latter will, he had cancelled the former by tearing off the seal, and throwing it into the fire, with a declaration that it should not be his will; that the latter will was fully executed, being signed, sealed, and published by the testator, and subscribed by three witnesses; that the testator declared great dislike to all his relations, and was greatly offended with Powis for not taking a person apprentice whom he had recommended to him, and that he had declared great satisfaction in the kindness and regard he had met with from Mr. Andrews and his family, and that he would reward them for it.

On the contrary, it was urged that Andrews had, by cajolery and stratagem (in persuading him to have a lamp set up in his chamber, by which the house was in danger of being fired) induced the deceased to fall out with his former landlord, Mr. Atterbury, with whom he had long lodged, in order to draw him to his house; that after he had so drawn him to his house, he endeavoured by false suggestions to alienate his affections from Powis; that he and his family kept him in constant custody, and would not suffer him to be seen; that Andrews was only an acquaintance of the deceased who, while his understanding was good, had frequently declared a very ill opinion of him; that before the making of that will, he had had a second fit of the palsy, by which his understanding was so much impaired that he did not know his most intimate acquaintance; that he was almost utterly incapable to read written hand, and that therefore his letters were always read to him; that the will was wholly [246] written by the executor, whose family was to get 90,000*l.* under it; that there were no instructions for making it proved to have been given by the testator, nor did it appear in evidence that it had been read over to the testator, or that he knew the contents of it; that the witnesses to it were the executor's wife, who could be no witness at all, a poor barber, and a servant-maid, both of whom had

received money or presents, and had made declarations contrary to what they had deposed on oath.

Heads of the arguments of the counsel for Andrews.

Serjeant Cheshire. The deceased had reasons for revoking Powis' will; one was that he had lent 11,000*l.* to Powis, for which he had promised him a mortgage, but had not kept his word.

Secondly. He continued a partnership trade with a person he disliked.

Thirdly. He desired him to take a relation apprentice which he had not done; he resolved to quit his lodgings before he went to Andrews, and would have gone to another place; declared he would leave nothing to his relations; directed Andrews to write a will from the old will, altering only the executor from Powis to Andrews, and changing the residuary legatees; a will made deliberately, though without witnesses, is a good will; declarations of witnesses in common discourse shall not take away the force of their depositions; a man shall not be permitted to swear against what he has signed and attested. The deceased recognized his will by mentioning it three or four days after the execution to the barber who witnessed it.

[247] Dr. Henchman. The questions are whether the deceased had an animus testandi tali modo; whether he had a capacity; whether he freely and voluntarily made Andrews' will. It is objected that the executor wrote it, and insisted that by the civil law the will is void, but in reality it was otherwise, for by that law only his legacy would have been void, and the writer subject to the penalty of the *Lex Cornelia de falsis*; if a man writes a legacy to his son, sub potestate, it is void; if to an emancipated son, it is otherwise by that law; and in England the paternal power is not admitted.

An evidence to a deed is a good evidence to a will. In the case of *Twisden contra Townsend*, Prerog. Mich. Term, 1727, Sir Thomas Twisden, the executor, wrote the will; no proof that it was read over to the deceased; but instructions were proved, and the Court pronounced for it.

In Lord Macclesfield's will, the subscribing witness denied his hand, he had custody of the will, and was the only surviving witness, but the will was pronounced for. When a witness contradicts his former deposition, it is a rule of law that *statur priori juramento*. Where iterable acts are deposed to by witnesses, they, by the civil law, are esteemed contesting witnesses.

Dr. Pinfold. The evidence does not prove the will was read over to the deceased, but that is not essential, for a will may be good, though nobody can prove that it was read to the testator.

Dr. Kinaston. Dr. Mead deposes that when he attended the deceased in August, 1721, he was then sensible, and the apothecary deposes the [248] same. The subscriptions to the receipts exhibited agree with the signatures of the will. Hammond, the banker, swears he would have paid any money upon view of a note signed with that hand. No law requires instructions for a will, nor that the will shall be read by or to witnesses. In the case of *Herne v. Johnson* no instructions were given, nor was the will read over, but the Court was satisfied with the evidence of the subscribing witnesses; extra-judicial declarations, though made by a man on his death-bed are not admissible against his oath. Gail. lib. 1, obs. 104, nu. 7, 8.(a)

Dr. Andrew. Every man has an undoubted right to dispose of his estate as he pleases, and no court can enquire into his reasons. Every man is supposed to intend what he executes; poverty is no objection to a witness. In *dubiis benigna interpretatio fienda est*. The confession of a counsel cannot bind a party; the confession

(a) 7. Sed quid si testis post juratam depositionem coram iudice vel commissario examinatus factam, extra judicialiter contrarium affirmet, an secunda contestatio priorem subvertet? Minime etiam si talis attestatio in mortis articulo facta sit.

8. Quod si contrariò testis privatim, et extra examen, factum in iudicio deductum, verum esse fateatur, postea verò in examine aliter deponat, an prima confessio posteriori præferatur? Nequaquam quia illa simplex, altera jurata, et pro iudice præsumptio est, testationem probè et sincerè conscriptam esse.

10. Ita illa privata et fortè captandæ benevolentiae ergo, altera judicialis et necessaria est, ad quam invitus quis compelli potest.

Gail. P. O. lib. 1, obs. 104, 7, 8, 9, 10.

of a proctor does, because he is dominus litis. The proof of disaffection to his relations is clear. The fact of Powis' will also stands uncontroverted. The [249] relations have proved that the deceased had the same odd behaviour before he made Powis' will as after. Mr. James Monk, an old acquaintance of the deceased, and who is no friend to Andrews, swears "That after the deceased returned from Shrewsbury, he was frequently with him, and he was sane." Eight or ten witnesses agree with Monk in this point; he went to the Exchange, received and paid money at his bankers. Mrs. Atterbury speaks to his insanity, and yet swears her husband was angry with her for disobliging the deceased, because he might otherwise have done something for them, therefore they supposed he had a capacity to make a will. Andrews' character is unspotted. The testator was disobliged with Powis for not taking Mrs. Cross's son apprentice; the deceased was not easy to be imposed upon.

It has been objected that if a man writes himself heir, he would, by the *Lex Cornelia de falsis*, have been infamous. The answer to that is that even by that law, if a man had wrote his emancipated son heir to any one, he would have been subject to no punishment. L. 11, ff. ad. Leg. Cornel. de fals.

The testator recognized his will, for Ditcher, whose evidence stands unimpeached, says that Powell declared after he had made his will that he would give Andrews his estate, which declaration was a recognition of the will, and he also, three or four days after it was made, said to Phillips, the barber, who witnessed it, "Barber, you are a witness to my will, by which I have given my estate to Andrews and his family; if my relations dispute it with them, be an honest man and speak the truth." Declarations of witnesses are not admissible contrary to their oath. In the case of [250] *Creswell v. Creswell*, in the Prerog. 3d Nov., 1715, instruction given for a will, the writer drew a will from it, and another contrary which he gave the testator, and he signed it, and the writer was a witness to it, afterwards he would have appeared as a witness to prove the forgery, but the court would not admit him, since he had signed the paper as a witness and rejected the allegation setting forth this matter. In the case of *Bird and Bird v. Wollaston*, Delegates, Feb., 1723; three witnesses to a will; the court swore to the testator's capacity at the time of execution, the other contrary, the court rejected his evidence.

Mr. Fazakerley. The will itself imports an animus testandi; there are many instances in chancery of committing men as lunatics, upon evidence only that they could not manage their own affairs; there are two positive subscribing witnesses to the factum of the will, who must be perjured if the fact was otherwise, which the court will be tender of declaring without full evidence directly proving the contrary. Extra-judicial declarations are allowed by all judges to be the slightest evidence. The statute of frauds was made to prevent frauds in making of wills, and does direct that no evidence shall be received to prove a nuncupative will after six months, unless the nuncupation was reduced to writing in six days after the death of the testator. There may be frauds as well in setting aside, as in constituting of wills, and the admission of evidence to prove frequent declarations made a long time ago tends to that purpose. Sir Edward Becher, Lord Mayor, Mr. Linyer, Common Serjeant, and others of reputation, prove Mr. Andrews' good character.

[251] Heads of the arguments of the counsel for Powis' will.

Mr. Lutwyche. Frauds are properly cognizable in the Delegates. No instance where chancery has interposed to set aside a will for a personal estate on account of fraud, but that court always has declared it does belong to the Spiritual Court; if we have not the full force of our evidence here, we cannot have it any where. In the case of *Bransby and Herridge*, Bransby made his father executor; by fraud and false representations of the father, Herridge persuaded him to revoke it, and by a new will to appoint him executor: the will contained lands, and therefore, as to the lands, the chancery set it aside on account of the fraud, and declared Herridge a trustee for the personal estate to the use of the father, by which the Ecclesiastical jurisdiction was saved, and the probate continued unrevoked. This matter is now under appeal to the Lords.

Andrews persuaded the deceased to do what would occasion a quarrel between him and his landlord, that he might draw him to his own house. The deceased came under the incapacity for making a will, mentioned by Swinburne, part 2, sect. 1; it appears that he was almost if not totally incapable to read writing, and therefore was

in the nature of a blind man,^(a) whose will ought to be read over to him before witnesses. Swin. part 2, sect. 11,^(b) but there is no proof of [252] reading this will of Andrews to the deceased; it appears from an interrogation put to one of the witnesses that Phillips, the barber, being asked whether he had not given a note for 60l. lent to him by Andrews, answered, "Yes, but it was only for a blind."

Mr. Reeves. Powis' will was made deliberately, while the testator was sane; not every small degree of understanding is sufficient for making a will, but the testator ought to have a sound and disposing mind. When a devise is extraordinary, some reason ought to be shewn why testator was induced so to do. Deceased used expressions of strong dislike to Andrews. The time for taking Cross's son apprentice was not come, when Andrew's will was made, therefore that was no reason for disaffection to Powis. Powell made a general order to Hammond to pay Andrews what money he should demand, which order was made soon after he came to Andrews' house, and is a proof that he was insane or grossly imposed on. It is said that if a man only subscribes his will, without witnesses it is good, but that is only where there is no suspicion of fraud; the will in favour of Andrews was not read to the deceased, and he could not read it himself, therefore he could not certainly know the contents. Any degree of sanity is not sufficient for making a will; *Marquess of Winchester's case*, Coke, 6 Rep. f. 23. It is the [253] constant practice, in common law courts, to admit proof of declarations made by witnesses contrary to their evidence on oath.

Dr. Strahan. Dr. Mead and the apothecary only talked with the deceased about his illness and he was able to give account of that; so can a child of six or seven years old. The old man was in custody of Andrews and his family, for some of them always attended him wherever he went. Some of his friends, particularly Mr. Thomson, was refused seeing him, on pretence he was not well. Observations were made by Andrews' people on all letters from Powis, in order to reflect on him and diminish the deceased's affection to him; and some of his letters concealed by Andrews. It appears from Andrews' own witnesses, as well as Powis, that he was in low circumstances when the deceased came to live at his house, which might be an inducement to him, by any means, to acquire to his family this great estate. The general order to Hammond to pay to Andrews on demand was within a month after Powell came to his house, so that the management of the deceased began as soon as he had got him into his custody. Andrews proved the will the day after Powell died, and entered on the estate immediately; he entered the probate in all the public offices, and by that means took up a large sum after the probate was called into the Prerogative Court on commencement of this suit, and upon that an order was made upon him by the Court to bring in 1000l. No declarations of Powis, in favour of Andrews, previous to his will. In the case of *Sands and Floyd contra Pearse*,^(a) Deleg., 1715, [254] Mr. Rolls made his will, by which he gave his estate to his daughter Pearse; the will was duly executed and witnessed, and he, before the witnesses, declared it as his will. After his decease, Mrs. Pearse refused to prove it, because her husband should not be benefited, with whom she was at variance, and then he propounded it. It appeared fully that the testator was insane, and that though he had published it properly, Mrs. Pearse had tutored him and taught him what to say. The will was set aside. The being able to say "Yes" or "No" is not a sufficient capacity; *Combe's case*, Moore's Rep. f. 754.

Dr. Sayer. Where there has been insanity the degree of evidence is different. Powis' will is reasonable, because he is nephew of the deceased. Duplicates were made of the will, and one was in the custody of the testator himself; but this latter

(a)¹ See Sir George Hay's judgment in *Barton v. Robins*, 3 Phill. 456, notes.

(b) "He that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses, but he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; and therefore, if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this were not sufficient, for it may be that if he should hear the same, he would not own it."—Swinburne, pt. II. s. 11.

(a)² *Sands and Lloyd v. Peirse and Peirse*, Deleg. 19th January 1714. Delegates present at the sentence—Mr. Justice Tracy, Mr. Baron Price, Dr. Clements, Dr. Raynes, Dr. Page, Dr. Phipps, and Dr. Strahan.

will has always been in Andrews' custody. Deceased declared he had made Powis his heir, spoke kindly of him, even after Andrews' will was made: his affection to Andrews grew, according to the witness, in five or six weeks' time. Dr. Harwood was interrogated, what the deceased said to him concerning his relations or will; on his first examination, he said nothing of disaffection; though not interrogated to that point, he swore the deceased was displeased with Powis. Andrews was sworn to the probate of his will by Dr. Harwood, to whom he made a present at that time of 50l. for mourning, on account of the Doc-[255]-tor's old acquaintance with the deceased. In October preceding Andrews' will, Powell declared he would give the greatest part of his estate to Powis. Minors, till a certain age, cannot dispose, though they can do common things and answer common questions. *Integritas mentis* is necessary in a testator, D. lib. 28, tit. 1, l. 2. Swinb. part 2, sect. 2, nu. 2.

Mr. Hamilton. A man who designs to act honestly, will take care to have witnesses of figure and reputation. When the testator executed Powis' will, he declared to the witnesses who he had made residuary legatees. The civil law directed that a testator should write the name of his heir himself, or declare it to the witnesses. C. de testamen. l. 29, in pv. Inst. de testament. ordin. 4. *Herbert and Lownds*, 3 Car. 1, Chancery Cases, Oct. 22. Mr. Bland made his will in favour of his children; when he grew weak, Lowndes, a scrivener, persuaded him to make a will and deeds in favour of him; much evidence that the testator was weak. The Court decreed that he was not absolutely insane, yet since there was fraud and management, the deeds should be set aside, and ordered Lowndes should not execute the will without his co-executor.

In the case of *Ainsworth and Pollard*, *ibid.* p. 101, and of *Maudley v. Moudley*, *ibid.* p. 123, wills and deeds were set aside on account of management of weak persons. *Fraser* contra *Duke of Devonshire*, Lord Harry Cavendish made certain deeds in his last sickness, fully executed, and no proof of insanity; but Lord Chancellor Cowper said, "A man in so weak a condition could not have an understanding adequate to what he was about," and therefore [256] decreed that the deeds were void, and the decree was confirmed by the Lords; but by Hale, Baron, those deeds were set aside, because they were not executed pursuant to the powers reserved to him, and it was on that account Lord Cowper said, "It did appear that he had not a mind adequate to what he was about."

Mr. Strange. There are three points before the Court, Powis' will, Andrews will, or an intestacy. The same degree of capacity is necessary to revoke as to constitute a will. The case of *Frost v. Hendrey*, 4 Mod. fo. 60. In the draught for Powis' will, blanks were left for the name of the executor, which the testator filled up, but having wrote the name ill, he disliked it, and ordered new ones to be drawn, and then, in the presence of the subscribing witnesses, had the blanks filled up with the name of Powis, as executor and residuary legatee; one draught kept by himself, the other by Baldwyn, who wrote or procured them to be wrote. All the instructions pretended for Andrews' will were only to get the names of Dr. Harwood's children, to whom, as it is pretended, the deceased did desire to leave legacies; notwithstanding which, the names of those children are not inserted in the will.

Heads of the argument of the counsel for Mrs. Collyer, and others of the relations of the deceased who contended for an intestacy.

Dr. Paul (the King's Advocate). The deceased declared to his brother Jeremy when he was dying, "That he would be a father and an uncle to his children; frequently gave presents to Mrs. Collyer, daughter to Jeremy. From Nov., 1719, [257] when he had his paralytic fit, he did no act, as appears from the evidence, that required judgment. In 1719 he laid up a dividend warrant in his closet, and did not know what he had done with it, but said, "It was stolen from him;" and said, "He could dispose of no money without the advice of his nurse who attended him." Powis applied to Murray, the old man's keeper, to procure him a will, and applied to the deceased for a deed of gift. It does not appear that the deceased himself read the instructions taken by Mr. Baldwyn; deceased attempted to fill up the blanks, was not able to do it; attempted to fill up the second draughts, though he knew he was not able to do it before, which shewed a want of understanding; he could not read, which proceeded from want of understanding only, because there is no proof he had lost his sight; so weak in mind, that no prudent person would trust him with fire; the time

he went from Atterbury's, so frantic in his behaviour that Mr. Reece would not receive him as a lodger; when he left Atterbury's, could not reckon with Atterbury for what he owed for his lodgings; went to Mrs. Rogers, his milliner, with whom he was well acquainted, but did not know her, took Thompson, a man of sixty years of age, and tall, for a little lad of about fourteen or fifteen. He that writes himself heir is infamous, per tot. tit. C. de his qui sibi adscrib: A testator must have *integritas mentis*. *Combe's case*, 1051. Moore's Rep. fo. 759. Executor charged with forgery; cleared as to the punishment for that, but the will set aside, because the testator was not sane. Duarenus disp. 1, nu. 27. Phillips, the barber, declared, "If evidence was wanting against a person who was under a criminal prosecution at the [258] Old Bailey, he would lend an oath to stitch him up." Declared he had signed Powis' will for Andrews, when the testator was out of his senses; a bribed person no good witness. Extra. de testib. cap. 1, ff. de falsis, Leg. 1 and 2. Nepos de monte Albano, nu. 75. Bartolus super, sc. 1, ff. de fals. When a witness is interested, he is not to be admitted. If a man thinks, though falsely, he had a right of commoning, he cannot be admitted at common law to prove a commoning.

The case of *Gore's Will* in the Delegates; the attorney who drew the will swore the testator read it over, and another witness swore he signed it, proved *contra* he was so weak he could not write, nor was able to read, his sight being distempered with the jaundice. The Delegates pronounced against the will.

Hester Gordon, her will in the Prerog. A small piece of paper signed as it seemed by Gordon, was propounded as her will. It did not appear who wrote the body of it. She had thereby given her estate to two of her children in prejudice of a third, but assigned a reason in the paper why she disinherited the other, viz. that she had given her 2000l. for her marriage portion. No proof of this will further than the subscription. The Court pronounced against it. The party did not appeal.

In the case of *Young and Young* in the Delegates, Byne, a Fleet parson, swore he married the parties; afterwards made an affidavit that he had sworn falsely before, and that he had been bribed to do it. The Delegates had no regard to his former deposition in the cause.

In the case of *Twisden contra Townshend*. The will was read over to the testatrix in the presence of [259] the witnesses, and she declared to others, she had made Sir Thomas Twisden her executor.

In the case of *Lady Bridget Osborne*, she swore she had never been married to Williams; Hall, the parson, alleged to have solemnized the marriage, swore he had not married them; but the Marquis of Carmarthen, her brother, swore she had confessed her marriage to him. And it was proved the parson declared he had strong compunction of mind for a great offence. Upon this evidence the Delegates pronounced for the marriage.

Mr. Lee. Such proof is to be admitted in all cases as is suited to the nature of the case. There is not sufficient evidence to pronounce for Powis' will. The exceptive evidence to Andrews' will is so strong that the will stands on comparison of hands only. A declaration of a witness may be received to contradict his evidence.

In the case of *Wood v. Cozens*, Sheffield made his will. Three witnesses to it. One swore expressly to his capacity, and the due execution of it; another was a legatary, and so repelled; the third swore he was not capable; he had before sworn the contrary in chancery. The Court had no regard to his evidence, but affirmed the will on proof by one witness of the due execution. This case is now before the Lords.

Rex v. Hayes, K. B. Hayes forged a bond, brought a witness to prove it, and recovered after it afterwards. That same witness was admitted by C. J. Raymond to prove the forgery, and upon that evidence and other circumstances only he was convicted thereof.

There are no expressions of disaffection to rela-[260]-tions till he became insane in 1719; public instances of insanity in May, 1720, immediately preceding Powis' will, which was made in June, 1720. To prove that the testator had not a legal capacity to make a will, and that the witnesses to Andrews' will were not sufficient, he cited Swinb. on Wills, part 4, sect. 24, nu. 2; part 4, sect. 27, nu. 10. Godolph. part 3, cap. 25, nu. 9. Swinb. part 7, sect. 14, nu. 5. Godolph. part 1, cap. 18, nu. 5; cap. 8, nu. 2. Those only are to be esteemed good. Witnesses quorum fides non vacillat. Ff. de test. lib. L. 1.

Reply for Andrews' will.

Dr. Henchman. In articulo mortis, a man may revoke by a less solemn instrument. Swinb. part. 2, sect. 25.

In the case of *Duke of Somerset and Sir John Jacobs*,^(a) there were three schedules imperfect in their dispositions, and without executors; they did not revoke the complete will for want of perfection.

The testator in this case was not blind, for he signed the will, and therefore had capacity to write, and it appears in evidence that he went to his closet and fetched a receipt from among other papers, which he could not have done if he had been incapable to read.

The subscription to the will is proved by Hammond on a comparison of hands, and that is a genus probandi, though not the best.

Dr. Mead has sworn that the deceased gave him such an account of his distemper, that he prescribed from it, and also that he believed he was capable to make a will.

[261] In the case of *Medlicot and Murford*, a will was written by the executor, and no instructions nor reading proved. One of the witnesses swore he believed the signing to the will was his hand. The will was pronounced for.

Incontinence is an objection to a witness. Covarruvias' Practical Conclusions. lib. 2, cap. 13, nu. 8. When the deceased tore the seal from Powis' will, he said, "Take notice of what I have done, I have now cancelled my former will."

The rest of Andrews' counsel spoke on the reply to much the same purpose.

Per Curiam. After a long and full hearing for several days of counsel on all sides, the Court was very unanimously of opinion that Powis' will was the true last will of the deceased, and that the will in favor of Andrews was null and void, and condemned Andrews in 100l. costs.

This judgment was given on the 28th Feb., 1727-8, at Serjeants' Inn, in Fleet Street.

(N.B.—An attempt was made to have examined Andrews' wife as a witness to the will, and a voluntatem was prayed before the Condelegates at Doctors' Commons on that point, but it was afterwards waived.)

[262] STEPHENS against WEBB. Arches Court, By-Day after Hilary Term, February 23rd, 1753.—An appeal pronounced for, on an understanding that the cause should be retained, and the adverse proctor should declare in acts of Court that he admitted certain points.

[See further, p. 456, post.]

(Appeal from Hereford in a grievance.)

Dr. Paul for Stephens. Anthony Stephens, farmer of the tithes of Mannington Stradley, in Herefordshire, brought suit against Mary Webb, on stat. Edw. 6,^(a) for hindering him from carrying his tithes, &c. 27th October, 1750, citation returned. Suit for great and small tithes. Small tithes paid. He now sues for tithes of twenty-seven acres of wheat, which were set out by the tithing-man, and therefore became his property; the dispute is upon the way for carrying off the tithes. We would have gone the same way as Webb carried off her own corn, which was the usual way, but she locked up the gates. This appeal is from rejecting an allegation.

Dr. Pinfold for Webb. Single point is now upon rejecting an allegation pleading the right of way; the substance of the allegation is laid in their libel, upon which they have had publication. We have likewise pleaded contrary and published.

Allegation for Stephens, 12th October, 1752.

1 art. Corn being cut, and the tithes set out, [263] Stephens would have carried them the same way as Webb did, which was the usual way, but Webb's son would not permit it.

2 art. Stephens went to Mary Webb to know how he was to carry away his tithes; she pointed to a place where there was a hedge and ditch, and said that was his way, but proponent alleges there was no way.

(a)¹ Deleg. 22d January, 1725.

(a)² *Barnell v. Jenkins*, 2 Phill. 391.

Libel read.

6 art. Webb carried away the tithes contrary to stat. Edw. 6.

7 art. Pleads the statute.

8 art. Webb stopped Stephens from carrying away the tithes, and locked the gate of the field where the tithes did grow, and fenced the lands by which he lost the tithes.

Witnesses on the libel read.

1. William Leach. 8 art. Deponent, servant to Mary Webb; last harvest he reaped wheat for her, and she carried away the wheat before the tithe was set out, leaving only a small portion for the tithes, and Webb locked up the gate every time her team was gone through.

2. Elizabeth Powell. 8 art. Webb's servants as they loaded left the tenth sheaf of the wheat. Stephens' agent asked how they should carry away the tithe? Webb told him through Emlin's ground, which was not a way.

3. Mary Price. 8 art. The wheat grew in an enclosed field; when Webb's waggon was gone through the gate, her people shut it, and would not let Stephen's waggon pass the same way.

[264] Webb's allegation, 1751, read.

3 art. Alleges the way her waggon went was through her private grounds; that that was not the way for carrying the tithes, and she told him he must pull down the hedge, and shewed him the right way.

Witnesses on second allegation.

1. Thomas Jones. 3 art. Powell, Stephens' agent, asked Webb which way he was to carry the tithes, she told him the usual way was through Emlin's field.

2. Thomas Webb. To same purpose.

Webb's counsel insisted that the substance of this allegation was pleaded in the libel, and the witnesses thereon had deposed that through Emlin's field was not the right way, and that Webb had pleaded the contrary to shew it was the right way, had examined and published thereon; that therefore this allegation was prius positum et contrarium prius positis super quibus.

{ Stephens' counsel replied that if their witnesses had sworn on the libel that through Emlin's ground was not the way, they had deposed extra articulum, and that part of their deposition could not be read.

JUDGMENT—SIR GEORGE LEE. I thought the first article was prius positum, and was rightly rejected; but as to the second article, though the substance of it was proved by the witnesses on the libel, yet as they had deposed extra articulum, I thought that article might be admitted; but for avoiding expence I proposed to the [265] parties that I should pronounce against the appeal, that Webb's proctor should consent to retaining the cause, and should declare in acts of court that he would not object at the hearing to any of Stephens' witnesses on the libel as having deposed extra articulum, by which Stephens would have the same benefit as if the second article was admitted, to which they agreed, and I rejected the allegation, and decreed accordingly.

FOOTE *against* RICHARDS AND BARTLETT. Arches Court, By-Day after Hilary Term, February 23rd, 1753.—In a suit under 5 & 6 Ed. 6, c. 4, not necessary that the witnesses should depose that the party proceeded against chided, brawled, and quarrelled; it is sufficient if they prove that words of brawling were used.

Appeal from Exeter.

Dr. Simpson for Richards and Bartlett. Prosecution by Richards and Bartlett, churchwardens of Colstock, in Cornwall, against Mrs. Elizabeth Foote, for brawling and quarrelling in the church, upon the statute of Ed. 6.; the churchwardens presented her at the visitation, and afterwards articulated against her before the official of the archdeacon of Cornwall, who dismissed her; the churchwardens appealed to the chancellor of Exeter; he pronounced for the appeal; reversed the sentence, and decreed Foote to be suspended ab ingressu ecclesiæ for a month; Mrs. Foote has appealed from that sentence to the Arches.

Merits of the case.

Cæsar, a negro servant of Mrs. Foote's, got Mary Crocker, his fellow-servant, with child; a vestry was called on 22d January, 1748, to con-[266]-sider how the parish should be indemnified from the child; Mrs. Foote there promised to indemnify the parish; but she not doing it, a second vestry was called on 12th February, 1748; both vestries were held in the church; she then abused the rector, Mr. Nicholas Richards; the churchwardens presented her for brawling in the church; presentment made on 3d May, 1749; 5th May, 1749, she was cited to answer said presentment; she appeared; churchwardens gave in articles, pleaded statute Ed. 6, and that Foote on a Sunday in Jan. or Feb., 1748, brawled and used these words to the parson: "Sweep before your own door, some people (speaking to the parson) are or may be as bad as Cæsar and Moll Crocker, witness nurse and Bess Collins, by my faith and troth, I will strip (or pull) the gown off his back," or "over his head," and other brawling words. We have examined three witnesses; the witnesses say the rector said to her, "You might have turned off Crocker and saved the parish this trouble. I believe some people are as bad as Crocker," &c., this proved by three witnesses; after publication Foote gave exceptive allegation, set forth that the witnesses are friends to the parson, and enemies to her; after the cause was concluded, the first judge admitted Foote to exhibit the parish register, to shew bastards were born in the parish, which the churchwardens had not presented, and exhibited three depositions in another cause, which she had commenced against the churchwardens for neglect of duty, in not presenting them. We shall object to all this evidence.

Dr. Paul for Foote. The witnesses do not say she brawled, chided, or quarrelled in the [267] church, which are the words of the statute. 27th Sep., 1751, when sentence was given in the first Court, the official had all the evidence that is now before this Court; 5th June, 1752, the chancellor of Exeter reversed the sentence of the official which dismissed Mrs. Foote, and pronounced that she had brawled, and suspended her ab ingressu ecclesiæ for a month. The churchwardens did not voluntarily present her; the minister by threats forced them to present her; the parson abused her, and said if all the water of the river Tamar was to run by her door for seven years it would not wash her clean; the words will not amount to brawling.

Witnesses for Richards and Bartlett.

1. James Lark. 1. Int. Presentment is true and made as he believes without malice; 22d Jan., 1748, vestry held in the church on Crocker's being with child, Richards, the rector, then said to Foote, "You knew that Cæsar and Moll Crocker had been too intimate for a long while, and therefore you might have turned her away and saved the parish all this trouble;" she answered, "Good lack, I believe there are some people as bad as Cæsar and Moll Crocker; sweep before your own door;" she declared that if the child was Cæsar's, she would make the parish easy, but she not doing it, deponent called another vestry, which was held in said church on 12th February, 1748, after morning service, where the rector and Foote were present, and said rector, speaking to Foote, said it was very hard the parishioners should not have security for the aforesaid base child, which Foote had promised to give, adding that if she would not give security, he desired they might have Cæsar again, who had been taken up, but dis-[268]-charged on promise of said security; Foote replied "I believe there are some people as bad as Cæsar and Moll Crocker; sweep before your own door, witness the nurse and Bess Collins," meaning Elizabeth Collins, a woman of bad character.

4. Int. Foote is a lay person. 5. Int. She has a good estate in Colstock; deponent is a witness at the instance of the rector.

2. Jeffery Knight. Believes presentment is true, &c.; deponent was at a vestry in the church on 22d January, 1748; the rector was in his pew, and Mrs. Foote in hers; the rector said to Foote, "I blame you, that after you had turned Moll Crocker out of your service, you should take her in again, as you knew that she and Cæsar lay together;" she answered that she thought Crocker had been past child-bearing; the rector replied, "Why, then, as you thought her past child-bearing, you would suffer them to go on in their wickedness;" she replied, "Sweep before your own door." Deponent was at a vestry in said church on Sunday, 12th February, 1748, when rector talked to Foote of giving security to the parish, but Foote fell into seemingly a passion, and told him "He should sweep clean before his own door first; remember

Bess Collins and the nurse," meaning Elizabeth Collins, a woman who had three bastards. She spoke in an angry manner, and intimated (as deponent apprehended) that the rector had been too familiar with Collins.

2. Int. Respondent is a witness at the request of the rector.

3. Susanna Borlace. Presentment is true; deponent was present in the church on 22d January and 12th February, 1748, when at both times there was talk of Cæsar's having a bastard [269] by Crocker; the rector said he thought Foote should have turned Crocker away when she knew Cæsar and she lay together; she replied "Some people are as bad as Crocker and Cæsar; sweep before your own door; remember the nurse and Bess Collins;" the rector replied, "If the river Tamar was to run by your door, it would not make you clean." On 12th February, deponent was going out of church, and in the church porch heard Foote say she would strip the gown off the parson's shoulders, but he was not present.

3. Int. At both times the rector began the discourse about security.

Witnesses for Foote.

1. William Bennet. William Richards, one of the churchwardens, owned to deponent that he was not in the church at the time of the supposed brawling; said he presented Foote at the instance of the rector, who threatened him if he did not, and that otherwise he should not have done it, and that the rector was to pay the expense; in 1748 several persons in the parish ought to have been presented for bastards, &c. who are not presented.

2. Henry Richards. Bartlett and William Richards said they were not present at said brawling, and would not have presented Foote if the rector had not threatened them; Richards said he would willingly withdraw his presentment if the rector would consent; the rector and his wife and Lark abused Foote very much, and the rector uttered these words, "Why did not you put Crocker out of the parish; you knew she lay with Cæsar;" producent behaved coolly and mildly, and did not abuse the rector.

[270] 2. Int. Does not believe the churchwardens would take a false oath.

Dr. Simpson for churchwardens. It is not at all necessary the words of brawling should be actionable; it is sufficient if the words are such as tend to create anger and disturbance. The words in this case are proved by three witnesses.

Dr. Paul for Foote. Every defamation in the church is not brawling; words of the statute are "chiding, brawling, and quarrelling." None of the witnesses say they chided, brawled, or quarrelled; our witnesses say she spoke mildly.

Dr. Hay, same side. In all penal statutes, the Court must proceed according to the letter of the statute, and as none of the witnesses say she chided, brawled, or quarrelled, the Court cannot pronounce that she did brawl.

JUDGMENT—SIR GEORGE LEE. But I was of opinion it was not necessary the witnesses should use those words; it was sufficient if they proved that words of brawling were used, which in this case was proved by three witnesses. I therefore affirmed the sentence of the Chancellor of Exeter, and remitted the cause, with 18l. costs.

[271] LADY MAYO *against* BROWN. Prerogative Court, By-Day after Hilary Term, February 26th, 1753.—Where the interest of a daughter, claiming administration to her father, is denied, it will be sufficient if she establishes the marriage of her parents by reputation and cohabitation; but she is bound to shew the time and place of her own birth.

[See p. 570, post; 2 Lee, 391.]

Gertryde Aylmer deceased intestate in 1732; Brown took administration to her as her husband, 1 sess. Mich. 1752; citation returned at instance of Lady Mayo as daughter of deceased, against Stephen Brown, to bring in the administration, and shew cause why it should not be granted to her as daughter and next of kin to deceased. Brown appeared, and denied Lady Mayo to be daughter; she gave in an allegation to plead her interest; she did not set forth time or place of her father and mother's marriage or of her own birth, but pleaded that she was the daughter of Whitgift Aylmer, by Gertryde his wife; that they lived publicly in London and Jamaica as husband and wife with reputation, and that she was owned by them, and reputed

to be their legitimate daughter, and pleaded a will of Whitgift Aylmer's dated in 1719, and also a deed wherein Gertryde was styled his wife, and Lady Mayo his daughter. I was of opinion it might easily happen that she might not be able to find out the time or place of her father and mother's marriage, and therefore that circumstantial evidence and public owning might be sufficient to establish the marriage, but directed she should specify the time and place of her own birth.

[272] RADCLIFF *against* VENFIELD. Prerogative Court, By-Day after Hilary Term, February 26th, 1753.—Costs given against a party who had filed a bill of discovery in the Court of Chancery, then proceeded to call for an inventory in the Ecclesiastical Court; and afterwards abandoning the latter suit, had revived the bill in Chancery.

Dr. Hay for Edward Radcliff. Ralph Radcliff made his will and appointed John Radcliff executor; John made Jane his wife, and Paggen Hale, Esq., executors; Jane took probate, made her will and appointed Edward Radcliff and Fitzwilliam Barrington, Esqs., her executors; 17th October, 1752, Jane Venfield, as executor of her husband, Robinson Venfield, cited Edward Radcliff to give in an inventory of Ralph Radcliff, the first testator's personal estate, and alleged that a legacy of 50*l.* was left to her husband in the will of Ralph Radcliff, which had not been paid; Edward denied her interest; probate of Jane's will decreed to Edward, undergoing a monition to exhibit an inventory if the court should order it; Edward's objection was that Jane Venfield had filed a bill in chancery against deceased, Jane Radcliff, and him the said Edward, for a discovery of said Ralph's estate, which was depending at the death of said Jane Radcliff; Edward exhibited many affidavits to prove this fact, and then Cheslyn, Jane Venfield's proctor, some time after, declared he would proceed no farther, because his client had revived her bill in Chancery, and made her option to proceed in that Court; the question now was whether she ought not to pay Edward Radcliff's costs.

Dr. Paul, counsel for Venfield, insisted that it was the rule of the Court not to give costs in that case, and that there was no instance of doing it.

[273] JUDGMENT—SIR GEORGE LEE.—I thought (I said) that such a rule was a very unreasonable one, for Mr. Radcliff was plainly harassed and put to an unnecessary expence, and in my opinion he ought to have his costs. The register said there was no such rule as Dr. Paul insisted on, and some of the proctors gave instances where costs had been given in the like cases; and thereupon I condemned Venfield in 10*l.* costs.

JEHEN *against* JEHEM. Prerogative Court, By-Day after Hilary Term, February 26th, 1753.—Answers objected to and reformed.

[See further pp. 401 and 568, post.]

On fuller answers.

Grace Jehen, widow of John Jehen, who died 28th August, 1751, prays administration to her husband, as dying intestate, was opposed by young Jehen, brother to deceased, and executor of a will of his, dated 18th October, 1749. The widow pleaded that the deceased married her on 24th February, 1749, subsequent to the will, and had a child by her, which is since dead, and therefore that by law by the will is void. He gave his answers to this plea.

Dr. Hay objected to the answers to the five first articles, which he admitted to be true; that instead of the word *admit*, he ought to have used the word *confess*; and to the 6th art. he objected that the latter part was redundant, and ought to be struck out. The 6th art. laid the date of the will, and no other fact to shew it was prior to the marriage; he admitted the article to be true, and then gave an account of a conversation with the [274] deceased, and several reasons to shew deceased intended the will should operate, notwithstanding his marriage, &c., to which he was not all led by the plea.

JUDGMENT—SIR GEORGE LEE. I was of opinion the word *admit* was equivalent to the word *confess*, but ordered the latter part of the answer to the 6th art. to be struck out, as redundant, and condemned young Jehen in 13s. 4d. the usual costs.

LADY COOKES WINFORD *against* HELLIER. Prerogative Court, By-Day after Hilary Term, February 26th, 1753.—A witness who had been examined in chief under a commission, but had been prevented by illness from being examined on interrogatories before the close of the commission, allowed to be reproduced and examined on interrogatories at the expence of the party who produced her.

[See pp. 39 and 137, ante.]

Hellier had a commission for examining witnesses in Herefordshire; several were produced and examined; among others, Sarah Hunkback was produced, sworn and admonished, but she (as it was suggested), being taken ill, went away without being examined. The substitute for Glasier, proctor for Lady Winford, alleged he would examine her on interrogatories, and prayed the commissioners to adjourn, and not close the commission, but they rejected this petition, and closed the commission; and now Glasier prayed that the said witness, Sarah Hunkback, might be brought to be examined on his interrogatories, at the expense of Hellier, who produced her. Bishop, proctor for Hellier, did not object to her being brought to be examined on Glasier's interrogatories, but insisted she ought to be brought at the expense of Glasier's client, and not at the expense of his client, and at whose expense she should be brought, was the question now before me.

[275] JUDGMENT—SIR GEORGE LEE. I was of opinion the witness ought to be brought to be examined on Glasier's interrogatories, by Hellier, the party who produced her, and at his expense, and said, though I did not remember any case where it had been adjudged; yet I took that to be the constant practice, and the registrar and practisers agreed it was so. I accordingly decreed the witness to be brought to be examined on Glasier's interrogatories, at the expense of Bishop's client who produced her.

SUTTON *against* SMITH AND OTHERS. Prerogative Court, By-Day after Hilary Term, February 26th, 1753.—Where there is no doubt as to the factum of a will which contains no disposition of the residue, the Court of Probate cannot pronounce the deceased to be dead intestate as to the residue.

[See p. 207, ante.]

Dr. Paul for Smith. Samuel Sutton, deceased, made his will, dated 6th November, 1749, in these words:

"I, Samuel Sutton, citizen and brewer, make this testament relating to my niece, Mrs. Elizabeth Edwards, and do give her five pounds a year for eight years, if she live, to be paid by Mr. Philip Smith, my executor to this will, to be paid on May-day every year.

"SAMUEL SUTTON.

"She shall have no more of my effects.

"Signed, sealed, published, and delivered
in the presence of us—

"Elizabeth Sutton,

"John Sutton,

"Joseph Sutton,

"Adam Critch."

Smith is executor, but has no legacy. Will proved in common form, 23d November. Deceased left a brother, Jeremiah Sutton, and several nephews and nieces. Ashbury Sutton, one of [276] the nephews, has cited the executor to bring in the probate and prove the will by witnesses, in solemn form of law, or shew cause why he should not be pronounced to be dead intestate.

Dr. Hay for Sutton. Deceased died 14th November, 1749; he made this will only to cut off his niece Edwards, who had disobliged him; the writer of the will says deceased, on 6th November, said he would make a will to cut her off; and after it was finished, he said, "It will do to cut her off;" he declares the will to be a testament relating to his niece Edwards, and at the end names Smith executor of this will, and says, "Edwards shall have no more of my effects;" which implies that he intended the rest of his relations shall have his effects, and the witnesses, except Critch, are all relations, and it cannot be supposed he intended them to attest an act to cut themselves off, the executor was conscious he was not entitled to the residue, and therefore compounded with the brother, and paid him 570l. in consideration of his releasing all claim on the deceased's estate. Ashbury Sutton, who at deceased's death was in Maryland, cited the executor to prove the will, and to shew cause why deceased should not be declared to have died intestate. We do not contend for an absolute intestacy, but insist that deceased is dead intestate as to the residue, that the general probate granted to Smith is wrong, and that he ought only to have a probate limited to Edwards's legacy.

Witnesses for Smith.

1. John Sutton. Deponent was nephew to deceased; 6th November, 1749, day of the date of [277] the will, deceased declared himself angry with Edwards for not having answered a letter deponent wrote to her by deceased's order, and said, "She shall see what she has lost, I will make a will to cut her off;" deponent by his order, wrote the will pleaded, and deceased read it over, and approved and executed it in presence of deponent and his mother Elizabeth Sutton and brother Joseph Sutton, who are all relations of deceased's, to wit, the wife, and sons of deceased's brother Jeremiah Sutton, and the next day Adam Critch witnessed it at deceased's desire. Deceased was of sound mind, &c.

2. Int. Respondent several times heard deceased say he would cut off his niece Edwards. 9. Int. Deceased at time of execution of said will said it was only to cut off Edwards, and that he would send for Smith to make another will. 11. Int. Producent is not related to deceased. 13. Int. Smith paid 570l. to respondent, for the use of respondent's father, and he released all claim on deceased's estate; has heard Edwards say Smith has paid her whole legacy. 16. Int. Deceased spoke well of Ashbury Sutton, and said he would take care of others of his relations. 19. Int. Has heard him say he would leave a share of his patent for extracting foul air out of ships by fire to respondent's brother. 20. Int. Respondent does not believe he intended to leave his fortune to producent.

2. Joseph Sutton. Deponent was nephew to deceased; John Sutton wrote a letter by deceased's order to Edwards, to which she did not send an answer; deceased was angry, and on 6th November, 1749, said he would cut her off, and then gave John Sutton instructions for writing the will plead-[278]-ed; deceased read it, and approved it, and signed it, to cut Edwards off only; and then John and Elizabeth Sutton and deponent signed it; believes Critch signed it the next day; deceased of sound mind, &c.

2. Int. Deceased expressed dislike of Edwards for not answering his letter. 5. Int. Deceased expressed great kindness for respondent and his brothers and sisters. 9. Int. Deceased said he made the will to cut off Edwards. 13. Int. Smith compounded with respondent's father for releasing his claim to deceased's estate. 20. Int. Does not believe deceased intended to leave his fortune to Smith.

3. Elizabeth Sutton. Deponent is wife to deceased's brother Jeremiah; deceased declared he would cut off his niece Edwards; deceased heard the will read and perused it himself, and approved it in presence of deponent and her two sons, and then executed it, and they attested it, and the next day Critch signed it, at which time deceased re-executed it; he was of sound mind, &c.

2. Int. Deceased angry with Edwards. 9. Int. Deceased said the will was to cut off Edwards; he talked of making another will. 11. Int. Smith was not related to deceased. 13. Int. Smith compounded with respondent's husband, and he released his claim on deceased's estate. 16. Int. Deceased spoke well of Ashbury Sutton, and was fond of deponent's sons and daughter. 20. Int. Does not believe deceased intended to leave his fortune to Smith.

4. Adam Critch. One day, about a week before deceased's death he told

deponent he had made his will; deponent read it; deceased said it was to cut off Edwards; deceased acknowledged [279] his subscription, and sealed it again, and then deponent at his desire signed it as a witness.

2. Int. Heard deceased say he was angry with Edwards. 5. Int. He spoke kindly of his brother and other relations. 9. Int. Deceased said when deponent signed it, he intended that only to cut off Edwards, and that he would send for Smith to make another will. 15. Int. Deceased left several relations. 16. Int. Deceased had affection for Joseph Sutton, and said what he had would fall among his relations. 19. Int. Said he had a good deal to leave to his relations. 20. Int. Does not believe he intended to leave his fortune to Smith.

Will read.

Dr. Paul for Smith. Court cannot pronounce deceased is dead intestate; factum of the will fully proved by four witnesses; they insist that he intended this will should be limited only to Edwards. 2 Vern. 37, *Lord Falkland* against *Bert*, parol proof of intention must be disallowed, and the will must stand on its own bottom. Statute of frauds, will in writing shall not be repealed by words alone; the executorship is general and extends to the whole estate; the executor has no legacy, and therefore shall take the residue. Smith giving money to the relations is no objection to the will. *Ward's case*.

Dr. Pinfold, same side. Court can only pronounce whether it is a will or not; the operation is a subsequent question.

Dr. Hay for Sutton. The Court under this process can inquire whether deceased is dead in-[280]-testate, as to part of his estate. We do not contend for a total intestacy. Deceased had no view of giving his estate to Smith. The witnesses attest against their father's interest. Parol evidence cannot be allowed to contradict, but it may to explain, a will. Deceased intended to die testate only quoad hoc, a general probate ought not to have been granted. The Court may revoke it, and grant a probate limited to the contents of this will only. April, 1733, *Trig* against *Matthews*.

Dr. Smalbroke, same side. Real intention of a testator shall set aside a presumed intention. 1 Vern., *Fane and Fane*, the Court has power to grant a limited probate.

JUDGMENT—SIR GEORGE LEE. I was of opinion I could, under this process, only pronounce for the will, or for an absolute intestacy; and in this case I could not pronounce for an intestacy, for the factum of the will and sanity of the testator were fully proved. The Court may grant a limited probate where the testator has limited the executor; but in this case there was no foundation for such grant, because the testator had made Smith executor without any limitation, and had directed him to pay the legacy of 5l. a year to Edwards without limiting any fund to pay it out of; consequently, the whole estate was the fund, and therefore the executor must collect in the whole estate. What would be the operation of the will, whether the executor should take the residue, or should be considered only as a trustee for the next of kin, was another question, which I could not deter-[281]-mine upon the present process; it might have been brought before this Court upon a process to call the executor to give in an inventory and account, and make distribution; but probably a prohibition would have been granted as had been done in two or three cases of this sort. Because the question related to a trust which is cognizable only in Chancery, I thought the plaintiff had mistaken his way, he should have filed his bill in Chancery to have had the executor declared a trustee, and probably that Court, upon this evidence of the testator's intention, would pronounce the executor to be only a trustee as to the residue for the next of kin; but I could now only pronounce for or against the validity of the will. I therefore pronounced for the validity of it, and confirmed the general probate to Smith.

HELLIER against HELLIER. Prerogative Court, March 6th, 1753.—An administration pendente lite granted jointly to the nominees of the parties litigant.

(On grant of administration pendente lite.)

Dr. Pinfold for William Hellier. Robert Hellier, Esq., deceased, lent 4000l. on mortgage of the estate of Edward Phillips and his wife; said Phillips and his wife are

dead ; the son of said Phillips has contracted to sell the estate, and the purchaser will pay off the mortgage, and notice is given for that purpose, and the title deeds which were in deceased's custody are demanded. The deeds cannot be delivered up, nor the money received, without an administration pendente lite ; both sides agree to having an administrator, but differ about the person ; Mr. Hellier names Mr. [282] Weston, his wife's brother, and offers 9000*l.* security, and consents the money should be paid into Court, to be laid out in the funds ; Mrs. Hellier names Mr. Bennet, a witness in the cause ; but at last, administration pendente lite was granted by consent to Mr. Bennet, named by Mrs. Hellier, and to Mr. Damarell, named by Mr. Hellier, who are to give joint security, and the 4000*l.*, when received from the mortgagor, is to be paid to Mr. Stevens, register of the Court, to be laid out in three per cent. annuities, in the names of the said register and of the proctor of each party.

COX against THOMPSON, ALIAS SMITH. Prerogative Court, March 6th, 1753.—
The interest of a father established, but without costs.

[See further, p. 529, post.]

Dr. Bettesworth for Thompson. Elizabeth Street, widow, deceased ; John Cox has set up a will of hers, dated 27th January, 1752 ; it is opposed by Thompson, the deceased's father. Cox denied his interest ; he has pleaded and fully proved himself to be deceased's father. We pray you will pronounce for our interest, and will give full costs to the time Cox was admitted a pauper.

Dr. Hay *contra*, for Cox. Thompson alias Smith entered caveat by name of Thompson. Cox warned it. Bellas appeared for Thompson, and alleged his interest as father to deceased, and prayed an answer, and declared he opposed the will. Cox denied his interest, and offered to propound the will, and to admit Thompson to be a contradictor, and Thompson to bring in scripts and scrolls. He brought in a paper in these words :

[283] "I, Elizabeth Street, revoke all wills by me made. Witness my hand, 29th April, 1752 ;" which he has since pleaded as a revocation. His interest stands thus. John Smith and Ann Carder married at Ramsgate in 1713, and lived there publicly as husband and wife till 1718, then Smith left his wife and lived at Uxbridge, where he took the name of Thompson ; the wife went to her father's at Canterbury, and in March, 1718, was delivered there of a daughter, by said John Smith, who was the deceased in this cause. The marriage of Smith and Carder is not proved by any witness who was present thereat, but an extract from the Ramsgate register, and cohabitation, are proved, and also an extract from the register at Canterbury of the baptism of the daughter is proved, wherein she is mentioned only as the daughter of John Smith. Proved that it was reported in 1718 that Smith was dead ; afterwards in 1728 Carder and her daughter came to live with him at Uxbridge ; he then pretended he was just married to her, that she was a widow, and had said daughter by a former husband. In the will propounded there is a legacy to deceased's father, John Thompson. We admit they have proved Thompson's interest as father, but they have not affected Cox with the knowledge that Thompson was father, and therefore he is not liable to pay costs ; and if the Court should condemn him in costs, as he is a pauper, he has nothing to pay.

Dr. Bettesworth admitted they had not affected Cox with the knowledge of the several facts above stated : and, therefore, upon the admission of the [284] counsel on both sides, I pronounced for Thompson's interest, but gave no costs.

JODRELL against CROP. Prerogative Court, March 6th, 1753.—A codicil not admitted to probate, for want of sufficient legal proof.

Dr. Hay for Jodrell. Mrs. Sarah Boulter died a widow without children, 12th October, 1748 ; left Susanna Crop, Richard Banner, and Sheldon Cradoek, her niece and nephews and next of kin. Caveat entered, which Jodrell warned. Deceased made a will, dated 4th April, 1745, appoints her brother, Richard Cradoek, executor and residuary legatee ; he died 6th July, 1748 ; same day she made a codicil of that date, whereby she made Jodrell executor and residuary legatee in the place of her brother, and confirmed all the legacies left in her will in these words : "I do hereby

give and bequeath what I thereby gave to my brother, William Cradock, deceased, to my nephew, Mr. Gilbert Jodrell, and do appoint him executor of my will in the place of said William Cradock." The will and this codicil are propounded by Jodrell. This codicil is opposed by Mrs. Crop as executrix in a codicil dated 10th July, 1748, wherein the will is confirmed, but revokes the codicil of 6th July, makes Crop executrix, and gives the residue according to statute of distributions; she has also propounded another codicil, dated 11th June, by mistake for July, wherein legacies are given to relations and servants. The will is not disputed; the single question is whether the codicil of the 6th July is the act of deceased, and if so, whether it is revoked by codicil of 10th July, [285] 1748. Great variety and contrariety of evidence; our witnesses say, on 6th July, Jodrell was acquainted with death of deceased's brother; she often declared, if her brother died, Jodrell should be in his place, and ordered Jodrell to come to her as soon as he heard of his death. Upon information of Cradock's death, Jodrell went to deceased and told her of it; she received him with great kindness, and ordered him to make said codicil of 6th July; in presence of Hannah Pen and Elizabeth Balchen, Jodrell drew codicil from deceased's instructions, read twice or thrice to her, and she executed it by setting her mark; she was eighty-three years old. For three years before she never set her name, but when her hand was guided by her brother. Proof of execution of codicil, 6th July; incapacity not pretended; they say Jodrell was only to have authority to act as her attorney; contrary proved; codicil not obtained clandestinely. Declarations in favour of Jodrell before death of deceased's husband in 1742, great affection for him; in 1740 Jodrell married her niece; in 1741 had a daughter by her, which deceased was fond of. 7th June, 1748, deceased told Jodrell her brother was ill, and if he died, she would make him executor, and put him in his place; 6th July, Jodrell dined with Long and Henry Balchen at deceased's, and told them what she had done, in afternoon of 6th Martha Balchen came and staid at deceased's house. Jodrell saw deceased two or three days after that, and when he was out of town constantly sent messages to her. Their opposition is not as next of kin, but under the codicil of 10th July. We shall insist that the codicil was the act of Banner and of Martha and Elizabeth Balchen. No instructions for it; it was con-[286]-certed and wrote at the house of Mr. Houghton between 6th and 10th July, carried by Banner ready drawn to deceased on the evening of 10th July. Pen, a witness for Jodrell, was at that time forced out of deceased's room. It is attested by Martha and Elizabeth Balchen; codicil 11th July, to benefit the Balchens; not one declaration leading to codicil 10th July. Deceased had no regard to Banner or Sheldon Cradock, and disliked Crop. Deceased died 12th October, 1748; Jodrell sent to secure papers, &c. on the 11th.

Dr. Jenner, same side. Jodrell's wife died 12th March, 1745. Deceased much concerned, said she was glad there was a child by her, it should be the same as if her niece had lived; continued affection to her death. On or about the 7th June, she sent for Jodrell, and then declared she would put him in her brother's place if he died; behaviour of Elizabeth Balchen between 7th June and 6th July; deceased ordered her servants to let her see Jodrell whenever he came, for Elizabeth Balchen would prevent her seeing him if she could; deceased bid Pen sign codicil of 6th July, and deceased delivered it to Jodrell. Balchen opposed codicil being made till her uncle could come; footman sent for him, who when he returned went up with the message, and heard deceased say, she had put Jodrell in place of her brother. Balchen swears Jodrell was not with deceased above half an hour. Jodrell would have deferred making the codicil till Henry Balchen came, but deceased would not stay. Jodrell dined that day at deceased's, and Long being sent for by Balchen, came in the afternoon; it was agreed at Houghton's that something should be [287] done to revoke codicil of 6th July. Jodrell visited deceased every day from 6th to 15th July. While Banner was with deceased on 10th July, Pen was by force kept in another room. Banner never came afterwards to see deceased. Mrs. Crop never at deceased's house from 1736 to 16th July, 1748, and yet she is executrix in codicil. 10th July, deceased had great dislike to Crop, and great affection for Jodrell.

Dr. Paul for Mrs. Crop. We oppose the codicil as next of kin; deceased died 12th October, 1748; deceased's brother, Richard Cradock, died at six in the evening of the 6th July; Jodrell's codicil made at noon of said 6th July; main question, Whether codicil of 6th, or codicil of 10th shall be established? execution of codicil 10th July fully proved. Jodrell not related to deceased; deceased's affection was to his daughter,

who has nothing by codicil of 6th July. Richard Cradock, while he lived, was intended to be deceased's executor; deceased deaf and bedridden. Jodrell on 6th July said he was just come from Islington, and deceased's brother was dead, and somebody must act for deceased; Henry Balchen was his agent; the servants were solicitous to have mourning for Cradock, and were told Jodrell would give them mourning. Jodrell, by Pen, asked her to make a codicil; deceased said, "No;" Elizabeth Balchen desired Jodrell to stay till Henry Balchen came, but he would not stay. Hannah Pen has signed codicil of 6th July, but Elizabeth Balchen who was present would not sign it. Codicil twice or thrice read, yet deceased took no notice of the mistake of her brother's christian name, [288] who is called William instead of Richard. Jodrell is called her nephew, he is not so. Pen says she told Jodrell deceased's brother's name was William; they have pleaded several recognitions of codicil 6th July. Pen swears deceased declared to several persons on 6th July that she had made a codicil; their witnesses swear that the deceased could not write her name without assistance. We have forty exhibits to shew she did write her name within two years and a half before her death. Pen swears she does not believe the signing to codicil 10th and codicil 11th July were wrote by deceased; proved by three witnesses she wrote them right. Before deceased died, Jodrell sent his clerks and turned Martha and Elizabeth Balchen out of deceased's house, and took possession of every thing. Our codicil was prepared without deceased's orders, but she readily approved it, and executed it, and deceased being informed of codicil 6th July, was very angry.

Dr. Simpson, same side. We oppose as next of kin, and till they have established codicil of the 6th July, they cannot oppose codicil 10th July; the proof of our codicil destroys the credit of their witnesses. Jodrell never saw deceased from April, 1745, to 7th June, 1748. Richard Cradock was alive when Jodrell told her he was dead, and the codicil of the 6th July was made on the supposition that he was dead. Roberts and Matthias swear Elizabeth Balchen was out of the room the whole time the codicil of 6th July was executing; Pen swears the contrary. Jodrell's agents, before deceased was dead, took away the will of 4th April, 1745. We admit that the codicil of the 10th July was car-[289]-ried to the deceased ready prepared, but full proof of intention, reading and execution of it. Deceased, after 10th July, thanked God she had discovered Jodrell's imposition.

Dr. Bettsworth, same side. Affection to Mrs. Crop proved by two indifferent witnesses; by will only 100l. given to Jodrell for his trouble in deceased's affairs.

Witnesses for Jodrell.

1. Elizabeth Perry ex. 17th April, 1749. Deponent servant to deceased nine years, ending ten years ago last October; towards latter part of said time, Miss Cradock used to visit deceased, and she was well received by deceased; Miss Cradock married Jodrell; deceased much pleased; Crop, Banner, and Cradock, niece and nephews to deceased; does not remember Crop visited deceased above three times; never heard deceased express affection for any of them; deceased's husband died in August, 1742.

2. Ann Jeyes. Deponent servant to deceased for a year-and-half, ending nine years ago; deceased much approved of her niece Cradock's marriage to Jodrell, was godmother to their daughter; never knew Crop visited deceased; never heard deceased express regard for her niece or nephews.

3. Elizabeth Steel ex. February, 1748. Deponent was servant to deceased for three years, ending about seven years ago; deponent often saw deceased till she was bedridden; Jodrell and his wife, related before marriage, were married with deceased's approbation; the deceased shewed great affection to Mrs. Jodrell, and she and her husband were frequently with the deceased, and well [290] received by her; she pressed them to come often; deceased scarcely visited any of her relations but her niece Jodrell; Crop came once or twice to deceased; deceased went to Mrs. Jodrell's labour, and staid till midnight, which she never did before as deponent knows of; deceased was godmother to said child, was much pleased at her being called Sarah after her name, and said she should be hers; never shewed any affection for Crop, Banner, or Cradock; expressed dissatisfaction to Crop, said she would never be satisfied with money; has known deceased refuse to see Crop; declared she never would call to see her; she received Banner, and invited him to dine with her; heard

her say Banner had been an imprudent man ; when deceased's husband died Jodrell assisted her in settling his affairs, and deceased was well pleased with it, and expressed obligation to him ; has heard deceased say her brother should enjoy what she had as long as he lived, but after his death none but her niece Jodrell and her daughter should enjoy what she had.

14, 15. Int. Deceased confined to her bed three years before her death ; respondent saw her but once after ; she was very deaf ; she wrote a bad hand, but never knew her set her mark.

4. Thomas Jefferys. Deponent, servant to deceased's husband at his death, and four years before ; deceased approved her niece's marriage to Jodrell ; Mrs. Jodrell often visited deceased ; believes deceased had great value for her and her husband ; never knew deceased visit Crop ; Jodrell had a daughter, deceased was godmother, and was at Mrs. Jodrell's labour ; has known Crop often come to visit deceased, but deceased saw her but once ; deceased declared dislike to [291] Sheldon Cradock ; Banner failed ; deceased said it was his own fault ; Mr. Jodrell came frequently to deceased and assisted in her affairs ; heard her say her nephew Jodrell was very kind in assisting her.

16. Int. Mrs. Jodrell was living when respondent left deceased's service.

5. Giles Watkins ex. April, 1749. Deponent servant to deceased in 1742, and lived with her two years ; Jodrell and his wife came often to deceased, she shewed great affection to her niece ; never visited Crop ; does not remember Crop came to deceased ; Jodrell transacted business for deceased.

6. Mary Hardy ex. March, 1748. Servant to deceased a year and four months from September, 1742 ; Jodrell and his wife frequently visited deceased, and she expressed great regard for them ; said she should always value him next to her brother ; deceased seemed fond of Jodrell's daughter ; Crop came once to deceased, but deceased used to decline seeing her, though she was well enough to have seen her ; deceased shewed disregard to Crop, Banner, and Cradock.

14. Int. Deceased bedridden three years before her death, and was deaf.

7. Elizabeth Thomas. Deponent servant to deceased eleven months ending in February, 1746 ; Crop, Cradock, and Banner, did not visit deceased while deponent lived with her ; has heard deceased speak affectionately of Jodrell's daughter.

2. Int. Mr. Balchen paid deponent her wages when she left deceased. 14. Int. Deceased very deaf and bedridden. 16. Int. Mrs. Jodrell dead ; does not know Mrs. Jodrell visited deceased.

8. Ann Webb. Deponent servant to Mrs. [292] Sheldon and to Mrs. Jodrell before and after she married Jodrell ; married in 1740 ; frequently dined with deceased, &c. ; deceased seemed to have great affection for Mrs. Jodrell, she often carried her daughter to deceased, and deceased often desired her to come to her.

16. Int. Mrs. Jodrell died 12th March, 1745 ; Mr. Jodrell afterwards continued to visit deceased.

9. Samuel Horner. Deponent, coachman to Jodrell when he married Miss Cradock ; deceased well pleased with said marriage : deceased godmother to Jodrell's child ; often sent messages that she should be glad to see Mrs. Jodrell's daughter, and she was often sent to deceased.

15. Int. Jodrell several times went to deceased after the death of his wife.

10. James Bond. Deponent servant to Jodrell from 2d April, 1745 to 2d April, 1748 ; Mrs. Jodrell died in March, 1745 ; Mr. Jodrell frequently sent messages to deceased ; one day he sent deponent with a message that he would wait on her ; she answered she should be very glad to see him.

11. Ann Oates ex. 1748. Deponent servant to Jodrell last summer, about end of May or beginning of June ; deponent went with Jodrell's daughter to see deceased ; child was carried into deceased's room and heard deceased, as deponent took it to be, speak kindly to said child ; deponent was in the next room, and did not see deceased, but heard the person deponent took to be deceased, say to said child, "Miss, tell your father I desire to see him," and bid Pen tell deponent the same, which message Pen delivered to deponent, and said that her lady desired if Miss [293] Balchen should say when he came that she was asleep, he would stay till she was awake.

12. Edith Medcalf ex. 1749. Deponent is servant to Jodrell ; latter end of June, 1748, deponent went with Miss Jodrell to deceased, and the child was kindly received ;

Pen told deponent that deceased desired deponent would tell Jodrell she should be very glad to see him as soon as he could conveniently come.

13. William Tefisser, gent. Deponent clerk to Jodrell; speaks to visiting messages, &c. between deceased and Jodrell.

14. Samuel Medley ex. January, 1748. Deponent was coachman to deceased to her death on 12th October, 1748; on which day before deceased was dead deponent and the rest of the servants were turned out of doors by Mrs. Crop, Mr. Cradock, and Mr. Balchen; deceased expressed affection for Mrs. Jodrell for twelve years before her death; deceased hardly visited any of her relations but Mrs. Jodrell; deceased fond of her god-daughter; shewed no affection to her other relations; did not visit Crop for at least twelve years before her death; deceased angry because deponent drove her on the side of Fenchurch-street on which Crop lived; deceased declined seeing Crop when she would have come to her; has heard deceased say Crop was a court lady and loved plays, &c.; has not seen Crop at deceased's for several years before 16th July last; Banner sometimes visited deceased till he failed, but seldom came afterwards; never heard of his being there till one Sunday after Richard Cradock's death, when he came privately thither; he sent letters to deceased; deponent gave her one and she said she should return it as it came, [294] and expressed displeasure at him, and said he should never have anything to do with her fortune; deceased very angry with him for spending other people's money with which he was entrusted; Sheldon Cradock was not with deceased for above a year before July, 1748; has often heard deceased say Jodrell was a very honest man, and a kind relation to her in settling her husband's affairs; she spoke many handsome things of him, and said, if her brother did otherwise than well, she knew what she had to do, for she should always acknowledge Mr. Jodrell's kindness, and would not be ungrateful; believes Jodrell assisted deceased in her husband's affairs, and she said he would not take anything for his trouble; she saw no visitors but her brother, Jodrell and his wife, and Mrs. Perry; Jodrell and his wife often dined with her; when Mrs. Jodrell died deceased thanked God the child was alive, and that should be all the same to her; deceased's brother died 6th July, 1748; he had declined in his health some months before, and lodged at Islington; deceased at date of her will had no brother but Richard Cradock; by William in the codicil was meant Richard.

2. Int. Respondent was carried before Lord Mayor and was forced out of deceased's house; was not examined before the Lord Mayor, and was refused admittance into deceased's house by Mr. Cotton. 4. Int. About twelve at noon of 6th July Cradock was dead, as deponent was told at his lodgings, but was not told at what hour he died.

15. Hannah Pen, æt. 38, ex. 22d Dec., 1748. Deponent was servant to deceased for four years before her death; never heard deceased express [295] regard for Crop, Banner or Cradock; heard deceased frequently express dislike of Crop, and say she was a proud good-for-nothing woman; deponent never knew her visit deceased till 16th July, 1748; Elizabeth Balchen desired Crop would come that day, which she did; deponent was present when Balchen told deceased Crop was in the house; deceased said she would not see her, she had nothing to do with her, she had made Mr. Jodrell her executor, and several times spoke to that effect; deceased of sound mind, &c. Balchen said to deponent, "You have declared you would not leave the room for anybody but Mrs. Crop, she is now come and must speak with Mrs. Boulter, and you must leave the room," and then deponent went out of the bedchamber; never knew Banner visited deceased but three or four times; she expressed a dislike of him; he came on 10th July, 1748, with Cotton and Martha and Elizabeth Balchen; told deceased Banner was in the house; deceased refused to see him, and said she should not alter her will, she had done as much for him as she would do, she had nothing to say to him, she had made Jodrell her executor; Martha Balchen then pressed deceased to see him; said he was come an hundred miles on purpose; at last deceased consented; he came into her bedchamber; he bid deponent retire out of the room, deponent refused; Martha Balchen then pushed deponent to turn her out of the room; deponent said to deceased, "Will you have me go out of the room? if you would I will go, otherwise not;" deceased replied, "Yes, Pen, go; he says he has but one word to say, and will not be troublesome;" deponent went into the passage and Cotton pushed deponent before him into another room at some distance, and then shut the door and sat down on a stool with his back against it, and kept deponent in said room

near half an hour, deceased afterwards told deponent that Banner and Elizabeth Balchen wanted her to give them all she had, but she would never alter her will, and added, "You know, Pen, I have made Jodrell my whole and sole executor in the room of my brother." Banner never came to see deceased afterwards; in May or June, 1747, Sheldon Cradock came several times to deceased's house, but she refused to see him, but he two or three times forced himself into her room, and told deceased he wished her dead and in heaven; she expressed dislike to him; he never came again till July or August, 1748, and he then went abruptly into deceased's room; deceased told him she had made her will and should do no more for him, and desired him to go, her brother shewed deceased a letter from Cradock, at which she was angry, and said she would never trust her affairs but with her brother or Jodrell; deceased shewed great regard for Jodrell and his wife and child; she expressed great sorrow for death of Mrs. Jodrell, and said her daughter should be the same to her; a little after Mrs. Jodrell's death, Elizabeth Balchen told deceased Mr. Jodrell had been there, but she told him deceased could not see him; deceased replied, "Why did you tell him so?" she answered, "Because you have said you will see none but your brother;" she answered, "But I would have seen Jodrell;" in May or June, 1748, deceased bid Jodrell's daughter tell him she should be glad to see him, and bid deponent tell Jodrell's servant Mr. Cradock was not well, she would have Jodrell call on him, and she should be glad to see Jodrell; deponent delivered the message; de-[297]-ceased often said Jodrell was very useful to her on her husband's death, and added, "He will know I have a regard for him by my will;" when her brother was ill, deceased said to deponent, if her brother should die, she would make no other executor but Jodrell; has several times told deponent when she heard Cradock was dead or dying, to send for Jodrell to come to her, and often said she would make Jodrell executor if her brother died; 7th June, 1748, Jodrell came to deceased, she expressed great satisfaction at seeing him, and said to him, "My dear Jodrell, I am glad to see you, no friend in the world I shall be so glad to see as you, I have wanted to see you a great while;" bid him sit on the bed by her, told him how ill her brother was; afraid she should lose him, but if he died before her she would put no one in his place but Jodrell, and that she would make him her sole executor, in room of her brother, and desired him if her brother died to come to her immediately; Catherine Roberts during such time was frequently in the room; after Jodrell was gone said day, she expressed herself greatly pleased at his having been there, and now said, "If anything happens to my brother he would be ready to assist, and if her brother died before her she would put Jodrell in his place;" she was of sound mind. Richard Cradock died 6th July; between 7th June and 6th July she declared to most of her servants she would put Jodrell in her brother's place; on 6th July, 1748, Jodrell came to deceased, she saw him immediately and he told her of her brother's death; she took Jodrell by the hand, and said, "Dear Mr. Jodrell, I will put you in the place of my brother to manage all my affairs and will make you executor of my will;" deponent remem-[298]-bers part of his answer, viz. that he had no paper: deceased said, "Pen will help you to pen, ink, and paper;" deponent fetched them, and deceased then again said to him she would make him her whole and sole executor in every thing, in the room of her brother; Jodrell asked her if she would have any alteration made in any other part of her will; she replied, No, she would leave it all to him, her sole executor in the room of her brother; Jodrell then wrote the codicil of 6th July, and Elizabeth Balchen, who was in and out of the room while Jodrell was writing it, said to him, "Sir, you ought not to do this till my uncle, Henry Balchen, or some of Mrs. Boulter's relations are present;" Jodrell replied, "Miss, I will leave it till the afternoon then and come and dine here, and your uncle, or any of Mrs. Boulter's relations may come and see it," and he left the codicil on the table, and went to deceased to take his leave of her, deceased asked where was he going? had he wrote it? deponent told her he was going to his chambers, he would come again to dinner; deceased said she would have it, and sign it directly before he went out of the room; Jodrell then read said codicil distinctly to deceased, and asked her if it was to her mind, she replied, "Yes, it was everything to her liking;" Jodrell read it twice or thrice to deceased, and she each time declared her liking of it; deponent and Jodrell asked Elizabeth Balchen to see deceased sign said codicil, but she refused; deceased said she was so weak she could not well sign her name, but she would set her mark, which would be the same, she then set her mark in presence of deponent and Jodrell, and

deceased bid deponent witness said codicil; deponent said to her, "Do you know you have made Mr. Jodrell [299] your sole executor in the room of your brother?" she said "Yes;" deponent hesitated about signing it, and deceased said, "Pen, I insist on your signing it:" deponent then witnessed it in deceased's presence; deceased of sound mind; deceased delivered codicil to Jodrell, and bid him take care of it, and said, "You see I am in a very weak condition, I have no friend but you, I desire you will come and dine here every day," he said he would come or send every day; after said codicil was executed, on 6th July, deceased declared to Henry Balchen, Joseph Bradney, Elizabeth Balchen, Catherine Roberts, Ann Matthias, John Caldicot, and deponent that she had made a codicil, and appointed Jodrell executor, in the room of her brother, and particularly Henry Balchen bid deponent ask deceased in his presence if she knew she had made Jodrell executor? she replied, "Yes;" deponent asked her if she would make Mr. Balchen executor? she replied, "No, she had made Jodrell executor, she had nothing to do with Balchen;" Jodrell visited deceased every day, except the 10th, from the 6th to the 14th July; deceased at all said times expressed pleasure at seeing him. By William Cradock in the codicil is meant Richard Cradock; deponent at the time of Jodrell's writing the codicil, told him by mistake that Mr. Cradock's name was William, he asking deponent what his name was.

4. Int. 6th July, Jodrell came before dinner. 7. Int. Did not hear Jodrell say somebody must act in her affairs in her brother's stead. 10. Int. Miss Balchen refused to be a witness; Jodrell desired Miss Balchen to read codicil to deceased. 11. Int. Jodrell came again, and dined at deceased's with Mr. Balchen and Mr. Long. 12. Int. [300] Deceased desired deponent not to leave deceased, for she was beset. Martha Balchen came and staid at deceased's. 13. Int. Jodrell had been an hour with deceased before the codicil was signed; deceased heard the codicil read; she had not taken anything the night before to compose her. 15. Int. Deceased used to set her name to writings in her brother's time; never knew her set her mark before 6th July.

16. John Caldicot, examined Jan., 1748.—Deponent footman to deceased almost four years before her death; on 16th July Crop sent message that she would come that evening; Miss Balchen desired she would come immediately, which she did; has heard deceased speak disrespectfully of Sheldon Cradock; heard deceased say her brother was her executor, and if he died she would make Jodrell executor, for he was always very kind to her; deceased shewed regard to Jodrell and his wife and family; heard deceased say she should set her niece Jodrell next to her brother; deceased sent deponent often to enquire after Mrs. Jodrell in her illness; on her death said the child should be the same to her as the mother. Jodrell often sent messages to deceased; often came, but believes he did not see deceased; two or three days after, 7th June, deceased ordered deponent always to let her see Jodrell when he came, for she said, "I have found that he has been here several times, and Miss Balchen has not let me know it;" and she then said, if anything happened to her brother, she had desired Jodrell to come to her immediately, and she intended to make him executor in her brother's room, and bid deponent tell the cook the said orders. Jodrell's daughter often came to see deceased, and [301] was kindly received. On evening of 7th June, heard deceased say Mr. Jodrell was a very kind relation of hers, she had always a great value for him, he shewed her more kindness, and took more notice of her on the death of her husband than any relation she had; though her niece was dead, there was a child living who was her god-daughter, and if any thing happened to her brother, she should make Jodrell her executor in the room of her brother. A few days after, 7th June, heard deceased ask Pen if she had let deceased's brother know Jodrell had been to see her, &c.; deceased seemed much concerned at her brother's illness. On 6th June, 1748, Jodrell came to deceased's; deponent acquainted Miss Balchen, she came down to Jodrell, and soon after told deponent Cradock was dead, and bid deponent go to her uncle's, Mr. Henry Balchen, and tell him Mr. Jodrell was there, and would be glad to speak with him; deponent went to Balchen's house; he was not at home; deponent went after him to a coffee-house; did not find him; left word to come to deceased's; deponent went home, and found Jodrell and Balchen together, Jodrell had then a paper in his hand, and he went to deceased's bedside, and said to her, "Madam, will you have any body made executor with me?" Roberts, the housemaid, and deponent stood at the door-way; deceased replied, "She had made him sole executor, and to fulfil the will that was made to her brother:"

and Jodrell then said, "You will not please to have any one else," she said, "No, because I will have no dispute;" Jodrell went away. Deceased of sound mind, &c.; after he was gone, deceased ordered deponent to get things ready, for Jodrell was to dine there. A [302] week after, 6th July, heard deponent say she was glad she had signed what she had to Jodrell; he came every day, except the 10th, from the 6th to the 14th July.

4. Int. It was after twelve when Jodrell came to deceased on 6th July. 14. Int. Deceased deaf, but not more so than usual on 6th July. 16. Int. Never heard what hour Cradock died.

17. Catherine Roberts. Day deceased died deponent and the rest of the servants were turned out of deceased's house by Crop and Mr. Balchen; heard deceased say if her brother died, Jodrell was her only friend; she designed him to be her executor in his room; 7th June, Jodrell very kindly received by deceased; deponent attended at tea; she spoke to him of her brother's illness, and said he was her only friend if she lost her brother; heard deceased say he was a very kind relation to her; between 7th June and 6th July, several times heard deceased express great kindness for Jodrell, and say he had been her very good friend, and if her brother died he should be next to him; Jodrell was with deceased on 6th July; deponent present that day; after he was gone, when deceased told Mr. Bradney, in presence of deponent and Pen, that she had made Mr. Jodrell her executor, and no one else, Bradney said, "Have you made Mr. Jodrell sole executor, and no one else?" she replied, "Yes, to avoid disputes;" and several times afterwards deponent heard her declare she had made Jodrell her executor; does not know deceased took any medicine the night before 6th July to make her sleep; she was perfectly sensible that day.

18. Ann Matthias. Deponent was cook to deceased at her death, but was turned out by [303] Crop with the rest of the servants; before she was dead, Crop came to see deceased on 16th July; deceased said she would not see her, but deceased did afterwards see her; deceased expressed dislike to Sheldon Cradock; received Jodrell and his wife and daughter kindly; expressed concern for Mrs. Jodrell's death; said her child was alive, and that would be the same; heard deceased bid the child tell her father she should be glad to see him, but cannot say when; has heard her say Jodrell was next to her brother to her; heard her say Jodrell had assisted her very much on her husband's death, and said if her brother died, she would put Jodrell in her will instead of her brother; Jodrell was with deceased on 7th June, 1748; two or three days after deceased bid deponent, if Jodrell came at any time, to let him in, for she would see him, but Betsy would hinder him from seeing her if she could, but she should be glad to see him often; between 7th June and 6th July, she heard deceased two or three times say, if her brother died, she should put Jodrell in her will in his stead, and make him in every respect as her brother; Jodrell was at deceased's on 6th July, but deponent was not up stairs while he was there; deponent sat up with deceased on the night of 6th July, and deceased declared she had signed a codicil, and made Jodrell her executor the same as her brother was before, and nobody else; deponent sat up with deceased on night of 10th July; deceased then said to Mrs. Pen, "I wonder you will go out of the room; Banner brought a paper here to sign, but I will never do it; he has spent his own fortune, he shall not have mine to spend; I have made Jodrell sole executor in [304] place of my brother; I will sign papers for none of them;" Jodrell came to deceased for several days after.

15. Int. Proves deceased could write her name.

Read will 4th April, 1745, and codicil 6th July, 1745.

Witnesses for Crop.

1. Elizabeth Balchen. Deponent related to deceased, and lived with her six years before her death; deponent present on 10th July with deponent's mother, Martha, and Mr. Banner; deceased in better health said day than for some days before; Banner desired deponent to ask deceased divers questions; deponent asked her if she remembered she had signed a paper to Mr. Jodrell; answered, "Yes, but she did not know what she had signed;" asked if she designed to make Jodrell executor, &c.; said she intended no such thing; deponent asked her if she intended to leave to Jodrell from her relations what she had given to her brother; she said, "No, I never intended any such thing;" Banner then pulled out codicil pleaded by Crop; deponent read it all over to deceased; Banner asked her if she understood and liked said codicil;

she said, "Very well;" then Banner read it again to deceased, and asked her again if it was to her liking; she said it was; deceased then set her name to it, and then deponent and Martha Balchen attested it, and deceased then said she was very glad she had lived to be made sensible how Mr. Jodrell had used her, that she did not think he would have used her so; she was well pleased with what she had then done, perfectly sensible and well knew what she did. On 11th July, 1748, [305] deceased told deponent she would give deponent's mother and other relations legacies for mourning, &c.; bid deponent send for Henry Balchen to do it; afterwards said she would give deponent 100l. more. Mr. Balchen came in the evening, and deponent gave him instructions for that purpose; Mr. Cumberland was there, and he wrote said codicil, and it was read to deceased in presence of deponent and deponent's mother, George Cumberland, Mrs. Pen, and Henry Balchen, and deceased then set her name to it, and it was then attested; deceased of sound mind, &c.; June was wrote in the date by mistake.

1. Int. Deponent is a legatee in the will in 100l. and twenty guineas. 2. Int. Deponent has received her legacies in will and codicil. 3. Int. Deponent executed releases.

2. Martha Balchen. Deponent intimate with deceased six or seven years before her death; deceased desired Banner to come up on 10th July; he asked her how she did, she said, "Very ill, but I am glad to see you;" deceased ordered Pen to go out of the room, which she did; agrees with Elizabeth Balchen as to the questions and answers put to her about Jodrell's codicil; deposes to reading codicil 10th July twice to deceased, and her approving and signing it, and she published and declared it by saying, "She was glad she had lived to sign that codicil to Mr. Banner," and then they, viz. deponent and her daughter, attested it; deceased of sound mind; agrees with Elizabeth Balchen as to the second codicil, made 11th July, but dated 11th June; Cumberland wrote it; Balchen read it to deceased, and she approved it and signed it in the presence of Mrs. Cotton, [306] Henry and Elizabeth Balchen, Cumberland, and deponent.

3. Henry Balchen. Deponent received deceased's rents, and managed her affairs; 11th July, deponent being sent for, went to deceased, who said to deponent, "I have not done enough for Elizabeth Balchen, I will give her another 100l.," and then mentioned several legacies, from which orders deponent directed Cumberland to write said codicil; on 11th July, deponent read it to deceased, she said, "It was very well," and deceased signed it, and Cumberland attested it; deceased of sound mind, and said she hoped she had set every thing to rights now; deceased expressed herself pleased, and said, "Could you think Mr. Jodrell could have used me so ill;" and she said the same several times afterwards; deponent understood her to mean Jodrell's codicil, though she did not mention it; she signed it worse than she usually wrote.

4. George Cumberland. Deponent well knew deceased; proves the transactions about codicil 11th July, same as the other witnesses; says he dated it June by mistake for July; deceased was supported by Pen to sign it; deceased wrote slow, but mentioned the letters of her name; sound mind; expressed her approbation very sensibly; mentions the same persons as present as Henry Balchen does.

Witnesses for Crop on another allegation.

5. Elizabeth Moore. Richard Cradock died at deponent's house, in Islington, between four and five in the afternoon of 6th July, 1748, as she best remembers, and believes the hour to have been after dinner, about two o'clock; deponent went [307] into Cradock's room, and then Carter went down to dinner, and after Carter had dined, deponent saw him alive, and some time after deponent was told he was dead.

6. Ann Carter. Cradock died on 6th July, in the afternoon; deponent and Wilson were in the room when he died, and it was then between four and five in the afternoon; Wilson looked then at the clock, and said "it was a quarter past four."

7. Richard Davis, gent. In afternoon of 6th July, 1748, deponent went to see Cradock, and his nurse then told deponent he was dead, and had been so about an hour, and it was then about five o'clock.

8. Henry Balchen. Cradock died 6th July, between four and five in the afternoon, as Horne, his laundress, told deponent about one at noon of same day; deponent told by Elizabeth Balchen that Jodrell had been at deceased's, and said Cradock was dead, and had told deceased she must empower somebody to act for her; deponent went

to Crop's, and sent her servant Smith to Islington, to inquire if Cradock was dead. Smith came back between four and five o'clock, and said Cradock was not dead, for he heard him groan. On 6th July, 1748, deponent was at deceased's, when Long and Jodrell were there. Long asked Jodrell what he had been doing; he said deceased had been very kind to him, and pulled a paper out of his pocket, but it was not read, as deponent best remembers. Long asked for a copy, Jodrell told him he would see him the next day, and give him a copy; next day, Jodrell desired deponent to excuse him to Long, for he could not see him that day, but [308] he would wait on him the next day; deceased often very deaf; deponent did not see deceased on 6th July, as he remembers; deponent has often seen deceased write, and never knew her set her mark to any writing. On 11th July deceased said to deponent, "Cousin, did you think Jodrell would have served me so?" 4th Oct., 1748, deceased signed two warrants to empower deponent to receive two dividends, and she then said, "Could you have thought Jodrell could have served me so?" Deponent received deceased's money, and transacted her affairs for her; deponent has seen Mr. Banner and Mr. Cradock visit deceased when they were in town, and deponent saw Mrs. Crop at deceased's house, two or three times after deceased's husband died; has heard deceased express herself very kindly of Banner, particularly said Lady Blunt had not done so well by Banner as she should, but she hoped she should make him amends. William Cradock, Mrs. Jodrell's father, died many years since.

9. Thomas Smith. Deponent servant to Mrs. Crop; in summer 1748 Balchen sent deponent to Islington; the message was in writing; does not remember what it was; deponent went about the middle of the day; does not remember the answer; when deponent was at the door of Cradock's lodgings he heard a groan or two.

1. Int. Mrs. Crop returned to town on 16th July, 1748. 3. Int. Does not know whether Cradock was alive or dead when deponent was at his lodgings. 5. Int. Two or three days after Cradock's death, Long, Balchen and Haughton met at Crop's, and deponent carried them pen, ink, and paper. 6. Int. Deponent told Pen of such meeting at Crop's. 8. Int. Deponent never knew [309] Crop go to deceased till after Cradock's death. 9. Int. It was commonly talked at Crop's that codicil, 10th July, was made by Haughton at said meeting at Crop's.

10. Elizabeth Cumberland alias Balchen. Deceased eighty-three at her death; deponent well knew Richard Cradock; he died 6th July, 1748, between four and five in the afternoon, as deponent believes; about eleven in the forenoon of 5th July, 1748, Jodrell came to deceased's; deponent went to him; he asked how deceased did; deponent told him she did not expect deceased to live an hour; Jodrell told deponent Cradock was dead, and said he was just come from Islington, and said somebody must now act for deceased, and proposed acquainting deceased with her brother's death; deponent said she would send for Henry Balchen; Pen came and asked Jodrell to walk up, and he went to deceased's bedside; deponent asked him to stay till Balchen came; he replied "No; two may surprise her;" he went up, and deponent with him; deceased told him she was very ill; Jodrell told her of Cradock's death, and said somebody must manage for her, and offered his service, and asked her if she could sign her name; Pen repeated to her what he said, for deceased could not hear him; deceased replied, "No, Pen, I can do nothing;" Jodrell asked if she could make her mark; deceased answered "No, Pen, I can do nothing;" Jodrell asked deponent for pen, ink, and paper, deponent refused, but Pen fetched him some; Jodrell went to a chest of drawers, and, in great hurry, wrote something; deponent very uneasy at seeing him write, and desired he would stay till her uncle came; he bid deponent not to be frightened, it would bring no [310] trouble to her; he was only putting himself in the place of Mr. Cradock; deponent said that he was then going to deprive deceased's relations; Jodrell carried said paper to deceased, and desired deponent to make deceased hear him; and gave said paper to deponent; deponent began reading to deceased, and after deponent had read about a line, deceased pushed said paper away, and said "Betsy, I can hear nothing;" deponent then gave the paper to Jodrell, and did not go out of the chamber, and Jodrell and Pen came from the bedside, and Jodrell said something, purporting to know whether deponent could witness said paper; deponent said "No;" deponent did not see deceased sign said paper, and is sure it was not read over to deceased; deponent was in said chamber during all said time; Jodrell said to Pen, "You will sign; Miss Balchen is a relation, I won't ask her;" Pen readily signed it; Jodrell put said paper in his pocket, and went away directly, and

said he would dine there, and then shew it to deponent's uncle; deponent was not once out of the chamber while Jodrell was there; Jodrell was not in said chamber quite half an hour; is certain deceased gave no instructions for making or writing said paper, nor was it read over to her, except the beginning, which deponent read till deceased stopt her; deceased so weak at that time that she believes she had not strength enough to have given instructions; deceased very deaf and ill, and between the Sunday and Wednesday, 5th July, she took two sleeping draughts which made her very drowsy, and was more deaf than usual; never knew deceased set her mark to any writings; believes Jodrell was but once to see deceased for two years before 6th July, and the servants would not own [311] he had been there; but deceased told deponent next day he had been there on 10th July; Banner came in the evening, and desired to see deceased; deponent and he went to deceased; he asked her how she did; she said "Very ill, but very glad to see him;" Banner desired Pen to go out of the room, but she refused, and deceased bid her go out, and she went; deceased was deafish, but not so deaf as on 6th July; deponent asked deceased by desire of Banner if she intended to make Jodrell executor in her brother's stead; she said "No;" asked, did she intend to give Jodrell what she had left to her brother; she said "No;" when Banner went away deceased kissed him, and said "God bless you, and all that belongs to you;" deceased expressed much surprize at being told the contents of Jodrell's codicil; deceased several times said she never intended to make Jodrell executor, or to leave him what she left to her brother, particularly on 11th July; Jodrell was two or three times after at deceased's house, and asked if deceased would see his daughter, she refused; deceased received Crop very kindly on 16th July, 1748, and expressed regard for her, and desired she would come often to see her; Crop came again on 17th July, and deceased received her kindly; on 18th July deceased asked, "Has Jodrell been here to-day?" Pen said, "Yes." Martha Balchen then said, "Did you make Jodrell your executor?" she said, "No, I never did," Pen replied, "Yes Madam, you did make him your executor," deceased with great anger said, "No Pen, I never did any such thing, it is a great lie; did Jodrell think I would leave my fortune from my own relations? I did not think Jodrell had been so bad a [312] principled man;" she spoke with warmth; deceased likewise said she had made all right with Mr. Banner; on 20th July Crop was with deceased, and the servants were called up, and deceased said to them, viz., Pen, Roberts, Matthias, and Caldicot, the coachman being absent, if Jodrell came to her house, to tell him she would not see him, he had used her ill, and she would never see him again; Jodrell never saw deceased afterwards, as deponent believes; she also said to them, she would have them mind Mrs. Crop, for she was to manage for her; believes deceased had good affection for Crop; Cradock and Banner never knew deceased refused to see them, the said Cradock and Banner, when she was able; Crop did not visit her, but messages passed between them; deceased sent her compliments by deponent when Crop's daughter married Long.

13. Martha Balchen. Deceased very deaf and very ill on 6th July; has often seen deceased write her name; never knew her set her mark to any writing; deponent was with deceased on 10th July, 1748, when Banner came, and Pen said, if he offered to come up she would send for a constable; deponent by deceased's order desired Banner to come up; he came up and asked deceased how she did, she said, "Very ill, but very glad to see you;" Banner bid Pen go out of the room, she refused, and deceased then bid her go, and she went; Banner then bid Elizabeth Balchen to ask deceased if she had made Jodrell her executor; deposes the same as Elizabeth to these questions and answers; deceased expressed great affection at that time to Banner, and she then signed codicil of 10th July; deponent staid at de-[313]-ceased's house from 6th July to her death; Jodrell after 6th July came several times, but deceased received him very ill, and refused to see his daughter; deceased received Crop very kindly on 16th July, and she offered to serve deceased in any thing she could; Crop came several times after and deceased received her well; deceased told Pen she must mind Mrs. Crop, for Jodrell had nothing to do with her affairs; on 16th July deceased said to Crop, "Lord! niece, how do you think Jodrell would have served me? he wanted me to give what my father got from my relations; I did not think he was so bad a man;" deceased frequently railed at him for what he did; on 18th July, 1748, deceased asked if Jodrell had been there; Pen said "Yes, and he will come every day;" deponent said, "Madam, did you make Jodrell executor?"

deceased said, "No," Pen answered, "Yes, madam, you did;" deceased replied, "Pen, it is a great lie, I have not made Jodrell executor;" deposes the same as Elizabeth Balchen; deceased expressed great resentment against Jodrell; gives same account as Elizabeth of deceased's orders on 20th July, not to let Jodrell in to see her.

14. Martha Redman. Deponent well knew deceased once saw Banner at deceased's; she often spoke of him with kindness to deponent; said to deponent she was sorry Lady Blunt had not done better by him; deceased then added, "Mr. Banner shall always find a friend in me."

15. William Roffey. Deponent has heard deceased speak respectfully of Crop, and affectionately of Cradock and Banner.

Int. Do not remember to have seen Crop, Cradock or Banner with deceased.

[314] Witnesses for Jodrell.

1. John Addis, apothecary. Deponent well knew Richard Cradock, he was deponent's patient; on evening of 5th July, 1748, deponent was sent for by Jodrell to go to Cradock at Islington, who was very ill; deponent went that night and found him in a dying condition; deponent when he returned told Jodrell his state; next morning about ten, deponent and Jodrell went to Cradock's lodgings; deponent went up and met the nurse, who told deponent, Cradock died between three and four o'clock that morning; deponent went into his chamber and saw him lie dead in bed, and examined him, and he was then cold; believes he had been dead some hours; deponent went down and told Jodrell Cradock was dead, it was then about eleven in the morning; Jodrell said he would go directly to Mrs. Boulsters.

2. John Romans, gent. Deponent was clerk to Jodrell; between one and two at noon of 6th July, 1748, Jodrell told deponent Cradock was dead, and bid him go to Islington to get the key of Cradock's chamber, in the Temple; Horne, Cradock's laundress, gave deponent the said key, about half an hour after two at noon.

3. William Cock. Deponent was coachman to Jodrell; deponent drove Jodrell, and an apothecary to Islington, one day in the summer, 1748, and then heard at the door that Mr. Cradock died that morning; Jodrell then went to deceased's and was there about twelve at noon, and staid there about an hour.

4. Thomas Greaves. Agrees exactly with the last witness; says he was footman to Jodrell, and went with him to Cradock's lodgings, on the 6th July, 1748, in the morning.

[315] 5. Hannah Pen. Deponent lived four years with deceased, and to her death; deceased had not for some months before 5th July taken a sleeping draught, and took none on that night, and was not, on 6th July, sleepy nor more deaf than usual, and was rather better in health on 6th July; Elizabeth Balchen told deceased that Mr. Long was below, and would be glad to see her; deceased said, "No, he was never so kind to come and see me in my illness, nor his mother-in-law, and I shall not see him now," and said, "I do not want his assistance," and added, "I have made Jodrell my executor, and he will take care of my affairs;" Long never saw deceased till the day she died; believes deceased between 6th and 10th July did not give any instructions for making a will, because deceased solemnly declared she had not; deceased acquainted deponent with all her affairs of moment for three years before her death; deceased could not write her name at length without assistance, and her brother constantly guided her hand; verily believes the subscription to codicils 10th and 11th July are much better wrote than deceased could write, and that they are not her handwriting; immediately after Banner and Cotton were gone, deponent went into deceased's room, and she seemed very much displeased with deponent for leaving the room whilst they were there, and then complained that she had never been so ill-treated in her life, and said, they (Banner and the Balchens) would have forced her to sign a paper Banner brought with him, but said she had not, nor ever would sign anything but in favour of Jodrell, and the same night deponent and Ann Matthias sat up with her, and she several times declared she had signed **[316]** nothing that day; 6th October, 1748, deceased said to deponent and Roberts, "I have almost killed you, but Jodrell is a good-natured man, and there is a little money in the house, and he is my executor, and will make you amends for what you have done for me, for I have put him in the place of my brother in every respect."

6. Catharine Roberts. Deceased on 6th July, 1748, ordered Jodrell to come up; deponent was several times in deceased's chamber while Jodrell was with her, and

is very certain Elizabeth Balchen was not in deceased's chamber during the whole time Jodrell was there, because deponent saw her in the dressing-room part of said time, and saw Jodrell go to her in said dressing-room, and heard him desire her to come into deceased's chamber; and he said they would ask her again if she would have any one joined with him; Elizabeth was in a great passion, but went into deceased's chamber with Jodrell; he staid about an hour; deceased did not rest so well as usual for some days before 6th July, but she was rather better on 6th, and less deaf; heard Elizabeth Balchen on 6th, after Jodrell was gone, ask deceased whether she would have Henry Balchen for her executor, and she said, "No." Henry seemed displeased that day; Martha Balchen came and resided at deceased's; deceased angry, and bid her begone out of her house, and said she was a wicked woman; deponent has often heard Martha say she would not rest till she had Jodrell's codicil revoked. Long came on 6th July; deceased would not see him; Pen constantly sat up with deceased; Jodrell was at deceased's 7th, 8th and 9th July, and saw deceased, and on 10th, Banner was there, and deponent [317] heard him and Elizabeth and Martha Balchen press deceased to sign something; deponent was at the door of the chamber, and heard Martha say, "Pray, Madam, do set your hand to this paper, Mr. Banner is here, you have done a wrong thing, Madam, you have done a wrong thing; pray sign this, if you do not, Betsey will be badly off;" deponent heard deceased say, "I will do no more, I have done for you all." Banner and Elizabeth Balchen also pressed her very much to sign the paper; deceased said the same again to them. After 6th July deponent heard Balchens say to deceased, Jodrell was nothing to her, his daughter was dead, and Pen assured deceased the contrary, and that Miss was living; deceased expressed herself very angry with the Balchens, and said, if they would not be quiet she would send for Jodrell, and he should turn them out of doors; never heard of any instructions from deceased for a codicil between 6th and 10th July; deceased never without some of her servants with her; Banner and Cotton came on 10th July; heard Balchen press deceased to sign a paper; Pen and Cotton were then in another room, where Pen said Cotton confined her by force; deponent saw them come out of said room; never saw deceased write; deceased very ill on 10th and 11th July; Jodrell was at deceased's house on the 11th, 12th, 13th and 14th July, and saw deceased each time; deponent was present at one of those times, deceased was very civil to Jodrell; on 11th July deceased spoke slightly of Crop; neither Long nor Haughton saw deceased between 6th and 10th July, 1748; deponent heard Crop desire deceased not to see Jodrell any more; deceased made no answer, but [318] at last said, "No;" at the said time the servants were called up, and deceased said to Elizabeth Balchen, "What would you have;" tells an incoherent story of wills, and that they pressed deceased to order her servants not to let in Jodrell, and at last she agreed; does not remember Jodrell was at deceased's after 14th July; heard Balchen say deceased should not see Jodrell; 6th October, 1748, deceased said she should soon die, and she hoped Mr. Jodrell would satisfy them for their care of her; but do not remember she then said he was her executor; on 12th October deponent and the other servants were turned out by Crop, &c.

7. Ann Matthias. Elizabeth Balchen was not all the time in deceased's room while Jodrell was on 6th July; deponent saw her in the kitchen and dressing-room, while Jodrell was there, who staid about an hour; 6th July, deceased was rather better, and less deaf than usual; deceased on that day told her she had made a codicil, and put Jodrell in the place of her brother, and she must mind him as she did her brother; Henry Balchen was very angry at said codicil; that evening, Martha came to deceased's house, who expressed great displeasure at her coming, and bid her begone; Martha said she would not go from her till she had altered Jodrell's codicil; Pen sat up with deceased from 6th of July to her death; some of her servants were always in her room; on Friday, 8th July, deceased said she was glad she had put Jodrell in her brother's place; on the 6th and 8th July deponent heard the Balchens very much press deceased to alter her codicil, she was angry and refused; on 10th July, at night, the Balchens pressed deceased to make a new codicil, and said [319] Miss Jodrell was dead; believes no instructions were given for codicil of the 10th July; believes for two years deceased could not write without having her hand guided; deceased very ill on 10th and 11th July, and believes she was not then able to write; does not believe the signatures to codicils 10th and 11th July were wrote by deceased; on night of 10th July she bid Pen never leave her; said that Banner

would have had her sign a paper, but she had signed to Jodrell, and would not to any one else; deceased refused to see Crop, when she sent a letter to say she would come; 6th October, 1748, Crop was at deceased's, and the servants were then called up, and Mrs. Crop was pressing deceased to do something, and Crop ordered them to go out of the room; on 6th October, at night, deceased complained Mrs. Crop pressed her to sign to her.

8. John Caldicot. Says Elizabeth Balchen and Jodrell were in the dressing-room on 6th July; heard deceased then say, in presence of Balchen, that she would have no executor but Jodrell; heard Pen on 6th July tell Martha Balchen from deceased she had no occasion for her, and desired she would go, but she said she would not; deceased on 6th July told deponent she had made Jodrell her executor, &c.; verily believes deceased did not see Long or Houghton between 6th and 10th July; on 20th July deponent and the rest of the servants were called up, and Miss Balchen talked about the will, and Crop said, "Madam, you will see Jodrell no more," and at last she said, "No, no."

9. Samuel Medley. On morning of the 6th of July, about eleven o'clock, deponent was at Cradock's lodgings, and Mrs. Horne then told depo-[320]-nent, Cradock was dead, and that Jodrell was just gone from thence; deponent went up and saw him dead; on 6th July the servants said deceased ordered them to regard Jodrell as they used to do her brother; Elizabeth Balchen was very earnest to receive and answer the messages from Jodrell.

10. Elizabeth Steele. Deceased wrote a very bad hand; believes the name of deceased to codicils 10th and 11th July are not deceased's writing.

11. William Tittenser. Says, at desire of Jodrell, he called most days in summer 1748, to inquire after deceased; Elizabeth Balchen generally answered she was better, but at the same time the servants said she much worse.

12. George Spencer. Deponent servant to Jodrell; on 5th July deponent went by Jodrell's order to inquire after Cradock, and deponent brought word he was very ill; Jodrell then sent for Addis.

13. John Vernon. 12th or 13th July, 1748, Jodrell sent deponent with an "How do you do" to deceased, and deponent went several times, and Balchen used to tell him deceased was so ill she could not see Jodrell.

Witnesses for Crop.

1. Elizabeth Cumberland alias Balchen. Deponent was in deceased's room most part of 6th July; deponent did not ask deceased to make Henry Balchen executor; deponent expressed great anger at Pen for imposing on deceased in Jodrell's codicil; Henry did not express anger at any of the servants about the said codicil; deponent's mother came to deceased's house on 6th July; [321] deceased several times expressed satisfaction at Martha's being there; did not hear deceased give any order to her servants to treat Jodrell as they used to do Cradock, and she was not capable of giving such orders that day; never heard deceased express satisfaction at Jodrell's codicil; but on 10th July, when deponent first told her of it, she expressed great resentment; deponent did not press deceased to revoke the codicil of 6th July, but when deponent told her on 10th July that she had made such codicil, she was much displeased with Jodrell; Pen told the Balchens she would send for Jodrell, and turn them out; this was said on 9th July; deceased then so ill and deaf that she could not hear what Pen said; deceased wrote her name without being guided; deceased on all occasions said Jodrell was a base man, for having imposed the codicil on her, and said so before most of her servants; and one day, deceased sent for her servants up, and told them she would not see Jodrell, for he had imposed on her, they must mind Mrs. Crop; deponent did not tell deceased of Jodrell's messages, because deceased could not bear his name; 6th October, 1748, deceased was not capable of making any declarations; 4th April, 1745, deceased gave deponent a duplicate of her will to lay in a chest of drawers; on 10th October deponent saw said duplicate in the drawer sealed up, and deponent left it there and locked the drawer; about ten in the evening of 11th October, 1748, Roberts called deponent out of the dressing-room, and deponent went into deceased's chamber, and found there Mr. Vernon and Mr. Tittenser, and they had hold of Martha Balchen, and told her she must go out of the house immediately, and then one of them took [322] deponent in his arms and carried her down, and said she must go out immediately, and then they and two other men turned deponent into

the street; the servants were present, but none of them assisted deponent; on 12th October, 1748, the lord mayor bound over the said persons, and the deceased's servants, and Jodrell was bail for them. 14th October, 1748, deponent was present with many persons when deceased's will was read, and deponent said she had one in her keeping, but when deponent looked for it it was gone; Mr. Balchen produced one duplicate, and Jodrell another; believes Jodrell's agents took it out of deceased's drawer on 11th October.

2. Martha Balchen. On 6th July when deponent came to deceased she was not capable of saying any thing, but she began to mend on the 7th; never heard deceased speak in favour of Jodrell's codicil, but she expressed great dissatisfaction at it in the morning of 11th July; swears, as the former witness, that deceased never ordered deponent to go out of the house; deponent sat up with deceased on 10th July at night, and swears deceased did not declare, as Pen and Matthias have sworn; deponent, or her daughter, sat up with the deceased every night from 6th July to her death, and never heard her speak to the effect deposed to by Jodrell's witnesses; deposes to her being turned out of doors by Jodrell's order, on 11th October 1748, in same manner as Elizabeth deposed; John Caldicot opened the street door and none of the servants assisted the deponent; on 12th October the said agents and servants bound over, and Jodrell bailed them.

3. George Cumberland. 10th October, 1748, deceased's will was in her drawer; deponent fas-[323]-tened the drawer behind with a wood screw; gives an account of turning the Balchens out of deceased's house on 11th October, 1748; deponent fetched Mr. Balchen, but Jodrell's agents would not let him in; Balchen and Long came again about 12 at night, but they would not let him in; on 12th the said persons were brought before the lord mayor, and also the deceased's servants, and Jodrell bailed them; on 14th October, 1748, deceased's will was not in the drawer where it was found on the 10th; the writer of the will said he had made only two parts, and Balchen said the part he produced was that which Cradock had.

4. Henry Balchen. On 6th July deponent did not express anger at Jodrell's codicil, but said deceased was not then capable of making one; deceased signed her name without guiding, and she so signed codicil 11th July in deponent's presence; deceased said to deponent, "Did you think Mr. Jodrell could have served me so?" gives same account as the other witnesses of transaction on 11th October, 1748, as to so much as happened after he was sent for; says they, on 12th, got a warrant and brought the said persons and the deceased's servants before the lord mayor; the part of deceased's will which deponent produced was in Cradock's custody to his death, and Jodrell produced another duplicate.

1. Int. Deponent and Jodrell locked up Cradock's chambers. 2. Int. Believes said will was in Cradock's chambers when they locked them up, and Sheldon Cradock, whose chambers they were, took off the padlock without Jodrell's privity, and they found deceased's will, which deponent took and kept. 3. Int. Deponent between 6th and 10th July was with Long at Haughton's, and they [324] talked of the codicil of 6th July, and deceased on being informed thereof, having declared she never intended making any such thing in favour of Jodrell, they asked Haughton what was necessary to be done in such case, and Haughton said, something should be drawn up for deceased's approbation; respondent said, he thought it would be proper for Banner to wait on her with it, and believes codicil 10th July, was drawn by Haughton, and that Banner carried it to deceased.

Witnesses for Jodrell.

1. Samuel Medley. 11th October, 1748, at eight or nine in the evening, deponent went to Jodrell, and told him, Pen and Matthias said, Crop intended to seize deceased's house, and then Jodrell sent Vernon and others to secure it; on 12th October Jodrell's agents and deceased's servants were carried before the lord mayor, but the servants were not examined, and they were never admitted again into deceased's house.

2. Ann Matthias. On 11th October deponent heard Crop, Mrs. Banner, and Balchen talk of seizing deceased's house; deponent heard deceased say when she was dying, she would have Jodrell sent for; and so they sent to inform Jodrell thereof; on morning of 12th October Sheldon Cradock, and others broke in and carried them before lord mayor.

3. Joseph Wilson. Proves locking up Cradock's chambers by agreement of Balchen

and Jodrell; but Sheldon Cradock and Balchen broke into the chambers, and Balchen took out duplicate of deceased's will.

4. John Romans. Deposes the same as the last witness, in substance as to locking up Cra-[325]-dock's chambers; Jodrell sent deponent and others to deceased's house on 11th October, when they turned the Balchens out.

5. William Tittenser. Speaks to same effect; says they were sent to wait till deceased's death to take care of her effects; Mrs. Balchen abused them, and they carried her and her daughter down stairs; does not know they were forced out of the house; they went next morning before lord mayor; deponent took deceased's will out of her drawer for to secure it; deponent was bound over; but the servants were dismissed.

6. John Vernon. Same as the other witnesses, as to taking possession of deceased's house, and getting her will; the Balchens might have staid in the house if they would have been quiet.

7. John Croucher. Deponent made deceased's will; and a duplicate one was kept by deceased, and the other by her brother; the will and duplicate, when opened, were in the same state as when sealed up.

Witnesses for Crop.

To prove warrants for South Sea and other dividends. Signed by deceased from 29th June, 1743, to 25th June, 1748.

Codicils of 10th and 11th July, 1748, read.

Dr. Hay's argument for Jodrell. Question whether Jodrell's codicil is proved. Codicil 10th July is founded only on supposition that Jodrell's was an imposition. Jodrell's codicil depends on the credit of Pen, Roberts, Matthias, Caldicot, and Medley; recognitions of this codicil; the witnesses against Jodrell's codicil are, Elizabeth, [326] Martha, and Henry Balchen, and if they have deposed the truth, Jodrell's codicil is a mere forgery; Pen has interest in the codicil of 11th July, and therefore swears against her interest, the Balchens swear for their interest; case must be determined upon circumstances and probabilities; capacity and execution is all that is necessary, and in some cases instructions; no doubt of capacity on 6th July; not proved that she took a sleeping draught on 5th July; direct proof of capacity by Elizabeth Balchen, for she gives account of what deceased said, which shews capacity. We pleaded that within two years of deceased's death, she never wrote her name without her brother's assistance, and they have not attempted to prove the contrary; the warrants of the 4th of October are not exhibited; execution of the codicil 5th July, proved by both the Balchens on their first examination, and also by Pen, and she is supported by Caldicot, who shews deceased knew what she did; affection material; Elizabeth Steele swears she several times heard the deceased say her brother should enjoy what she had, and afterwards her niece Jodrell, and her daughter should have it; the transaction on 6th July was open, and public; codicil 6th July read over to deceased, as appears from codicil 10th July reciting it; it was never read by Henry Balchen or Long, and they could know the contents only from Elizabeth Balchen, having heard it read to deceased by Jodrell, and this perjures Elizabeth Balchen; mistaking the name of Cradock not material; codicil 10th July, made on supposition that deceased was imposed on by Jodrell; if she was not, the last codicil drops; no intention, no instructions for codicil 10th July; we have pleaded that Cotton confined Pen in another room [327] while codicil 10th July was executing; they have not contradicted it; no pretence of affection from deceased to her relations.

Dr. Jenner, same side. I shall consider, first, the facts not controverted; secondly, those that are. Facts not controverted: deceased intended to die totally testate, and had affection for her niece Jodrell. Points controverted: whether she intended to benefit Jodrell, and execute codicil of 6th July; whether she revoked it; I shall enquire what are the presumptions of law arising from both species of facts. Deceased employed Jodrell to take care of her brother in his illness; to shew the deceased was capable on 6th July, Long desired to see her on that day, and she refused him; next day his wife came to visit deceased, which shews they did not think her insensible; Elizabeth Balchen was from home on 7th June, which shews deceased was not then very ill. No recognition of codicil 10th July. *Lamkin* against *Babb* (vide *supra*, p. 1), *Prerog.* 1752; they have not pleaded incapacity on

6th July; no evidence that Crop ever managed deceased's affairs or saw her after 20th July; no declaration of deceased that she had made Crop executrix.

Dr. Smalbroke, same side. Banner had not been with deceased for years before 10th of July, and never saw her after; from Crop's witnesses it appears that Jodrell did acquaint the deceased with her brother's death; Elizabeth Balchen proves the identity of Jodrell's codicil; deceased never reproached Jodrell himself; for the Balchens are quite silent as to that; codicil of 6th July read over, [328] as appears by recital in codicil 10th July, which is in the words of codicil 6th July, which could be known only by Elizabeth Balchen; Jodrell intended it should be read to deceased; Elizabeth Balchen did not say, in *recenti facto*, that Jodrell had imposed on deceased, or that the codicil had not been read; they have alleged that deceased could not sign her name, without assistance, for two years before her death, but have not proved it; our witnesses are supported by several who were not in deceased's family; the Balchens are supported by nobody, they swear the deceased said she was glad she had signed to Banner, but he is not executor.

Dr. Paul for Crop. Nothing given to Jodrell's daughter, to whom it is pretended deceased had affection; we want no evidence of affection to next of kin; not contradicted that Jodrell said "somebody must act for deceased, now her brother is dead;" we do not insist that she was insensible on 6th July; Pen says she told Jodrell Cradock's name was William, therefore she gave the instructions; but one witness to support this codicil of 6th July. 1 Vern. 161, *Allam against Jourdan* (vide supra, p. 28), one witness against answers of a party makes no proof. Recognitions of codicil 6th July indeed proved by Pen; the maids say the subscription to codicils 10th and 11th July are not deceased's hand; Pen was animose to the Balchens. Maxim of law, *ratihabitio mandato æquiparatur*, and therefore approbation will have the same effect as instructions, *Young and Young*, Deleg.: no instructions, the late judge of Prerog. pronounced against the will, but [329] it being attested by three witnesses, and found in deceased's custody, the Delegates held there was sufficient evidence of deceased's approbation.

Dr. Simpson, same side. No legal proof of Jodrell's codicil; there must be two unexceptionable witnesses, or supporting circumstances; codicil of 6th July unfavourable, is in prejudice of the next of kin, and for the benefit of the writer, and is supposed to be the act of a very infirm person made upon a false representation of Cradock's death; next of kin not to be disinherited without full proof; codicil of 6th July confirms the legacies given by the will to the Balchens; proved deceased never talked familiarly with her servants, which affects the declarations they have sworn to; no act of friendship done by Jodrell to deceased after the will of 1745 was made; no act of disobligation done by the relations; Pen is contradicted by Elizabeth Balchen, as to all the facts about executing the codicil of 6th July; codicil of 10th July is a revocation of Jodrell's codicil; codicil of 11th July shews deceased had a good opinion of the Balchens. Jodrell did not apply to deceased to get the codicil of 6th July recognized; if codicil of 6th July was made in the life of Cradock it cannot be supported, because if he was alive it was made upon a false representation.

Dr. Pinfold, same side. Jodrell's writing the codicil creates a strong presumption against it; very odd he should not ask deceased her brother's name; Steele's evidence relates to Jodrell's child; yet she has not left her a legacy in the will of 1745, nor in codicil 6th July; improbable she should make the declarations to her servants de-[330]posed to between 7th of June and 6th of July; affection to Banner proved by three witnesses; in the will the deceased leaves him 100l., and the same to Sheldon Cradock; no disobligation from Crop; Jodrell never came to deceased from 1745 to 7th of June, nor from thence to 6th of July; if we can shew Pen has forsworn herself, no credit can be given to her; and that she has forsworn herself appears from her swearing to deceased's declaration on 6th July, of recognition in the presence of witnesses, who either swear contrary or say nothing to it; Pen swears that the deceased never wrote her name from 1744 without guiding; again, as to codicil of 11th July, that the signing of it is deceased's writing, and yet it is proved Pen was present when deceased signed it; they have not denied her presence at that time; deceased very ill on 6th July, and could hardly bear; if Jodrell meant fairly he would have staid till Mr. Balchen came, who he knew was sent for at noon; he did not tell Long the contents of the codicil; no evidence to reading codicil of 6th July, but Pen; Elizabeth Balchen knew the contents of the codicil from what Jodrell told

her; deceased never spoke to Jodrell as her executor in the several visits he made her after 6th July; codicil of 10th July would not have been produced if it had not been a fair transaction; on 11th October Jodrell got possession of deceased's house, and not only turned out the Balchens, but refused admittance to all deceased's relations.

Dr. Bettesworth, same side. When her brother died, it was natural for deceased to divide her estate among her relations; all declarations in favour of Jodrell before the will are answered by it; if de-[331]-ceased made the codicil of 6th July upon a false cause, supposing her brother to be dead, when he was not, it will destroy that codicil; clear in evidence that deceased never before set her mark; Jodrell is married to a second wife, and nothing is given to his daughter by the codicil of 6th July, and therefore all the declarations in favour of the child are proof against that codicil; there is not sufficient proof by law to establish his codicil; it does not appear when deceased was first informed of the contents of that codicil; admit that the codicil of 10th July was concerted by the relations, but it is better proved than Jodrell's; codicil of 11th July strengthens codicil of 10th July; she signed the codicils of 10th and 11th July; why then did she not sign that of 6th July? the Court may pronounce against both codicils; Mr. Balchen was administrator to Richard Cradock.

JUDGMENT—SIR GEORGE LEE. I pronounced against the codicils of 6th and 10th July, and pronounced for the will, &c. the codicil of the 11th July by mistake dated 11th June; I pronounced against Jodrell's codicil of 6th of July, not on account of fraud or imposition (for I thought there was reason to believe the deceased had more regard to Jodrell than to her next of kin, and had told him on 7th June, that in case of her brother's death she would put him in his place) but because I thought there was not a sufficient legal proof to establish it, for Pen, the only direct witness to it, was so contradicted by Elizabeth Balchen, that she was not an intire witness, and some objections to her appeared from her own deposition, and I pronounced against Crop's codicil of 10th July, because it was made [332] by the relations, not only without instructions from the deceased, but without her privity, and had nothing to support it but the evidence of Martha and Elizabeth Balchen as to deceased's approving and executing it, and they were so much contradicted by the other witnesses, as well with respect to that transaction, as with respect to other particulars in their depositions, that I could not give entire credit to them; I pronounced for the will of 4th April, 1745, because both sides agreed it was a good and valid act of deceased's. As to the codicil of 11th July, I was not at all satisfied with it, and thought it rather the act of the Balchens than of deceased, but as there were four witnesses who proved that deceased gave instructions for it, approved and executed it, and was in her senses, I thought myself bound by law to pronounce for it. I therefore gave sentence by interlocutory for the will of 4th April, 1745, and for the codicil of 11th July, 1748, and against the codicils of 6th and 10th July, 1748, and pronounced the deceased to have died intestate as to the residue, and without making an executor.

Appealed, but the sentence was afterwards affirmed by consent in the Delegates.(a)

LOVETT against HARKNESS. Prerogative Court, Caveat Day, March 15th, 1753.—

The executor of a latter will put upon proof by the executor of a former will. Latter will established—no costs.

Darby Cochland, deceased. Will, dated 2nd January, 1752. Robert Harkness, sole executor; Probate granted in common form, called [333] in by Lovett, executor of a former will dated in May, 1749. Harkness propounded the last will.

Witnesses for him.

Benjamin Hill. Deceased said he had no relations. Deponent wrote the will of January, 1752, from instructions by the deceased; deponent read it to the deceased, he approved, executed it, and published it, and was of sound mind.

Note.—Harkness admitted Lovett to be a contradictor, and did not pray the first will to be brought in.

(a) On the 4th March, 1754. The Judges Delegates present at the sentence were —Mr. Justice Wright, Dr. Walker, and Dr. Arthur Collier.

JUDGMENT—SIR GEORGE LEE. Sentence for the last will, but without costs, because Lovett had not pleaded.

BOND *against* BOND. Prerogative Court, Caveat Day, March 15th, 1753.—Administration contested between a son and an asserted wife.—Administration pendente lite given to the nominee of the son in preference to the nominee of the wife, because his interest was certain, and that of the wife uncertain.

[See pp. 354 and 429, post.]

Dr. Pinfold for William Bond. John Bond died a widower, intestate, left William Bond, his son. Sarah Bond, who pretended to be the deceased's widow, appeared in the Prebendal jurisdiction of Colwich, in Staffordshire, and alleged herself to be widow of the deceased, and that he had been dead fourteen days; he died on the 5th November, 1752, and she appeared and alleged as aforesaid on the 13th November, 1752, and took administration as widow, which has been since revoked for want of jurisdiction. Caveats on both sides were entered in the Prerogative; each party prayed administration, but the son denied the widow's interest, and she confessed his. Fanshaw, as proctor for the widow, pro-[334]-pounded her interest, and gave in an allegation. Both sides agree that administration pendente lite ought to be granted. We name William Barnes, yeoman, to be administrator, no exception to his character, and we offer undoubted security. The deceased had children by Sarah Southern, who pretends to be his widow, but never owned her as his wife.

Dr. Simpson for Sarah Southern alias Bond. My client has had six children by the deceased, as his lawful wife. William Bond cited her before the Dean and Chapter of Lichfield to bring in probate, and then found there were bona notabilia. We have pleaded both a marriage and cohabitation with reputation. We oppose any administration pendente lite. They named William Barnes but last Monday; we have not had time to object to him; they have exhibited several affidavits to prove Sarah was esteemed the deceased's mistress and not his wife; they go to the merits of the cause, and I shall object to their being read.

Act read.

The deceased occupied three farms, had live and dead stock, a great deal of corn, and 400 sheep, mortgages, &c. Sarah Southern alias Bond had possessed herself of great part of the effects, and many of them are perishable. Fanshaw alleged she possessed herself by virtue of a probate obtained at Colwich; does not appear that the estate is wasting. Barnes is brother to Ann Barnes, a witness for, and aunt to, William Bond; prays administration may be granted to Thomas Shaw, innholder, giving 2000*l.* security.

[335] Act at Colwich, 13th November, read.

Alleged her husband to have been dead 14 days.

Affidavits for William Bond.

1. William Atkins. Deceased died 4th November, 1752; immediately after, Sarah possessed herself of the deceased's effects, which she now disposes of as her own property.

2. Simon Wilton. Deceased had three farms in his occupation at the rent of 300*l.* per annum; had a large stock alive and dead, much cattle, and mortgages, &c. Sarah has possessed herself of all the effects, and has sold corn and sheep and a cow. She sells the deceased's stock as she meets with purchasers.

Affidavits *contra* for Sarah.

1. Sarah Bond. Deponent possessed herself of deceased's effects by virtue of her administration, and has sold part of them to pay rent, &c. Deponent has had eight children by her late husband, John Bond; six are now living; William Bond has declared he will strip her of every thing if administration is granted to his nominee; deponent has borrowed money to pay rent; total of inventory 154*l.* 15*s.* 2*d.*; has paid more than she has received by 10*l.*

2. John Stytych and Henry Morell. Deponents advised Sarah to sell the effects mentioned in the schedule; believes they were sold at a fair price; believes she has paid the sums stated in the schedule.

3. John Dunn. Deposes to the good character of Styth and Morell.

Dr. Pinfold for William Bond. Estate perish-[336]-able in its nature; only exception to William Barnes, that he is brother-in-law to Ann Barnes, a witness, which is not proved.

Dr. Hay, same side. Fanshaw does not deny an administration ought to be granted; and has named an administrator, and they testify Sarah's selling the effects from the perishableness of the estate.

Dr. Simpson contra. We had not time to prove exceptions to Barnes; Sarah has sworn herself to be deceased's widow, and she must be presumed to be so; no objection to Shaw, she has six children living, who must share in the estate.

Dr. Smalbroke, same side. Her alleging that her husband had been dead fourteen days was mere matter of form; it was the act of a clerk, and is no objection to Sarah

JUDGMENT—SIR GEORGE LEE. I was of opinion that the affidavits, which reflected on Sarah's character, and which went to the merits of the cause, they being intended to shew she was not the deceased's wife, were improper, and ought not to be read; but I thought, from the nature of the estate, that it was perishable, and Sarah's own witnesses shewed it was, and that therefore administration pendente lite ought to be granted, and I decreed it to William Barnes, the nominee of the son, whose interest was certain and confessed, whereas the interest of Sarah, claiming as widow, was denied, and was under litigation.

[337] BOSWORTH, by his Guardian *against* CRADOCK. Prerogative Court, Caveat Day, March 15th, 1753.—Affidavits in causes always made before surrogates or commissioners appointed by the Court; whereas affidavits of debts, of the service of processes, &c. may be made before masters extraordinary in Chancery or justices of the peace.

Mary Bosworth, widow, deceased, left children; Elizabeth Estwith, guardian to them, has taken administration to the deceased for their use. Isaac Bosworth, the deceased's husband, died intestate. The widow took administration to him, and possessed herself of his effects. Cradock, a creditor to the deceased's husband, has, by his attorney, William Reynolds, called the guardian to exhibit inventories of deceased's and her husband's estate. Reynolds has made oath of the debt before Wilson, mayor of Gravesend.

1. William Reynolds. Deponent is attorney of Cradock, who is at Jamaica: believes Isaac Bosworth was indebted to Cradock 30l. by note.

This affidavit was sworn before Thomas Wilson, mayor of Gravesend. 1st May, 1752, is the date of the letter of attorney which was read.

2. John Seacombe. Reynolds is master of a ship; he is attorney of Cradock; demanded the said debt of Mary Bosworth as administrator to her husband, but she died before it was paid; deponent gave Reynolds the affidavit two days before he was going to sail; the note is in the deponent's custody.

Dr. Simpson for Bosworth. There ought to be a clear constat of the debt before inventories are decreed at the instance of a creditor. The constant course is not to receive affidavits sworn before anybody but the officers of the court. This affidavit is not legal evidence; it does not appear that Wilson is mayor of Gravesend.

[338] Dr. Hay contra. An affidavit to prove a debt is well made before a justice of peace.

JUDGMENT—SIR GEORGE LEE. I was of opinion that the affidavits of Reynolds and Seacombe taken together sufficiently proved the debt to Cradock. The only doubt was whether the affidavit of Reynolds was properly sworn before the mayor of Gravesend.

Mr. Stevens, the registrar, said affidavits in causes were always sworn before Surrogates or commissioners appointed by the court; but affidavits of debts, as this was, and of service of processes, &c. made before a master extraordinary in Chancery, or a justice of peace, were received.

I therefore decreed the guardian to give in inventories, affidavit being first made to prove that Wilson, before whom Reynolds made affidavit, was at that time mayor of Gravesend.

JUDGER AND JUDGER *against* MANN. Prerogative Court, Caveat Day, April 12th, 1753.—Importunity not established.

Dr. Paul for Judger. John Judger, brewer, made his will, 28th April, 1752; made his son, James, and brother, William Judger, his executors, and left the residue to his son, James. Jane Mann, the deceased's daughter, opposes the will. We have examined three witnesses. Mann has not pleaded.

Witnesses for Judger.

1. Samuel Whitbread. The deceased was the deponent's servant nine years; he died in May, 1752; the deponent went to see the deceased in his illness, and advised him to make his will; de-[339]-ceased was willing; William Shield took instructions for deceased's will in deponent's presence, and then Shield drew the will pleaded; it was read to the deceased, and he approved it in presence of the deponent, the said Shield, and Eliza Hebden, and duly executed it; and Shield and Hebden attested it; the deceased of sound mind, &c.

2. William Shield. Will made at Islington where the deceased lodged; deponent did not know the deceased; never saw him before, but Whitbread, whom deponent knew, called him Judger; says the instructions were made out of a paper Whitbread brought, and which deceased approved; deponent drew the will pleaded from the said instructions; read the will to deceased; he approved and executed it in the presence of Hebden and deponent who attested it, and of Whitbread; deceased of sound mind, &c.

3. Elizabeth Hebden. Deponent was servant to the deceased for six years, and to his death; proves execution of will, and publication; deponent and Shield attested it; deceased of sound mind.

3. Int. Deceased made a will ten or eleven days before his death, and left his effects equally among his children; deponent was a witness to it. 4. Int. Deceased had a regard for his daughter Mann; and she was with him in his illness till she lay in.

Dr. Hay for Mann. Insisted that as he had made a will equally in favour of his daughter so few days before his death, and as the instructions for the last will were brought by Whitbread without any notice from the deceased, and as the witnesses too came by order of Whitbread, and the deceased was then very near death, the last will must be presumed to have been made by impor-[340]-tunity, or a weak head, and therefore was not good.

JUDGMENT—SIR GEORGE LEE. But as the former will did not appear, and the witnesses proved the deceased's approbation, execution, and capacity, I pronounced for the will pleaded.

WINGFIELD *against* WINGFIELD. Prerogative Court, Caveat Day, April 12th, 1753.—

An administration decreed to a widow under a caveat, not to be stopped from passing the seal by a second caveat.

Dr. Pinfold for the widow. Timothy Wingfield died intestate in Feb., 1753; left a widow and several children. Caveat entered in the name of Thomas Johnson, of Cheslyn; the widow waived it; Cheslyn appeared for Nathaniel Wingfield, alleged him to be a creditor, and prayed an inventory; the court decreed an inventory, he making affidavit of his debt, otherwise the administration to pass to the widow; he did not make an affidavit, but entered another caveat, which stopped the administration passing under seal, and then Southgate appeared for the same Nathaniel Wingfield, and alleged he was brother to the deceased, and denied the widow's marriage to the deceased.

We insist he cannot do it again upon this second caveat, and that the administration is decreed absolutely to the widow.

Dr. Collier for Nathaniel Wingfield. Insisted that his client had an interest both as a brother and a creditor; that his right as a creditor only was determined under the first caveat, and that he must set forth his other interest as brother un-[341]-der this caveat, and put the widow upon proof of his marriage.

JUDGMENT—SIR GEORGE LEE. But I was of opinion the administration was decreed absolutely to the widow under the first caveat upon Nathaniel's not making

affidavit of his debt, and ordered letters of administration to pass under seal to the widow; especially as the brother was not without remedy, for he might if he thought proper call in the administration by process, and put the widow on proving her marriage; and declared I should discountenance that practice of entering caveats merely to stop the decrees of the court from being carried into execution.

THOMAS *against* BAKER. Prerogative Court, Easter Term, May 9th, 1753.—The executrix of an executor entitled to an administration cum testamento annexo, in preference to the widow of the original testator.

James Thomas, deceased, made his will 27th March, 1751, gave all his estate to John Baker, his heirs, executors, administrators, and assigns, in trust to pay himself his debt and the charges of the deceased's funeral, &c., and gave the remainder to his (deceased's) wife, and directs that if his wife should die before his prize-money is recovered, all his effects in that case should go to the said Baker, and made him sole executor. The deceased was a seaman of the "Prince Frederick," Privateer. Baker took probate, made his will and appointed his wife sole executrix, and died; she proved his will. Cheslyn, proctor for Thomas, took process against Mrs. Baker, to shew cause why administration cum testamento should not be granted to Thomas' widow.

Will read.

[342] Dr. Jenner for Thomas. Insisted the privity was not continued to Mrs. Baker; her husband was only executor for a special purpose to pay himself his debt, and pay over the residue to deceased's widow; the deceased never intended him a benefit, unless the contingency happened of the prize-money not being recovered in the wife's lifetime. Stat. Ed. 3, (a) made the executor of an executor suable. A special trust to sell an estate shall not go to the executor of the trustee, Wentworth's Office of Executors. (b)

[343] JUDGMENT—SIR GEORGE LEE. It did not appear that the prize-money was paid, and the testator gave his estate in trust to Baker, his heirs, executors, administrators, and assigns.

I did not see any reason to take this case out of the common course, and therefore decreed the administration with the will annexed of James Thomas, to Mrs. Baker, the executrix of the deceased's executor.

(a) By the 13 Edw. 1, st. 1, c. 23, executors shall have a writ of account, and the like action and process in the same, as the testator might have had. And by 4 Edw. 3, c. 7, executors for a trespass done to their testators, as of the goods of their testators carried away in their life, shall have action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life. And by the 25 Edw. 3, st. 5, c. 5, executors of executors shall have actions of debts, accounts, and goods carried away, of the first testators, and execution of statutes merchants, and recognizances made to the first testator, in the same manner as the first testator should have had if he were in life, and on the other hand, this statute provides that executors of executors shall answer to others for as much as they have recovered of the goods of the first testator, as the first executors would do if they were in full life; and the 19 Car. 2, c. 3, enacts, that where any judgment after a verdict shall be had by or in the name of any executor or administrator, an administrator de bonis non may sue forth a scire facias and take execution upon such judgment.

(b) Since that statute (13 Edw. 3) and at this day, where by a will a special trust is recommended to an executor, as to sell land, &c. this not performed in his lifetime shall not be performable by his executor, contrariwise of an interest, as to take the profits of lands for certain years towards the payment of debts and legacies.

So as now in all cases except of special trust or authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor. Wentw. O. E. part 2, c. 20.

FREEMAN against FREEMAN. Prerogative Court, Easter Term, May 9th, 1753.—
A nuncupative will established.

William Freeman made a nuncupative will, 20th December, 1751; the deceased was a waggoner; on the road on the 19th December, 1751, he fell under his waggon, and was so much hurt that he died the next day; gave all to his wife, but did not name her executrix; the nuncupative will was opposed by the deceased's nephews and heirs, who were his next of kin. Three witnesses were examined.

1. Sarah Heath, ex. 9th June, 1752. Deceased a stranger to the deponent, but believes he was William Freeman, the deceased in this cause; he was brought to deponent's father-in-law's house, a public house at Stapleford, on 19th December, and he died about ten on the morning of the 20th December; between eight and nine that morning, deceased's wife asked him who he would leave his effects to; he took her by the hand and said, "To you, my dear," and bid the deponent take notice he was of sound mind.

The nuncupation was reduced to writing, and signed by the witnesses on the 7th Jan., 1752.

[344] 2. Int. Deceased died of the hurt he received by his waggon, which broke his leg.

2. Reginald Heath, ex. 9th June, 1752. Agrees with the former witness; deponent a stranger to the deceased; deposes to presence of Mary and Sarah Heath and himself at the nuncupation.

3. Mary Heath, ex. 9th June, 1752. Deceased a stranger to the deponent; deposes the same as the other witnesses; proves the presence of herself, and of Sarah and Reginald Heath, at the time of the nuncupation.

No opposition at the hearing.

JUDGMENT—SIR GEORGE LEE.(a). I decreed for the nuncupative will, and granted administration with the will annexed, to the deceased's widow.

TAYLOR AND AUSTIN against COX. Prerogative Court, Easter Term, May 9th, 1753.

—A will and codicil propounded by the executors in a common condidit, the next of kin, by special proxy, admits the allegation *modo et formâ*.

Thomas Bryan, Esq., deceased, made a will and codicil, dated 22d Oct., 1748; appointed Bryan Taylor and Francis Austin, Esqs., and Dr. William Webb, executors. The executors propounded the will and codicil in a common condidit. The deceased's sisters and only next of kin by special proxy confessed the executor's allegation *modo et formâ*. Upon which confession, I gave sentence for the will and codicil.

[345] **BIRD, ALIAS BELL v. BIRD.** Prerogative Court, Easter Term, May 14th, 1753.—An exhibit which might have been pleaded to establish identity cannot be pleaded as evidence.

An appeal from the Commissary of St. Paul's on a grievance, in admitting certain articles of a libel.

Thomas Bird brought a suit against his wife Elizabeth, for nullity of marriage, by reason of a former. In his libel he pleaded as follows:—

1 art. That Robert Bell courted Elizabeth White, alias Bell, alias Bird.

2 art. That they were married together on 5th April, 1722, at the parish church of St. Mary Magdalen, Old Fish Street, by Mr. Rayner.

3 art. Exhibits certificate of the said marriage by Mr. Rayner, dated in 1742.

4 art. Pleads their cohabitation, &c.

5 art. In 1723 or 1724, Robert Bell went a soldier to Gibraltar, and passed by name of James Clark.

6 art. Pleads his being in foreign parts.

7 art. Elizabeth, in 1735, pretended herself a widow, and Bird courted her.

(a) *Bennett v. Jackson*, 2 Phill. 190; *Parsons v. Miller*, 2 Phill. 194.

8 art. On 7th Feb., 1735, the said Elizabeth and Thomas Bird were married at St. Bennet's, by Mr. Will's, by licence.

9 art. Pleads certificate of the said marriage.

10 art. Cohabitation, &c.

11 art. Bell was living on the 7th Feb., 1735, and is still living.

12 art. In 1743, Bird hearing that the said Robert Bell was living, enquired after him, and applied to him, and the said Robert Bell, alias James Clark, gave bond to Thomas Bird and the [346] said Elizabeth not to sue them on account of their marriage and cohabitation together.

13 art. Exhibits the said bond, marked C.

14 art. Robert Bell on 15th July, 1743, made oath of his marriage to said Elizabeth.

15 art. Exhibits that affidavit.

16 art. Robert Bell visited several persons, particularly the said Elizabeth.

17 art. Pleads identity of parties to said bond and affidavit.

N.B.—Elizabeth Bird appealed from admitting art. 12, 13, 14, 15, 16, 17.

Dr. Paul for Elizabeth. Husband and wife cannot be witnesses for or against each other. Coke's 1st Inst.; Law of Evidence, 2 Vern., *Cole and George*. Affidavit not evidence upon the merits of a cause. Littleton's Reports, 1 vol. p. 44; Styles, 475. Stat. 29 Car. 2, c. 4. Affidavits must be made before a judge or a commissioner of the Court.

Dr. Hay, on the same side. Suit began in Easter Term, 1752. From his own shewing, he knew in 1753 of her marriage to Bell, and yet continued to live with her, and has had children by her since, and has had eight children by her from his marriage to her. Bell, in his affidavit, dated 15th July, 1743, swears he was married to Elizabeth twenty-four years before that time, which carries the marriage to 1719, contrary to the certificate.

Dr. Pinfold contra. Libel debated below before Dr. Simpson. We might have pleaded Bell's declarations.

[347] JUDGMENT—SIR GEORGE LEE. I was of opinion that the bond and affidavit might have been received, if they had been pleaded as acts done by Robert Bell, to prove he was alive after the 7th Feb., 1735, when Elizabeth married Bird, but as they were pleaded to prove the marriage of Bell to Elizabeth, I was of opinion they could not be received, because the acts of a third person could not be evidence against her (1 Phillips, L. E. 79), and more especially in this case, when it was laid in the libel that Robert Bell is still alive, and therefore may be examined as a witness to prove his own marriage to Elizabeth.

I therefore pronounced for the appeal, and rejected the 12th, 13th, 14th and 15th articles, and directed the 17th to be reformed.

PRENTICE *against* FARRAND. Prerogative Court, Easter Term, May 16th, 1753.—
Objections to an inventory must be pleaded in an allegation.

Dr. Hay for Farrand. William Wallis died intestate; left a widow, Elizabeth, who took administration, and Anna Maria Farrand, a daughter. The widow is dead, and administration de bonis is granted to Farrand. Prentice is executor of the widow; he has taken out process against Farrand to exhibit inventory and account, and see portions allotted. Farrand appealed, and gave inventory, &c., and then Farrand prayed an inventory from Prentice. We now object in an act of Court to that inventory as not full.

Dr. Pinfold for Golding Prentice. Fanshaw, for Farrand, in an act of Court has alleged our in-[348]-ventory is not full, he ought to object by an allegation. We have sworn to the truth of the inventory, whereas the act is only assertion.

JUDGMENT—SIR GEORGE LEE. I was of opinion Fanshaw ought to plead his objections (a) in an allegation, and he accordingly asserted he gave an allegation.

(a) It has been a controverted point whether it is competent to the Ecclesiastical Courts to admit allegations in objection to inventories.

The cases of *Hunter v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922;

LEGGATT *against* LEGGATT. Prerogative Court, Easter Term, May 16th, 1753.—
An application for a joint administration refused.

[See further, p. 408, post.]

Dr. Hay for Abraham Leggatt. Andrew Leggatt, widower, died intestate, left a son Abraham, and a daughter, Elizabeth Leggatt, a married woman. Abraham, the son, prays administration; no objection to him; but Phillips, for the daughter—[349]—ter, prays she may be joined in the administration.

Dr. Pinfold for Elizabeth Leggatt. In 1720 a settlement was made by Abraham Leggatt, grandfather to the parties, of the leasehold lands and premises to himself for life, then to his wife for life if she remained a widow; then to Andrew his son for life, and to his wife Elizabeth, and the survivor of them, and the executors, administrators, and assigns of such survivor. If the daughter is not an administratrix, it is a doubt at law upon the settlement, whether she will not be deprived of her interest in the leasehold lands.

JUDGMENT—SIR GEORGE LEE. I was clearly of opinion that as Andrew had survived his wife, the leasehold estate vested absolutely in him that he might have disposed of it, and as he was dead intestate, it was subject to distribution, and whether the daughter was administratrix or not, her interest would be the same.

I therefore pursued the general rule, and decreed the administration to the son alone,^(a) but directed it should not go under seal till after fifteen days.

MURPHY *against* MASON AND FENNEL. Prerogative Court, Easter Term, May 16th, 1753.—Probate of a will revoked on failure of proof of the identity of a testator.

William Murphy, deceased. Mason took probate as executor of a will dated in 1744. Catharine Murphy, the deceased's sister, called him to [350] prove the will by witnesses. Probate brought in in 1751. Murphy's interest confessed in 1752. Will propounded by Mason. Cause concluded in Easter Term, 1752. The witnesses, all strangers to the deceased, could not prove his identity.

JUDGMENT—SIR GEORGE LEE. I pronounced against the will for want of proof of the identity of the testator; revoked the probate, and decreed administration to the sister, and condemned Mason in costs.

BARTON *against* ASHTON AND GRAY. Arches Court, Easter Term, May 16th, 1753.—

A proceeding against a parish clerk for deprivation ought to be plenary, and by articles. If a parish clerk is nominated by the parishioners he is a temporal officer; whereas if he is nominated by the incumbent, he is a spiritual officer.

[See further, pp. 466, 533, post.]

(An Appeal from Lincoln.)

Dr. Simpson for Ashton and Gray. The cause arises on revoking a licence

and *Henderson v. French*, 5 Maule and Selwyn, 406, seem, at first sight, and to a certain extent at least, to militate against this exercise of jurisdiction on the part of the Ecclesiastical Courts, while, on the other hand, the high authority of Sir George Lee in this case, and that of Sir William Wynne in *Shackleton v. Lord Barrymore*, Prerog. Hilary Term, 1798, and the more recent decision of Sir John Nicholl in *Telford v. Morrison*, Prerog. Michaelmas Term, 1824, are strong in support of the contrary doctrine. Undoubtedly this jurisdiction, whether founded or not, has the sanction of ancient practice, and is supported by the venerable names of Lynwood and Swinburne, and other acknowledged oracles of the ecclesiastical law. See Lynwood, b. 3. Swin. p. 6, s. 20.

It is to be observed that in the case last decided, viz. that of *Telford v. Morrison*, no prohibition was moved for, nor has any appeal been interposed. The administratrix submitted to the jurisdiction of the Prerogative Court, and brought in a further inventory, at the prayer of the creditor.

(a) The court prefers, *ceteris paribus*, a sole to a joint administration, because it is infinitely better for the estate. *Earl of Warwick v. Greville*, 1 Phill. 126.

granted to Luke Barton to be parish clerk of Louth, in Lincolnshire, and granting a new licence to Gray to be clerk. The vestry agreed to indict Barton for embezzling the poor's bread, and the vicar was requested by the parishioners in vestry, to revoke the appointment of Barton, and he accordingly did revoke Barton's appointment, and appointed Gray in his stead. Citation against Barton to shew cause why his licence should not be revoked and a new one granted to Gray upon the vicar's new appointment.

[351] The judge rejected Barton's allegation, and gave sentence upon a *vivâ voce* examination against him.

Dr. Paul for Barton. Cause began at a public-house in May, 1752. Louth is a prebendal jurisdiction, and the prebend refused to revoke the licence, and then they applied to the Surrogate of the Chancellor of Lincoln. The office of parish clerk is a freehold, and he cannot be deprived but by articles. Barton was called to shew cause, but they rejected his allegation, and examined witnesses *vivâ voce*.

Evidence for Ashton and Gray.

Order of Vestry, 30th March, 1752, ordered prosecution against Barton at the sessions for stealing the poor's bread.

April 14th, 1752. Resolved that Barton for his misbehaviour be removed by the vicar, and the vicar does thereupon discharge Luke Barton and appoint Edward Gray, parish clerk; signed by Ashton, the vicar, and attested by several parishioners.

Act, 8th May, 1752, Sped at an inn, alleged that Ashton discharged Barton for his scandalous behaviour in stealing the poor's bread, and that Ashton then appointed Gray; that Wilson, prebendary at Louth, refused to revoke the licence upon Ashton's presentation; thereupon the surrogate of the chancellor granted a citation.

Act, 26th May, 1752, in court.

Citation returned; proctor exhibited proxy for Barton; Ashton's proctor alleged Barton had behaved ill to Ashton, &c.; exhibited vestry book, and produced and examined witnesses *vivâ voce* on the part of Ashton; no libel, allegation, or ar-[352]-ticles; objection taken that these witnesses cannot be read.

Dr. Simpson. We insist that this is a summary proceeding, and therefore *vivâ voce* examinations are right. A parish clerk is a temporal officer, removable by the vicar; the license is only an approbation, the proceeding is therefore summary; it is not a cause to deprive, if it had been such, there must have been articles. When a parish clerk is nominated by the parish, a *mandamus* will lie.

Dr. Hay, same side. The appeal is both from the sentence and from rejecting an allegation; witnesses not necessary; it was sufficient to shew that the vicar had revoked the appointment of the clerk. Parish clerk is a temporal office. A clerk named by the parishioners by custom must be admitted by the ordinary.^(a) Brownlow, 2d part, 38: a clerk cannot be deprived by the Spiritual Court, but must be deprived

(a) *Gaudrey's case with Dr. Newman*. A prohibition was granted against Dr. Newman, chancellor of Canterbury, for having, by sentence, deprived a parish clerk who had been elected by the parishioners, because his election was against the canon,* and the court (according to the reporter) held, "that one parish clerk is a mere layman, and ought to be deprived by them that put him in, and no others, and if the Ecclesiastical Court meddle with deprivation of the parish clerk, they incur a *premunire*, and the canon which willet that the parson shall have election of the parish clerk, is merely void to take away the custom that any parish had to elect him."

In another part of the case it is stated, "And it was resolved that if the parish clerk (I presume the parish clerk so elected) misdemean himself in his office, or in the church, he may be sentenced for that in the Ecclesiastical Court, and excommunicated, but not to deprivation. Brownlow, part 2, 38.

The principal points ruled in that case seem to be: 1st, that the custom of the realm cannot be taken away but by act of parliament; and 2dly, that prohibition lies as well after as before sentence.

This case is also reported by Hughes, 275; see also 3d Roll's Abr. 234, 256; Gibs. 214; Godb. 192.

* 91st canon.

by the power that [353] appointed him; a license is only a power to the clerk to sue for his dues; gives him no right to his office.

JUDGMENT—SIR GEORGE LEE. I was of opinion that Ashton and Gray should have appealed from the decree of the prebend to the chancellor, which was not done, and thereby the prebend's refusal became absolute: but if the chancellor had an original jurisdiction, he had proceeded wrong in examining witnesses *vivâ voce*; that he ought to have proceeded plenarily by articles in order to deprive, and therefore these witnesses could not be read: that no acquiescence or even consent of the parties could warrant a judge to proceed summarily in the way he had done in a criminal cause which was in its nature plenary; that where a parish clerk was appointed by the parishioners by custom, he had been held to be a temporal officer, and of that sort were the cases cited by Dr. Hay, but where he was nominated by the parson, he was a spiritual officer, and so it was held in B. R. 13 Geo. 2, in the case of *Townsend and Thorpe*,^(a) where a consultation [354] was granted to the Spiritual Court to proceed to deprive a parish clerk, that in this case the clerk being nominated by the vicar, he was subject to the Spiritual Court, and they ought to have proceeded against him by articles; and that these summary proceedings were therefore null.

I accordingly pronounced for the appeal; reversed the sentence below, and dismissed Barton from the suit with 25l. costs.

BOND *against* BOND. Prerogative Court, Easter Term, May 23rd, 1753.—Objections to an administration *pendente lite*, sustained.

[See p. 333, ante, and p. 429, post.]

Dr. Pinfold for William Bond. John Bond, the deceased, died 5th Nov., 1752, intestate; we say he died a widower, and left William Bond his only child. Sarah Southerne claims to be the deceased's widow, and took administration in the prebendal jurisdiction of Colwich, and on 13th Nov., 1752, alleged that the deceased had been dead fourteen days, and administration was revoked for want of jurisdiction, the [355] son's interest was admitted, and Sarah's was denied, and she has pleaded it; the son's interest being certain and Sarah's doubtful, the Court, on 15th March last (*vide supra*, p. 333), granted administration *pendente lite* to William Barnes, named by the son. We mistook Barnes' Christian name, for his true name is Thomas; Smith appeared and alleged this mistake. Fanshaw for Sarah, now objects to Thomas Barnes, that he is poor, has not a domicile of his own, but lives with his father who is aged.

Read act of court, dated 17th May, 1753. Smith alleged the mistake in Barnes' name, and prayed administration to be granted to Thomas Barnes, giving 2000l. security as ordered before. Fanshaw alleged that Barnes is brother to William Bond's wife; is a lodger with his father, and is in low circumstances and bears but an indifferent character; that the deceased's personal estate is 1700l. as appears by inventory given in since 15th March last. Smith alleged that Thomas Barnes lives with his father to assist him, and that he has served in his own right the offices of constable and collector of window-tax in the parish where he lives, and is in good circumstances, and is a parishioner of his parish. Barnes offers undeniable security in such sum as the court shall order.

(a) *Townsend v. Thorpe*, Str. 776; in that case the court laid down that a parish clerk was an ecclesiastical officer as to every thing but his election; but in a later case, which is to be found in the same reports, that of *Peake v. Bourn*, Str. 942, the court seems to have doubted whether this proposition had not been too broadly assumed in *Townsend v. Thorpe*, and strongly inclined that he was a temporal officer, as to the right of his office. In aid of the proposition the following cases were cited:—18 E. 3, 17; 13 Co. 70; 2 Cro. 670; Pal. 379; Mar. 101; 1 Keb. 286; 2 Roll. Abr. 285, pl. 37; 2 Brownlow, 11; 1 Lev. 75; 1 Vent. 143; 2 Lev. 18; Salk. 536; Godb. 163; Old Bendl. 142; 1 Lev. 94; Fitzh. Annuity, 40; Hugh's Parson's Law, 275. It is, however, to be collected from the report that no positive opinion was given on this point. The only point decided in the case was that a parish clerk might execute his office without the license of the ordinary.

Affidavits for Sarah.

1. John Styteh and John Mott. Both well acquainted with Thomas Barnes; he is brother to Elizabeth, William Bond's wife, lives with his father who rents a farm of 40l. a year only; rents nothing himself, and is in indifferent circumstances; Styteh swears John Barnes, the father, is [356] rated for the farm, and Thomas has no settled abode, and has but an indifferent character; deponents believe he is set up only to distress Sarah Bond.

2. John Dunne. Gives John Styteh a good character.

Affidavits for William Bond.

Thomas Barnes, Edward Hugh, Henry Kent, Thomas Atterby, and Thomas Weaver.

Thomas Barnes says his father is between sixty and seventy years old, and has three children—Elizabeth, John, and deponent; the deponent lives with him, and has the care of his affairs. In 1750 and 1751 the deponent was constable and collector of the window tax in his own right; has more than sufficient to pay his debts, and has some money at interest, and will render a true account of his administration without favour to any one.

The others say that John Barnes, the father, bears a good character, is esteemed an honest man and of good substance; they have known Thomas Barnes sixteen years; he is a parishioner, and bears a very honest character, and is a man of good substance, and fit to be entrusted with the administration, &c.

Dr. Simpson for Sarah. We insist she is widow to deceased, and has six children by him; the Court will take care the administration is granted to a proper person of substance, &c. Thomas has not a settled abode; rents nothing himself; is not rated in the books; all the witnesses to Thomas Barnes' character live in London, and he lives in Staffordshire.

[357] JUDGMENT—SIR GEORGE LEE. I was of opinion the objections against Thomas Barnes were material; that he was not a proper person to be the administrator, and decreed that William Bond should name for administrator pendente lite some person indifferent between the parties, who is an housekeeper and a man of substance, and that security should be given in double the value of the estate.

DRUMMOND, Attorney of Ogilvie v. HAMILTON. Prerogative Court, Easter Term, May 23rd, 1753.—A fraudulent administration revoked.

Dr. Paul for Ogilvie. James Hamilton died intestate; left a sister Ellen Ogilvie, his only next of kin; she has called John Hamilton, who took administration to the deceased as his brother, to shew cause why the said administration should not be revoked, he not being brother to the deceased as falsely suggested by him, and not having any interest. Lee appeared for Hamilton, who has since been hanged for forgery, and denied Ogilvie's interest; she propounded it; nobody now appears to oppose her interest, and therefore the administration must be granted to her.

Dr. Pinfold for Lee, late proctor of Hamilton. 5th May, 1751, citation against John Hamilton to bring in the administration, &c. Ogilvie has examined two witnesses, and prayed two requisitions to Scotland but took out neither.

As her interest was denied, she cannot have administration till there are proper parties to the suit before the court.

[358] JUDGMENT—SIR GEORGE LEE. I directed Hughes, proctor for Ogilvie, to apply to the king's proctor to know whether he would interfere for the crown, the interest in Hamilton's effects being vested in the king by his being convicted of forgery and hanged.

GARDINER against JOHNSTON AND OTHERS. Prerogative Court, Easter Term, June 4th, 1753.—The latter of two wills established.

Dr. Hay for Catherine Gardiner. William Johnston, deceased, died 5th August, 1751, left a widow, Ann Johnston, and Catherine Gardiner, a niece by a brother, and Robert and Mary Johnston, a nephew and niece by another brother, his next of kin; will dated 2d August, 1751; executed 3d August; contents of the will, to his wife

15l. payable eight days after his death, and an annuity of 60l. quarterly; and 20l. to Mary Johnston, his niece; and 10l. to his nephew Robert; and one shilling to William, the son of Robert; and 5l. to Ann Edwards, his servant; residue to his niece, Catherine Gardiner, and appointed her sole executrix. Will executed in presence of three witnesses; John Wilson, mayor of Lincoln, John Durance and Charles Mackinnon.

The deceased was a Scotchman, a soldier, pedlar, an hardware man, then a linen draper, and died a farmer; he had no children living, sent for his brother's children to live with him, and particularly Catherine Gardiner, whom he educated, and gave her a fortune of 500l. in marriage to Edward Gardiner. On 2d August, 1751, deceased gave instructions to Edward Gardiner, the hus-[359]-band to Catherine, for making his will, who carried them to Mr. Peart, an attorney, who drew the will from them. The will is opposed by the widow and nephew Robert, who have propounded a former will, dated 18th Nov., 1743; therein he gives all his real and leasehold estates to his wife for life, and his plate and furniture absolutely, and gives the reversion of his said estates and all the residue equally between his nephew and nieces, and appoints two executors in trust, who have renounced. We admit the factum of the will, but say it was cancelled by the deceased and is revoked by our will. The deceased perused and corrected our will, and ordered it to be carried to Mr. Atkinson, a counsel who made a interlineation: the widow was present at the execution of the last will; the deceased ordered the legacy of 5l. to his maid-servant to be read over twice to him, deceased could not find his spectacles, and tried other people's, but they would not do; he attempted to write his name, was so weak he could not make his mark; the widow alleges incapacity; but his physician and apothecary swear to his capacity; two of the subscribing witnesses speak doubtfully to capacity at the execution; but Wilson, the mayor of Lincoln, swears positively that he was capable; one Robinson swears to deceased's declaration in favour of the widow, but he proves instructions for one will.

Dr. Jenner, same side. Deceased sent for the witnesses; attempted to write his name but could not; deceased fully approved the will, and bid Edward Gardiner write his, the deceased's, name, for him, but that being objected to, deceased made his mark, and delivered the paper to Edward Gar-[360]-diner. On the 3d of August, in the afternoon, the deceased recognized the will to his apothecary. The deceased has two brothers. Catherine Gardiner was the daughter of one of them. William Johnston, the deceased's grand-nephew, disobliged him, and he turned him out of his house. Latterly there were quarrels between the deceased and his wife, and nothing is left to Edward Gardiner.

Robinson gives an account of the instructions, and says eight or ten lines of them were written before he came into the deceased's room.

Dr. Paul for Johnston. The deceased was an alderman of Lincoln. By the first will the wife was well provided for; the remainder was given equally to his nephews and nieces his next of kin. Gardiner has pleaded that the deceased had two brothers, Andrew and Archibald; that the deceased's father had a good estate, which he left wholly to Archibald, but the contrary is proved. Deceased had 300l. fortune with his wife, which set him up; he always declared he would leave her handsomely for her life, and after her death it should go to her next of kin. He fell down his cellar stairs in September, 1750, and was much hurt and impaired thereby; and he had another fall, from his horse, in the May following; he then took to drinking, by which he was much weakened in his understanding. Gardiner drank with and encouraged him in drinking, and endeavoured to set him against his wife. Deceased declared he would do no more for Edward Gardiner; had great affection for Robert Johnston and his son William. A week before his death was incapable of all business. Gardiner has pleaded [361] that deceased, on the 2d of August, bid Edward Gardiner cancel his will, and carry it with instructions for a new will to Peart. Robinson swears the deceased named his wife executrix. No proof of instructions for the last will. I cannot justify the subscribing witnesses for varying from their act; but they say they signed the will to prevent worse persons signing it; Wilson declared he once thought to decline signing it. At the time of the execution the deceased fell into a fit. Edward Gardiner guided the deceased's hand to make the mark, and wrote "William Johnston, his mark;" before the mark was made, Edward Gardiner had the first will in his custody.

The cause will turn on the deceased's declarations, and on John Robinson's evidence.

Witnesses for Gardiner.

1. Robert Waterman. Knew the deceased eighteen years before his death; deponent was journeyman to him; deceased educated Catherine Gardiner, and has heard he gave her 500l. fortune when she married.

1. Int. The deceased drank hard latterly. 6. Int. Deceased fell down stairs and from his horse. 8. Int. John Robinson and Davis were intimate with deceased.

2. George Durance. Has known the deceased about thirty years; heard him say he gave his niece 500l.

3. John Wilson. Has known the deceased thirty years, the same as the last witness, and speaks to the deceased's affection for his niece Catherine; he was not much hurt by his second fall.

[362] 4. Joseph Twornby. In 1750 heard the deceased express a great affection for Catherine, and said he intended to leave a great deal to her.

2. Int. Deceased had a great affection for his wife. 20. Int. The deceased used to cry in discourse.

5. John Johnston. Knew the deceased twenty years; about three months before his death he fell from his horse, which hurt his health, but not his senses; frequently told deponent he would alter his will and make Catherine and her children his executors. In January before his death, he declared so in presence of his wife, and said he would allow his wife only 20s. a week.

2. Int. Deceased and his wife lived happily together; never heard any dispute between them but that in January.

6. George Houghton, gent. Deponent is an attorney, was employed by deceased; deponent thinks the deceased declined in his senses after his falls; about five or six months before his death, deceased said he would leave Catherine 5 or 6000l.; he was then a little fuddled.

5. Int. Was angry with his great-nephew William for sinking a keel of his. 8. Int. Robinson and Davis were intimate with the deceased; he believes he would declare his mind to them.

7. Thomas Foss. 1st April, 1751, at Potterhanger, the deceased, after dinner, expressed great affection for Catherine and her children, and said he would leave all he had to her, except 20s. a week to his wife, and he cried; he was then very sensible and sober.

8. Samuel Haslewood. 1st April, deponent was present with deceased and many others, when [363] he made the declaration deposed to by the last witness, with whom he agrees exactly; deceased then sober and sensible.

9. John Spittlehouse. Well knew the deceased for many years; speaks to affection to Catherine; heard deceased, within a year of his death, say he would leave the biggest part of his effects to her.

10. John Rippindale. Speaks to declaration on 1st April, 1751, the same as Foss and Hazlewood, and says deceased frequently declared he would leave the biggest part of what he had to Catherine; said he would only leave his wife 20s. a week.

20. Int. Deceased said he would not leave to Mr. Gardiner any thing; deceased and his wife lived happily together.

11. Thomas Squire. Agrees with the other witnesses as to declaration on the 1st April, 1751.

12. Thomas Chambers. The same.

13. Ann Parks. The same.

14. Richard Town, butcher. Knew the deceased twenty years; has frequently heard him say he would make Catherine his executor, &c. 30th Sept., 1750, the deceased fell down his cellar-stairs, and was much hurt; and in May he fell from his horse, and his health was impaired, but his senses were as good as ever; deponent last saw him on the 18th July before his death, he was then perfectly in his senses; after his second fall, the deponent heard the deceased say he would give his wife only 60l. a year.

2. Int. Deceased and his wife had frequent quarrels. 3. Int. On the 18th July deceased was perfectly sensible. 5. Int. The deceased turned William Johnston out of his house for sinking the [364] deceased's keel. 8. Int. Robinson, Nowler, and Davis were intimate with the deceased.

15. Mary Slack. Last saw the deceased on 16th of April, 1751, when the deponent paid him rent, and he gave the deponent a receipt wrote by himself; he talked as sensibly as he ever did in his life.

16. Edward Morris. The deponent paid the deceased money in the spring before his death; his senses good; had affection for Catherine Gardiner.

17. William Gibson. In the spring before his death the deceased was sensible.

18. Edward Leatherland. The deceased kept his books as well as any one could who was not bred to business; entries made therein by the deceased to the 17th July, 1751, and they were as regular as the past entries.

19. Richard Town, ironmonger. About Christmas, 1750, the deponent had some discourse with the deceased, and he was then perfectly sensible.

20. Charles Dinmont, M.D. Deponent knew the deceased from 1745; the deponent visited him as a physician in February, 1751; he was then perfectly sensible, and capable of making a will; and he saw the deceased twice on the 3d of August, and again on the 4th in the morning, at all which times he was capable of making a will; on the 5th of August the deponent was with him, and he was then dying.

21. Joshua Peart. Deponent was acquainted with the deceased in 1738; did business for him as an attorney; kept his books equally regular to his death. On 2d of August Edward Gardiner came to deponent between eleven and twelve in [365] the morning, and desired the deponent to make a will for the deceased, from instructions he brought, which the deponent did, and gave it to Gardiner, and in the afternoon Gardiner came again, and said the deceased meant only one annuity of 60l. to his wife, and 15l. in money, and desired the deponent to scratch out one of the 60l. annuities, but the deponent wrote the will over again, and the interlineation in the body of the will is not the deponent's handwriting; and also deponent, by the deceased's order, wrote the 5l. legacy to the deceased's maid-servant.

3d Int. Proves the first will; says he saw it uncanceled in Edward Gardiner's hand on 2d of August, and on the 18th of September, 1751, he saw it cancelled in Gardiner's hand. 4. Int. Gardiner asked the deponent to be a witness to the last will, but deponent refused, because he had not taken the instructions; on 9th March inst. the deponent declared he had not been a witness, because he had not taken the instructions, and because he heard the deceased was not perfectly in his senses. Int. tertio loco. 3. Int. Believes the deceased could not have been imposed upon in April or May before his death.

N.B.—The instructions were given in by this witness, and read as part of his depositions.

22. John Robinson, gent. The deponent is clerk to counsellor Atkinson; Gardiner came to the deponent's master on the 2d of August, and the deponent, by his said master's order, interlined in the will that the annuity of 60l. to his wife was in lieu of dower.

23. John Wilson, Esq., mayor of Lincoln. Deponent knew the deceased upwards of 15 years; 3d August, Edward Gardiner came to the depo-[366]-nent and desired him to be a witness to the deceased's will; and the deponent, Durance, and Mackinnon went together to the deceased's house; they found the deceased sick in bed, and his wife and Edward Gardiner with him; deponent went to deceased's bed-side and asked him if he knew the deponent, the deceased replied, "Yes, Mr. Wilson, I know you, and I have sent to desire you, and Mr. Durance, and Mr. Mackinnon to be witnesses to my will," or to that effect, and then bid Edward Gardiner read his will, which he did audibly and distinctly, and the deceased was then asked by somebody, whether it was to his mind, deceased said, "Yes;" and ordered that part of the attestation relating to the servant's legacy of 5l. to be read over to him again, and then Gardiner placed a table with pen and ink by the deceased's bed-side, and the deceased called for his spectacles, but they could not be found; he attempted to write his name, but could not, and then he bid Gardiner write his name for him, and said he would make his mark; Gardiner guided the deceased's hand and he set his mark; the deceased was extremely weak in body; he, before, attempted to write his name, and without assistance wrote part of it, which was done in the presence of the deponent and the other witnesses; and being asked by Gardiner whether he delivered that as his will, he moved the paper towards Gardiner and the deceased moved his lips, but the deponent did not hear what he said, and then the witnesses attested it, &c., and then the deceased muttered something about wine, but the

deponent could not distinctly hear him ; the deponent believes the deceased was very sensible, though very weak in body ; the deceased's wife was present all [367] the time and made no other objection than saying, "How can I like it?" on being asked how she liked it.

24. John Durance. Knew the deceased thirty years ; 3d August, Gardiner came to the deponent and said deceased desired the deponent would be a witness to his will ; the deponent, Wilson, and Mackinnon went to the deceased's chamber, where his wife was ; the deponent asked the deceased if he knew him, the deceased said, "Yes ;" Gardiner read the will distinctly ; after which the deceased said he had like to have forgotten 5l. to his maid, and bid him read that part over again, and asked if Mr. Peart had taken notice of it at the bottom ; the deceased asked for spectacles, but there were not any that would fit him ; he wrote part of his name, but could not go on, and then bid Edward Gardiner write his name, saying it would do as well, but the deponent objected to it, and then Gardiner wrote "William Johnston, his mark," and then the deceased by Gardiner's guidance, made his mark ; and the deceased, being very weak, Gardiner put the will in his hand and said, "You publish this &c.;" the deceased moved his lips ; the deceased was fully in his senses and capable of making his will and spoke properly ; the deceased asked his wife if there was any wine in the house, she said "No ;" he replied, "You are always backward ;" the deceased's wife was present all the said time ; deponent asked her if the deceased had consulted her about the will, she said, "No ;" deponent asked her if she approved of it, and she said, "How can I?"

16. Int. The deceased said he knew the wit-[368]-nesses. 17. Int. Wilson said he once thought of going out of the room, for he at first thought the deceased was not sensible. 18. Int. Believes the deceased knew the contents of the will, for he ordered part of it to be read over again ; the deponent saw the deceased move his lips, but did not hear him publish the will ; he thought the deceased was sensible, but cannot be certain.

25. Charles Mackinnon. Gardiner came to the deponent and said the deceased desired he would be a witness to his will ; says, deceased said he had heard the will read over once or twice ; Gardiner read it over distinctly ; gives account that the deceased ordered the part relating to the maid to be read over again, which Gardiner did ; Gardiner said to the deceased, "You must now sign it ;" the deceased said, "Do you sign it," but Gardiner said it would do better for the deceased to sign it himself ; the deceased attempted to write his name, but he could not ; the deceased bid Gardiner write his name and he would set his mark ; Gardiner guided the deceased's hand to set his mark ; the deceased took the will and delivered it to Gardiner and said something, which the deponent did not hear ; the deponent thinks the deceased was weak in mind as well as body, and not capable of making his will ; but believes deceased knew he was making his will ; the deponent subscribed as a witness, because if he had refused, he thought somebody might be sent for who could not give so good an account as the deponent.

2. Int. The deponent has seen the deceased sometimes behave ill to his wife. 17. Int. Read. Answer: Did not hear Wilson declare he had once [369] a mind to go away. 19. Int. The deponent has declared that he did not think the deceased had sufficient capacity to make a will.

26. John Hooton, apothecary. The deponent knew the deceased fourteen years ; the deceased educated Catherine, &c. ; expressed great affection for her ; in the deceased's last illness the deponent attended him ; on the 2d of August deceased was perfectly sensible ; deponent gives an account of a discourse with the deceased ; on the 3d of August deponent was with the deceased both morning and afternoon ; in the afternoon the deceased and his wife talked together about the deceased's will, and she saying, "You have altered, or intend to alter your will ;" the deceased replied, "Yes, and not so much to your satisfaction as you may think ;" she said, "Where must I live then?" he replied, with some warmth, "At Woolledge's house and be damned ;" on the 4th of August the deceased was sensible but very weak ; on the 5th of August the deceased was speechless ; at all other times he was very sensible, but cannot say whether he was capable of making a will, but believes he was.

27. William Favell. The deceased did business after his last fall.
Will read.

Witnesses for Johnston.

1. Ann Taylor. The deponent was servant to the deceased at his death ; about six weeks before his death the deponent heard Edward Gardiner say to the deceased, "Sir,—Counsellor Bevan sends his service to you and wonders you don't alter your will ;" the deponent did not hear deceased's answer ; about a fortnight or three weeks [370] after, heard Edward Gardiner say to the deceased, "I beg you will not omit altering your will, for you don't know how soon a change may happen ;" the deponent went away and did not hear the answer ; the deceased fell from a mare of Gardiner's and was much hurt ; the deponent heard him say he believed Gardiner lent him the mare to break his neck ; believes from that time the deceased declined in his senses ; he lost his appetite, but drank harder, and Gardiner drank with him till he was fuddled ; and at these times the deceased used his wife ill ; has heard the deceased say Gardiner wanted him to alter his will ; has heard the deceased express affection for Robert Johnston and his son, and say he should leave him part of his estate ; the deceased talked of fighting the devil, both when drunk and sober ; the deceased drank a bottle of wine and of mead on the morning of 2d August ; believes for several months before his death he was incapable of doing business.

4. Int. Deceased was passionate. 5. Int. Deceased drank hard ; deceased turned William, his great-nephew, out of doors, and said he would leave him nothing. 23. Int. Deponent present on 2d August ; when Gardiner took the first will out of deceased's bureau, he called deponent to be present ; deceased kept the key of the bureau ; believes he gave it to Gardiner to take out the will. 29. Int. Deceased drank strong liquors till two days and a half before he died ; never saw him drunk after the Sunday se'nnight before he died ; while he kept his bed deponent could not judge whether he was drunk or not.

2. Robert Read. In January or February, 1750, the deceased told the deponent he intended [371] to make William Johnston his heir, and said the same about a fortnight afterwards ; the deceased educated the said William in Scotland ; Wilson, soon after the execution of the will, told the deponent he did not think the deceased sensible, he could not be so ; "for my part I would have left the room, but Mackinnon said, 'If we do not sign it somebody else will ;' and as there had been quarrels between the deceased and me, if I had gone away they would have said it was an ill-natured thing in me."

11. Int. Has heard the deceased forbid William Johnston his house.

3. Eleanor Hunter. The deponent attended the deceased on the Wednesday, Thursday, Friday, and Saturday nights before his death ; the deponent thought him sensible to Thursday morning, when she thought his senses failed him ; on Friday night he appeared quite senseless and stamped and asked for his green spatterdashes, though he had none ; the same on Saturday night ; and was both nights incapable of making a will.

4. Robert Fotherby. A year and half before deceased died, heard him say he would make William Johnston his heir.

5. Joseph Cap. About two years before the deceased's death, heard him make the same declaration.

6. Henry Waller. The deceased cut his head by a fall in September ; he drank to excess when Gardiner was with him ; deponent has frequently heard Gardiner press the deceased to make his will ; deceased answered, "You know I have done handsomely for you hitherto, and I shall remember you ;" Gardiner said the deceased's wife had taken an antipathy to him, and if he did not [372] make his will he should have nothing, and said 50l. a year was more than the deceased's wife could spend ; the deceased said he should not stint her after such a manner ; such conversation always happened when Gardiner was there, and deceased has told the deponent Gardiner was always at him to make a will ; deponent once saw the deceased use his wife ill when Gardiner was present, and beat her.

7. William Penny. About six weeks after the deceased's first fall, the deponent asked him to make his will, and make provision for William Johnston ; the deceased said, "I have made provision for his father ;" the deponent thinks the deceased was not perfectly sensible.

8. John Baxter. Proves the first will, dated 18th Nov., 1743.

9. Joshua Peart. The same. To interrogatories, swears the said first will was uncanceled on 2d August, 1751.

27. Int. The deceased was worth about 6000l.

10. Stephen Twelve. The deceased had above 900l. fortune with his wife; after marriage he turned linen draper; his wife did all the work of the house.

11. Elizabeth Robinson. The deponent is wife to her fellow-witness, John Robinson; deposes to the deceased's affection to his wife, and said she helped to get his fortune, and he would provide handsomely for her; declared he had made his will in his wife's favour; deceased told the deponent Gardiner endeavoured to set him to alter his will in his favour when he was fuddled; deponent asked him if he intended to do so, he replied he never would do so, for he knew Mr. Gardiner too well to leave his wife in his power; the de-^[373]ceased told the deponent so before his first fall; after his falls the deponent thinks the deceased was not always in his senses; he has told deponent Gardiner had been persuading him to leave his wife only 50l. a year, and Gardiner said he must do so; upon the deponent saying, "What, would you leave your wife in that manner and have the world say you have left your wife to come to the parish?" he answered, "No, I will not alter my will;" after the deceased's falls the deponent told Gardiner, it was said he was drinking his uncle to death; he replied, "That the deceased was wrong in his head;" Wilson told the deponent he thought the deceased was not capable of making his will when it was executed.

12. John Durance. Deponent knew the deceased thirty years; on 3d August, 1751, about two p.m. Gardiner read the will over of his own accord; the deceased attempted to sign it, but could not, and bid Gardiner write his name; Gardiner guided his hand to make the mark; when the deponent first went into the deceased's room, he thought the deceased was sensible; but when he executed it, deponent thinks he was not capable of knowing what was said or done; Wilson coming down stairs said he had once thought of coming away without signing the will.

13. Charles Mackinnon. 3d August, 1751, the deceased ordered Gardiner to read the will, and bid Gardiner sign it; the deceased attempted to sign it, but could not; Gardiner held the deceased's hand, and guided it to make the mark; verily believes during the whole transaction the deceased did not know what he was about; and deponent signed it only because he thought if he and the other witnesses refused, some other persons would be called in, who might not give so good ^[374]an account of the affair; Wilson said in deceased's room, "Pray let us go, for I don't care to stay;" deponent said, "We may as well stay, for others will come in our stead."

26. Int. Verily believes deceased did not know what he was about, if deponent had been a stranger to deceased he does not know whether he should have thought him incapable, for in the first part of the transaction about reading the will he appeared to be sensible.

14. Thomas Ball. About a fortnight after deceased's death, Wilson told deponent that when he was at deceased's house there was something there he did not like, and wished himself out of the house; deponent has often heard him say so.

15. John Davis. In 1738 deponent was journeyman to deceased; has heard deceased say his wife was very industrious; had great affection for his wife; expressed great satisfaction in his will made in her favour; after his fall in September, he was much hurt in his understanding, and after his second fall he grew worse; deponent has seen Gardiner drinking to excess with deceased; deceased told deponent Gardiner had been pressing him to alter his will in his favour, and deceased then said he had done enough for him; believes deceased had great affection for Robert and William Johnston.

8. Int. After his falls, when drunk, deceased talked of fighting the devil.

16. John Robinson, carrier. Deponent very intimate with deceased about sixteen years; has heard him declare he had got about 7000l., and said it was a good deal owing to his wife; said he would provide handsomely for her; told deponent the contents of his first will, and expressed great ^[375]satisfaction at having made it; deceased said he told Gardiner the contents of it, and he pressed him to alter it, and leave deceased's wife in his care, but deceased said he knew him too well, and if he was in his senses he would never alter said will. The deponent has often heard Gardiner press deceased to alter his will and leave his wife only 50l. a year, for she had used him ill, deceased replied, "I am satisfied with my will, and will do no more for you, and I think my wife well deserving of what I have left her;" deponent has heard Gardiner endeavour to incense deceased against his wife; has heard deceased declare so after his falls; the last was in May; in May, 1751, about the middle,

deceased fell from his horse, and at times talked insensibly; in June or July, 1751, deceased told deponent Gardiner and his wife had been pressing him to alter his will, and give his estate to them, and leave his wife only 50l. a year, but he said he would do no more for them; "I declare, if I know what I do, I will never do more for them than I have done;" deposes to deceased's affection to Robert and William Johnston. On 2d August, 1751, between ten and eleven in the morning, deponent was with deceased; Edward Gardiner came into the room, and sat down near the table, where was a paper with about eight or ten lines on it, and then Gardiner began to write under said lines without any previous discourse with deceased; in deponent's presence, and whilst he was writing, deceased said, "Are not you a stupid puppy?" and said he had been writing four or five hours, and he knew not what, and deceased said, "I give my wife 60l. a year, to be paid her quarterly, free from all deductions, and I also appoint her whole and sole executrix," and he likewise said he gave [376] his wife 15l., to be paid her some days after his decease, and mentioned some other legacies now in the last will, after which Gardiner read, but not from the beginning of the paper, and read, "I give my wife 60l. a year, and appoint her my whole and sole executrix, and then read the other legacies; the names of Edward and Catherine Gardiner were not mentioned either by the deceased or in the reading by Gardiner; there lay a paper on the table, which he believes was the first will; deceased said nothing of approbation; after Gardiner was gone, and deceased's wife was come into the room, deceased said to her and deponent, "Who has got my will?" deponent asked what he called his will, deceased said, "That paper which lay on the table is my will;" and said Gardiner and Peart he supposed were going to cook up a will, and said if Gardiner brought him any paper to sign, he should desire deponent might be sent for to see what it was; deponent never saw deceased afterwards; during part of the time deceased was sensible, other part he appeared not to be so; thinks he was sensible when he talked of Gardiner's cooking up a will, but does not think he had capacity to make a will. The will pleaded by Catherine is not agreeable to what deponent heard deceased declare, nor to what Gardiner read to him; in the afternoon of the 2d of August Gardiner told deponent he was going with deceased's will to Counsellor Atkinson; Gardiner encouraged deceased in drinking.

4. Int. Deceased was passionate. 9. Int. Deponent has done business with deceased after his fall in September. 11. Int. Deceased was angry with Johnston for sinking his keel; has heard deceased say when he was in liquor, he would do [377] handsomely for Gardiner's family. 19. Int. Deponent heard deceased order a legacy of 15l. to his wife, and 10l. to Robert Johnston. 20. Int. Deceased ordered 60l. a year to his wife. 31. Int. Deceased has frequently desired deponent to assist his wife. 32. Int. Deponent has lent money to deceased's widow, and has retained counsel for her.

17. Thomas Parsons. Knew deceased twenty years; before his death deceased said he intended William Johnston to be his heir.

18. John Westland. The same.

13th article of Gardiner's allegation read.

Pleas that deceased ordered Edward Gardiner to destroy his first will, and thereupon he cancelled said will, and then deceased gave Gardiner instructions for the new will, in presence of Robinson who then came into the room; pleads that deceased in Robinson's presence directed Catherine to be made executrix and residuary legatee.

The first will read.

Dr. Hay's argument for Gardiner. The question is only on the validity of the last will, and whether the deceased was capable at the time it was executed. A year before his death he intended to make William Johnston his heir, but afterwards was disobliged by him; had affection for Catherine Gardiner and her children. John Johnston frequently heard deceased say he would leave his estate to Catherine and her children, and 20s. a week to his wife. Hooton says about five or six months before deceased's death, he said he [378] would leave Catherine 5 or 6000l. and Spittlehouse deposes to same effect. Town, the butcher, says deceased declared he would alter his will. Capacity—he made entries regularly in his books to 17th July, 1751. Dr. Dimmock swears to full capacity on 2d and 3d August and 4th in the morning. Instructions—Peart's evidence material; says Gardiner brought the instructions back again, and said there was a mistake in giving the wife 60l. a year twice over. Peart and deceased at variance. Gardiner went to Atkinson for his

opinion on the will, which he would not have done without orders. Robinson confirms the instructions as to all or most of the legacies. Execution—all the witnesses agree deceased knew them, and ordered the will to be read over, and he called for his spectacles, and attempted to write, when he found he could not write his name, he bid Gardiner set his name; he delivered the will after he had set his mark, and asked for wine for the witnesses; his wife present all the time, did not object that he was incapable. Hooton proves a recognition on the 3d of August in the afternoon; if deceased gave instructions, and attempted to execute the will, it was sufficient to make it a good will, and if he had then died it must have been pronounced for. Mackinnon swears against his own act. Will ordered to be cancelled, but not then done, because the new one was not made. Gardiner called Taylor to be present when he took the will out of the bureau, and had the key from deceased, which shews it was his act. Importunity—if their witnesses swear true, Gardiner wanted a will in his own favour; this is not so. Robinson's evidence extraordinary; he has accounted for the whole will except the appoint-[379]-ment of the executrix and residuary legatee; says deceased said, "Gardiner and Peart are going to cook up a will;" deceased therefore knew Gardiner was going to Peart; wife present at execution, but she did not send for Robinson. Robinson owns he saw Atkinson's opinion, but never offered to come to hinder the execution of the will.

Dr. Jenner, same side. Disputes between deceased and his wife; declaration at Potterhanger was made when he was very sober; he had plainly an intention to vary his will; fully proved that deceased asked if Peart had put in the legacy of 5l. to the servant maid; shews he knew Peart drew the will; never could intend his wife to be executrix, for he gives her 15l. to be paid to her in eight days, and she could not pay herself; deceased's intention to make his will is clear; the question is only on execution; deceased told the witnesses he had sent for them to be witnesses to his will; he attempted to write his name. Wilson's good character fully proved.

Dr. Bettsworth, same side. Deceased had no children living; was sober when he gave the instructions for Robinson, who was present, does not intimate any thing to the contrary; the wife could not pay herself the legacy; previous declarations in favour of Catherine; regard to William Johnston before he disobliged deceased; declaration to Hooton is a full recognition of the will of 2d August.

Dr. Paul contrâ, for Johnston. Mala fides in Gardiner's plea; Gardiner attempted to incense deceased against his wife; no ill behaviour in the [380] wife to him; declared he would give Gardiner nothing, but by this will he will take all in right of his wife. No will can subsist without instructions, and an animus testandi; no evidence of the instructions; two 60l. a year to the widow in the instructions, no evidence deceased intended to give only one 60l. a year to her. Cok. 6 Rep. fol. 23, testator must have sane and disposing memory. Moore, 760, *Combe's case*, testator ought to have a discerning judgment. Prerog. *Cave v. Smith*, Dr. Mead and Mr. Blackstone, the apothecary, visited Mr. Cave in his illness, and swore to incapacity; three witnesses swore to execution of the will, and to capacity at that time; sentence for the will. Wife's behaviour good; revoking a former will requires more judgment than the first making.

Dr. Pinfold, same side. The question is whether there is a sufficient evidence to revoke the first will; his wife had never disobliged him; necessary to consider how the first will became cancelled; pleaded that Gardiner cancelled the first will by deceased's order on 2d August: proved by Peart it was not then cancelled; Gardiner misrepresented William Johnston to deceased; it does not appear Gardiner the niece was with deceased till 1st April, 1751; Edward Gardiner set the deceased against his family; importunity to revoke a former will is illegal; I admit we have not proved total incapacity; there is no evidence of instructions but what arises from Robinson's deposition; Gardiner took away and carried the first will to Peart without deceased's order; Durance and Mackinnon have quite destroyed their own credit, and therefore there is but one witness to the execution.

[381] Dr. Smalbroke, same side. Will of 1743 made in full capacity; deceased approved that will in May, 1751, and it was uncanceled on 2d August, 1751; capacity is the only point, he intended his fortune for his wife, his great-nephew, or for Catherine Gardiner, exclusive of her husband. Where there is reason to suspect fraud there must be full proof of capacity.

JUDGMENT—SIR GEORGE LEE. I was of opinion the last will was sufficiently proved to be the act of the deceased, and that he had capacity sufficient to do that act, and therefore gave sentence for the will dated 2d August, 1751, but gave no costs.

Easter Term, (a) 1754, the Delegates unanimously confirmed my sentence, and gave 100l. costs.

PYTT *against* FENDALL AND JONES. Prerogative Court, Easter Term, June 4th, 1753.
—Question as to regularity of an excommunication.

Dr. Simpson for Leonard Pytt. Rowland Pytt, deceased, made will, and Fendall and Jones executors. Leonard Pytt, deceased's son, and a legatee in his will, called executors to accept probate and to give in an inventory. Citation on 31st March, 1753, personally served on both, and oath made of the service; returned first session this term, no ap-[382]-pearance then. Continued to second session, no appearance then. Third session, 23d May, decreed to be excommunicated for not appearing. Setting the seal to the excommunication consequential on the decree. Letters denunciatory passed, and the excommunication was duly published in the church of St. Martin's in the Fields. Mr. Stevens, junior, as proctor for Fendall and Jones, now appears, and has alleged in an act that the letters denunciatory are null and void, because a schedule of excommunication was not signed by the judge or a presbyter, and the excommunication was not published in the parish church where either of the parties cited lived.

Dr. Pinfold, same side. They are in contempt of the court, and cannot be heard to make objections. The judge's decree is absolute, and he is *functus officio*.

Dr. Smalbroke *contra*, for Fendall and Jones. The executors deny they have acted as such; the court has only decreed them to be excommunicated. Fendall and Jones, executors and residuary legatees in trust, in the will of Rowland Pytt, late of Gloucester. 8th January, 1753, Cheslyn, for Pytt, took citation against Fendall and Jones to bring in the will, and take probate, or shew cause why administration with the will should not be granted to a third person to substantiate proceedings in Chancery. 1st session Hilary Term, 1753, Stevens, junior, appeared for William Jones and brought in the will, and declared he had no objection to the administration being granted under the limitations in the mandate. Fendall did not appear; Cheslyn prayed to be heard, but did not bring on his peti-[383]-tion. On 31st March, 1753, he took out a second citation to accept probate, and exhibit an inventory at promotion of Leonard Pytt; they neglected to appear. Jones having appeared and answered the former citation. On 3d session they were decreed to be excommunicated. Letters denunciatory were taken out the Saturday after, and published in St. Martin's church in Westminster on the Sunday. On Monday Stevens junior had orders to appear for the executors, which he told Cheslyn. The objections which we rely on to have the letters denunciatory suppressed are, 1st, because there was no schedule of excommunication signed; and, 2d, because both the executors live at Gloucester, and the publication ought to have been made there, where by the proceedings it appears they live.

Act of Court read, and the decree on third session Easter Term and the letter denunciatory.

Dr. Smalbroke for Fendall and Jones. The process of an excommunication is that the adverse proctor must pray the party to be pronounced contumacious, then to be excommunicated, then a schedule must be read and signed by the judge or a presbyter and the excommunication must be published in the parish church of the party excommunicated. Clark's *Praxis*, new edition, tit. 37, 38, 39. Letters denunciatory shall be published in the parish churches of the parties.

Dr. Simpson for Pytt. Every thing in Clark is not now law. Where the judge decrees a person to be excommunicated, and does not act by a presbyter, a schedule is not necessary. In these letters denunciatory there is no mention of a presbyter. [384] Judge may excommunicate by interlocutory; excommunication published any

(a) On 29th May, 1754. The Judges Delegates present at the sentence were Mr. Justice Birch, Mr. Baron Smythe, Dr. Waller, Dr. Simpson, Dr. Ducarell, and Dr. Harris.

where is good; Menoch: Quæst. Arbit. cas. 541, nu. 9. Sententia excom.; though it was not in scriptis, non est nulla.

Dr. Pinfold, same side. Every clergyman in the province to whom the letters denunciatory are offered is bound to publish them. In the case of *Paul v. Paul*, Deleg. though the party lived in Ireland, he was denounced excommunicate in St. Bennet's church in London.

JUDGMENT—SIR GEORGE LEE. I observed that in this case the question as to the effect of the suit was not very material, for it appeared by the act of the court that Mr. Stevens was ready to appear absolutely for the executors to the citation, and therefore, with respect to them, the only question was whether they should be allowed to appear now, or whether they must first take the oath de parendo juri and be absolved; and that question depended on another, viz., whether they were regularly excommunicated and published, which for the sake of practice it was necessary to determine; and I was of opinion the proceedings upon the excommunication were irregular and void, for though I did not think it necessary to call in a presbyter to excommunicate, and assist me in doing what by stat. 37 H. 8, (a) I, as being a doctor of law, was empowered to do by myself, yet that did not alter the form of proceeding in any other respect. On the 3d session, I only decreed the parties to be excommunicated, but the schedule was the actual sentence of excom-[385]-munication and was indispensably necessary, for without that sentence the letters denunciatory were not warranted, and were therefore void; indeed where an excommunication ex nunc prout ex tunc for non payment of costs is embodied in a sentence upon the merits of a case, a schedule is not necessary, because the judge's signing the sentence had the same effect. I thought it was most proper to excommunicate by a schedule, but I agreed it might be done by interlocutory; for there the minutes of the court would contain an express sentence of excommunication by the judge, and the intended interlocutory was no more than putting that sentence into form. I was likewise of opinion that publishing the excommunication in Westminster when the parties lived at Gloucester was very irregular; a man in that way might be excommunicated and taken up upon the writ before he knew anything of the matter, and therefore where the habitations of the parties were known, and they could safely be published in their parish churches, they ought always to be published there; but it did sometimes happen that the publication must be elsewhere, as where the habitation of the party was not known, or he had no certain abode, or could not safely be published in their parish church, which had happened in the case of a Register of the Prerogative Court in Ireland, who was a member of the Irish Parliament: the Delegates in England decreed him to be excommunicated for not transmitting the process; but the clergy in Ireland refused to publish the [386] excommunication, for fear of a breach of privilege; whereupon the Delegates upon debate, from the necessity of the case, ordered him to be published in London.

Upon the whole I suppressed the letters denunciatory as void, for want of a schedule and as irregularly published, and then Mr. Stevens appeared for the executors, and declared that neither of them would take probate of the will.

HUGHES *against* COOK AND OTHERS. Prerogative Court, Easter Term, June 4th, 1753.—Creditors are entitled to a constat of the personal estate, but they have no right to litigate the quantum of security, or to require the sureties to justify.

Howell Wynne Hughes, a distiller and freeman of London, died intestate without children, left Ann Hughes his widow. Caveats were entered by Cook and others, creditors; they prayed a commission of appraisement, which was granted and returned; household goods, &c. amounted to between 1100l. and 1200l., and good debts (but not received) to upwards of 2771l. The widow prayed administration to be granted to her directly; suggested that the estate suffered, and that the creditors were distillers, and were endeavouring to get her husband's customers from her; offered

(a) By 37 H. 8, c. 17, s. 4, Chancellors, vicars general, commissaries, officials and registers were empowered to execute and exercise all manner of jurisdiction commonly called Ecclesiastical jurisdiction, and all censures and coercions appertaining or in any way belonging unto the same, albeit such person or persons might be lay, married, or unmarried, so that they were Doctors of Civil Law.

to give security in 4000l. for her faithful administration, and the persons named by her were reported by the officer of the court sufficient for that sum; she likewise offered to charge herself with the effects received and in her hands, but not with the debts until they should be received; the creditors opposed the administration passing under seal, and prayed she might first charge herself with the whole inventory, and give security in double the value of the estate, and that the sureties should justify on oath.

[387] JUDGMENT—SIR GEORGE LEE. I was of opinion she was not obliged to charge herself with any thing more than had come to her hands; that as the right to the administration was not controverted, I was bound to grant administration to the widow without delay; that creditors were only entitled to a constat of the estate, which they had by the inventory and appraisement, but had no interest in the administration bond, and it had been so determined, and therefore had no right to litigate the quantum of the security or to require the sureties to justify, and therefore as in this case three parts of the distributable estate would belong to the widow, I thought the security offered was sufficient, and ordered administration to pass under seal to the widow immediately, giving 4000l. security.

PATTEN *against* CASTLEMAN. Arches Court, Trinity Term, June 18th, 1753.—The claim of a vicar for a fee on the wedding of one of his parishioners in the church of another parish, not substantiated. The general principle of law is that where no service is done, no fee can be due.

[See p. 199, ante.]

Dr. Paul for Castleman. The Reverend John Castleman, vicar of South Petherton, in the county of Somerset and diocese of Bath and Wells, has brought a suit in the Consistory Court of Bath and Wells, against James Patten, of the parish of Marlock, in the same county and diocese, for subtraction of a marriage offering. The cause was appealed to the Arches, and retained here upon a grievance. The third article of the libel pleads that on the marriage of solemnization or marriage of every spinster or single woman, being an inhabitant or parishioner of the parish of South [388] Petherton, there was and is by law due and of right ought to be paid to the vicar of the vicarage of South Petherton for the time being, an offering or sum of five shillings, which said offering or sum of five shillings for time immemorial hath been paid by persons marrying a spinster or single woman, living or residing at the time of her marriage within the parish of South Petherton; that in 1746 and 1747 Rebecca Silvester was a spinster, and resided at South Petherton, and that on 20th Jan., 1747, James Patten was married to her in the parish church of Merriot, in the diocese of Bath and Wells, and therefore five shillings is due from said James Patten, for a marriage offering to Castleman, vicar of South Petherton.

Dr. Pinfold for Patten. No dispute on facts. We admit that Silvester was a parishioner of, and resided at Petherton, and was married to Patten, a parishioner of Marlock, at the parish church of Merriot, on 20th January, 1747; it does not appear whether they were married by banns or licence. Citation in this cause on 6th April, 1752. Libel lays custom for time immemorial to pay five shillings to the vicar of the parish where the woman lived; the witnesses speak only to a short time; the points I shall insist on are that the custom is not proved, and if it was, it is an unreasonable custom, and void.

Evidence for Castleman.

1. Edward Wheatley, clerk, æt. 41. Castleman is vicar of South Petherton, and entitled to the dues belonging to that vicarage; deponent has been curate of South Petherton for seventeen years, and believes it has been the custom to pay [389] five shillings to the vicar upon the marriage of any spinster residing within that parish, by licence, though she is married in any other place, and deponent has received many such fees for the vicar; gives several instances thereof, all which marriages, except one, were by licence, the fee is due whether the marriage is at Petherton or not. Rebecca Silvester was a spinster, and lived at Petherton; she was married to Patten at Merriot church; Patten refuses to pay said fee.

2. Samuel Allen. Castleman is vicar of Petherton, and entitled to the dues, &c.; it is commonly reputed there is a custom to pay five shillings for the marriage of a spinster residing in said parish, and believes it to be so; deponent married a woman of that parish out of it, and paid said fee.

3. Samuel Haile, æt. 34. Deponent believes five shillings ought to be paid to the vicar for every spinster, &c.; believes it has been paid immemorially; deponent paid it seventeen years ago for his marriage; believes Patten married Silvester at Merriot church.

4. Thomas Bowyer, clerk. On 20th January, 1747, deponent married James Patten the party, to Rebecca Silvester, at Merriot; she was of the parish of Petherton; the entry in the register does not shew whether the marriage was by banns or licence.

5. John Hilliard. In 1736 deponent paid a fee of five shillings to the vicar for his marriage to a woman of Petherton; deponent is of the same parish and was married there; believes it is the custom to pay that sum to the minister of the parish where the woman lives.

6. Samuel Edmunds, æt. 48. In 1731 deponent married Ruth Vile, spinster, of Petherton, at [390] Taunton church; deponent paid five shillings to the vicar of Petherton for said marriage; it is the common opinion such fee is due, whether the parties are married at Petherton or not; never heard it denied but by Patten.

7. Robert Lawrence, æt. 40. In 1736 deponent married a woman of Merriot (of which parish deponent also is) at Petherton church, and paid five shillings, and it is the custom in all the neighbouring parishes to pay five shillings.

8. John Beal, æt. 51. In 1737 deponent married Elizabeth Baker, a woman of Petherton, at that church, and paid five shillings fee; and deponent married his second wife, who was of Marlock parish, at Crowhern, and paid the same fee of five shillings to the vicar of Marlock; it is the custom in that neighbourhood to pay such fee, whether the woman is married in her own parish church or not.

N.B.—Patten did not plead, but only gave a general negative issue to the libel.

Dr. Paul for Castleman. This is an ecclesiastical custom, and therefore it is sufficient to prove it for forty years. Stat. Circumspecte agatis, 13 Edw. 1, suit for oblations shall be in the Spiritual Court. Lindw. p. 185, says a marriage fee is an oblation. Stat. 2 & 3 Edw. 6, chap. 13, directs payment of usual and accustomed offerings. Marriage licences always reserve the fee to the minister of the woman's parish. I insist it is a fee due from those who are married by licence, but do not say anything of those married by banns; these parties must have been married by licence, because they were not married in either of their parish churches.

[391] Dr. Hay, same side. This is an ecclesiastical right, and founded on an ecclesiastical law. (a) Degge's Parson's Counsellor, p. 175. There was anciently a burial fee paid where the person died, though not buried there. The law is founded on good reason, because the minister is bound to perform all divine offices to his parishioners, and to reside in his parish for that purpose. We rely both on the law and the custom in this parish and in the neighbourhood.

Dr. Pinfold for Patten. We admit Patten and his wife, who were of different parishes, were married in a third parish. A fee must be due either of common right, by express law, or by custom. Statute Circumspecte agatis says only that oblations are to be recovered in the Spiritual Court. Statute 2 & 3 Edw. 6, c. 13, does not relate to this question, it speaks of Easter offerings. Licence reserves only general right, no law therefore for this demand. Rubric of matrimony directs when the marriage fee shall be paid, and it is the accustomed fee that is to be paid; 1 Salk. 332, *Burdeaux* against *Dr. Lancaster*, demand for a christening fee by the parson, who did not christen the child. Holt, C. J., held it was unreasonable, for a fee must be due only for doing something; the custom is pleaded for time immemorial, but it is attempted to be proved only for about twenty years; the oldest witness is but fifty-one years old. No positive evidence that these parties were married by licence, and yet Wheatley speaks of [392] the custom extending only to those that are married by licence.

Dr. Bettesworth, same side. They should shew the custom was originally good,

(a) By the custom of England every parishioner (except as hereafter excepted) was to be buried in any common part of the church or chapel, paying the accustomed fee for breaking the soil. Degge, P. C. part 1, c. 12.

and has been for forty years a custom; it must be reasonable. Burdeaux had his child baptized in the French church in the Savoy; where there is no duty done, no pay is due. Hobart, 175, *Topsall* against *Ferrers*, burial fee not due without actual burial. Lord Raymond's Reports, 2 vol. 1558, *Naylor* against *Scot*, custom to pay a fee for christening, held unreasonable, when there was no actual christening. No proof that these parties were married by licence; this custom is not legally proved, and if it was, it is unreasonable.

Dr. Paul's reply. Baptism is a sacrament, and therefore no fee is due. The words of a marriage licence are, without prejudice to the minister of the church where the woman is a parishioner. Admit we have given no instance of this fee being paid before the year 1731.

Dr. Hay's reply. A parishioner must attend the duties in his parish. We cannot shew a determination in this case, because, perhaps, there never was a refusal of this fee before. Patten did an illegal act in marrying in a foreign parish. The licence is an evidence of the ecclesiastical law. We have not pleaded that the marriage must be by licence to entitle to the fee. We plead that by law a fee is due, and by custom that fee is ascertained at five shillings.

Mem. This case was argued on the last session in Easter Term, 1753, but it being a new case in [393] the Ecclesiastical Court, and a point of consequence to the clergy, I took time to consider it, and on this day, the first session of Trinity, 1753, gave sentence by interlocutory for Patten, and dismissed him from this suit.

JUDGMENT—SIR GEORGE LEE. I was of opinion that no fee was due by law where no service was done; anciently no fee was demandable for marriage, but only a voluntary offering was made of what sum the party married thought fit to give, which appears from Lindw. lib. 3, tit. 16, cap. "Quia quidam," in these words: "Quia quidam maledictionis filii in nubentium solemnibus, purificationibus mulierum, mortuorum exequiis, et aliis in quibus ipse Dominus in ministrorum suorum personis solebat oblationum libamine populariter honorari ad unius denarii vel alterius modicę quantitatis oblationem, populi devotionem restringere moliti sunt, residuum oblationis fidelium suis pro libito vel alienis usibus multoties applicantes;" therefore excommunicating the instigators, and Lindw. Gloss. verb. Nubentium solemnibus, sets forth the times when it was lawful to marry, and when not; and therefore the Constitution must speak of offerings for marriages actually performed. If then no law has established a fee for actual marriage, it can be demandable only by custom, and accordingly Watson's Clergyman's Law, chap. 52, p. 572, says "Accustomary payments for marriages, christenings, churchings, and burials, properly belong to the parson or vicar of the church where they are made, and are recoverable by law where there is a custom for the payment of certain sums upon the performance of these several duties;" and in chap. 53, p. 575, "un-[394]-der offerings, called also oblations and obventions, are comprehended all customary payments for marriages, christenings, churchings, and burials, and have been, and yet are recoverable in the Ecclesiastical Court, as is notorious."

And notwithstanding the statute of Circumspecte agatis, and of 2 & 3 Edw. 6 if the custom is denied, a prohibition will go to try it at common law, and it must be immemorial; and so it was held by the whole Court of King's Bench, Hill. 7 Geo. 2, *Read* against *Deallary*, which case I argued, and a prohibition was granted to stay a suit in the Ecclesiastical Court for customary Easter offerings, and the custom was denied; but if the custom is admitted, then the Spiritual Court may proceed, and in the present case, if a prohibition had been prayed, it would certainly have been granted; and therefore, as this was a matter subject to the cognizance of the common law, I thought myself bound to determine agreeably to that law, that there may not be a diversity of judgments in different courts; and clearly by the common law this custom is not proved, for it is not sufficiently proved even by the ecclesiastical law, which requires a usage for forty years to be proved; but here no instance has been given of paying the fee demanded for above twenty-one years; and therefore I thought the custom was not proved, but if it had been proved, the custom would be unreasonable, for no ecclesiastical law warrants a demand of a fee where no service is done, and though I could not find in the Common Law Reports any determination upon the particular point now before me, yet, in similar cases, the temporal courts had determined that a custom to pay a fee where no service was done, was unreason-

able, as appear-[395]-ed from the cases cited by the counsel for Patten, in the cases of burials, christenings, and churchings, which are thus reported :

Hobart, 175, "*Edward Topsall and Others v. Ferrers*.(a) Edward Topsall, clerk, parson of St. Botolph's Without, Aldersgate, and the churchwardens of the same, libelled in the Court Christian, against Sir John Ferrers, knight, and alleged that there was a custom within the city of London, and especially within that parish, that if any person die within that parish, being man or woman, and be carried out of the same parish, and be buried elsewhere, that there ought to be paid to the parson of this parish, if he be buried elsewhere, in the chancel, so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them for such as were buried in their own chancel, and then alleging that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demand of him the said sum ; whereupon, for Sir John Ferrers, a prohibition was prayed by Serjeant Harris, and upon debate it was granted ; for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or to pay as if he was, and so upon the matter to pay twice for his burial."

1 Salk. 332, "*Burdeaux v. Dr. Lancaster and Others*, Hill. 9 Will. 3, B. R. Burdeaux, a French [396] protestant, had his child baptized at the French church in the Savoy, and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1d. to the clerk. A prohibition was moved for, and Levinz urged this was an ecclesiastical fee due by the canon. Holt, C. J. 'Nothing can be due of common right, and how can a canon take money out of a layman's pocket. Lindwood says it is simony to take anything for christening or burying, unless it be a fee due by custom, but then a custom for any person to take a fee for christening a child when he does not christen it is not good ; like the case in Hobart, where one dies in one parish, and is buried in another, the parish where he died shall not have a burying fee. If you have a right to christen, you should libel for that right, but you ought not to have money for christening when you do not.'"

Lord Raymond's Reports, 2d vol., fo. 1558. 2 G. 2, Regis,' B. R. 1729, "*Naylor, qui tam versus Scott*. In a prohibition granted to stay a suit in the Spiritual Court by the vicar of Wakefield, grounded upon a custom for a due for churching women, which was alleged to be this, viz. 'That every inhabitant keeping a house and having a family in Wakefield, in Yorkshire, and having a child or children born in that parish at the time of churching the mother of the child, or at the usual time after her delivery when she should be churched, have time out of mind paid ten pence to the vicar of that parish, for or in respect of such churching, or at the usual times when the mother of such child should be churched.' Issue was taken upon [397] the custom, and a verdict found for the defendant, that there was such a custom ; and upon motion made to the court by Mr. Filmer for the plaintiff, in arrest of judgment, to prevent the granting a consultation, the court being of opinion that it was a void custom ; 1st. Because it was not alleged what was the usual time the women were to be churched, and therefore uncertain. 2d. Because it was unreasonable, because it obliged the husband to pay ; if the woman was not churched at all, or if she went out of the parish, or died, before the time of churching, judgment was arrested. Mr. Crowle, counsel for the defendant in the prohibition."

As to the clause in the marriage licence, I was of opinion it was only a general saving of such right as the minister might have, but if he had none by law, the licence neither did nor could give him any. Upon the whole, I was of opinion the fee demanded was not due by any law, that the custom was not proved, but if it had been proved it would be an unreasonable custom by the Ecclesiastical as well as the Common Law, and void, and therefore I pronounced no fee to be due in this case to the vicar, and dismissed Patten, but did not give costs because it was a new case, and because the clergy did generally imagine a fee was due, and in fact it had been paid in many instances to Mr. Castleman and his predecessors, and likewise to his neighbouring clergy, and therefore he could not be said to be litigious.

(a) This, and other authorities on this point, have been subsequently collected, in 1 Burn's Eccl. Law, 268, ed. 1824.

After I had given this judgment, Mr. Stevens, [398] the proctor, told me there was the same case determined in the Common Pleas about eight or ten years ago. Mr. Dovey, parson of Birmingham, brought a suit in the Consistory of Litchfield against an husband who married a woman in another parish, who was a parishioner of Birmingham, for a marriage fee of five shillings grounded on custom; and upon motion for a prohibition, the whole court of Common Pleas was of opinion it was an unreasonable custom, and granted a prohibition.

Proctors in this cause, Mr. Bellas for Patten, and Mr. Cæsar for Castleman.

HILLIER *against* MILLIGAN. Arches Court, Trinity Term, June 25th, 1753.—Question raised whether the chancellor of the diocese of Lincoln exercises a concurrent jurisdiction with the Commissary of Buckinghamshire.

[See p. 532, post, and 2 Lee, 8.]

Appeal from Lincoln.

Dr. Paul for Milligan. Robert Milligan, farmer of the impropriate tithes of Hanslop, in Bucks, commenced suit in Consistory of Lincoln, against Edward Hillier for tithes arising at Hanslop in the Archdeaconry of Buckinghamshire. Hillier appeared under protestation and alleged he was subject only to the commissary of Buckinghamshire; Milligan insisted on a concurrency between the chancellor of Lincoln and the commissary of Buckinghamshire. Chancellor's surrogate pronounced for the concurrency, and ordered Hillier to appear simply, from which he appealed; Præsertim from the judges refusing to dismiss Hillier from suit in Consistory of Lincoln with costs, and from assigning him to appear absolutely next court. We are now before the court [399] with an allegation pleading the jurisdiction of the Consistory of Lincoln.

Allegation.

- 1 art. Pleads antiquity of the chancellor's office.
- 2 art. That the commissary's office is more modern.
- 3 art. That the present chancellor's patent was granted before the present commissary's.
- 4 art. Chancellor's patent gives him jurisdiction in all Ecclesiastical causes throughout the diocese of Lincoln.
- 5 art. Exhibits chancellor's patent.
- 6 art. There is no other exception in his patent but of reserving to the bishop the grant of orders, licences to curates, &c., &c.; the commission has no jurisdiction given him exclusive of the chancellor.
- 7 art. There are six archdeaconries in the diocese of Lincoln; it has been the constant practice to institute suits arising within the archdeaconries in the Consistory, as appears by the bishop's and the court's registry.
- 8 art. When the office of commissary was instituted it was not intended thereby to deprive chancellor of his jurisdiction.

Dr. Paul for Milligan. Commissaries were instituted cumulative in the fourteenth century; pray the allegation to be admitted.

Dr. Smalbroke, same side. I differ from Dr. Paul, and think we are not at liberty to plead; [400] this is an appeal from a grievance, and must be heard on *ex iisdem actis*, Clark, tit. 285.

But it was agreed on all hands that this was as to the jurisdiction a final interlocutory that had the effect of a sentence, and therefore they might plead in the Court of appeal.

Dr. Hay for Hillier. Stat. 23, H. 8. Suit for these tithes must be brought in the Court of the commissary or official of Buckinghamshire, for no man can be cited out of his jurisdiction. Coke 1 Inst. 338, says, "Commissaries being in remote parts, were instituted for the ease of the subjects who could not go to the Consistory conveniently."

JUDGMENT—SIR GEORGE LEE. I was of opinion they ought to specify in the second article the time when the commissary's office was instituted, and that they should plead instances in the seventh article of concurrency, for this Court cannot

take cognizance of what is in the registry's at Lincoln, unless they pleaded the instances referred to; and rejected the eighth article because it did not plead facts; but admitted the rest.

[401] CHAMBERLAYNE *against* DART, CALLING HERSELF CHAMBERS. Prerogative Court, Trinity Term, June 27th, 1753.—In an interest cause, if the time and place of the marriage of an ancestor cannot be set forth, it is necessary to plead cohabitation and reputation.

JUDGMENT—SIR GEORGE LEE. Upon admission of an allegation, I was of opinion' in pleading an interest, it was not necessary to set forth the time and place of the marriage of the ancestor, in order to prove the fact of the marriage; but if the fact was not pleaded it was absolutely necessary to plead cohabitation and owning with reputation, and ordered the allegation to be reformed accordingly.

JEHEN *against* JEHEN. Prerogative Court, Trinity Term, June 27th, 1753.—The custom of gavelkind must be pleaded, for it is *lex loci*, and not *lex terræ*.

[See p. 273, ante, and p. 568, post.]

Upon debate of an allegation in which the custom of gavelkind was pleaded, Dr. Simpson insisted that it was not a matter of fact to which witnesses could depose, but it was a matter of law, it was *lex loci*, for all the lands in Kent were held in gavelkind, except those that were disgavelled by the statutes of H. 8, and Edw. 6.

JUDGMENT—SIR GEORGE LEE. But I was of opinion the custom of gavelkind ought to be pleaded, because it is *lex loci*, but not *lex terræ*; so various customs are the *leges loci*, [402] particularly the custom of London, but yet it is to be pleaded and proved by the recorder of London's court-keeper, for judges are not supposed to know the usages or customs of particular places, districts, or provinces, or counties.

PIPON *against* WALLIS. Prerogative Court, Trinity Term, July 4th, 1753.—Two executors gave a letter of attorney to a third person to take administration cum testamento annexo. One of the executors dies, the other has a right to call in the letter of attorney, and to take a probate of the will.

Dr. Jenner for Wallis. Mary Berkeley, deceased, lived in Jersey, made her will there 23d Feb., 1740, and appointed Mr. Le Geyt and Mr. Pipon executors; they both living at Jersey, gave letter of attorney to Mr. Wallis to take administration with the will annexed for their use and benefit. Wallis took administration in 1741, and has received great part of the effects, and transmitted them to Jersey; Le Geyt is dead; Pipon is now come to England, and has cited Wallis to bring in the administration and shew cause why it should not be revoked, and probate of the will granted to him as surviving executor. We insist the administration cum testamento is granted absolutely to Wallis and cannot be revoked; the old method was to grant administrations *durante absentia*; but that was found to be very inconvenient, for then if the executor came into England the administration expired, and suits brought by the administrator abated, and therefore that method was altered, and they are not now granted temporarily but absolutely; it is granted to the administrator by the executor's act.

Dr. Hay for Pipon. The administration does [403] not now expire as it used to do by the executor's coming home; but he must take out process against the administrator to shew cause why it should not be revoked. The single question is whether an executor shall not have probate when he desires it, though administration has been granted to his attorney for his use.

JUDGMENT—SIR GEORGE LEE. I was of opinion, that though the administration was granted absolutely, yet that the foundation of it, the letter of attorney, was revocable; that the administrator was only an agent for the executor; that when the executor desired probate the Court was bound to grant it to him, and therefore I revoked the administration, and decreed probate to Pipon, but without costs. Then

Cæsar, proctor for Pipon, prayed an inventory and account, which Godfrey Farrant, proctor for Wallis, opposed, because he was not cited for that purpose; but as he was before the Court, I was of opinion he was bound to give them, because, as administrator, he swore to give in an inventory and account when lawfully required, and assigned him to give them in accordingly.

FRANK against CARR. Prerogative Court, Trinity Term, July 11th, 1753.—A witness having an expectation of interest and advantage, in case the will should be established, held to be incompetent.

Dr. Pinfold for Frank. Hillersden Frank, Esq. great nephew and universal legatee in the will of Edward Wills; Ann Carr is the deceased's niece and next of kin. Edward Wills died 10th December, 1749, was a pensioner in the Charter-house, aged [404] near 100; blind several years. Will dated 1st March, 1748-9, in these words: "In the name of God, amen. I, Edward Wills, of the Charter-house, being of healthful body and sound memory, do make this my last will and testament, revoking all other wills by me made formerly, and appointing John Hillersden Frank and his lawful heirs my only heir. Witness my hand, Edw. Wi. the mark D. Mary Manning, witness; Thos. Hatch."

On day of the date of the will the deceased gave instructions to Hatch, his barber, and he wrote them down in presence of Manning, the nurse. Deceased executed the will in their presence, and gave it to her to lay away. 15th June, 1749, John Carr, clerk, son to Ann Carr, came to see deceased. Manning shewed him the will; he took an exact copy of it. Declarations of affection to Frank previous and subsequent to will, and that he would leave his estate to him; told him where his effects lay, and declared in his favour three days before his death. Disaffection to Carr—cancelled a will in her favour made in 1747 about a year before he died. After deceased's death Parson Carr was sent for, Manning shewed him the will; Carr read it, and sent for Hatch; bid him bring him a razor, and Carr scratched out Frank's name, and desired him to write his (Carr's name) in the place, but he refusing, Carr wrote it himself. Next day Carr desired Manning to destroy the will, which she did. The paper propounded is the copy taken by Parson Carr, 15th June; Mrs. Carr insists deceased ordered Manning to destroy this will; and that he thought it was destroyed; they have insisted that deceased used to write his surname at length; his capacity remained to his death; Parson Carr told [405] Parson Medcalf what he had done; Medcalf told him he had done a bad act, and by his advice Carr went to Frank's father, and discovered the whole affair.

Dr. Smalbroke, same side. Dates material; will in favour of the Carr family dated 21st August, 1747; deed to convey deceased's freehold estate to Edward Wills Carr, a minor, dated 26th October, 1747, he cancelled said will of 21st August, 1747, about twelve months before he died. Frank's will dated 1st March, 1748-9; Carr's copy of it, 15th June, 1749; instructions to Mills, an attorney, for a new will on 6th or 7th October, 1749; beginning of November, 1749, declared he would make only a verbal will; died 10th December, 1749.

Dr. Hay for Carr. Mrs. Ann Carr prays administration to her uncle, as dying intestate; deceased very covetous, stone blind, very deaf, rich, and talked of his riches; sometimes said he would leave his effects to Carr, and sometimes to Frank. By will in 1747 gives his principal effects to Edward Wills Carr, and made his father executor; there is also a deed of gift in said minor's favour unrevoked: on 1st March, 1748-9, deceased did dictate a paper to Hatch; in August, 1749, deceased bought a freehold estate; in October, 1749, deceased sent for the will and bid Manning read it; deceased much displeased with it; soon after sent for Mills; gave him instructions for a new will; said he would make Frank and Davis executors; deceased ordered Manning to destroy the will, she told him she had destroyed it; deceased sent to Mills to forbid him making his will, in the November before his death told Mills he would only make a [406] verbal will; Mills went to deceased five days before his death, and he was then incapable of doing any thing. Manning did not destroy the will. Parson Carr inserted his own name instead of Frank's on 13th December; did not inform Frank of said transaction till 23d December. Carr is interested, and his deposition cannot be read, and, therefore, there is no proof of the copy of the will, which is propounded as a true copy.

Dr. Bettesworth, same side. Three points; 1st, the copy propounded is not proved; 2d, no due execution; 3d, a revocation.

Witnesses for Frank.

1st. Thomas Hatch, barber. Deponent well knew deceased; was his barber 1st March, 1748; deponent, by deceased's dictation, wrote a paper of the tenor with, and as he believes, in the words of, the paper A, viz. the copy pleaded; deponent read it all over to deceased audibly, in presence of Manning; deceased made his mark thereto, and then deponent wrote his name, and Mary Manning made her mark, as witnesses to said will, and then deceased ordered it to be put by; deponent did not observe, but that deceased was then of sound mind; believes exhibit A is a true copy of said will; deceased died on Sunday, 10th December, 1749; on Tuesday, 12th, deponent was sent for to deceased's lodgings, found there John Carr, clerk, and Mary Manning, Carr had the said will in his hand; deponent, at his request, fetched him a razor, and Carr scratched Frank's name out, and desired deponent to write said Carr's name in the place; deponent declined the same, by reason there was an hole made in the paper; Carr then [407] inserted his own name in place of Frank's, and then went away with said will; next morning Carr called on deponent, and carried him to the deceased's lodgings, when he produced said will, and said to deponent and Manning that he could not be easy till the said will was destroyed, and then gave it to Manning, and desired her to make away with it, and she then tore it in pieces, and put them in her mouth, and afterwards put them into a close stool.

3. Int. Deceased made a sort of blot on the will, but cannot say whether it resembled any letters. 12. Int. Respondent was not aiding in destroying the will.

14. Int. Respondent did not examine the copy with the will, and therefore cannot swear it is a true copy, word for word with the original. 15. Int. Believes exhibits E, F, and G are said John Carr's handwriting; deponent received them by the post.

The Rev. John Carr's deposition was offered to be read; objection made that he was interested; in support of said objection, the counsel for Ann Carr read exhibit D, which was a letter from said John Carr, dated 23d December, 1749, to his mother, and which he proved on an interrogatory to be his own handwriting, in which he tells his mother that Mr. Frank, the father of the party to whom he discovered the transaction about destroying the will, was so generous as to promise that she and he should share between them a moiety of deceased's effects, in case the will should be pronounced for; this expectation of advantage the counsel for Carr insisted was sufficient to repel him from being a witness; on the other hand, the counsel for Frank insisted it could only affect his credit, not his competency.

[408] JUDGMENT—SIR GEORGE LEE. I was of opinion it did fully appear from the letter marked D that Carr had an expectation of an interest and advantage in case the will should be established; that whether the father's promise was binding or not, the influence arising from Carr's expectation was the same. In the case of *Ivory v. Lambe*, Prerog. 5th Feb., 1715, where a witness had released his legacy, but upon an interrogatory said she expected it would be paid her if the will should be pronounced for, though she was not promised to be paid, it was held her expectation was a bias, and her deposition could not be read. So in the case of *Stirling and Pendleton*, Prerog. 1735, a witness who said he expected a reward was set aside; and therefore I was of opinion John Carr's deposition could not be read.

Bishop, proctor for Frank,^(a) appealed ad statim from this order for repelling Carr, and so no more evidence was read.

LEGGATT *against* LEGGATT. Prerogative Court, Trinity Term, July 11th, 1753.—The expences of a commission of appraisement decreed to be paid out of the estate of an intestate.

[See p. 348, ante.]

Andrew Leggatt, widower, died intestate; left a son, Abraham Leggatt, and a

(a) It does not appear that any discussion took place on this point in the Court of Delegates. On the 11th July, 1754, the proctor for the party appellant exhibited a proxy from his principal, by virtue of which he renounced the appeal, and the cause was remitted to the court below.

daughter, Elizabeth, the wife of ——— Leggatt. The son prayed administration; the daughter prayed she might be joined in the administration with the son; the [409] Court decreed it to the son only. A commission of appraisement was decreed and executed, in which they both joined, and now the daughter prayed that the expences on the commission of appraisement and her costs on the motion, upon the grant of the administration, might be paid out of the estate, which the son opposed, as to the expences on the motion, but not as to the expences on the commission of appraisement.

JUDGMENT—SIR GEORGE LEE. I allowed the expences of the commission of appraisement to be paid out of the estate, but no more, and referred it to the Registrar to settle those expences. It was so determined by Dr. Bettesworth, in the case of *Mackfarson and Coughling*, Prerog. 2d Dec., 1738. See my large Case Book.

MOORE FORMERLY ARUNDELL, Attorney of Moore *against* STEVENS, Attorney of Smart, AND SMART.(a) Prerogative Court, Trinity Term, July 11th, 1753.—A mariner's will which has been given as a security for a debt, held to be void.

Dr. Jenner for Moore. John Smart, mariner on board the "Augusta," man-of-war, made his will 14th December, 1745, and appointed Thomas Moore his sole executor and universal legatee, who is now abroad, and acts by his wife as his attorney. Deceased gave instructions to Mr. Pike of Plymouth for making this will, who drew it accordingly, and it was executed at the house of Dr. Martyn, the mayor of Plymouth, who, together with said Pike and one Norton, witnessed it. Elizabeth Moore as attorney of her husband [410] propounded the will, and it was first opposed by deceased's mother, but is now, since her death, opposed by Stevens, as attorney for Christian and Hellen Smart, the deceased's sisters.

Dr. Hay for the sisters. Martyn and Pike, two of the subscribing witnesses, were utter strangers to deceased, and Norton, the third witness, is not examined, or any account given of him. Identity of the testator is not sufficiently proved, but if it was, the will was only made to secure a debt from deceased to Moore, and is therefore void by stat. 9 & 10 W. 3. We have not pleaded.

Evidence for Moore.

1. William Martyn, M.D. John Smart, the testator in this cause, on or about 14th December, 1745, applied to deponent, as mayor of Plymouth, to witness his will; he produced a will ready written, and duly executed it in presence of deponent and the other subscribing witnesses, and was of sound mind.

2. Int. Said Smart was an utter stranger to deponent; believed he executed a letter of attorney at the same time.

2. Abraham Pike. John Smart, mariner of the "Augusta" (as he styled himself), gave deponent instructions for the will propounded; deceased approved and executed it in presence of Dr. Martyn, Norton, and deponent, and was of sound mind.

2. Int. To best of deponent's memory, Smart executed a letter of attorney to Moore at the same time. 3. Int. Smart was an utter stranger to deponent. 6. Int. Cannot depose whether the will was made to secure a debt or not.

3. Robert Quin. Deponent well knew John [411] Smart, of the "Augusta," who he takes to be the testator in this cause; deponent and he went together in the "Ruby" man-of-war to the East Indies, where Smart died.

2. Int. Verily believes, but cannot positively depose, that John Smart, the testator in this cause, and he that died in the "Ruby," was the same person. 6. Int. Believes the will was made to secure a debt to Moore. 7. Int. Believes the name "John Smart" to the will is said Smart's writing, but cannot be positive. 8. Int. Has heard and believes deceased was indebted to Moore at his death; believes the will and power was a security for said debt.

4. Judith Hill. Deponent knew John Smart of the "Augusta," and afterwards of the "Ruby;" believes he was the testator in this cause, for he was an acquaintance of Moore's, and indebted to him.

(a) This case is reported in a note to the case of *Zacharias v. Collis*, 3 Phill. 176.

6. Int. Believes the will was made to secure a debt, for deponent has heard Elizabeth Moore say the overplus of deceased's effects, after her husband's debt was paid, was to go to Smart's mother. 8. Int. Deponent knows Smart, the deceased in this cause, was indebted to Moore, and believes the security for said debt was the will.

5. Thomas Christy. Believes the deceased John Smart in this cause was the same John Smart that died in the "Ruby."

6. Int. Does not believe deceased intended to leave all his effects to Moore, but only to secure his debt to him. 7. Int. Respondent has seen deceased write; the name subscribed to the will looks like his writing, but cannot be positive it is so. 8. Int. Knows deceased was indebted to Moore; heard him say he had given a will, power, and bond to said Moore, to secure said debt to him.

[412] Dr. Jenner for Moore. Identity is proved from the several witnesses, taken together. They should have pleaded that the will was made to secure a debt. It ought not to be proved upon interrogatories, because we have no opportunity of counter-pleading.

Dr. Hay for Smart. *Craig and Leicester*, (a) Prerog. December, 1713, and afterwards in the Deleg. (b) Jan., 1739—Prerog. *Harwood v. Leke*; Prerog. Trin. 1750, *Anderson v. Ward*. In all those cases the wills of mariners were set aside, because they were made only to secure debts.

JUDGMENT—SIR GEORGE LEE. I was of opinion the identity of the testator was tolerably well proved, but I thought it sufficiently appeared that this will was made to secure a debt to Moore; that from the cases cited and others, it was a settled point that wills made by seamen to secure debts were void; that the evidence thereof had generally arose upon interrogatories, and not upon pleas; particularly it was so in the case of *Ivie v. Preston and Brown*, Prerog. 25 June, 1741 (see my large Case Book), where the proof was much slighter than in the present case, but yet that will was set aside. I therefore gave sentence against this will of Smart's, and pronounced him to be dead intestate so far as appeared to me, but did not give costs.

[413] KNIGHT *against* COOK. Prerogative Court, Trinity Term, July 11th, 1753. Will torn to pieces after the death of a testator, directed to be pasted together.—Probate decreed in common form.

Dr. Simpson for Elizabeth Cook. Elizabeth Perry died in November, 1752, a widow, without any relations. 10th October, 1749, she made a will, attested by three witnesses; gave to John Knight, who was her husband's nephew, 30l. and legacies to his children, and made Joseph Cook executor. 4th May, 1751, she made another will, attested by three witnesses; gave 40l. to John Knight, but nothing to his children, and appointed Joseph Cook and Elizabeth Cook, his wife, executors. 3d November, 1752, after deceased's death, John Knight and his wife being at Cook's house, Cook sent for Griffith to read the last will to them; Mrs. Knight being angry that deceased had left nothing to her children, snatched the will out of Griffith's hand and attempted to put it in the fire, Griffith prevented her, and then she tore it into small pieces; Joseph Cook is since dead. John Knight as being a legatee, cited Elizabeth Cook to bring in all scripts and scrolls, and to prove the last will by witnesses; she brought in scripts and scrolls, and prayed probate in common form of the will, dated 4th May, 1751; Knight's proctor declared he did not insist (as being a legatee in the first will) on proving the last by witnesses, and Knight made an affidavit that he knew of no relations deceased left; and Griffith made affidavit that the will was torn in manner above stated by Elizabeth Knight after deceased's death.

Per Curiam. Upon the single affidavit of Griffith, I directed the will to be pasted together, and probate to pass [414] in common form to Elizabeth Cook the surviving executrix.

(a) *Craig v. Leicester*, cited by Sir John Nicholl, in his judgment in *Zacharias v. Collis*, 3 Phill. 189.

(b) Deleg. 11th June, 1714. Mr. Justice Blencow, Mr. Baron Bury, Sir Nathaniel Lloyd (K. A.), Dr. Herriott, and Dr. Henchman were the Judges Delegates present at the sentence.

MINTY ALIAS MISITA *against* GOULD AND MONTGOMERY. Arches Court, Trinity Term, July 16th, 1753.—Legacy pronounced for.

Dr. Collier for Lawrence Minty. Mary Essex, deceased, made will 4th Feb., 1749; gave several legacies; 100l. to her brother, Lawrence Minty, to John Taylor 10l., to Mary Ashton 10l., all of them to be paid in a year after her death; to Mary Elizabeth Titt 50l., to Caroline Essex 10l., to be paid at their age of twenty-one or marriage; to Charles Gould her landlord, and her friend William Montgomery, 5l. each; residue to her brother Lawrence Minty; made said Gould and Montgomery executors, with power to deduct their costs, charges, &c. They took probate 19th October, 1750; Minty cited executors in a cause of legacy and to exhibit inventory and account.

2d Sess. Mich. 1751, citation returned.

3d Sess. Bellas appeared for Gould; Montgomery excommunicated for not appearing; Bellas to exhibit inventory and account, 1 Sess. Hill. 1752.

2d Sess. Hill. Bellas for Gould exhibited inventory &c.; Hughes for Minty prayed significavit against Montgomery; decreed; and he taken upon the writ and imprisoned in the Compter.

[415] 2d Sess. Trin. 1752, Montgomery absolved; Cæsar appeared for him.

4th Sess. Hughes gave in libel; proctors for both executors gave an affirmative issue, &c.

1st Sess. Mich. 1752, Cæsar for Montgomery exhibited declaration, 6th Feb., 1752. Hughes by special proxies confessed the inventories and account; it appeared from Gould's inventory that deceased had at her death 200l. O. S. S. Annuities standing in her name, which the executors got transferred into their own names; same day Gould appeared, and Court admonished him to transfer said annuities to Minty before the by-day, he paying the proctor's bills; Cæsar undertook that Montgomery should attend and join in the transfer; Montgomery refused to attend.

1 Sess. Easter Term, monition against him to join in transfer on 25th May; on return of the monition, two objections taken, first by Cæsar, that the monition was not served by the officer of the Court; secondly, by Bellas, that the whole 200l. was not due to Minty, for some of the legacies were still unpaid.

Dr. Hay for Gould.—27th Jan., 1753, Bellas exhibited inventory for Gould; balance in his hands upon the inventory only 4l. 17s. 3d.; legacies still unpaid amount to 80l.; sets forth in the inventory that deceased had 200l. O. S. S. Annuities which he is willing to sell when his co-executor will join with him, but he cannot transfer alone; 6th February, 1753, Hughes has confessed Gould's inventory to be true, and consequently confessed that clause. Gould confessed the libel, and was admonished to transfer; he is, and always has been, ready to pay Minty what is due to [416] him; but the executors cannot transfer the whole 200l., for 80l. must be deducted for the legacies unpaid.

Nobody appeared for Montgomery, for Cæsar, his proctor, declared he would appear no more for him.

JUDGMENT—SIR GEORGE LEE. It being agreed that the balance due to Minty for his legacy of 100l. and the residue, was 120l.; I decreed the executors to pay that sum to him by the 31st of this month, he paying the bill of Mr. Bellas, proctor for Gould. Gould being present in Court, declared he was ready to pay said sum if Montgomery would join in selling the annuities. I decreed a monition against Montgomery to pay the said sum to Minty.

WINCHLOW, Administratrix of Smith *against* SMITH. Arches Court, Trinity Term, July, 16th, 1753.—Answers in a proceeding for an inventory and account, held to be sufficiently full.

[See further, p. 651, post.]

On fuller answers.

Dr. Jenner for Winchlow. Richard Smith, deceased; Margaret Winchlow his daughter; 9th Nov., 1738, Smith made his will, appointed his daughter, Elizabeth Smith, sole executrix and residuary legatee; she renounced in both capacities; administration cum testamento granted to Thomas Bateman a creditor; he is dead, and administration cum testamento de bonis non is granted to William Smith, son of

the testator Richard. Elizabeth Smith, executrix of Richard, is dead, and admi-[417]-nistration to her is granted to her sister, Margaret Winchlow, my client; she, as representative of Elizabeth Smith, has brought a suit against William Smith for the residue of Richard Smith's estate, and has called for an inventory and account; William has given in inventory and account, and denies there is any residue of Richard Smith, we having given in an exceptive allegation to the inventory, and have pleaded that William Cullen made Richard Smith his executor and residuary legatee; Richard took probate, and Bateman took administration cum testamento de bonis non to Cullen, and William Smith has done the same; and we plead that William Smith has received 122l. of Cullen's estate in right of Richard Smith. In his answers, William says that he has received 122l. of Cullen's effects, but that no part thereof belongs to Richard Smith's estate, for more than that sum is still owing from Cullen's estate for his debts and legacies. We insist that he ought to set forth in his answer what has been received and paid of Cullen's estate, and what debts and legacies remain unpaid.

JUDGMENT—SIR GEORGE LEE. But I was of opinion the answer was full, for he had answered to every part of the article of the allegation, and Winchlow must prove that there is a surplus of Cullen's estate, or she may call William Smith to exhibit an inventory and account of Cullen's estate, for she as representative of the residuary legatee of Richard Smith, who was residuary legatee of Cullen, has sufficient interest for that purpose: thereupon I pronounced the answers to be full.

[418] BIRD, ALIAS BELL *against* BIRD. Arches Court, Trinity Term, July 16th, 1753.—Alimony allotted pending suit.

[See p. 345, ante.]

Bird brought suit against Bell, his wife, for nullity of marriage, by reason she had a former husband living when she married him. She gave in an allegation of faculties, and in his answer thereto he admitted that he is by trade an anvil maker, and gets by his trade 100l. a year clear, and is worth about 1000l.; has three children by a former wife, and ten grandchildren, whom he at times assists with money. Upon settling alimony pending the suit, I allowed her 20l. a year, to be paid quarterly from the return of the citation against her; and her proctor porrecting a bill of costs, which amounted to 60l. 1s. 4d., and his proctor declaring he had no objection to it, and the register informing me he had perused it, and that the several articles were reasonable, I taxed it at 60l. besides the monition, to be paid thirty days after service of the monition, which I ordered not to pass under seal till after fifteen days.

SMITH *against* CORRY, FALSELY CALLING HERSELF SMITH.—Prerogative Court, Trinity Term, July 18th, 1753. An administration granted on false suggestion, revoked.

[See p. 432, post.]

Dr. Hay for Smith. Simon Smith died intestate, and we say a bachelor; Elizabeth Corry took administration to him as his widow, and swore [419] the effects were under 20l.; William Smith, deceased's father, cited her to bring in the administration, and shew cause why it should not be revoked &c.; she appeared and confessed his interest as father, but he denied her interest as widow, and she propounded it; we have an affidavit to shew deceased's effects were above 20l. and that Corry knew so before she took administration; and therefore pray the administration may be revoked, as granted on false suggestions.

Affidavit of Milleson Edgar, Esq.

Deceased was deponent's servant at his death; he had in his own custody when he died 33l. 1s. 6d. besides wages deponent owed him; deponent has paid apothecary's and other bills for deceased, and deponent has now remaining in his hands of deceased's upwards of 22l. which Corry was informed of before she took administration.

Per Curiam. I revoked the administration because it was granted on false suggestions, in fraud of the stamp duty, and of the fees of the office, &c., and condemned her in the usual costs, viz. 3l. 6s. 8d.

LADY ANN JEKYLL *against* JEKYLL. Prerogative Court, Trinity Term, July 30th, 1753.—Instructions in the handwriting of a party deceased, purporting to dispose of real and personal property, held not to be entitled to probate.

Dr. Paul for Lady Ann. Joseph Jekyll, Esq. died 17th November, 1752; made a will dated 20th November, 1749, all wrote and signed by him, but not attested, nor any signature wrote; contained only personal estate, made no executor, but appointed his wife Lady Ann universal [420] legatee and guardian of the child with which she was then pregnant. This will is marked A, and is propounded by Lady Ann. On the 9th of November, 1752, he came to London, in order to go abroad for the recovery of his health. On the 10th of November he went to Mr. Baldwin, his attorney, and gave him instructions in his own handwriting, and by word of mouth, for preparing a draft of a will for both real and personal estate against Sunday the 12th of November, when he said he would come again to him and peruse it, in order for execution. These instructions wrote by deceased, in which he gives to each of his brothers and sisters 500l., and makes Lady Ann and his brother Blacket Jekyll executors, are propounded by Thomas Jekyll, one of his brothers, as a legatee. The instructions are marked B. The deceased was afterwards taken ill on said 10th of November. On 12th November a message was sent to Baldwin, to acquaint him that the deceased was ill and could not come to him that day. The deceased did nothing more towards carrying said schedule into execution, and therefore must be deemed in law to have departed from it.

Dr. Jenner, same side. Will, 20th November, 1749, contains only personal estate, the latter paper contains his whole estate, real and personal. The benefit Lady Ann had from the personal estate by the first will is diminished, and the benefit intended her by the instructions out of the personal estate cannot take place.

Dr. Hay for Thomas Jekyll. Caveat entered. Lady Ann propounded will of the 20th November, 1749, which I admit is proved to be deceased's [421] handwriting; by that will he leaves all his personal estate to Lady Ann. Schedule B, the instructions of Friday, the 10th of November, are entirely wrote by deceased. Baldwin was the deceased's attorney; the deceased told him he was going abroad the Monday or Tuesday following, and bid him make a will, to be ready by Sunday, 12th November, and he would then look it over and execute it. By the instructions, it appears the deceased intended to vest a real estate in trustees; gives 500l. to each of his brothers and sisters, and made his wife guardian of his daughter, and she and Blacket Jekyll, executors. Sunday at noon, Baldwin received a note in Lady Ann's handwriting, acquainting him that the deceased was ill and could not come to him that day. Deceased was not apprehended to be in danger, even on the day he died, and he never thought himself in danger. Baldwin says he believes deceased would have completed his will if he had thought himself in danger of death.

The will marked A being admitted by the counsel for Mr. Jekyll to be all of deceased's handwriting, was read on behalf of Lady Ann, and on the other side, Lady Ann's counsel admitted the instructions marked B were all of deceased's handwriting.

Witnesses for Mr. Jekyll.

1. Samuel Baldwin, gent. Deponent had for several years done business for deceased as his attorney. On Friday, the 10th of November, 1752, deceased came to the deponent, and said he intended to go to France for the recovery of his health the Monday or Tuesday following, he having been ill some time, and said he was come to give him in-[422]-structions for making his will; the deceased then in a great hurry wrote the paper of instructions marked B and gave it to the deponent, and bid him prepare a will from the said paper, and from instructions he then gave deponent by word of mouth, against the Sunday morning following; the deceased was then of sound mind. Since the deceased died, the deponent has heard Lady Ann say that in coming to London the last time, she and the deceased talked about making his will; the deceased said he would, and she should make it for him, and she pressed him to give his brothers and sisters a 1000l. a-piece, if his daughter died under age; he said he thought that would be more than his estate would bear, and said he would not leave them more than 500l. a-piece. On said 10th of November, deceased left with deponent his marriage-settlement, from which deponent took the description of his lands, to be settled in trustees; the deponent dictated to his clerk the draft of a

will, conformable to deceased's instructions; the deceased directed the deponent to get said draft ready for his perusal by Sunday morning, and he would then come and settle it for execution. On Sunday, 12th November, the deponent staid at home for the deceased, and about one o'clock at noon he received a note, he believes of Lady Ann's writing, that the deceased was ill, and could not come. From said 12th November to the deceased's death, the deponent sent daily to his house, and never understood he was thought in danger of dying.

6. Int. Believes deceased would have completed his will if he had thought himself in danger.

2. Charles Jerningham, M.D. Deponent attended deceased on the 17th November, found [423] him very ill, but did not think he would have died so soon, but he did die that evening.

3. Peter Shaw, M.D. Deponent well knew deceased, attended him as his physician eight or nine days before his death twice a-day; deponent apprehended he had an irruptive fever of a bad sort, but deponent spoke comfortably to him and his lady, but thought the event uncertain; he died sooner than the deponent expected. Deceased did not seem to apprehend danger, but talked of going to Italy. On the 17th of November, in the afternoon, Dr. Jerningham said he hoped there was no immediate danger, but he died soon after; he had a rash, which deponent thought a favourable symptom.

Dr. Paul's argument for Lady Ann. Deceased left paper B with Baldwin only to prepare a will for his perusal on the Sunday, not to be then executed; the question is, whether paper B can revoke the complete will A. No recognition of B; no act done, though deceased was so long ill; by law, therefore, paper B is not valid. *Plumstead's case*, Prerog. 1727. Deleg. *Calamy and Limbery against Hyde and Mason*.(a) Prerog.

(a) Prærogativa, Tertiâ Sessione, Paschæ, May 19, 1731. Dr. Bettesworth, Judge.

Dr. Calamy and Limbery contra Hyde and Mason.

Mr. Mason, an attorney, possessed of a considerable real estate, and about 30,000l. personal estate, made his will, 23d June, 1729, and a duplicate thereof, and thereby appointed Dr. Calamy and Mr. Limbery his executors; one duplicate he kept in his own custody, and the other he gave to Limbery, and with it a letter, giving an account of his estate, and where his several effects lay. By this will he devised his lands to his brother, and the residue of his personal estate, after his debts and legacies paid, to the widows and children of dissenting ministers. Some little time before his death the deceased, with his own hand, made several obliterations and interlineations upon the duplicate in his custody, and by these alterations gave his land to Mr. Hyde, made him sole executor, and devised to him all the residue, and charged his real estate with an annuity of 200l. per annum to his brother, and gave him 1000l., and devised some other legacies different from what was contained in his will before, and then makes a fair draught of his will with his own hand, thus altered, adding some more legacies to it, and wrote about two sheets of a duplicate of this fair draught. In the altered will he changed the date from 1729 to 1730, and in the fair draught left a blank for the date.

The cause appeared before the court upon these bare facts, without any pleadings or any evidence but what arose from the answers of the several parties, and the confession of all sides, that the alterations, and the draught in pursuance thereof, were wrote by the deceased.

Calamy and Limbery propounded the first will. Hyde set up the new schedule aforesaid, wrote from the altered duplicate, as a testamentary schedule; and Mason opposed both in order for an intestacy.

Per Curiam. Where an unfinished paper remains alone, the Court often carries it into execution. This paper cannot operate as to the real estate, and the deceased being a lawyer, must know so much; he had time to have completed the schedule, and his not having done so is a proof of his departing from it. There being duplicates of his first will makes a material difference, for the obliterating one duplicate does not destroy the other, unless it appears testator had such intention, and in this case, if that had been his intention, he might easily have sent for the other from Limbery. It appears, from Calamy's answers, deceased had thoughts of making a new will, on account of alteration in his circumstances, but at same time declared that if he should die there

1732, *Devon* against *Devon*, the testator's deferring to com-[424]-plete his will for a week, was held to be a departure. Prerog. *Child* against *Edwards*, the same. [425] Deleg. *Duke of Somerset* against *Sir John Jacobs*. (a) Deleg. case on *Governor Harrison's*

would be no confusion, he had so well settled his affairs, and that he had taken care of the dissenting ministers, which could not relate to the schedule, by which no provision was made for them. Upon the whole, the Court was of opinion that the first will did still subsist, and was a good will.

Mr. Rushworth, proctor for Hyde, appealed ad statim, and the Court, at petition of Sayer, pro Calamy and Limbery, assigned him certificandum de prosecutione, the first day of next term.

Law quoted by Dr. Paul, for the first will:—Instit. tit. quibus modis testam. inf. § 7; Vin. cod. verb. credibile est; Digest, lib. 28, tit. 4, l. 4, Gothof. gloss. cod.; Swinb. p. 7, § 14, case 4, 2; Vernon, 650, *Tyrer's and Onyon's case*, A. made two duplicates, afterwards cancelled one, and declared he would have cancelled the other, if it had been in his custody, pronounced in that case to have died intestate. *Fye and Caron's case*.

Dr. Henchman, pro Mason, quoted the case of *Whitehead and Jennings*, in the Delegates. A. made his will duly executed, then made another will with another executor; last will was lost. Question was whether the first should revive; determined it should not, because there was a new executor appointed by the last will.

N.B.—November the 23d, 1732, this sentence was affirmed in the Delegates, vide my notes, and again upon a review; *Walter and Jones*, eodem die, same, vide my notes. (This case is copied from Sir George Lee's MS.)

The Judges Delegates who were present at the sentence in *Calamy and Limbery v. Hyde and Mason*, on 3d November, 1732, were, Chief Justice Raymond, Mr. Justice Probyn, Dr. Tindall, and Dr. Branston. The Commission of Review seems to have been appointed on 30th May, 1733; judgment was given on 5th November, 1734; the Judges present being the Chief Baron Reynolds, Mr. Justice Henage, Mr. Baron Comyns, Sir Henry Penrice, Judge of the high court of Admiralty, Dr. Pinfold, and Dr. Kinaston.

(a) This case was much relied upon by Sir William Wynne, in his judgment in *Passey v. Hemming*, Prerog. 1806, but from the want of any accessible report of the case, the facts were misapprehended.

Delegates, Serjeants' Inn, Chancery Lane, January the 22d, 1725.

Duke of Somerset contra *Sir John Jacobs*.

Lord Allinton died in the year 1723, leaving a complete will, made in the year 1685, and also three testamentary schedules made about the year 1708, all which were very imperfect. By the complete will of 1685, Sir John Jacobs was appointed executor and residuary legatee. Duke of Somerset prayed that the said will should be set aside, and that Lord Allinton should be pronounced to have died intestate, alleging that the above-mentioned schedules did amount to a revocation of the will. It was urged by the counsel for the Duke, that the beginning the said schedules was a manifest proof that the deceased did not intend the said will should stand as his last will and testament, and that any such declaration in writing was sufficient to revoke a testament, because the intention of the deceased only was to be considered, and in this case the beginning new testamentary schedules, in which he declared expressly that he did thereby revoke all former wills by him made, using these words "hereby revoking," &c. was a full proof that he did not intend the former will should stand, especially considering that the former will was near forty years old, and that there had happened a very great change in the circumstances and condition of the deceased since his making of it; and to shew farther that he did not intend it to be of any force, it was proved that he said he had no will. The question upon the whole matter was this, whether the imperfect schedules which contained only some few legacies, would amount to a revocation of a will complete, which still remained uncanceled.

Dr. Bettesworth, in the Prerogative Court, gave sentence for the will against the schedules, and the Delegates confirmed the said sentence.

In this case Serjeant Commins, counsel for the will, said in his reply that a declaration of a man that he has no will, is no proof against a will found. *Serjeant Jeffrey's case*, in *Goldsborough*, f. 33, a latter will in confirmation of a former is no revocation

Will, [426] 5th February, 1738. Deleg. *Combe against Combe*, will for real and personal estate set aside, because [427] it could not operate for both. Prerog. 1748, *Barkeley against Warner*. Deleg. *Williams and Wynne*. Deleg. 1751, *Baumont against Sharpe*, case of Jordan's will. It does not appear deceased ever spoke of his will from 12th November to his death.

[428] Dr. Jenner, same side. Deceased imposed a condition on himself that paper B should not operate till he had perused, approved, and executed it. The deceased's whole intention cannot be carried into execution. Prerog. 1752, *Berrow and Cox*.

Dr. Hay and Dr. Bettesworth contra. It was not deceased's intention to benefit Lady Ann by paper B; it was wrote by deceased but seven days before his death; appoints executors; where there is a constat of a testator's intention, it is to be supported. Object. Paper B contains real estate, and cannot operate as to that, because it is not executed. Answ. There is no general rule that a will shall not operate as to personals, though not good for real estate. Comyn's Rep. fol. 453. Deleg. 1721, *Brown and Heath against Pocklington*, will for both real and personal estate, not executed, held good for the personal. Deleg. *Watkinson against Wosey*, the same. Deleg. *Baumont and Sharpe*, the same, where it appears clearly that a man intended equally to provide for all his next of kin, and made provision for some of them out of his real, and for others out of his personal estate, and the benefit out

of a former. A will is a complete act, and therefore a man may revoke without any devise, an incomplete will may revoke a complete one, but every inchoation of a will, with a general clause of revocation is not sufficient; there is a great diversity where sudden death prevents the completion of a schedule, and where it is intermitted voluntarily. A will that is partial may revoke one that is general. Where any thing is done *animo testandi*, that, though incomplete, is a revocation *si non animo testandi secus*. Inserting something in the body of a schedule is not of the same force as the testator's signing it with his own hand. A man's approving what is wrote is not sufficient, if he did not direct it.

Dr. Henchman on the same side. The Delegates in this case must either pronounce for the will, or declare an intestacy, because the schedules have not been propounded. If the deceased is pronounced to have died intestate, the schedules can be of no use, whereas they do contain bequests recoverable at law, and therefore the schedules ought to be taken as part and parcel of the will. A testament without an executor is not valid as a testament; Swinb. part 5, No. 4. Without an executor no will can subsist; therefore such a will cannot revoke one with an executor, unless it be made in extremis. It is a rule of all laws that *agnatio liberorum rumpit testamentum*; the bare writing something in a paper is not a confirmation of the whole.

Dr. Phipps on the same side. A *contraria voluntas* is not estimated from any small variation in a will, but from the essential parts of it being changed, and these are, the nomination of an executor, &c. Gratiani *disceptationes forenses*, Discep. 764, nu. 1. A general clause of revocation does not revoke, but it must be made *simpliciter* as to the former will, *ibid.* nu. 7, et nu. 26. A diversity is to be taken where a revocation is in general, and where it has a respect to a testament to be made; the one case has a respect to intestacy, the other to a different devise to be made, and then the parties under an intestacy being certain, and in the other case not, such a general revocation is more to be regarded than the other.

Dr. Andrews, same side. No instance of an imperfect schedule of fourteen years' standing ever pronounced for as a testament in any ecclesiastical court; they are only held good when the deceased was *morte preventus* from finishing it. Swinb. part 7, cap. 12.

Dr. Sayer on the same side. A second will with the same executors is no revocation. The case of *Fuller contra Wicks et Alias*, in the Prerogative, anno 1715.

N.B.—The schedules not having been propounded, the Delegates did not pronounce them to be a part of the will, but took no notice of them. (This case also is transcribed from the MS. notes of Sir George Lee.)

The Judges Delegates present at the sentence in *The Duke of Somerset v. Sir John Jacobs* (on 22nd January, 1725) were the Bishops of St. Asaph, Gloucester, and Hereford, Lords Bathurst and Guildford, Chief Baron Gilbert, Mr. Justice Reynolds, Sir Henry Penrice (Judge of the Admiralty), Dr. Tindall, and Dr. Audley.

of the real estate cannot take effect for want of execution, the will shall be set aside, because if the testator had foreseen that event, he would have made a different disposition. The use of deceased's house, &c. given by B to Lady Ann, cannot be considered as a compensation for the loss of what was given her in the will A, out of the personal estate, more than is given her in paper B, because there is no proportion between the value of the one and the other. Prerog. *Walker and Martin* against *Mitchell*, a departure must be proved by evidence, [429] or from clear presumptions. Deleg. *Smith* against *Cunningham*, the question here is, whether deceased died with full intention of confirming the instructions, if he did, they must be pronounced for. Prerog. the case of *Serjeant Wynne* against *Baker*.

JUDGMENT—SIR GEORGE LEE. I was of opinion the paper B could not be pronounced for as deceased's last will, because it was very imperfect; the testator's name did not appear in it; it was not intelligible without explanation, and it was not explained by the evidence; contained real and personal estate, but could not operate as to the real; and yet he as much intended Lady Ann a benefit out of the real, as he intended the legatee a benefit out of the personal estate; he had sufficient time to have carried it into execution, but did not, and had not shewn by any act or declaration that he desired it should operate as to his personal estate, though it could not as to his real; and, lastly, it appeared clearly that paper B did not contain his whole will, for Baldwin swears deceased directed him to make a draft of a will from B, and from other instructions he gave him by word of mouth. I therefore pronounced against the validity of the paper marked B propounded by Mr. Jekyll, and for the validity of the complete will marked A propounded by Lady Ann Jekyll, but did not give costs.

BOND *against* BOND. Prerogative Court, Caveat Day, July 31st, 1753.—Objection to the sureties offered for an administrator's bond, over-ruled.

[See pp. 354 and 429, ante.]

Dr. Simpson for Sarah Bond. John Bond, deceased, left Sarah Bond, his widow, and six children by her, and William Bond, his son by a for-[430]-mer wife; the widow confessed William's interest, but he denied hers, which she propounded; administration pendente lite decreed on the 15th March, 1753, to the nominee of William, because his interest was certain; he named John Barnes, and administration was decreed to him; it afterwards appeared there was not any person of the name of John Barnes, and then William named Thomas Barnes, who upon exceptions being taken to him, the Court rejected; he then named one Phillips, to whom the Court decreed the administration, he giving 3000l. security, and notice of the sureties; he named for sureties, Mr. Bradley and Mr. Atkins, who both refused to be his sureties. Since William has so long trifled with the Court, we pray that Sarah may be allowed to nominate the Reverend William Bond, uncle to William, the party to be administrator. William Bond has now nominated for sureties Mr. Hand, who was his proctor at Litchfield, and who acted as substitute in this cause on examination of witnesses by commission, and is therefore a party; and another person, one Adderley, who lives in London. Hand, indeed, swears he is worth 3000l. and upwards, his debts paid; but the other only swears he is worth 200l.; the sureties are bound conjunctim et divisim, and therefore both ought to be worth 3000l., otherwise, it is the same as taking only one surety.

JUDGMENT—SIR GEORGE LEE. I was of opinion the objections to Hand, as having acted as substitute, had no weight at all, and that it was sufficient if the sureties together were worth the sum mentioned in the administration bond. I therefore pronounced the sureties offered [431] to be sufficient for 3000l., and decreed administration pendente lite to pass to Phillips, the securities Hand and Adderley first giving bond.

Fanshaw, proctor for Sarah, appealed ad statim, but did not proceed on the appeal.

SAVILLE *against* MORGAN. Prerogative Court, Caveat Day, July 31st, 1753.—The Court has no jurisdiction to direct an inventory of a leasehold estate under lives which was held on a mortgage. An inventory ordered as to the other effects.

Dr. Pinfold for Morgan. Peter Morgan is the deceased; Morgan, the executor, is cited by Saville, a creditor, to take probate and give in an inventory, &c.; Morgan took probate, and exhibited a declaration; therein he sets forth that Saville was possessed of a leasehold estate of deceased's, which was mortgaged to him, and has received the rents and profits, and has likewise laces and long lawns which belonged to the deceased, in his custody, and therefore prays an inventory from him; Saville alleges that he is not obliged to give an inventory, for he has lent money to deceased, which is secured to him by mortgage of said leasehold estate and goods, and he is accountable only in chancery.

Dr. Simpson for Saville. Morgan, in his declaration on oath, says his father the testator mortgaged the leasehold estate to Saville, and that Saville is in possession thereof; the estate is a leasehold for three lives; the legal estate is in Saville the mortgagee, and the mortgage can be redeemed only in chancery.

JUDGMENT—SIR GEORGE LEE. As Morgan had confessed in his declaration that Saville was in possession of the leasehold es-^[432]tate by virtue of a mortgage, I was of opinion I had no jurisdiction over that, or the rents thereof, but that he was accountable only in chancery; but as it did not appear by evidence that the laces and lawns were comprised in the mortgage, I ordered Saville to give an inventory of them.

SMITH *against* CORRY FALSELY CALLING HERSELF SMITH. Prerogative Court, Caveat Day, July 31st, 1753.—Admission of an allegation opposed on the ground that the party giving it in had been condemned in costs, which remained unpaid, but as no monition to enforce the payment had been served on him, the objection was not sustained.

[See ante, p. 418.]

Dr. Bettesworth for Corry. Simon Smith died intestate; left Elizabeth Smith his widow, and William Smith his father; 12th March, 1752, the widow took administration, and swore the effects were under 20l.; she was mistaken, for they appear to be something above that sum; the father cited her to bring in the administration and shew cause why it should not be revoked, as granted on false suggestions, &c.; 12th April, 1753, Southgate brought in the administration, confessed the father's interest and propounded the widow's interest; the last Court day the administration was revoked, because she had made a false suggestion as to the value of the estate, and she was condemned in 3l. 6s. 8d. costs. We now offer an allegation pleading her marriage to deceased.

Dr. Hay, counsel for the father, declared he did not oppose the allegation, but prayed it might not be admitted till she had paid said costs. But as a monition had not been served on her to pay the costs, and she was not in contempt, I admitted the allegation.

[433] LAST, FORMERLY PECK *against* BROWN AND OTHERS. Prerogative Court, Caveat Day, July 31st, 1753.—Probate of a former will revoked, in order that probate might be given of a later will.

Dr. Simpson for Mary Last. 30th March, 1753, Last took out a decree against William Brown, pretended executor of William Peck deceased, in a will dated 28th April, 1744, and against John Jessas and Robert Darling, assignees in a commission of bankruptcy, issued in July, 1750, against Brown, to appear on 12th April to bring in said will, and to shew cause why the probate should not be revoked, and why probate of a later will dated 4th October, 1749, should not be granted to Mary Last the deceased's sister and executrix therein named. Decree was served on all the parties personally. 12th April, 1743, Fanshaw appeared for the assignees; Brown not appearing, was decreed excommunicated.

2d Sess. Easter Term. Hughes appeared for Brown, and was assigned to bring in the probate, and Fanshaw was assigned to declare whether he opposed the last will.

4th Sess. Trin. Term. Fanshaw for the assignees declared he did not oppose the last will; but Hughes for Brown said he would oppose it; Smith for Last, alleged Brown, being a bankrupt, had no interest. The Court assigned to hear on Hughes' petition this day; Hughes has not delivered his act; Smith gave him notice he would move the Court this day; Hughes now alleges Brown is applying to have the commission of bankruptcy superseded, and therefore prays time till next term. Prerog. 1737, in *Heysham and Bowyer* against *Trubey*, held a bankrupt had no interest, and that his assignees only could oppose [434] a will. Prerog. *Shehan* against *Webb*, Shehan, the executor, becoming a bankrupt, his assignees intervened and carried on the cause.

JUDGMENT—SIR GEORGE LEE. I pronounced against Brown's interest, revoked the probate of the first will granted to him, and decreed probate of the latter will to Mary Last, deceased's sister and executrix.

LLOYD against OWEN AND WILLIAMS. Arches Court, July 31st, 1753.—Indecency during the performance of divine service not proved. The sentence of a Diocesan Court reversed.

Appeal from Bangor.

Dr. Paul for Owen and Williams. Richard Lloyd, Esq., of the diocese of Bangor, is articulated against, before Dr. Owen the chancellor, for misbehaviour in the church 17th February, 1751; the chancellor pronounced that Richard Lloyd was guilty of the crime charged in the articles; remitted the penalty but condemned him in costs. Lloyd appealed from this sentence, and made Owen the chancellor and Williams the proctor parties.

Dr. Pinfold for Lloyd. Citation 1st Feb., 1749, to answer to articles for irreverent and indecent behaviour in the church at time of divine [435] service, at the instance or promotion of our mere office. Citation signed by David Williams, proctor for the office; returned 6th February, 1751. Lloyd appeared by Lewis, his proctor; 31st May, articles given in.

1 art. Lays law, canons, &c. generally.

2d art. Lays three churches in which Lloyd behaved indecently and irreverently, &c.; he gave a negative issue.

Four witnesses examined on the articles.

1st witness says, Lloyd at Easter or Whitsuntide behaved indecently; this witness is Andrew Hughes the parish clerk.

2d witness. Knows of no indecent behaviour.

Two other witnesses say they saw Lloyd smile in the church.

The chancellor and proctor were made parties because there were no other.

Evidence read for the office.

Citation read of mere office, signed by Williams, proctor for the office.

Head of the articles of mere office.

1 art. Lays laws, canons, &c. generally.

2 art. That in 1748 or 1749, in the churches of Beniow, and two others, or some of them, you behaved irreverently, &c.

Witnesses.

1. Andrew Hughes. Lloyd behaved so indecently in the parish church of Beniow in Easter or [436] Whitsun week, 1749, and disturbed the congregation so much by playing with Joyce Hughes, that deponent went from his seat to her, and desired she would sit somewhere else, that the congregation might not be disturbed.

1. Int. Respondent was asked by the chancellor to be a witness.

2. William Jones. Deponent saw Lloyd laugh or smile in Aberath church; cannot depose farther.

3. Ellen Evans. Deponent saw Lloyd in Aberath church, and accidentally looking towards him, saw him smile, but saw no other indecency.

Dr. Paul's argument. In iterable acts, single witnesses make sufficient proof. Lloyd has made no defence. Canon 18, anno 1603, requires reverence and attention in divine service; the rubric after the communion service in Edward the Sixth's liturgy directs devotion in the church, and not to behave ungodly on pain of excommunication, or other censure; Stat. 1 Eliz. ch. 1, H. 14, requires attendance at parish

church, and decent behaviour in time of divine service, on pain of punishment by censures of the church.

JUDGMENT—SIR GEORGE LEE. I was of opinion Lloyd had just case of appealing ; no sort of indecency was proved but by Hughes ; and he did not set forth what the indecency was, nor that it was in time of divine service, which is expressly required by stat. 1 Eliz ; that the other two witnesses only deposed to smiling, which was not such an indecency as Lloyd could be punished for ; that the Canon of 1603 was exhortatory, but did not inflict any penalty, and a prosecution could not be founded [437] upon it against a layman, because the Canons of 1603 do not bind the laity, as was held in the case of *Middleton and Thorpe*, B. R. ; and as for Edward the Sixth's rubric, it was not law since the Statute of Uniformity, 13 & 14 Car. 2 ; that the sentence was a very extraordinary one, for it found Lloyd guilty, and condemned him in costs, but inflicted no censure, for it remitted the penalty ; that it was necessary in this case to make the chancellor and proctor parties, because there were no other parties, for the proceedings were of mere office, without even assigning a necessary promoter.

I therefore pronounced for the appeal, reversed the sentence, dismissed Lloyd, and gave him 20l. costs.

FIRTH *against* FINCH. Prerogative Court, Michaelmas Term, November 7th, 1753.

—A legatee consents to release his interest that he may be examined as a witness. Some specified legacies are omitted in the release. The Court allowed the witness to exhibit another release, and to be repeated to his deposition.

[See further, p. 579, post.]

Sarah Nichol, widow, deceased, made her will, and appointed William Firth executor. Her daughter and next of kin, Sarah Finch, opposed the will. Firth propounded it by a common condidit, afterwards exhibited another allegation, which was admitted, and a commission granted for examining witnesses in the country. He produced John Nichol, deceased's grandson, as a witness thereon, who had legacies in the will, in these words : "I give to my grandson, John Nichol, [438] the sum of 100l., and my large silver tankard, and silver soup spoon, and two silver table spoons, and the long table and two forms in Battler's Green kitchen." Before he was sworn he exhibited a release of the 100l. legacy, but the substitute in the country for Mr. Collins, proctor for Firth, by mistake, omitted to insert the specific legacies in the release. He was then examined upon the allegation, and cross-examined, and the commissioners returned the commission, with the release and depositions, to the Court. Mr. Collins being informed of the above defect in the release, prayed that John Nichol's deposition may be suppressed till he has given a release of all his legacies under the will, and that then he may be again repeated to the same deposition, or may be re-examined, and alleged that publication had not passed, nor had the depositions been seen. Cheslyn, proctor for Finch, opposed this motion.

Firth's council cited and relied on the case of *Judger and Mann* (vide supra, p. 338), Prerog. 30th Jan., 1753, as a case in point.

JUDGMENT—SIR GEORGE LEE. I was clearly of opinion the witness was at liberty to exhibit another full release, and that then he should be repeated to the same deposition, from whence no inconvenience could arise. Accordingly John Nichol being in Court, he exhibited a release of all his interest under the will, and then I gave him the oath of a witness, he being produced as such by Collins, and ordered the return of the commissioners to be opened, and his deposition to be taken out, which was done, [439] and he read over the whole deposition to himself in court, and was then repeated to it in court, and he openly declared the deposition was true upon the oath he had taken, and to his mind ; and I condemned Firth, Collins' client, in 1l. 6s. 8d. costs for the expence of this motion, which Finch had been put to by Firth's neglect in not exhibiting a proper release at first.

PLUNKETT FORMERLY SHARPE *against* SHARPE. Prerogative Court, Michaelmas Term, November 14th, 1753.—A question as to how far certain exhibits could, under any circumstances, be admitted as evidence.

[See, on another point, p. 623, post.]

On admission of an allegation.

Thomas Sharpe died intestate 20th November, 1751, without children; left Ann, his widow, a minor, now married to Plunkett; 13th December, 1751, administration of deceased's effects was granted to her father, as her guardian, till she should come to age; deceased's fortune was in the hands of his brother William Sharpe; the administrator applied to William to account with him for deceased's fortune; William paid several sums part of deceased's fortune, and took Ann the widow's receipts for the same, she being come to age; the administration to her father expired, and then she as widow applied for administration to her said deceased husband; William Sharpe the brother opposed her, and denied her marriage to deceased Thomas Sharpe; she propounded her interest, and gave an allegation setting forth a [440] public courtship at her father's house, from March to October, 1747, not only with privacy of her family, but also of William Sharpe, and the rest of the deceased's family; that at his, the deceased's request, she consented to be married privately; and in 3d article of allegation alleges that they were married at the Fleet, on 13th October, 1747, by William Dale, a clerk in holy orders, since deceased, in the presence of one Foxal, who acted as clerk, and gave her away, at the house of the widow Bates, who as well as Foxal is also since dead; that the said Bates' daughter, Elizabeth Hayward, was present below stairs, saw the deceased and Ann come into the house and go upstairs with Dare and Foxal to be married; and saw them come down again, when they owned they were married; and the deceased in her presence paid Dare three guineas fee for the marriage, and Dare demanded half a guinea more for the certificate of the marriage, but deceased not having so much money in his pocket, he pawned his watch for the same, and a few days after came and redeemed it; pleaded public cohabitation with reputation and owning from a short time after 13th October, 1749, to his death in November, 1751, and that William Sharpe the party, and the rest of deceased's family, owned and treated her as his wife, and pleaded instances thereof; and in 18th article pleaded death of Dare; and that he had often declared he knew deceased Thomas Sharpe, and had married him to said Ann; and in 19th article pleaded that the abovesaid certificate of marriage from Dare (in which he certified that Thomas Sharpe and Ann Bank were married together in the parish of St. Sepulchre's, as appeared from the register of marriage in the hands of [441] Bates), was found among the deceased's papers, and that it was signed by William Dare, and that he would not have signed a false certificate; and laid identity of persons.

Dr. Simpson, counsel for Sharpe. Opposed only said 3d, 18th, and 19th articles; 3d, because there was nobody present who is now living at the marriage, and therefore could not be proved.

JUDGMENT—SIR GEORGE LEE. But I admitted the 3d article, because she might be relieved by Sharpe's answers, and the facts to which Hayward was specified were very material to create a presumption of marriage, and upon interest, cohabitation with reputation and owning were sufficient to establish a marriage; but I rejected the 18th and 19th articles, because I was of opinion that Dare's declarations would not be evidence, when even his evidence upon oath, if he had been examined, could hardly have had any credit given to it; and as to his certificate, it was not evidence, and could not have weight in any Court; and though it was offered only as a circumstance, yet if credit could not be given to it, it could not be received to any purpose, and though two articles of an allegation in the cause of *Reddaway and Reddaway*, Prerog. 1st Sess. Hill. 1747, which were read and appeared to be almost verbatim, the same as these articles were admitted by Dr. Bettesworth my predecessor; yet I said I could not be of the same opinion, that if my judgment was wrong, it might be redressed by appeal, but till the Delegates had determined that such declarations and certificates were evidence and [442] ought to be received, I never would admit them, and therefore I rejected the 18th and 19th articles, and admitted all the rest of the allegation.

DENT, BY HIS GUARDIAN *against* DENT. Arches Court, Michaelmas Term, December 4th, 1753.—An executrix condemned to pay legacies.

Robert Dent made his will 29th November, 1746; made his wife Ann executrix and residuary legatee, and gave her 500l. three per cent. Bank Annuities for life, and the reversion thereof equally to be divided between his two sons, Robert and Benjamin, and gave said Benjamin 100l., towards his maintenance, which he leaves to the discretion of his executrix and gives him some specific legacies; in October, 1748, the wife proved this will; 5th November, 1748, she made her will, and appointed said Robert her son executor, who proved her will and took administration cum testamento to his father: the widow died in said month of Nov., 1748, a very short time after her husband.

4th Sess. Hill. Term, 1753, Benjamin Dent, by his guardian, commenced a suit against Robert for the aforesaid legacies left him in his father's will; Robert appeared; libel given in on behalf of Benjamin, and a negative issue; Benjamin's proctor exhibited copies of the wills of Robert the father and of Ann the executrix of Robert; the adverse proctor confessed the subscriptions and identities; on 16th July, 1753, Robert was excommunicated for not giving in his personal answers.

[443] 1 Sess. Mich. 1753, the excommunication was returned, and the cause was called on; Robert did not plead a plene administravit.

Per Curiam. I gave sentence ex parte, condemned Robert to pay the legacies sued for by Benjamin, with interest for the pecuniary legacy of 100l., and the dividends that had become due since the mother's death on Benjamin's moiety of the 500l. three per cent. Bank Annuities, and condemned Robert in 24l. costs.

N.B.—I had no other evidence before me but the clause of the father's will, by which the legacies were given, which Robert's proctor had confessed.

LASCELLES AND LASCELLES *against* JOBBER AND OTHERS. Prerogative Court, Michaelmas Term, December 14th, 1753.—A party held not to have established his right to pray an inventory.

Ann Millington died intestate; divers persons claimed to be her next of kin who denied each other's interests. In 1746 administration pendente lite was granted to Henry Lascelles, Esq., who gave in an inventory of the personal estate, which amounted to upwards of 20,000l., and gave security in 50,000l. Alice Marchant, who claimed to be cousin-german and next of kin to Ann Millington, died, but made her will, and appointed Walter Jobber and others her executors, who intervened in that cause for Marchant's interest. Before the [444] suit relating to Mrs. Millington was determined, Mr. Lascelles, the administrator pendente lite, died, but made his will, and appointed his sons Edwin and Daniel Lascelles his executors. Mr. Jobber, pretending interest, entered caveat against proving Mr. Lascelles's will, and prayed an inventory from his executors of Ann Millington's effects. Suggested that Lascelles had made interest of Millington's money, and therefore had now, at his death, more of her estate than he had when the first inventory was given in; but, as Marchant's interest had not been pronounced for, her representatives were not creditors of Lascelles's estate, and had no right to pray an inventory in the manner they had done from his executors; indeed, if the cause relating to Millington had not been concluded, and set down for hearing as it is, they might perhaps have had a right to call for a further inventory from Lascelles, of his representatives in that cause, but they could not in this; I therefore rejected Jobber's petition.

DAVIES *against* DAVIES AND EVANS. Prerogative Court, Michaelmas Term, December 4th, 1753.—Will found with the seal torn off, in the repositories of the deceased; held that the act was done animo cancellandi. Declarations by the deceased on his death-bed not deemed to be sufficiently specific to revive the will.

[Referred to, *Price v. Powell*, 1858, 3 H. & N. 350.]

Thomas Davies, bachelor, died 2d Oct., 1751, made a draft of a will with his own hand, which he carried to Mr. Hale Wortham, an attorney at Royston, who drew a will for him exactly conformable to it, bearing date 7th Dec., 1749. Deceased left

Thomas and John Davies, his nephews, and Jane Evans, his niece, his only next of kin, by his will he left his nephews and niece legacies of 30l. each, but made his two nephews executors [445] and residuary legatees. The night he died search was made for his will, and in a box in his chamber, this will and the draft of it were found tied up together in a piece of paper, and sealed, but this seal was torn off from the will, and put within it. Two questions were made—first, whether this will, which was admitted to have been duly made and executed by the deceased, was cancelled by him; and, secondly, whether, supposing he did cancel it, it was not revived by declarations he made on his death-bed, that he had settled his affairs, and that his nephews were his heirs and executors. At the time of finding the will, it was supposed to be of no effect, and therefore, Thomas Davies, on the 8th of Nov., 1751, took administration to the deceased as dying intestate. In Sept., 1752, Jane Evans cited him to make distribution; whereupon, in Oct., 1752, John Davies, who was the other executor named in the will, cited his brother, the administrator, to bring in the administration, and shew cause why it should not be revoked, and why probate should not be granted to him of the will. Thomas Davies brought in the administration, and declared he did not oppose the will. Jane Evans then intervened and opposed it, and John Davies propounded it.

N.B.—John Davies was security for his brother's administration, and was privy to all the transactions.

Witnesses for Davies.

1. Hale Wortham, gent. Was offered to be read, but the factum and due execution of the will being admitted, no evidence was read to that point.

2. Henry Bellein. Deponent first knew de-[446]-ceased in 1736; was intimate with him to his death, which happened on 2d Oct., 1751. Deceased had great love for his nephews, particularly for John, and often said they should have the bulk of what he left. On 30th Sept., 1751, deponent asked deceased if he had settled his affairs; he replied, "I have not lived so long in the world without settling my affairs in a proper manner." Deponent asking him in whose favour, he replied his nephews, and that they wished him dead for what he had, and said he had made them his heirs or executors, or to that effect.

N.B.—The exhibits on both sides were admitted to be proved.

3. William Stevens. Deponent has heard deceased say Jane Evans was a proud, saucy slut.

4. Robert Fig. The same.

5. Ann Gyburn. Knew deceased thirteen or fourteen years. On the 1st of Oct., 1751, attended deceased as his nurse, and was with him to his death; when deponent came to him, she told him he wanted a clean cap, but he said he would not put on a clean one till his nephews came, whom he said he had sent for; he seemed impatient till they came; they came in the afternoon of the 1st of Oct., 1751; deceased received them with great kindness, and seemed overjoyed at seeing them, and called for wine and drank their healths, and then delivered to them all his keys; he was very sensible.

5. Int. Deceased did not seem to think himself in danger of death. 7. Int. Would not let anybody have his keys till his nephews came.

6. William Stevens. Deponent well knew deceased; in evening of the 30th Sept., 1751, deponent went to deceased, and deponent and Jackson, [447] at whose house deceased lodged, went into the deceased's room; deponent proposed to him to send for his nephews; deceased said, "For what?" the deponent reminded him that he had formerly bid the deponent send for them if he should be ill; deceased after some pause said, "Send for Jack," and deponent sent for both.

1. Int. The deponent did not press deceased to send for them. 3. Int. The deponent was present at the search for the will, when the bureau was first searched, and the box was not searched till the last. 6. Int. Believes deceased did not think he should die.

7. John Blythe. The deponent intimate with deceased; speaks to affection for his nephews; the deponent, within a month of his death, has frequently heard deceased say they were his executors and would be the better for what he had; heard him say within a month before his death he had made his will; the day before he died, deponent asked him if he had made his will, and he said he had, 'Do you think I

have lived so long and not settled my affairs ; I have settled them in favour of Tom and Jack," and at same time looked at a box in the room, and as deponent now best recollects, nodded to it. The day after deceased's death, deponent was present at searching for the will, it was found in the said box, in a brown paper, tied with pack-thread and sealed, and two or three bank notes with it ; the seal was torn off from the will at that time, but it was wrapped up within it.

2. Int. The first place searched was a bureau. 4. Int. Next place searched was deceased's trunk, and the box last. 6. Int. Deponent did not believe the deceased had cancelled the will, but Thomas Davies said he believed the will was cancelled, for [448] Dr. Lee had told him so, and that it was not now of force.

8. William Stevens. The deceased, about four years before his death, said he would make his will in favour of his nephews, and that they, and nobody else should have his effects. The Whitsuntide before he died, deponent told him he was sorry to hear he was likely to lose some money ; deceased answered, "I lose it, no, my nephews will lose it." A year before his death, he told the deponent he had made his will in favour of his nephews ; the will was found in a wooden box by deceased's bedside, and the draft with it, and there was a paper in it that looked like a bank-note ; the seal of the will was torn off, but it was wrapped up with it.

9. Judith Spencer. Deponent knew deceased seventeen years ; deposes to affection to nephews ; has often heard deceased say they should be his heirs and executors. In a fortnight or three weeks before his death he declared he had made his will, and left them what he had, and made them executors.

Clause in a letter from the deceased to his nephew John, dated Jan. 21st, 1749, wrote upon the death of Jane Evans's husband, in which he said she was young enough to go to service.

2d letter from deceased to John, dated 15th August, 1750, has these words : "It is no matter how little company you keep with your cousin Jenny and her sister, unless they were better."

Will read.

Witnesses for Evans.

1. William Jackson. Has known deceased twenty years, he lodged and died at deponent's house. Evans and her husband came to visit the [449] deceased, and he received them kindly. In Sept., 1751, the deceased was taken ill ; believes he did not think himself in danger of death ; deponent was present at the search for the will ; they searched the box last, where the will was found ; deponent saw no papers of consequence with it ; his papers of moment were found in his bureau and trunk ; they afterwards searched to see if they could find any other will, but found none.

2. Elizabeth Jackson. Deceased lodged at deponent's four years before and to his death ; he received Evans and her husband well ; he did not seem to think he was in danger in his last illness.

3. Lawrence Smith. Deponent first knew Jane Evans in 1749 ; her husband died in January, 1749, insolvent ; she was forced to go to service. In July, 1751, deponent was at Barkway, and told deceased Jane Evans's condition, that she was forced to sell all her goods and go to service ; deceased said his nephews told him her husband had left her 500l. or 600l., and seemed much surprised at finding her affairs were so bad, and said his nephews had deceived him, he would alter his will, and make Jane his executrix. On 11th August, 1751, deceased gave deponent and his wife a letter for Jane Evans, and expressed concern for her, and said his nephews had imposed on him, and he had cancelled his will, and would make another, and Jane executrix, and then delivered said letter to deponent for Evans.

4. Frances Smith. Agrees exactly with the last witness ; says deceased cried at hearing of Jane's bad circumstances, and said his nephews had deceived him ; said it was a pity she should go to service after having been so long a housekeeper, and expressed great desire to see her, and [450] said now he had found his nephews out, and he had cancelled his will, and would make Jane his sole executrix.

5. Robert Antrobus, gent. Deponent was intimate with the deceased for a year before his death. A day or two after the deceased's death, Thomas Davies shewed the deponent the deceased's will, which had the seal torn off. About two months before the deceased's death, he at Wortham's house at Royston asked deponent if he would come to Barkway if he should send for him ; deponent said he would : the

deceased then said he had made his nephews his executors, but he would alter his will, and made deponent promise to come when he should send for him; deceased several times after, and within a very short time before his death, told the deponent he would make a new will, and that the deponent should do it for him.

6. James Orlebar. The day the deceased died, the deponent was at a search for the deceased's will, which was found with the seal torn off, and no papers of consequence with it.

7. Ann Phillips. Says Thomas Davies told her there was a flaw in the will, for the seal was torn off.

Letter from deceased to Evans, dated 11th of August, 1751, says, "He begins to know his nephews;" expresses kindness for her.

Dr. Simpson for Davies. No particular instance of affection to the niece. First question, whether the will was cancelled by the deceased? Shall insist that it was not cancelled by him; but, secondly, if it was, he republished it by his declarations; settled intent to die testate, his nodding at the box where the will was amounts to a re-[451]-publication. *Cotton and Cotton* (298), 2 Vern. Deleg. *Slade and Burgoin* against *Dr. Friend and Lloyd*.

Dr. Bettesworth, same side. The seal being kept with the will, it was not completely cancelled, though I believe it was torn off by deceased; his declarations shew he considered it as his will, which amounts to a republication, and his delivering his keys to his nephews is an act in affirmance thereof.

Dr. Pinfold contra, for Evans. The will was clearly cancelled by deceased; no act done by him to revive it; parol evidence cannot revive a will that is once destroyed. The case of *Cotton and Cotton* has been denied to be law at the Delegates. Declarations alone not coupled with an act, cannot revive a will.

Dr. Hay, same side. This republication depends entirely on parol; a will cancelled cannot be revived by parol. Stat. of Frauds, will cannot be destroyed without an act (*Stride v. Cooper*, 1 Phill. 334); same danger of perjury if it can be restored by parol without an act. Swinb. part 9, sect. 16. Godolp. p. 25, when a will is destroyed by operation of law, it may be revived by parol, but when the testator has destroyed it, it is otherwise. In the case of *Slade and Burgoin* against *Dr. Friend and Lloyd*, the Delegates doubted whether the will was cancelled, and the parol evidence was only to explain the doubtful facts, and clear up that point; the declarations made by the deceased were drawn from him, and did not come ex proprio motu.

[452] JUDGMENT—SIR GEORGE LEE. The will having been always in deceased's custody,^(b) I was clearly of opinion he cancelled it himself, and probably did it between the July and the 11th August, 1751, upon being informed that his niece's affairs were worse than he imagined; and this agrees with what he said to Antrobus about that time, concerning making a new will; the only question was whether his declarations on his death-bed were sufficient to revive it again, and to operate as a republication; and I was clearly of opinion they were not, for none of them directly pointed at this paper, and it would be very dangerous to establish wills upon loose general declarations, contrary to apparent acts done by testators themselves. I therefore pronounced that the deceased was dead intestate, but gave no costs.

HON. ROBERT HERBERT, ESQ. v. HELYAR. Arches Court, By-Day after Michaelmas Term, December 10th, 1753.—An allegation offered after publication, rejected.

[See further, pp. 539 and 567, post.]

Appeal from Winchester upon a grievance, in admitting an allegation.

Dr. Pinfold for Herbert. Mr. Herbert is impropiator of King's Clear, in Hants, Helyar holds lands in that parish called Freemantle Park, Her-[453]-bert sued him for tithes. On the 17th Nov., 1752, publication upon the libel, and copies of the depositions decreed. Allegation, 23rd March, on behalf of Helyar admitted. Two first articles

(b) *Loxley v. Jackson*, 1 Phill. 128; *Wilson v. Wilson and Others*, ibid. 552; *Colvin v. Fraser*, 2 Hagg. 191; *Lillie v. Lillie*, 3 Hagg. 189; *Pinhallow v. Pinhallow*, ibid. notes, 190; *Hare v. Nasmyth*, 1 Shaw, 73 S. C.

plead contrary to libel. Third article pleads exemption, and claims prescription in non decimando.

Dr. Simpson for William Helyar. In the libel Herbert pleads generally that he is impropriator, and has been in possession by himself and predecessors of the tithes of the parish time out of mind; in some cases, may plead after publication. Question is, whether tithes are due for the lands in Freemantle Park? none have ever been paid.

Libel read.

1 art. In 1748, and to May, 1750, Herbert was and is impropriator of the tithes of King's Clear.

2 art. Herbert has a right to all tithes in the parish.

3 art. His predecessors have for time out of mind enjoyed all tithes in the parish; claims tithes of Freemantle Park.

Answers to libel.

Admits Herbert to be impropriator, but denies him to be entitled to tithes from Freemantle Park. Three sets of answers to same effect. Believes Herbert is not entitled to tithes of several other lands in the parish. Denies he has been in possession of any right to the tithes sued for.

Witnesses.

1. William Pierce. He believes Herbert is impropriator of all the tithes of King's Clear, except [454] some lands in the parish of which the vicar has the tithes; his predecessors have or ought to have been in possession of those tithes.

N.B.—He does not depose to tithes having being paid of Freemantle Park.

2. Thomas Smith. Herbert's predecessors have been in the possession of all the tithes of the parish.

3. Edward Tomlyn. Impropriator has a right to all tithes of the parish, except those which belong to the vicar.

Allegation from admission of which the appeal is brought.

1 art. Recites 1st, 2nd, and 3rd articles of the libel; alleges the truth is that Herbert is not the owner of all the tithes in the parish, for that part of the lands there have been immemorially tithe free, and Herbert is only owner of the tithes of part of the parish.

2 art. Tithes were never paid for Freemantle Park, and Helyar has no other lands, and those have always been tithe free, and neither he nor his predecessors have ever paid any tithes for those lands.

3 art. Several parts of those lands, called Freemantle Park, have been sowed, and the owner has not paid tithe of such grain growing thereon, and they have always been esteemed tithe free, and none have ever been demanded, or any composition made for them.

An allegation for Helyar, which was rejected, and from which he did not appeal.

2 art. Says that Herbert is owner only of tithes of certain lands. Herbert never occupied tithes of Freemantle Park.

[455] 3 art. Part of Freemantle Park was ploughed 40 years ago, and no tithes were paid by the owner of the lands.

Dr. Pinfold for Herbert. This allegation is professedly in contradiction to the libel after publication; in 3d article, found exemption solely upon custom. Coke, 2d Rep. *Bishop of Winton's case*, held that a layman cannot prescribe in non decimando, 1 Roll's Abridg. f. 653. A layman cannot prescribe in non decimando without shewing some special matter. Degge's Parson's Counsellor, p. 206, the same. Watson's Clergyman's Law, chap. 27, the same. 2 Croke, fol. 47, *Webb against Sir Henry Warner*, prescription pleaded, held not good, because it was de non decimando. 2 Keeble, *Bowles versus Atkins*, held a layman cannot prescribe in non decimando.

Dr. Hay, same side. This is the same as the rejected allegation. Spiritual persons and the king may plead prescription for not paying tithes, but nobody else. Lands of abbeys dissolved by statute 27 Hen. 8 and Edw. 6 are not tithe free, Selden's History of Tithes. A layman cannot prescribe, but must shew a particular exemption.

Dr. Simpson contra, for Helyar. The impropriator ought to shew these lands have ever paid tithe; since he does not, the law will presume these lands were legally exempted. No proof that the impropriator ever received tithes from Freemantle

Park. Being *contrarium prius positis*, after publication is not always a sufficient exception to a plea. In defamation causes witnesses may be examined after publication; so in a marriage cause. [456] The witnesses on the libel have not deposed to any of the facts we plead in this allegation.

Dr. Bettesworth, same side. This allegation is clearly contradictory to the libel, and therefore material. They have not pleaded that these lands ever paid tithes; no danger therefore of perjury in proving they have never paid.

JUDGMENT—SIR GEORGE LEE. I was of opinion this allegation ought not to be received, because it was offered after the depositions on the libel were seen, to which it was contradictory, and also because it was the same in substance with the allegation which had been rejected, and from which Helyar had not appealed; and, lastly, I was of opinion it was not relevant, for a layman cannot by law prescribe in non decimando, but must plead a special exemption. I therefore pronounced for the appeal, rejected the allegation, and gave Mr. Herbert 30*l.* costs.

STEVENS *against* WEBB. Arches Court, By-Day after Michaelmas Term, December 10th, 1753.—In a suit for subtraction of tithes, a tender held to be sufficient.

[See p. 262, ante.]

Anthony Stevens, farmer of the tithes of the parish of Bow Church, brought suit in Consistory of Hereford against Mary Webb, for carrying away her tithes, contrary to the statute of Edward 6th, anno 1 and 2, by which the party is to pay double the value of the tithes. The tithe of twenty-seven acres of corn were carried away by Webb, who hindered Stevens, the farmer, from carrying them away. The cause came to the Arches, upon an appeal from a grievance.

[457] Dr. Pinfold for Webb. They have charged in their libel that the tithes were not properly set out, and that Webb hindered Stevens from carrying them away. She has tendered below, in the beginning of the suit, 2*l.* 14*s.*, which appears to be more than the value of the tithes demanded. We have fully proved, from their witnesses, that the tithes were duly set out. As to the hindrance in carrying them away, the case stands thus: the driver of the farmer's team would have gone through Webb's gate; she told him that was not the way to carry the tithes; upon which the driver went away and left them in the field, and Stevens sent her a message that she might keep the tithes, and pay him the value of them, and thereupon she put the tithes into her own barn.

Witnesses for Stevens.

1. William Leach, 4th March, 1750. Deponent servant to Mary Webb in 1749, and reaped twenty-seven acres of her wheat; they left for tithe, but not a full tenth; the corn was carried as it was cut, before the tenth was sent out; Webb's people locked the gate when her team was gone through.

5. Int. Each acre produced six bushels, worth 3*s.* 6*d.* each. 6. Int. Webb would not let the plaintiff carry the tithes through her gate.

2. John Hope. Tithes were set out, but cannot say whether truly. 5. Int. Powell, the farmer's man, removed them to another ridge.

3. Elizabeth Powell. Webb's servants left the tenth sheaf as they loaded the nine parts; Webb refused to let the plaintiff's servant carry off the tithes the way she carried her corn; the tithes [458] lay in the field nine days, and then Webb carried them away.

4. Mary Price. Deposes that Webb's people refused to let Stevens's waggon go through her gate, and they said she ordered them to refuse.

Witnesses for Webb.

1. Richard Williams. Nine days after Webb had carried her corn, she ordered a gap to be opened in the field through which she had carried her corn; plaintiff might have had the tithes if he had pleased; Stevens said she might take the tithes, and he would not sue her; cannot say how many bushels there were on an acre; the tithe amounted to about eleven bushels of marketable wheat.

2. Thomas Jones. Tithe was set out as the nine parts were carried away; Powell, who rented the tithes of Stevens, gathered them together, and put them into stacks;

he asked Webb which way he should carry the tithes, and she shewed him a place in the hedge which divided that ground from Peter Emery's, and told him there used to be a gap, and the tithes used to be carried that way, and if he would open the hedge she would stand by him, which he refused, unless she would open it for him, and then Powell refused to take the tithes; after they had lain in the field nine days, Webb sent deponent to open a gap where she had carried her corn, and sent to plaintiff to tell him he might carry his tithes the same way; deponent told him so, but he refused to take the tithes, and said he might be sued for coming on the ground, and said Webb might take them and pay him the value; there were about eleven bushels of wheat for the tithes.

[459] 5. Int. The respondent offered to take the tithe of the plaintiff.

3. Thomas Webb. They left the tithe as they loaded the nine parts, and the tithe gatherer made them up. Powell would have carried the tithes the way Webb carried her corn, but she would not let him; the tithes lay a fortnight on the ground.

Dr. Paul for Stevens. Two questions on the statute; 1st. Whether the tithes were duly set out before the nine parts were carried. 2d. Whether the plaintiff was not hindered from carrying them away. Tithe ought to be set out from the nine parts, the penalty of the statute is incurred in three points; 1st. For setting it out without the tithe gatherer. 2d. In not suffering the tithes to be carried the same way she carried her corn. 3d. In obstructing the carrying them away; the way they would have had us gone was sowed, and there is no proof it was the usual way.

Dr. Hay, same side. Suit on the 2d sect. of stat. 2 & 3 Edw. 6, c. 13, penalty double value and costs, if grain is carried before tithe is set out. Same penalty if parson is hindered in carrying his tithes; there was no way to carry them off but through Webb's gate.

Dr. Pinfold for Webb. It does not appear in proof that Stevens is impropiator. Elizabeth Powell says the tithe was set out; it is not denied that the usual way of carrying was through Emery's ground.

Dr. Bettsworth, same side. They ought to [460] have proved the quantity and value of the tithes, and ought to have shewn the way Webb went was the usual way, 1 Bulstrode, p. 103, the tender is more than the value of the tithes.

JUDGMENT—SIR GEORGE LEE. I was of opinion this case did not come within the statute, for it appeared the tithes were really set out, and the tithe gatherer made no objection to them, and with respect to the obstruction in carrying them, it did not appear that the way Webb carried her corn was the usual way of carrying the tithes, which it lay upon the plaintiff to have proved, and the tender appearing to be fully as much as the single value of the tithes in question—I pronounced the tender to be sufficient, and dismissed Webb, but without costs, no costs having been given to Stevens on the grievance.

BARTON *against* THE REV. MR. ASHTON.(a) Arches Court, By-Day after Trinity Term.—Articles admitted against a parish clerk: he appeals to the Court of Arches, and applied to the Court of King's Bench for a mandamus: not competent to him to proceed in both courts; assigned to declare which he elects.

[Considered, *Walsh v. Bishop of Lincoln*, 1874, L. R. 4 Adm. & Ec. 242.]

Upon a motion.

Dr. Simpson for Ashton. The Rev. Mr. Ashton, parson of Lowth in Lincolnshire, turned out his parish clerk, Ralph Barton, and appointed another to officiate, and then articled against Barton in the consistory of Lincoln for misbehaviour in his office of parish clerk, and prayed that his license might be revoked. 12th June, 1753, citation returned. 15th June, appearance for Barton, who prayed he might not be disturbed [461] pending the suit, but that he might quietly possess the office till sentence should be given against him. Judge assigned to hear his pleasure thereon; articles admitted; Barton appealed from admission thereof, and from the judge's assigning to hear his pleasure on Barton's prayer. Articles admitted 31st July, 1753, from which, &c. he immediately appealed. 11th July he applied to the King's Bench for a mandamus to

(a) Vide *supra*, p. 350, post, p. 533.

restore him to his office. We pray he may be assigned to make his option, whether he will proceed in the King's Bench on the mandamus, or in this court on the appeal.

Dr. Paul for Barton. Ashton is minister of Lowth, Barton is parish clerk there, his offence was saying that Ashton was a great rogue; a rule only for a mandamus has been granted; the articles were afterwards admitted at Ashton's petition.

Affidavit of John Gentle, gent., was read to shew that Barton was proceeding in the King's Bench, and had obtained a rule to shew cause why a mandamus should not go.

JUDGMENT—SIR GEORGE LEE. I was of opinion Barton ought not to proceed in both courts, and assigned him to declare, the first day of next Hilary Term, whether he would proceed in the King' Bench on the mandamus, or in this court on the appeal.

[462] *LETHES against EDSFORTH AND KYFFIN.* Prerogative Court, By-Day after Michaelmas Term, December 12th, 1753.—The capacity of a testator established.

Dr. Pinfold for Lethes. Thomas Edsforth, bachelor, died 31st January, 1752, made his will 30th January, 1752, and appointed David Lethes executor and residuary legatee, died of an inflammatory fever, left a brother, John Edsforth, and two sisters, Frances Kyffin and Eleanor Fish; gives 5l. a year annuity to each of his sisters, 100l. to his niece to be paid at her age of 21 years, and all the residue of his real and personal estate to David Lethes, the executor. Kyffin and Edsforth oppose the will; the only question is sanity; great intimacy with Lethes, who was the deceased's cousin, and disaffection to his brother. About nine in the morning of 30th January, Lethes sent to Mr. Barber, an attorney, to make deceased's will; Barber was a stranger both to deceased and to Lethes; deceased was butler to Lady Lawson; Lethes, Newman, and another present; Barber asked them if deceased was in his senses, they said yes, and then he talked with deceased, who at first ordered 30s. a year to his sisters; Lethes told him it was too little, then he said he would give them 5l. but absolutely refused to give his brother anything, and then his niece being mentioned he gave her 100l., he then gave Lethes the residue and made him executor. Barber explained the meaning of residue, and then Barber's clerk wrote the will, and it was read to the deceased and he approved it; the deceased wrote at first his [463] name John instead of Thomas, but it being taken notice of, he said "pho! what a blockhead am I," and then wrote "Thomas Edsforth;" the three subscribing witnesses and another person were present all the time; Lethes acted disinterestedly, for he told Fish her brother was very ill, and advised her to go to him; the physicians and James say he was not sensible, but from instances they prove the contrary.

Dr. Paul for Edsforth and Kyffin. Will made at ten in the morning of 30th of January; no declaration in favour of Lethes before or after making it; declarations that he would provide for his brother; sending for Barber solely the act of Lethes; Barber asked deceased about his fortune; whole will made by interrogatories; at first said he would give his sisters 15s. a-year a-piece; was in convulsions, but yet said he was very well. The physicians say he was not sensible when they were with him about the time of making the will; his publication of the will was only repeating Barber's words, clear proof of total incapacity. The day before the will was made, he declared he would make none.

Witnesses for Lethes.

1. John Barber, Gent. About nine in the morning of 30th January, 1752, deponent was sent for to Lady Lawson's house to make a will for the deceased; the deponent went with Newman; never before saw deceased or Lethes; deponent asked the persons present whether deceased was sensible; they said "Yes;" deponent asked deceased what this fortune was; he said he had an estate of about 21l. a year, and 300l. in money; deponent [464] asked him how he would dispose of his fortune; he answered he would give 1l. 10s. a year to each of his sisters; Lethes saying it was too little, deceased said, "Let it be 5l. a year;" deponent and Lethes asked deceased what he would give his brother, he replied "Nothing," and seemed uneasy at his name being mentioned. William Newman put the deceased in mind of his niece, and the deceased said he would give her 100l., and ordered it to be given to Lethes in trust for her; his brother was again named to him, but he said he would give him nothing; deponent

told him a great part of his estate was undevised, and asked him to whom he would give the residue and make his executor; he answered "Mr. Lethes," separately to each question; the deponent explained to him the meaning of residue; the deceased said he understood it; then by the deponent's dictation, deponent's clerk wrote the will pleaded; deponent read it to him; deceased approved and then executed it, but wrote his name "John;" the deponent took notice of it, and the deceased then said "Pho! how could I be such a blockhead?" and then deceased said, "I deliver this as my act and deed," having first altered his name; deponent bid him repeat "I publish this as my last will," and then deponent, Newman, and Davis witnessed it; the deceased was of sound mind, &c.

2. Philip Davis. The deponent is clerk to Barber, and by his orders followed him to Lady Lawson's on 30th January, and there from Barber's dictation, who received the instructions from the deceased in the deponent's presence, wrote the will articulate; Barber read it to deceased and he approved it; gives same account of execution as [465] Barber; deceased appeared to be perfectly in his senses, &c. deceased was a stranger to deponent.

3. William Newman. The deponent was fellow-servant with the deceased; the deponent went for Barber at Lethes's desire; the deceased gave Barber instructions for the will; Barber asked the deceased several questions concerning his age and fortune; the deponent asked the deceased what he would leave his brother; he said "Nothing at all;" what would he give his sister Fish, he said "15s. a year;" Lethes said it was too little, and then the deceased said he would give his sisters 5l. a year each; he deposes to rest of instructions the same as the others, particularly to the deceased's giving the residue to Lethes, and making him executor; the deceased a second time said he would not leave his brother a farthing; does not remember that the deceased said anything on being told he had wrote his name wrong; proves execution, &c. and sanity at that time.

1. Int. On night of 29th January the deponent was with deceased; at two in the morning he was delirious, and at three was in convulsions, and was not quite sensible at six when deponent left him. 3. Int. About seven in the morning of 30th January the deponent told Elizabeth Mark, the deceased had been insensible. 4. Int. The deponent was sent by Lethes for Barber. 6. Int. Did not hear deceased say anything when he wrote his name John. 7. Int. Verily believes the deceased was sensible when he made his will.

Witnesses for Edsforth and Kyffin.

1. Thomas James. Knew the deceased for four years before his death; the deceased had great love for his brother and sister Kyffin; saw them with [466] the deceased within a fortnight before his death; knows the deceased maintained his brother till his death, and was engaged to pay his house-rent; 30th January, 1752, between nine and ten in the morning deponent went to the deceased, found with him Lethes, Newman, and a maid servant; the deponent asked him how he did; he answered "Indifferent," and smiled; the deceased knew the deponent; deponent said to Newman, "I think it is proper the deceased should settle his accounts," meaning some money the deponent had paid for him; the deponent went home for his book, and returned immediately; met Lethes on the stairs, and told him he had brought his book for the deceased to sign, and desired him to be a witness; Lethes said the deceased must do another affair first; the deponent went into deceased's room and found there Barber, &c. and deceased said he would have Lethes come in; Davies wrote the will from Barber's instructions who received them from Newman and Lethes, but before Barber directed his clerk to write any legacy he asked the deceased if it was to his mind, and he answered "Yes," but the deponent verily believes he was not capable of proposing, and he did not propose one single legacy, but seemed quite insensible to the making a will, or understanding what he did; Barber read the will to the deceased, and asked him if it was to his mind; he answered "Yes," and smiled, but seemed quite senseless; the deceased wrote John as his Christian name; Barber told him of it, and after ten minutes he wrote something near the word John; he appeared quite insensible; the deponent asked the deceased if he knew what the accounts were between the deponent and him; he answered "Yes," but behaved as before, senselessly; the deponent knew the deceased did not know [467] the accounts, and therefore believing him to be insensible, did not ask him to sign them; about ten

minutes after the will was finished, the physicians came, and seemed to have no hopes of him.

1. Int. Believes the deceased had greater love for his brother and sister than for Lethes. 6. Int. Brother often disobliged the deceased, but the deceased had forgiven him. 16. Int. The room was unlocked, and the servants went backwards and forwards. 20. Int. The deponent applied to Lethes to pay him the debt due from deceased, if the will should be good, but the deponent thought it was not.

2. Elizabeth Mark. The deponent was fellow-servant to the deceased for sixteen years; heard the deceased say, the winter before he died, he would leave his brother an annuity: he had affection for his sister Kyffin; at seven in the morning of 30th January, the deceased was very ill, but he said he was very well, and laughed; the deponent sent for Lethes, and then Dr. Clifflin was sent for; deponent was not present when the will was made, but he had a paper in his hand when the deponent went into deceased's room about ten that morning, and heard him say, "This is my last will and testament;" verily believes he was not capable of making a will.

2. Int. The deceased and Lethes were cousins, and the deceased expressed great kindness for him. 16. Int. Nobody was hindered from going to the deceased while the will was making. 17. Int. Lethes sat up with deceased on the night of 30th January.

3. Mark Warkup. Within six weeks of the deceased's death, deponent heard him express great kindness for his sister Fish, and say he would [468] provide for his brother, but would leave the money in trust for him; on 30th January at nine in the morning, Lethes told the deponent the deceased was dying, and at same time said he had sent for a lawyer to make the deceased's will; the deponent went up to the deceased, and asked him how he did; the deceased, in a foolish, smiling way, answered, "Very well," but seemed insensible: the deponent then said to Lethes, "The deceased cannot be capable of making a will;" deponent said to the deceased, "Rouse up, you are going to make your will;" the deceased answered, "Yes," but did not seem in his senses; on 29th January the deponent asked the deceased to make his will, but he absolutely refused, and said he would not till midsummer; he was then sensible.

13. Int. The deponent asked the deceased if he should sit up with him that night; he said, "With all his heart;" deponent has always declared that the deceased was insensible.

4. Michael Heron. The deceased shewed great love for his brother and sisters; about fourteen days before his death he told the deponent he would provide for his brother.

5. Margery Rule. Affection for brother and sisters; the deceased maintained his brother to his death; at eight in the morning of 30th January, the deponent went into the deceased's room, and found him singing; he seemed to be convulsed; Dr. Clifflin was with deceased between nine and ten that morning; soon after Barber came there, deponent heard Barber read to the deceased, and asked him if he approved of it, and he said, "Yes."

1. Int. The deceased and Lethes great friends. 6. Int. Has heard the deceased complain of his brother, but knows he had a regard for him. 13. Int. The deponent said to deceased, "I am sorry you [469] have not left your poor brother anything;" he answered, "He will have," and smiled. 14. Int. The deceased wrote letters to Lethes.

6. Burroughs Nash. The deceased offered to be security for Mr. Kyffin for a rent of £5l. a year.

7. Robert Taylor, M.D. About ten in the morning of 30th January, the deponent visited the deceased as a physician; he was then delirious, and apparently dying, and deponent verily believes he did not know what he said and did; the deponent staid with him three or four minutes; visited him again in the evening, and then he was in the same condition, and incapable of making a will, &c.

10. Int. The deponent infers incapacity from what the deceased said. 9. Int. Respondent thinks it possible, but very improbable, that the deceased should be capable of making a will between the times the deponent saw him. 16. Int. The deponent advised Lethes to make up this cause.

8. John Clifflin, M.D. The deponent attended the deceased three weeks; on 30th January, about nine in the morning, Lethes told the deponent he believed the deceased was dying; the deponent went to him; sometimes he spoke sensibly, and at others

not, but believes he was not capable of making a will; the deponent saw the deceased three times that day; at all times he was incapable.

6. Int. The deceased expressed affection for Lethes.

Witnesses for Lethes.

1. Margaret Dalton. The deponent was fellow-servant with the deceased; never heard him express regard for his brother or sister Kyffin; the deceased was angry at his brother's coming to him in his illness; the deceased and Lethes were cousins; be-[470]-lieves the deceased had greater regard for him than for his brother or sisters; the deponent, about seven in the morning, saw the deceased; the deponent at first thought him not sensible, but afterwards he talked very sensibly; the deceased's brother came while the will was making; the deceased saw him, and the deceased then seemed in his senses, and was so about three in the afternoon; between two and three in the afternoon of 30th January, Fish and Kyffin were with the deceased, and Kyffin then asked the deponent, "How long has my brother been out of his senses?" the deponent answered, "I did not know he was out of his senses;" the deceased being asked if he knew what they said, he replied, "Yes," and seemed perfectly sensible.

2. Joyce Head. Deposes that Lethes, on 29th January, told Fish her brother was very ill, and advised her to go to him and get him to make a will; she replied, "Do you, Mr. Lethes, for you have more influence over him than I."

3. Joseph Jefferson. Has heard the deceased damn all his family, and heard him say, within six months before he died, that his brother was a good-for-nothing fellow; he had a great affection for Lethes.

4. Moses Paul Juliott. The doctor's prescriptions took up some hours in making.

Inventory.

The deceased had a real estate of about 20l. a year, one-half of it copyhold, which devolves on his brother.

JUDGMENT—SIR GEORGE LEE.—Upon the whole evidence, I was of opinion that the deceased was in his senses when the will was made, and gave sentence for it, but without costs.

[471] *TIMBRELL against RICE AND WELCH.* Prerogative Court, By-Day after Michaelmas Term, December 12th, 1753.—A creditor entitled to an inventory of the effects of an intestate.

Jane Timbrell, who is a creditor in 20l. of the estate of James Appleton, deceased, has called Rice and Welch, executors of Margaret Appleton, who was administratrix to her husband, James Appleton, with his will annexed, and residuary legatee, to give in an inventory of James's effects.

Dr. Jenner for Rice and Welch. Said that James Appleton made his wife residuary legatee for life only, remainder, after her death, to be equally divided between Jane Timbrell and others, and made said Jane Timbrell and others executors, who renounced. That Timbrell may take probate of James's will, and then may sue the executors of Margaret for the effects; but as Margaret was only administratrix to her husband, there was no privity continued from James to Margaret's executors, and therefore they were not liable to be called to give in an inventory of James's effects.

JUDGMENT—SIR GEORGE LEE.—But I was of opinion Timbrell was entitled to have a constat of James's estate, and as the executors were in possession of it by their executorship to Margaret, they were liable to give in an inventory, and accordingly I decreed that they should exhibit an inventory of James Appleton's estate, and condemned them in 1l. 6s. 8d. costs.

[472] *HELYAR v. HELYAR.*(a) Prerogative Court, Caveat Day, January 8th, 1754.
—The statute of frauds does not prohibit the introduction of parol evidence, to prove the fact of a will having existed subsequent to the will found on the

(a) An authentic report of this case has long been a desideratum to those who take an interest in questions of testamentary law. It involves the consideration of some difficult and much-controverted points; and perhaps no case has been more

death of the alleged testator. Established by proof that a latter will, with a different executor which did not appear, had been made.—The execution of a second will of a different purport from the first is by law a revocation of the first, though the second may not appear.—It is a presumption of law that a will never out of the deceased's custody, and not appearing at his death, has been destroyed by the deceased.—Some act of revival is necessary to republish a will which has been destroyed by the making of second will of a contrary tenor.

[Discussed, *Moore v. Moore*, 1817, 1 Phill. 406; *Cutto v. Gilbert*, 1854, 9 Moore, P. C. 144; and see 2 Lee, 556.]

Dr. Pinfold for William Helyar, Esq. Robert Helyar, Esq., died on 25th June, 1751, a bachelor; left Mrs. Johanna Helyar his sister, and William Helyar, Esq., his nephew, and two nieces, Martha Cosens and Mary Pitcher, who are cited, but do not appear; made a will, dated 12th February, 1742, duly executed and attested by three witnesses; it contains real and personal estate. The deceased had an estate at Newton, in Cornwall, which was left by his sister, Lady Coryton, to him and his sister Johanna. By this will he leaves his sister his moiety of that estate and 2000l.; he had another estate at South Taunton, in which the nephew had a share; this estate he leaves to his nephew, and makes him executor and residuary legatee. This will was drawn by Mr. Newman, an attorney. Deceased, at the time of making it, declared he left his estate to his nephew to preserve it in the male branch, and [473] desired Newman to persuade the nephew to make his will also, and give his estate to the deceased; he did so, and both wills were dated the same day, and duplicates made thereof and exchanged. The factum of the deceased's will and his sanity are admitted; but the sister opposes the deceased's will on this point, viz. that on 17th December, 1745, the deceased made and executed another will, and therein appointed his sister executor and residuary legatee, and that he did not name his nephew in it; there was in it a clause revoking all former wills. Vincent Darley says he made a will for the deceased at that time, but cannot say who was executor, or whether there was a revocatory clause; the other witness speaks only to execution. The deceased took this last will into his custody, and it has not been seen since, and was not in being at his death. The deceased was in Cornwall the winter before he died, but died at South Taunton; he carried a hair trunk with him thither, which was placed in his room, and he kept the key in his pocket. He died of a dropsy, his sister and nephew were both with him. His bureau and rooms were sealed up within two hours after his death. Two persons of a side were appointed by each party, who searched for a will the next morning; the seals were found entire; they first searched the hair trunk, and there found the will dated 12th February, 1742, which is propounded. The deceased was engaged in a chancery suit relating to his estate at Newton; the will was tied up with papers relating to that estate, and there was money, &c. in the trunk. The sister said there must be another will. They then sent to Newton to seal up his study there, and likewise to London to seal up the deceased's chambers in the Temple. [474] The same persons who searched at Taunton searched at Newton, but found no will of the deceased; but, in an open trunk in his study at Newton, they found the duplicate of William Helyar's will with papers of no consequence; search was afterwards made at the deceased's chambers, but no will was found there. Pleas of affection and disaffection have been given in on both sides. It is suggested that the deceased was angry with his nephew for marrying Miss Weston in 1743, but it will appear he was afterwards well satisfied therewith. In 1744 and 1745 he was godfather to William's children, and they had transactions together upon money matters and accounts. In May, 1751, they met and settled accounts, and the deceased ever received William with great kindness. In 1751 the deceased was about buying

frequently cited or so much misunderstood. The judgment, also, is highly creditable to the learning and judicial attainments of Sir George Lee, and the perusal of it will satisfy the reader of the erroneous impression of those persons who have maintained that the principles laid down by Lord Mansfield, in the case of *Goodright on the demise of Glazier v. Glazier*, 4 Burr. 2512, are diametrically opposed to those on which the judgment in this case is founded. In point of fact, the circumstances of the two cases are widely different, and the judgment in each instance is a legal conclusion deduced from the circumstances of the particular case.

an estate because it was near his nephew's; he wrote letters of affection to William. We have pleaded the deceased's dislike to his sister; she and William were always upon bad terms. Deceased and his sister did live together in Cornwall, and corresponded when separate. The points are, 1st. Whether our will is revoked? 2dly. Whether there is not evidence of acts done by the deceased which will amount to a republication?

Dr. Smalbroke, same side. The nephew, after his marriage, made dispositions of his estate contrary to his will. They have pleaded circumstances to infer that John Shury, the deceased's servant, took away the last will after the deceased's death.

Dr. Clarke, same side. The single question is whether, under the circumstances of this case, the last will has revoked the former.

[475] Dr. Paul contra, for Mrs. Johanna Helyar. The deceased was a lawyer. We do not dispute the factum of the will dated 12th February, 1742, the design was to exchange wills. William, the father of the deceased, died in September, 1742, he left his money to the deceased, but his real estate went to the nephew. Both wills were made with the prospect of gain. In 1743 William married contrary to the deceased's liking; the deceased told his nephew thereupon, "that he had made his will and given him 40,000l., but damn me if you shall now have a farthing." Johanna made her will in June, 1745, and appointed deceased her executor and residuary legatee. Deceased declared he had made his will in the country, which was the will of 17th December, 1745. Darley, the writer of it, swears he believes the sister was executrix and residuary legatee. The nephew knew there was a second will: on the search, declared he was sure there was another will, and said he knew where it was. William made several wills after his marriage; so that the exchange of wills was at an end. The deceased and William had several quarrels. The deceased never went to the nephew's house after his marriage; never saw his wife or any of his children. Just before his death, the nephew came to him and he was angry thereat. The deceased wrote very affectionate letters to his sister; the letter of 19th January, 1744, shews he was not godfather to William's child from affection. The case will turn chiefly on the revocation by the second will. Great reason to suspect the deceased's servant, John Shury, had taken the last will out of the deceased's chambers. It is clear, in point of law, that the execution of a later will destroys a for-[476]-mer, and that the former cannot be revived without some new act, and the practice has been so.

Dr. Simpson, same side. Questions of law—the revocation by a latter will; no proof that the second will was cancelled; if it was, acts were done to revive it.

On 12th Feb., 1742, William and Newman went to the deceased at Newton to settle accounts. The deceased then made a will merely with a view of William's doing the same; the deceased would not execute his will till his nephew had first executed his. In August, 1743, William and Newman went again to Newton, and then got from the deceased the family settlement, in order for William's making his marriage settlement. Mr. Bennet swears that the deceased told him that William denied any intention of marrying Miss Weston, and proves declarations of deceased's disaffection to William, and that William should have nothing from him. The deceased asked Bennet if he could not alter his will by codicil. The deceased expressed great joy at his sister's making her will. Darley proves factum and execution of the second will and instructions, and Honor Pearse proves execution, and that the deceased took it into his custody. Subsequent declaration that he had made such will, and full proof that William declared after the deceased's death, that he knew there was another will, in which Johanna was executrix, and said he knew where it was, but would not tell. There is full proof of a second will executed, but no proof that it was cancelled by the deceased. Upon the deceased's death the key of the hair trunk was taken out of his pocket, and given by Webber to Shury, two hours before the doors were sealed up, and the next morning the [477] key was found in the trunk, and therefore Shury must have been at it before the doors were sealed up. Shury was the last person in the deceased's study at Newton, when the deceased left the place, and a trunk was found there open, from which probably Shury took the will pleaded. Search was made at the Temple for a will; the doors there were sealed up, but the laundress had free access for some days before; Shury had one key of the chambers which he kept for a fortnight. The third key was found by Shury in a drawer at the chambers, which had been fully searched, and no key then found. The will pleaded was found

among deeds which concerned Johanna. It is improbable the deceased should put it there, when it was a will to defeat her. A good deal of evidence attempted to prove the deceased's affection to William; William seldom saw the deceased, only when they had accounts concerning their lime-works to settle. Shury sent for William when the deceased was ill without his privity. Divers declarations from the deceased of his dissatisfaction at William's marriage. In 1747 great quarrel between the deceased and William on settling their accounts, which the deceased spoke of to his death. In September, 1749, the deceased spoke very slightly of William. The deceased and William's family never visited, and the deceased never went to William's house. Affection to his sister appears from the deceased's letters and from full evidence. The grand point is the question of law.

Drs. Hay and Bettesworth, same side. We insist that the will pleaded was put into the trunk by Shury.

[478] Witnesses for William Helyar.

1. John Newman. Proves instructions in writing from the deceased for making the will of 12th February 1742, and his drawing it and a duplicate pursuant thereto; the deceased approved and executed it in the presence of the deponent and John Cox and William Wells and a duplicate, and they attested them; the deceased was then of sound mind, &c.

2. Int. The deceased said he wished his estate to go in the male line, and he desired the respondent to speak to William and get him to make his will, and give his estate to the deceased. The respondent did speak to William, and he made his will, in which he gave all his estate to the deceased except a few legacies, and made the deceased, executor and residuary legatee. The deponent drew wills for both; the deceased delivered duplicates of each, which the deponent made, and William executed his will and duplicate, and sent one part to deceased; and then the deceased executed his will and duplicate, and sent one part to William. William some time after married, and on the birth of a daughter made a new will. 3. Int. William settled part of his estate on his marriage, and he has since made several wills. 5. Int. In a day or two after the deceased died; upon search the will pleaded was found in the deceased's trunk, no will was found at Newton or at the Temple. 6. Int. The doors of the chambers at the Temple were sealed on behalf of both parties. 7. Int. The interests of the deceased and William under each others wills were nearly equal. 9. Int. The deceased often travelled near William's country house.

2. John Cox. Proves execution of the will pleaded and capacity.

[479] 3. William Wells. The same.

9. Int. William's house is about ten miles out of deceased's road from his own house to London. 10. Int. William went to the deceased, but the deceased never visited him or his wife.

The will read.

Witnesses for Johanna Helyar.

1. William Bennet, Esq. The deponent first knew the deceased in 1789, and was concerned for him as a lawyer; the deceased was a barrister at law; great affection between the deceased and his sister Johanna; Lady Coryton their sister left Newton to the deceased and Johanna as tenants in common, and they lived there together; the deceased's father made him executor, and gave him most of his personal estate, and his real estate descended to William; about 1743 the deceased told the deponent that William solemnly denied he was going to be married to Miss Weston, but said that a day or two after William asked for the deceased's mother's marriage settlement, and that he had let him have it, and the deceased said to William, "I have made my will and given you 40,000l. but damn me if you shall have a farthing of it;" and asked the deponent if he could not alter his will by a codicil.

2. James Willis. Proves affection between the deceased and the producent; believes it lasted till his death; they were joint owners of Newton; after William's marriage the deceased said William had very much offended him by not consulting him on his marriage—adding that he had provided for him very largely by his will, but he was resolved he should not now have a penny.

[480] 7. Int. Respondent is solicitor for the producent in a cause against William in chancery.

3. Elizabeth Clements. The deponent was often at Newton with the deceased and the producent; they lived together in perfect great harmony; the deponent heard the deceased speaking of William say, "Since he is married to Betsy Weston, let me be damned if ever he has a groat of mine;" the deceased's sister, Mary Helyar, died in October, 1745.

4. Vincent Darley, Gent. The deponent knew the deceased ten years; Lady Coryton died about 1740, and left her estate at Newton to the deceased and Johanna; the deceased and she lived in perfect harmony together; on the 17th December, 1745, the deceased desired the deponent to draw a will for him, and as the deponent best remembers, he drew it from verbal instructions then given him by the deceased, and the deceased approved it, and then the deponent engrossed it, and the deceased approved and executed it in the presence of the deponent, Honor Pearse, and Elizabeth Cornish, now dead, who attested it; the deceased was then of sound mind, &c.; the deponent does not remember that the deceased ordered a revocatory clause to be inserted, but believes there was such a clause in the will because it is usual; he cannot positively say Johanna Helyar was executrix and residuary legatee, but to the best of his remembrance and belief she was both; the deceased took the will into his own custody; he does not remember the particular legacies.

1. Int. 2do loco. Does not remember that any person was present at giving the instructions for the said will, or at the reading of it to deceased, or execution, except the subscribing witnesses; the deponent never saw the will afterwards.

[481] 5. Honor Pearse. Deceased and producent kept house jointly at Newton; deceased was absent from Newton two years as she believes, because his sister could not be there; great affection between deceased and producent to his death; kind letters passed between them; deceased's father left him his personal estate, and his real estate went to William; has often heard the deceased express displeasure at William's marriage; Mary Helyar died 29th October, 1745; he proves execution of a will in December, 1745, by deceased, in presence of deponent, Darley, and Elizabeth Cornish, since dead; the deceased declared it to be his will and they then witnessed it; about four months before the deceased died, the deponent heard him speak of the quarrel between him and William in 1747, and said William said to him, "I wish I had a sword, and I would run you, sir, through the guts;" mentions expressions of dislike to William.

4. Int. Deceased was six weeks at Newton when his sister was not there. 3. Int. 2do loco. Deponent did not hear the said will read, or instructions given for it; does not know the contents of said will of December, 1745; 9 Int. 1mo loco. Producent would not see William when he was at Newton.

6. Neal Ashby, Gent. There appeared to be good harmony between the deceased and his sister; deceased expressed displeasure against William, and talked about William's getting his writings from him; in June, 1745, Johanna made a will in which she gave her moiety in Newton to the deceased, and the greatest part of her effects; the deceased was much pleased thereat; a fortnight or three weeks after the deceased told the deponent he should make his will, and afterwards at London de-[482]-ceased told deponent he had made his will in the country.

7. Int. Soon after the deceased's death the deponent and Mr. Gapper sealed up the deceased's study in London, and a padlock was put upon the door; the deponent had the key of the padlock, and Gapper of the door. 10. Int. Deponent was present at the search for the will at deceased's chambers; a strict search was made, but no will was found; the doors were found sealed up as they were originally, when they came to search; Respondent had no suspicion that the doors had been opened.

7. Neale Webber. Deponent was the deceased's attorney; deceased and his sister behaved kindly to each other; Sunday before deceased's death (who died on Tuesday) William came to deceased's house, and deceased was very angry with one Easterbroke for going for William without deceased's knowledge, and said to him, "How dare you go for him without my knowing it."

3. Int. Respondent did not observe that deceased behaved uncivilly to William.

4. Int. Respondent found a key in deceased's pocket at his death and gave it to John Shury.

8. Sarah Astal. Deponent is servant to the producent; deceased and producent lived together in great harmony and corresponded when absent; deceased died at Taunton; deponent was present the next day when search was made for his will;

will, dated in 1742, was found in a trunk in a closet in deceased's room, and William then said "This is one will, but I have another;" deponent said the producent knew of one made by Darley five or six years ago; William said he did not mean that, but meant one made three years ago, in which his aunt the producent was executrix.

[483] 14. Int. John Shury was present at such search; the respondent went to tell the producent of the will found.

9. William Hole. Great affection between deceased and producent; kept house at Newton jointly; before William's marriage often heard the deceased express great dislike of it, and the same since, and he would not see him for several years after, and believes deceased was never reconciled to him; and deponent has heard deceased complain of William's behaviour to him till within a short time of his death; deponent was present at finding the will, and William then said "I am very well satisfied there is another will, and I know where it is;" some body then present said, Sir, if you know where it is, you may save us the trouble of going into Cornwall to look for it, he replied, "Sirs, you may go look for it in Cornwall, and if you do not find it, then I will tell you where it is."

12. Int. The day the deceased died all his chests, &c. were sealed up, and the next day it was agreed that search should be made; first in deceased's closet in an hair trunk; there the will was found; in said trunk there were some papers of no consequence, and some relating to a cause in chancery; both William and John Shury said there was another will. 13. Int. The next day they went to Newton to search for a will, but found none.

10. Amos Dridge. Depos to affection between deceased and producent, and joint housekeeping; the will pleaded was found in a bundle of papers in a hair trunk; and William then declared there was another will made by deceased a few years before, and said if they did not find it in [484] Cornwall he would tell them where it was, but would not tell them then, though pressed.

11. John Hood. Deceased and producent always behaved with great affection towards each other.

12. Grace Verrier. The same. Has not been with them together in company since the year 1742.

13. John Hay. Depos to great affection between deceased and producent; in 1750 deceased expressed great dissatisfaction at the quarrel between him and William in 1749.

14. John Hicks. Deceased and producent kept house jointly; they behaved with very great affection towards each other, and believes it continued to his death.

15. Countess of Clancarty. Deponent was often in company with deceased and producent, and they appeared to have, and deponent believes had, very great affection for each other; producent seemed greatly alarmed at deceased's illness, and she would have gone to him, with a rash on her, but deponent advised her not to go then, but she did go soon after.

10. Int. Diligent search was made for a will at deceased's chambers, but none was found; the doors were found sealed up.

16. John Damarell. Deceased and producent lived in good friendship, and jointly kept house at Newton; does not know that the deceased disliked William's marriage. In 1747 deceased and William met to settle accounts, and no dispute happened about the accounts, but in the evening a quarrel arose between William and deponent, and William insisted that the deponent should ask his pardon: [485] accounts, in May, 1751, were settled between William and deceased in a very friendly manner.

1 and 4. Int. Deceased was very little at Newton. 12. Int. In an hour after deceased's death his closet, &c. were sealed up; in the trunk with the will was a book of accounts of all deceased's securities, &c.; deceased was careful of said trunk.

1. Int. 2do loco. On 23d September, 1749, did not hear of any will lately made by deceased. A dispute arose on that day between deceased and William about some interest money, but deponent heard nothing said of a will. 2d Int. Deceased in 1751 received William very friendly; believes deceased had William's interest very much at heart, and did not intend to disinherit him. 5th Int. Webber declared the deceased was in danger, and therefore William was sent for.

17. Elizabeth Damarell. Depos to affection; deceased told deponent that, in 1749, William said to him, "if I had a sword, I would run you through the guts."

18. Christopher Symmonds. Deponent was coachman to deceased; he and pro-

ducent lived affectionately together. Easterbroke went to acquaint William that deceased was very ill, and fetched him; deceased asked deponent who sent for William; deponent said he did not know; deceased replied "Nor I neither," and seemed to be in no hurry about his coming.

1. Int. 2do loco. Deponent never attended the deceased in London.

Witnesses for William Helyar.

1. Clement Cattrell. In their father's lifetime deceased and Johanna quarrelled.

191. Int. William is passionate.

[486] 2. John Cox. Deceased and Johanna did not seem to live in a friendly manner; has heard him talk to his sister Mary, but not to Johanna; deponent has reason to believe deceased approved of William's marriage, for he kindly enquired of deponent after William's wife.

18. Int. Deponent never saw deceased at William's house. 24. Int. Does not know deceased ever visited William, or ever saw his wife and children. 44 and 45. Int. In May, 1751, William went to deceased's, but deceased kept his room, and deponent did not see him. 19. Int. 2do loco. Has not seen deceased and his sister together since the death of their father.

3. William Alter. Deponent never observed any affection between deceased and Johanna.

19. Int. Has not been in company with them for ten years.

4. John Clinick. In their father's time deceased and Johanna did not seem to agree.

19. Int. Has not seen deceased since his father's death.

6. Phillis Cox. Never saw any thing but disagreement between deceased and his sister Johanna; has heard and believes deceased and producent never visited.

19. Int. Has not seen deceased and Johanna together since their father's death.

7. Thomas Taylor. In March, 1751, deponent went to deceased about selling him an estate near to his nephew's; deponent said he supposed deceased intended it for his nephew; he replied, "Probably they may go together."

1. Int. 4to loco. Shury brought deponent a paper, and asked him if that was not the conversation between deceased and deponent; and depo-[487]-nent said the paper was too full. 2. Int. Respondent refreshed his memory by frequently talking with Trist before Shury came to respondent.

8. Rev. Mr. Daubney. Deceased died at seven in the morning, and soon after the closets, &c. were sealed up till next day. Never heard deceased visited William's family.

9. John Mayhew. Deponent, servant to William fourteen years, was with him at deceased's house when deceased died; deponent went to Newton to seal up deceased's study.

10. Int. Never knew deceased visit William's family.

10. John Damarell. Believes it was deceased's intention his estate should go in the male line; deceased was only five times at Newton after his father's death; on 23d September, 1749, deceased and producent settled accounts, and producent having borrowed money of deceased at 4 per cent. but conditioned to pay five if the interest was not paid by a certain day, some words arose between deceased and producent thereupon; in September, 1750, deceased told deponent he had sent for William to come and settle accounts; in May, 1751, William came, and they behaved very friendly; deceased carried all his securities to his house at Taunton, which belonged to him and William; on the Friday before deceased's death Webber declared he was in danger. The day before the deceased died, he took the air in his coach with Shury; deceased always carried a hair trunk with him in which the will was found; search made for a will next morning after deceased died; the closet first searched; the seal of the closet door unbroken, and in same state as when first sealed; his trunk was first searched as the most likely [488] place to find deceased's will; and the said trunk being locked, the key was brought, and it was unlocked, and several papers in a cause, and accounts for many thousand pounds were found with the will; the will was carefully tied up with papers of moment.

38. Int. The will was delivered to William, who then said there was another will; deponent apprehended he meant the duplicate. 11. Int. Deceased at first disapproved William's marriage. 116. Int. Believes the doors were sealed within

two hours after deceased's death. 186. Int. Never heard deceased made any will after this, except one made by Darley. 191. Int. Respondent did not observe but that deceased behaved as a kind brother to his sister. 3. Int. 2do loco. Respondent did not give William any just cause to be angry with respondent in 1747; does not know who took the will out of the trunk. 8. Int. The will was lodged with respondent. 9. Int. Respondent delivered the will to William without consulting Johanna.

11. John Newman, gent. When deponent made will of 12th February, 1742, deceased declared his estate should go in the male line; deponent has often heard deceased speak very disrespectfully of Johanna; deceased told deponent he had a great love for his nephew, and thought his estate should go in the male line to preserve the family, and gave the deponent instructions for the will pleaded, and then said he thought his nephew would do right to make his will, and give his estate to him if he survived, and desired deponent to speak to him about it, and then said his sister Johanna was of a very unhappy temper, and asked if the quarrel between her and William was [489] made up; deponent spoke to William, and he ordered deponent to make his will accordingly; deceased expressed great affection to his nephew, when he made the said will. In August, 1743, William went to see deceased at Newton, and deceased used him very kindly, and no discourse then passed about William's marriage; Johanna was in the house, but would not see William; in January, 1743, William married Elizabeth Weston, and settled on her an estate of 300 guineas a year, and the settlement was not made from the family deeds; does not believe any of the family deeds were in William's hands; in September, 1747, there was a dispute between deceased and William about interest money, but William did not behave with any indecency to deceased; a quarrel in the evening between William and Damarell; he believes the deceased did not hear of said quarrel till next morning; deceased and William parted very good friends the next day; a short time after deponent talked with deceased, and shewed how the quarrel began, and he was satisfied; in May, 1751, deceased was uneasy lest producent should not come to him, and bid deponent send for him; deceased received him with great affection, and enquired after his family very kindly; has often heard deceased declare his approbation of William's marriage; in 1744 William had a daughter born; the deceased excused himself, but afterwards stood godfather, and deponent was his proxy; in 1745 deceased was godfather to another child of William's; about a year after William's marriage deponent told deceased what settlement William had made, and he approved of the settlement, and said the estate would go in the male line as he would have it; in February, 1749-50, deceased en-[490]quired after William and his family, and said he had not been to see them, because it would displease Mrs. Johanna, but he would come soon; and deceased wrote down the names of William's children, and drank their healths and their mother's, and bid deponent tell William he desired he would give his children a good education; deponent said, "Then I hope you will take care of their fortunes;" he replied, "My nephew has little else to mind but their education; there will be enough for them." Agreed the closet should be first searched; the door was found sealed; the hair trunk was locked, and the key thereof was brought, and it was then unlocked, and the will pleaded was found, with papers of accounts and in causes, &c.; deponent wrote to Ashby to know if he had any will of deceased's, and he wrote to Mr. Gapper to go with Ashby to seal up deceased's chambers; they searched at Newton for a will; found the study sealed up; no will there; deponent present at search in the Temple; study door sealed; no will.

14. Int. Deponent has made three or four wills for producent since 1743.

16. Int. Immediately after his son's birth, William made a new will. 26. Int. Believes deceased never saw William's wife or children. 30. Int. Cannot tell whether producent and deceased saw one another between September, 1749, and May, 1751. 69. Int. Says no deeds were delivered by William, or deponent, in August, 1743. 90. Int. When the chambers were searched, deponent does not remember what was said about a third key. 79. Int. Respondent has from producent 5l. a year for looking after the alms-houses at Coker, and the poor have the rest of the estate.

[491] 12. Elizabeth Davis. Deponent was laundress to deceased at his chambers, and had the keys of his chambers; deponent received a letter from Shury, dated 25th June, 1751, informing her deceased was dead, and that Ashby and another person

would come and seal the doors; they came while deponent was reading the letter, and sealed the doors, and deponent carried away the keys, and a day or two after a new padlock was put on, and Ashby had the key, and afterwards Ashby came a third time and took away deponent's key, but from the first the door continued sealed up; some time after, deponent attended at the search for a will, and the study door was, when they came, found sealed up as at first.

11. Int. 2do loco. Respondent was not applied to to deliver the keys of deceased's chambers. 19. Int. Does not believe any person clandestinely entered the deceased's chambers.

13. Robert Gapper, Gent. Deponent present at search for a will at deceased's chambers; when they came, the outer door of the chambers and study doors were sealed up; no will found.

2. Int. John Shury was there, but did not assist in the search.

Exhibits read.

Letter marked A, dated 26th March, 1751, from the deceased to Newman, says, "I have brought up all the deeds relating to Mr. Helyar's mother's settlement."

Letter B from deceased to William, dated 6th September, 1750, says, "He will do any thing to serve him; service to his family."

[492] C ditto, dated 1st October, 1744, "Service to William's wife," letter on business.

D ditto, 8th July, 1746, the same.

E ditto, June 9th, 1747, the same.

F ditto, August 2d, 1749, the same.

G ditto, March 14th, 1748-9, the same.

H ditto, November 2nd, 1750, the same. "Shall be ready to assist him in every thing."

I ditto, dated 13th November, 1744, about being godfather to William's child.

K ditto, dated November, 1744, same.

L to Newman, dated November, 1744, to be his proxy.

M to William, on the same subject.

Witnesses for Mrs. Helyar.

1. Sarah Astal. The producent went out with the deceased in his coach; deceased, while she was in town, wrote every week to her; producent rose early, deceased late, and therefore at Newton they did not breakfast or sup together; they kept house jointly at Newton; deceased had great regard for producent; gives little instances of deceased's complaisance to his sister; she went down to deceased in his late illness; on Sunday before deceased's death William came to deceased's house; he lay in a bed without curtains, and sent four miles for his wine; the deceased, in going to his coach the day before he died, passed by and saw William, but took no notice of him; it was more than two hours after deceased's death that the closets were sealed up; at time of making the search at Taunton, Shury found the key of the London study; Shury refused to deliver that key to producent; Shury gave producent a parti-[493]-cular account of what money was in the hair trunk before the search was made for the will; when will was found, William immediately declared he knew there was another will, in which his aunt was executrix, and then deponent went out of the room to tell the producent.

2. William Hole. When William's health has been drank to deceased, he expressed displeasure; deceased always shewed great affection for his sister, and they corresponded by letter when absent; deponent present at search for will at Newton, and Newman was present, and readily turned to the deeds, and said deceased would not let William have a certain deed, which said Newman then looked on, lest he should sell the estate; deceased, within a month of his death, spoke slightly of William and his family; in deceased's study at Newton, in an open trunk, a duplicate of William's will was found; the windows of the study were open; Shury had access to deceased's hair trunk; the key was in it when they first came to search for the will; producent had no seal put, on her part, on the study at Newton.

3. Amos Dridge. Speaks to affection to producent; in study at Newton, Newman said the deeds in a certain drawer belonged to an estate he named; never heard deceased speak disrespectfully of the producent; the duplicate of William's will was in a trunk in the study at Newton; no papers of consequence with it; the key was in

the hair trunk at the time of the search, and deponent saw it in the trunk when he first came into the closet; Shury, before the search began, declared how many guineas there were in the trunk; the will was found by Shury.

4. Honor Pearse. Deceased seldom spoke of [494] William, but when he did, he always spoke of him in a slighting manner; the deceased and the producent dined together at Newton, though they did not breakfast or sup together; deceased ordered several repairs to be done at Newton the last time he was there; never observed but that deceased had great regard for producent; deceased corresponded with producent very affectionately; deceased would not come to Newton but when producent was there; producent did not see William but when he was at deceased's house at Newton; duplicate of William's will found in deceased's study at Newton; no seal put on study at Newton on behalf of producent.

5. Henry Pontglass. Deceased and producent behaved kindly to each other.

6. Rev. John White. Deponent often at Newton; has often heard deceased speak disrespectfully of William; never heard him speak otherwise; producent bears a very good character.

7. John Richards. Has often been present with deceased and producent; they behaved kindly to each other; believes they loved one another.

8. Christopher Symonds. Deceased sent his coach for his sister when she came from London to him; had affection for her; William came to deceased's a week before deceased's death, and continued there to his death, and deceased was two days before he would see him.

9. William Crabb. Knew deceased and producent ten years; they behaved in a friendly manner to each other.

10. John Hicks, Esq. In September, 1749, deponent was at deceased's house, and conversation arose about several gentlemen in the neigh-[495]-bourhood dying without sons, and somebody in the company said to the deceased, "It is a pity you don't marry and get children," and somebody replied, "Mr. Helyar has a nephew;" deceased answered, "Aye, a nephew," and then made use of some slighting expressions concerning his said nephew, but does not remember the expression; deceased and producent shewed great affection to each other.

11. William Hicks. Deposits to some conversation in September, 1749, but does not now remember the particulars.

12. Elizabeth Jeffreys. Proves affection between deceased and producent, and visiting between them at London.

13. Neale Webber. Deposits to affection between deceased and producent; producent was not present when deponent delivered key of deceased's trunk to Shury.

14. Margaret Rider. Brotherly affection between deceased and producent; her character established.

15. William Bennet, Esq. The same; they had a fondness for each other; believes it continued till his death; believes deceased was not godfather to William's child by choice, but from William's importunities.

16. Adam Pearse, Esq. Brotherly love between deceased and producent; deponent expected deceased would make some great addition to producent's fortune from what deponent has heard him say; never heard deceased mention his nephew.

17. Countess of Clancarty. Is well assured deceased had a great value for the producent, and he constantly shewed it; her character unble-[496]-mished; they corresponded and visited; at search in deceased's chambers, producent asked Shury for third key; he said he did not know where it was; deponent searched the drawer where the key was afterwards pretended to be found, and is sure it was not there at the beginning of the search.

16. George Dutton, Esq. Present at search for will at chambers; producent asked Shury for his key; he said it used to hang on such a peg, and said he did not know where it was; it was not in the chambers when the search was first made, but Shury afterwards pretended to find it in a drawer which had been before carefully searched.

19. Neale Ashby. Deceased and producent behaved kindly to each other; deposes concerning the third key the same as the other witnesses; says the drawer, when Shury found the third key, had been carefully searched before.

20. Jerningham Cheveley. Deponent assisted in sealing up deceased's chambers; deposes the same as the other witnesses to the third key.

Exhibits read.

A letter, dated 31st March, 1749, from deceased to Mrs. Page on business.

B ditto, dated 5th September, 1749.

C. ditto, no date.

I ditto, dated 7th April, shews deceased's intent to go to Newton.

K letter, dated 24th September, 1742, to producent from deceased on business.

L ditto, on business.

M ditto, on business.

[497] N ditto, 12th November, 1748, on business.

O ditto, 19th January, 1744-5; expressions of regard to producent; says "he was godfather to William's child, because he was so importunate he could not refuse without coming to an open rupture with him, and expresses himself slightly of William.

P ditto, dated 7th May, 1751, on business.

Q ditto, dated 21st May, 1751, on business.

Inventory read.

Dr. Pinfold's argument for William Helyar. No testamentary paper subsisting at deceased's death but the will. They seem to insist that this will was made by Carter, and William having made subsequent wills, deceased's will ought not to enure to William's benefit; and, secondly, that the will of the 17th December, 1745, is a revocation of ours. Clear from the circumstances that our will was not conditional upon his nephew's will subsisting. It appears from three of their witnesses that the deceased had no regard to the duplicate of William's will, whereas he took care of the will pleaded, and carried it with him. No proof that the last will subsisted after the deceased's death. The Court cannot receive parol evidence to the contents of a paper that does not exist. 5 Coke's Reports, *Cheyne's case*, no writing can be revoked or altered but by a writing. In equity, parol may be admitted in order to destroy fraud, Vern. 296, *Thynne v. Thynne*. Prove the papers subsisted at the deceased's death, and then the contents may be proved by parol. Parol proof is allowed to ascertain a thing described. [498] Deleg., *Woodley v. Mills*; (a) cannot supply any words by parol. In this case they are attempting to create a will by parol; any man's will may, by these means, be destroyed. Stat. Frauds, revocation is to be by some writing declaring the same, or burning, cancelling, &c.; but supposing parol proof may be received, the next question is, whether they have proved sufficiently the contents of the latter will? to revoke the latter must be contrary to the first will; Darley cannot certainly say Johanna was executrix in the last will; his evidence is not assisted by any one. Mr. William Helyar's declaration at the search will not prove there was a latter will in which Johanna was executrix. Our will was once the deceased's complete act. Deceased's behaviour to his nephew, and care of first will, shew deceased intended the first should operate. Last will always in deceased's custody; no evidence that the will of 1745 was in the hair trunk, or that Shury was near the trunk before the search; witnesses directly contradict each other as to that fact whether the key was in the trunk or not. A destruction of a will cannot be presumed; presumption is that the deceased destroyed the last will—*quo animo?*—that the first will might subsist to keep the estate in the male line. The fact of disobligation is William's marriage; subsequent behaviour shews deceased was reconciled. Deceased was afraid of quarrelling with his sister lest he should lose her moiety of Newton. Last letters from deceased to William shew his regard to him. Declaration to Taylor in favour of Wil-[499]-liam in March, 1751. William received kindly the last time he came to the deceased. Careful preservation of this paper, and of no other testamentary one, shews deceased intended to die testate with this paper.

Dr. Smalbroke, same side. Will of 1745 was deceased's own act; it is not ascertained what the will in 1746 was; it might be a codicil. But one witness to prove last will; no proof that it was inconsistent with the former will: no declaration that he had left his real estate to his sister by will of 1745; great danger of perjury in allowing revocation on parol evidence of a latter will; parol evidence cannot support a total omission. A paper that is void as a will cannot operate as a revocation;

(a) *Woodley and Newth v. Mills*, Deleg. 9th July, 1746. The Judges present at the sentence were, Mr. Baron Clarke, Dr. Audley, Dr. Pinfold, Jun., and Dr. Salusbury.

it cannot be intended that a complete will shall be revoked by a will not appearing. 2 Vern. 741, *Onions v. Tyvers*, clause of revocation in a will that is void will not revoke a former will. Testator clearly and plainly shewed his intention to re-establish his first will. Deceased brought will of 1742 with him to Taunton, but he did not bring the duplicate of William's will.

Dr. Clarke, same side. No doubt of the factum of the will of 1742; deceased never cancelled the old will. No satisfactory evidence of the contents of the later will; no reason can be assigned for his preserving the first will, but his uncertainty which should exist; improbable, under the circumstances of his family, that he should intend to give his estate to his sister, in preference to the heir of the family. A mere execution of a subsequent will does not destroy a former, because they may be consistent; a mere clause revocatory will not do. Uncertain whether, in the will of 1745, there was such a clause; [500] if it was matter of form only, it cannot operate as a revocation, but can only be put in to support that will in which it was inserted; intention is the guide to presumed revocations; the last will was destroyed by deceased, and thereby he shewed he had departed from the revocation. Statute of frauds will not allow a will in writing to be revoked but by an appearing will in writing. Revocation not to be presumed, Swin. part 7, s. 14. Latter will does not make void a former, when the latter is imperfect.

Dr. Paul contra, for Mrs. Johanna Helyar. Shury knew what money was in the trunk before the search; therefore he had looked into it. First will made for a purpose; notion of bartering wills at an end when William married; deceased never went to William's house, or ever saw his wife and children. They have insisted we have not made proof of the second will. Darley swears he made a will for deceased; proves execution, &c.; a will duly made may be revoked by a non-appearing will, Swin. part 7, sect. 14, nu. 1. It is sufficient that the executor might have existed, ff. lib. 28, tit. 3, l. 1. Testamentum, lib. 16, Cod. Inst. lib. 2, tit. 17, 2. Vinn. eod. verb. superius rumpitur; L. Sanximus Cod. de Testamentis. Vinny, nu. 9, a will ipso jure rumpitur per posterius: in those cases testator dies intestate. Minsing eodem loco agrees with Vinnius. Keeping a will does not give it force, ff. lib. 29, l. 25, de Testam. Milit. The practice is with us; Prerog. Mich. 1746, *Manners alias Silvester against Roberts*; a second will which did not appear with a different executor was pleaded to revoke a former will, the court admitted the plea; afterwards by consent the next [501] of kin had the administration. Prerog. 1749, *Shipway v. Shipway*, a plea of the same kind was admitted, but no proof made upon it. Prerog. 1749, *Jennings against Williams*, Thomas Quackly made his will; upon evidence that a second will had been made the court ordered the cause to be opened. Nothing can revive a will once destroyed but a republication; no evidence that deceased constantly carried the will of 1742 with him; parol evidence is not to be received to construe a will contrary to the words of it, but parol is good to prove the fact of making the will.

Dr. Simpson, same side. The questions are, first, Whether there is legal proof of making the second will? If there is, secondly, Whether that does not revoke the first? Thirdly, Whether, then, the first must not be republished? Fourthly, Whether the last will was cancelled by the deceased? Statute of frauds only enacts that a written will for personal estate shall not be revoked by a nuncupative will. We only prove a fact by parol that the deceased made a second will with a different executor: difference between parol to prove a fact and to prove contents and meaning of a will; ademption of a legacy must be proved by parol, when a thing bequeathed is given away by the testator; fact to imply revocation may be proved by parol, as, for instance, the burning a will. Noy, f. 103, says suppression of a will is punishable at law, &c. therefore must be proved by parol. 2 Peere Williams, 680, a release which was lost was set up in bar to a demand. Lord Chancellor said if execution could be proved, it would be a bar. Parol evidence of the fact of a will allowed, though the will did not appear. 1 Peere Williams, 793. [502] *Hampden's case*, Hobart, 189, parol proof that a deed had been executed, and a violent suspicion that it had been suppressed, court made a decree against the party suspected. Full proof of the fact that a subsequent will was made; it was made after the deceased was godfather to William's child. Darley is supported by precedent, and subsequent declarations of the deceased, and by William's declarations. The fact of the execution of a later will, with a new executor, is an implied revocation. Revocations are favourable, because for the benefit of the heir at law or next of kin. *Roper's case* in the House of Lords,

first will was revoked by one that was void on account of the estate being given to a Papist, Shower's Parliamentary Cases. *Nosworthy's case*, contents of the latter will totally unknown, and therefore the first was established; but this case proves parol evidence is to be received. A latter will that is void revokes a former, Swinb. 7 part, sect. 14, nu. 1 and 2. Last will shall stand. Office of Executor, p. 25, Hardres, *Nosworthy's case*, a second will without a clause of revocation, revokes. *Sands's case* mentioned in *Nosworthy's case*, first will revoked because a different executor was named in the last. Cod. lib. 6, de Testam. L. 27. Sanximus Instit. lib. 2, tit. 17, nu. 2. Second will proves mutatio voluntatis; doubtful whether deceased destroyed this last will; evidence sufficient to oust the presumption that he destroyed it himself. Conversation with Newman about William's marriage settlement prior to the last will. Damarell and Newman both employed by William, and therefore under influence, and so not entire witnesses as to the trunk being locked; and both contradicted in several points. No doubt but Shury had [503] access to the trunk after the deceased's death. If the court is of opinion that the last will was suppressed, we shall be entitled to costs. A will once destroyed cannot be revived but by express act of republication, or a necessary implication of revival. No declaration in favour of the first will after the last was made. 2 Vern. 736, *Batchelor and Searle*, Vinnius's Com. ad lib. 2, tit. 17, Inst. 6, nu. 3. It lies on him that propounded the first will to prove that the deceased destroyed the last with intent that the first should revive. A will is destroyed by arrogation, afterwards the heir is emancipated, the first will is not revived ipso facto. Prerog. 20th May, 1724, *Stacey and Dickens*, first will revived upon express declarations. Prerog. 1731, Oct. 25, *Vanier* against *Hue*, the same. Deleg. 23d May, 1714, *Jennings and Whitehead*; Mr. Keck made a will in 1701, made another in 1713 with a different executor, which he afterwards burnt; on his death-bed he sent for a person to make his will. Sir Charles Hedges held the first was revoked by making the second will, and that a special act was necessary to revive the first: his sentence was affirmed by the Delegates. Prerog. 1718, *Burt v. Burt*, the same.

Dr. Hay, same side. Question whether the will pleaded is the last testamentary act of the deceased; this depends on two questions; first, whether it has ever been revoked? if it has, whether it has ever been revived, and when? After 12th February, 1742, deceased made another will on 17th December, 1745. Objection taken that we cannot prove the subsequent will by parol evidence. General apprehension on the deceased's death that something wrong might be done; parol [504] evidence may be received in this case. By statute of frauds, you may prove fraud by parol; we insist parol evidence may be given of a will revocatory of a former; the view of the statute was to prevent wills in writing being revoked by words only. Destruction of one duplicate is the destruction of both, but such destruction must be proved by parol. It would be absurd to say a witness may depose to a will that does not appear, if he only asserts it existed after the testator's death, and yet shall not be allowed to depose to a fact of making such will, because it was not in being at the testator's death. Statute of frauds does not relate to this case, for the rules of evidence in that statute relate only to wills of real estates. 2 Salk. 592. 3 Mod. 203. 2 Shower, 537. Hardres, 374. 17 Car. 2, Pasch. *Hitchins and Basset*, Jury found a second will, but contents wholly unknown, and therefore the court would not hold it to be a revocation of the former; for it might be a confirmation of it; this case shews clearly that a second independent will not appearing will revoke a former: judgment affirmed by the House of Lords. Prerog. 1749, *Jenkins* against *Williams*, Quackley made his will in February, 1742; his sister opposed it; one of the witnesses deposed that long after the testator made a new will, in which he (the witness) was executor, but it could not be found; Dr. Bettesworth thereupon said, "How can I pronounce for this as the last will, when it appears upon oath that there was a later will," and he ex officio rescinded the conclusion of the cause, and allowed the sister to plead the fact of this last will as a revocation, but upon the evidence thereon it appeared the witness was mistaken, for the paper he executed was a letter of attorney. In [505] this case the second will was made soon after the birth of William's son, and soon after his sister's will in favour of deceased. Will of 1742 gone on 17th December, 1745; what did the deceased do afterwards to revive it? A will destroyed by act of the testator cannot, as to lands, be revived without express republication, 1 Vern. 329. *Hall and Dunck*, slight evidence received to revive a will destroyed by implication, but it is otherwise when destroyed by the act of the testator: it is not always to be presumed that a will is

canceled by the testator. A month before the deceased left Newton, he said, as Hole deposes, "that his nephew was a pretty fellow, he will not settle accounts, Newman will be the best man." If the deceased did cancel his last will, it will not revive the first, but he is dead intestate; only two declarations, one to Newman in February, 1749, at the Temple, which relates to the education of William's children; that very conversation shews Newman knew the will he made for the deceased in 1742 was revoked by his asking deceased to take care of William's children. Taylor is the second witness to a declaration in March, 1751; at South Taunton, Taylor said to deceased, "I suppose you purchase this estate of Trist for your nephew;" deceased answered, "Probably they may go together." Neither of these declarations can operate to revive a will; obiter declarations will not revive; they have insisted on the safe custody of this paper; there is great presumption of fraud, and of suppressing the last will; this will wrapped up with papers to which the sister had right of access; Shury had access to the trunk, therefore the presumption of the deceased's destroying the last will is gone. We shew Shury did go to the [506] trunk from the key being in it, and from his knowing what money was in it, but it is not material whether his access was before or after the deceased's death; these facts take away the presumption that the deceased destroyed the will; Shury was last in the study at Newton; brought his things away with him, contrary to his custom; left the windows there open through hurry. Custody alone will not revive a destroyed will.

Dr. Bettsworth, the same side. Constant affection to sister; no declaration in favour of the nephew, except what Newman deposes to when the will of 1742 was made. Newman contradicted as to writings concerning the Helyar estate being delivered to him in 1743. Deceased's father, died in September, 1742. First will made sub spe remunerationis, which according to Swinburn will destroy it; there is an implied condition in the deceased's will that he should, in return, have William's estate, which became impossible by William's marriage, and the birth of children. In June, 1745, sister made her will in favour of the deceased; deceased did not congratulate his nephew on the birth of his son, which happened in October, 1745, but made the second will on the 19th December, 1745. New will implies entire mutatio voluntatis; sufficient proof there was a new executor named in second will. Prerog. *Manners*, formerly *Silvester* against *Roberts*. Prerog. last term, *Davies* against *Davies* and *Evans*. Roll's Abridgment, 614, *French* against *Montague*. A last will, that cannot be carried into execution, shall revoke a former will. Deceased did not destroy the last will; there is no proof that he did; no motive for him to destroy it; in order to revive, there must be ex-[507]-press proof of intention to revive. There are suspicions from whence fraud is to be collected, Newman knew there was another will, Shury and William both knew it, the family suspected some fraud. The key being in the hair trunk is a demonstration that Shury had been at it; Damarell and Newman say it was brought, by whom? For Shury, who had the key, was present; very improbable the deceased should put this will amongst the papers his sister was to inspect; Shury left the study at Newton in a hurry, and therefore left the windows open; Shury took the key of the chambers in the Temple.

Dr. Pinfold, in reply. Parol evidence admissible in cases of fraud. They should shew a fraud, but it is far otherwise: nobody saw the last will after it was executed; presumption that testator destroyed a will himself may be ousted by contrary proof, but not by suspicions. Mrs. Helyar could have no access to this trunk without deceased's knowledge, for he kept the key. Parol proof is not sufficient; the statute relates to subsisting wills; the case of *Hitchins* and *Basset* was before the statute. Latter wills revoke former when they both subsist. No determinations in the cases of *Manners* and *Roberts*, *Shipway* and *Shipway*, and *Jenkins* and *Williams*. Deleg. 1714, *Whitehead* and *Jennings*, the judgment was founded on deceased's sending for a person to make a new will on his death-bed. Prerog. 1718, *Burt* and *Burt*, in 1687 John Burt made his will, and his wife executrix, in 1713 he made another, in which one Read and she were executors, which he destroyed by cancellation, and she burnt it after deceased's death. She prayed probate of first will, the bro-[508]-ther pleaded the last will as a revocation; the first will was found among old papers of no value, the first will was not propounded. They have in this case presumed the contents of the second will. Nothing certain from Darley's evidence; the law has not prescribed any certain act to revive; no circumstances to shew the deceased intended to die intestate.

Dr. Smalbroke, same side. The will of 1745 could not revoke the former, because it was not inconsistent with it. Supposing there was another executor, it will not follow that the wills were inconsistent. Statute of frauds does not relate to revivals. Declarations are sufficient to revive.

Dr. Clarke, same side. The deceased cancelled the last will to revive the first, as appears from preserving the first. Hole and Dridge on their second examination, and not before, say the key was in the trunk.

JUDGMENT—SIR GEORGE LEE. I took time to consider this case, and on the 9th January, 1754, gave sentence against the will propounded.

I was of opinion that the statute of frauds did not relate to parol evidence of the facts of a subsequent will with different executor, but only prohibited the revoking of a written will for personal estate by parol. That the question here was only whether parol evidence shall not be allowed to prove a matter of fact. That there was no more danger of perjury in receiving parol evidence in this than in all other cases. That the cases cited [509] clearly proved that parol evidence ought to be received.

In the case of *Hitchins and Basset* (2 Salk. 592), though Sir Henry Killigrew made both wills long before the statute of frauds which was enacted in 1677, yet the cause was tried long after, viz. in 1688, as appears from Hardres, Salkeld, and other reports. Now if the statute had prohibited receiving parol evidence to prove a latter will which did not then appear, it is not to be imagined but that the counsel for the first will would have insisted on it as an absolute bar, but no hint of such objection was given in any of the reports.

Though there were no final determinations as to this point in the cases of *Manners and Rogers* in 1747, of *Shipway and Shipway* in 1750, or of *Jenkins and Williams* in the same year, yet the admission of the allegations pleading subsequent wills as revocations of former, though the latter did not appear, shewed that Dr. Bettesworth was of opinion that parol evidence was to be received, and also, that the latter non-appearing wills, if they were independent ones, would revoke the former, otherwise it had been to no purpose to admit the pleas.

That the cases of *Stacey and Dickins* (1 Phill. 415) in 1724, of *Vanier and Hue* in 1731, of *Burt and Burt* in the Prerog. in 1718, and particularly the case of *Whitehead and Jennings* in the Deleg. in 1714, all fully proved parol evidence to prove subsequent non-appearing wills was to be received; and, lastly, the case of *Sellers and Garnet* (1 Phill. 430) in the Prerog. in October, 1746, was full to this point, for there an executed will was held to be revoked by a will wrote while the testator was alive, but he died before it was brought to him; and the contents were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parol evidence could not be received; that it was to revoke a written will by parol only, contrary to the statute; but both Dr. Bettesworth in the Prerogative and the Delegates who affirmed his sentence in 1751 were of opinion that it was a will in writing; that the parol proof of the instructions ought to be received, and that it was not a case within the statute of frauds.

Secondly, I was of opinion that the evidence in this case to prove the factum of a latter will, and that a different executor was named therein, was sufficient as to the fact that the deceased did make a will in 1745. It was fully proved by two subscribing witnesses, who swore that the third witness was since dead; and as to the contents, though they were proved only by Darley, who swore that to the best of his remembrance and belief Mrs. Johanna Helyar was both executrix and residuary legatee in the will of 1745; yet he was strongly supported by circumstances; viz. from the deceased's displeasure to his nephew, from the satisfaction he expressed at his sister's making her will in his favour, from his declaration that he would make his, and his making one soon after, and from his having at that time lost all hopes of succeeding to his nephew's estate. But without these circumstances, the evidence of Darley alone would be sufficient; for so it was held in the case of *Whitehead and Jennings* (1 Phill. p. 412, 426, 435, 439), both by Sir Charles Hedges and the Delegates; for in that case Robert Taylor, the writer of the last will, deposed that Mr. Keck the testator executed that [511] will in the presence of himself and James Smith, and Edward Fewtrell; and as to the contents, he deposed that to the best of his remembrance and belief, the deceased had, by his said will, made Whitehead, his said wife's youngest son his executor; and to an interrogatory said he could now

remember but one legacy in said will, viz. 100l. to Mr. John Tolson. Smith swore he did not know whether the paper he saw the deceased execute was a will or any other writing, and Fewtrell swore he believed it was a will he saw the deceased execute, but knew not the contents, and there was no other witness to that point. So that the evidence upon this head in the present case is stronger than the evidence was in that case.

Thirdly, I was of opinion that the executing of a second will of a different purport was by law a revocation of the first, though the second does not now appear.

All the authorities that had been cited from the text law, and from the commentators, shewed it; all the books said the first will is revoked by the completion of the second. The revocation does not depend on the keeping and preserving of the last will; the cases cited shew the same. In the case of *Burt and Burt* (1 Phill. p. 412, 429) the deceased was declared to have died intestate, because he had made a subsequent will which had revoked the first, though it was afterwards cancelled, and did not appear.

So in the case of *Whitehead and Jennings*, though the deceased on his death-bed declared his disapprobation of his first will, yet these declarations could not have revoked it since the Statute of Frauds; the Courts must have pronounced for the first will, if they had not decreed it to have [512] been revoked by making the second will, which it was found the testator did afterwards himself burn.

Fourthly, I was of opinion that the deceased must have been presumed to have destroyed the latter will himself, because it had never been, so far as appeared, out of his custody (a)¹ from the time it was executed. There was no proof that Shury ever saw it—nothing to affect him but mere surmises grounded on slight circumstances; for as to the key being in the hair trunk, the evidence was as strong on one side as the other. No evidence to affect Shury's character; I could not then presume him guilty of suppressing a will; and if I could suppose him capable of doing the act, I must go further, and suppose he was bribed to do it by Mr. Helyar, who alone could receive advantage thereon; but there was not the least colour from the evidence to suppose him capable of doing such an action.

Fifthly, and which was the main question, I was of opinion that the deceased had not done any act sufficient to revive the will of 1742; his having destroyed the last, and preserved the first will, were not acts sufficient for that purpose. There must be to revive a republication or some express declaration of the testator that he would have the first operate as his will; the authority from Vinnius, Inst. lib. 2, tit. 17, s. 6, n. 3, was full to that purpose, and his opinion was founded on the Text Law, ff. de bon. poss. sec. tab. lib. 37, tit. 11, l. 11, n. 2. In the cases of *Vanier and Hue*, and of *Stacey and Dickens*, the testator's intentions that the first will should operate were fully [513] proved. And in the case of *Burt and Burt*, where no such intention was proved, the deceased was pronounced to die intestate.

In the case of *Lewis and Bulkeley*, (a)² Deleg., 1732, Mary Williams made her will while sole, afterwards married Dennis Hampton, whom she survived, and at his death left the said will uncanceled, and very near her death declared she considered it as her will; but notwithstanding, a very full commission of Delegates (there being five

(a)¹ *Rickards v. Mumford*, 2 Phill. 23. *Freeman v. Gibbons*, Prerog. 1793, 2 Hagg. 328, 346. *Colvin v. Fraser*, 2 Hagg. 266.

(a)² Vide sup. p. 190. The following observations are to be found in this case in Burn's Ecclesiastical Law: "And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis some years ago before the Delegates: Mrs. Lewis, a widow, made a will, soon after which she married again: in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained, and being found after her death, the question was whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and shewed that, among the Romans, if a man had made his will, and was afterwards taken captive, such will revived and became again in force by the testator's repossessing his liberty. But it was observed, on the other hand, that marriage is a voluntary act, captivity the effect of compulsion." 4 Burn, E. L. 51.

Judges and eight Civilians) pronounced her to have died intestate, because, as the will was destroyed by her marriage, a republication was necessary to revive it.

In the case of *Whitehead and Jennings*, the testator did himself destroy the last will, and he kept the first amongst papers of the greatest consequence; if he had died without declaring any thing about the first (and he did not declare his dislike of it till within five or six hours of his death), and the Court had, from the circumstances [514] of the safe custody of the first, and his own destroying the last, pronounced for the first, it is clear from the evidence that a will would have been established which was not agreeable to the testator's mind.

The same probably would have been the case here, for the dislike the deceased shewed to his nephew made it very improbable he should intend to revive the will of 1742.

When a testator has done a deliberate act to destroy a will, it would be very dangerous to construe it to be revived on surmises and conjectures only.

Upon the whole, therefore, I was of opinion to pronounce against the validity of the will of 12th February, 1742, and gave sentence accordingly, but without costs.

N.B.—Mr. William Helyar has appealed to the Delegates, and prayed a commission (a) to Lords Spiritual and Temporal; but on hearing counsel the Lord Chancellor granted it only to Judges and Civilians, (b) because the questions in the cause turned upon points of law. The cause was afterwards argued, (c) and Mr. Helyar renounced his ap[515]-peal, and consented that the cause should be remitted back to the Prerogative Court; and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 14th January, 1757.

DR. BOUCHIER *against* HORNGOLD AND OTHERS. Prerogative Court, Hilary Term, January 23d, 1754.—An interest established in a pedigree cause. Executors of the asserted next of kin condemned in costs.

Dr. Simpson for Dr. Bouchier. Ann Millington died 11th March, 1743-4; divers caveats entered and warned by Bouchier; a commission of inspection and appraisal granted, and all deceased's writings brought into court. On 2d Sess. Michaelmas, 1744, Wotton appeared for Robert Evans, Thomas Crowter and Catharine Brookes, and alleged them to be cousins-german once removed. Cause called on to hearing in September, 1745; Holman appeared for John Grasset, executor and residuary legatee

(a) The commission was addressed to Mr. Justice Wright, Mr. Justice Clive, Mr. Baron Legge, Sir Robert Salusbury, Drs. Walker, Jenner, Collier, and Harris.

(b) See the reasons assigned for this limitation by Lord Chancellor Hardwicke, 3 Atkyns, 798.

(c) This cause was compromised in the Court of Delegates, and was not, I apprehend, argued before that Court on the part of Mr. William Helyar; it was set down for argument on 13th January, 1757, and the entry in the Delegates' Book is as follows:—

“*Helyar against Helyar and Others*, for information and sentence at the petition of the proctors on all sides:

“Farren exhibited a special proxy under the hand and seal of William Helyar, Esq. the party appellant in this cause, and by virtue thereof renounced the appeal heretofore interposed in this cause, on the part and behalf of the said William Helyar, and consented that the cause should be remitted to the judge from whom the same is appealed. The judges having heard an advocate on behalf of Johanna Helyar, spinster, the party appellate in this cause did, by their interlocutory decree, having the force and effect of a definitive sentence in writing, at the petition of Major, decree this cause, with all its incidents and emergents and things whatsoever, to be remitted to the judge from whom the same is appealed, in the presence of Stevens and Bellas, not opposing the same.”

The case of *Helyar* was pressed upon the Court of K. B. by Mr. Dunning as a high authority in support of an intestacy, when he argued *Glazier's case*, and he also seems to have been under the impression that the case had been decided after argument by the Court of Delegates. See 4 Burr. p. 2513. Lord Mansfield and Mr. Justice Yates both advert to *Helyar's case* in their judgment in *Goodright v. Glazier*.

of Margaret Grasset, widow, and alleged her to be cou-[516]-sin-german to deceased. By-day, Hilary Term, 1746-7, Farrer appeared for Alice Marchant, and alleged her to be cousin-german to deceased, and denied Grasset's interest, confessed Dr. Bouchier to be cousin-german once removed, but denied him to be next of kin. 26th May, 1747, Farrer exhibited for Mr. Furst and Mr. Jobber, executors of Alice Marchant. Allegations given in by all parties; from 1st Sess. Easter Term, 1750, Grasset, Evans, Crowter and Brookes have done nothing; the contest is now only between Dr. Bouchier and the executors of Alice Marchant.

Dr. Bouchier's pedigree.

Thomas Millington of Newberry married Mary Bettesworth, widow, daughter of Henry Lucas of Frowle in Hampshire, had issue by her Sir Thomas Millington, who married Ann Hannah King, widow, and Mary Millington, who married Richard Astell, and several other children. Sir Thomas Millington had issue by his said wife Ann Hannah King, Ann, Mary, and Thomas. Thomas and Mary died unmarried, and so did Ann, the intestate in this cause, who survived them. Mary Astell had by her husband Richard Astell three daughters, Mary, Ann, and Frances. Mary married Thomas Woodward; Ann married Gabriel Towerson, and Frances married Dr. Thomas Bouchier, Professor of Law at Oxford, who had issue by her Dr. William Bouchier, the party in this cause; therefore the deceased and Dr. William Bouchier were first cousins once removed. All sides agree that Sir Thomas was son of Thomas Millington of Newberry, and that the deceased was Sir Thomas's surviving daughter, except Evans, who has alleged that Sir Thomas was the son of John Millington of Haverden in Flintshire. We have exhibited [517] the will of Henry Lucas, dated the 22d July, 1636, in which he gives his grandson Richard Bettesworth, son of his daughter Mary Millington 100l.; the said Mary by her will dated the 1st May, 1655, gives her son Richard Bettesworth a legacy, and another to her brother John Lucas, and to her son Astell, and to Mary Astell her grand-daughter, and makes her son Thomas Millington of Oxford her executor. 21st November, 1660, he proved said will. In a bible which was in deceased's custody there is an entry in Sir Thomas's handwriting, in which he says that bible was given him by his uncle John Lucas. John Lucas by his will dated the 20th August, 1681, gives his niece Mary Woodward a legacy, and makes Sir Thomas Millington and Dr. Thomas Bouchier executors.

Newberry Register of Baptism.

Mary Millington, afterwards Woodward, January, 1623.

Thomas, afterwards Sir Thomas Millington, in 1628.

John Millington, 20th June, 1625.

William Millington, October, 1626.

Francis Millington, in 1630.

Will of old Thomas Millington of Newberry, dated the 9th July, 1631, gives his children William, Mary and Francis, 900l.; to his son John 200l., and to his son Thomas 350l., and makes his wife executrix; she proved the will 11th November, 1631; he had a real estate which he entailed on his eldest son John, and so on to his other children; this estate lay at Marlborough. Thomas Millington was entered at Trinity College in Cambridge in 1645. 1st December, 1679, Sir Thomas married Mrs. King. In octavo bible [518] entries by Sir Thomas of the births of his children. Dr. William Bouchier is descended from said Thomas Millington of Newberry. William Astell, father of Richard Astell, who married Mary Millington, sister of Sir Thomas, gives legacies to his grandchildren by his said son, and makes their grandmother Millington executrix. Richard Astell by his will dated 28th October, 1658, gives a moiety of his personal estate to his three daughters, and makes his mother-in-law Mary Millington and his brother-in-law Thomas Millington executors. Will proved by Thomas Millington. Inventory dated 17th January, 1658, delivered into the Orphan's Court by Thomas Millington, Fellow of All Souls; entry on the back thereof by Sir Thomas of the time his sister Astell died. 20th January, 1658, guardianship granted by Orphan's Court of Richard Astell's children to Mary Millington their grandmother and Thomas Millington, Fellow of All Souls, their uncle. Pocket-book of Sir Thomas's writing, in which he often mentions his brother Richard Astell.

In July, 1669, Ann Astell married to Gabriel Towerson, and upon that occasion

he gave a bond for securing her fortune, on which Sir Thomas indorsed "my nephew Towerson's bond," and on said marriage a release was given by them to Sir Thomas, on which he indorsed "my nephew and niece Towerson's release."

Mary Astell married also in 1669 to Thomas Woodward, and a like release and entry was made. Frances Astell being at age in April, 1675, received her fortune, and gave Sir Thomas a release, on which he made the like entry. Many letters from Sir Thomas to Mrs. Astell, and proposals to Dr. Bouchier to marry his said niece. Certificate of [519] marriage of Dr. Thomas Bouchier to Mrs. Frances Astell in 1681. Settlement on said marriage in 1681, and surrender of lands in said marriage settlement mentioned that said Frances is niece to Sir Thomas Millington. Letter from Sir Thomas to her in 1683; calls himself her uncle. Several letters between Sir Thomas and Dr. Bouchier. Letters from Dr. Thomas Bouchier to Sir Thomas, in which he subscribes himself his nephew. Letters from Gabriel Towerson to Dr. Bouchier calls him his dear brother. Entry in a book by Dr. Thomas Bouchier of his marriage on the 11th of August, 1681, to Frances Astell, and of his children by her. Thomas Millington admitted Fellow of All Souls in 1648, and afterwards his titles are added at the end of his name. Deceased declared that the Bouchiers, the Woodwards, and the Towersons the only relations she had on her father's side.

Evans, Crowter, and Brookes allege that John Millington of Haverden married Mary Lucas of Frowle, and that Sir Thomas was their son, but have not proved it.

John Grasset claims from Thomas Millington of Newberry by his son John, who went to Barbadoes and married there to one Elliott, by whom he had Margaret Grasset, mother of John Grasset, the party, as executor to his mother Margaret, who survived the intestate in this cause; pleaded that John came to England and lodged at one Chiven's by Clare Market, and that letters of John's, and papers between him and Sir Thomas were found at Chiven's, but it is clear that Sir Thomas's brother John died in Ireland in 1660.

Administration of his effects was granted to his son in 1661, and said son afterwards, as heir at [520] law, sold the estate which old Thomas Millington had at Marlborough, and in the deed of sale he is described as the son of John, the son and heir of Thomas Millington of Newberry.

Pedigree of Alice Marchant.

She claims to be the daughter of Francis Millington, brother of Sir Thomas, and youngest son of old Thomas Millington of Newberry; all the pleas for this interest have been given in by Furst and Jobber the executors, and were given in after publication, and Dr. Bouchier's and Grasset's pleas. No proof of owning her by Sir Thomas as his relation; not one writing in support of the pretended relationship.

Mary Millington's will in 1665 does not mention a son Francis; they have pleaded that Francis Millington lived at Bloxholm, where he kept a school, and a public house, and died in 1702; Alice Marchant died the 4th of May, 1747. Thomas Fox and William Millington, witnesses for the executors, attempt to establish an owning of Francis by Sir Thomas Millington; Fox was afterwards condemned and hanged for forgery. Fox says in 1701 he was servant to William Millington, son of Sir Thomas, and that Sir Thomas owned Francis and gave him 100l., but had just before horse-whipt him; William Millington deposes to facts when he was three years old. Fox and Millington swear they were surgeons in the "Greyhound," man-of-war, but from the Navy books that appears to be false. We shall shew those two witnesses have knowingly sworn false in various instances. We have a certificate of the birth of Mary Par, wife of Fox, by which it will appear she was but four years old when her husband [521] swears she was a servant with him in Sir Thomas's family. William Millington, the witness, says he was natural son to Sir Thomas Millington, and that he had an annuity of 100l. a year from Sir Thomas's estate; swears that deceased went to see Alice Marchant at Bloxholm and Oxford, in 1711 and 1712, and called her cousin. In April, 1747, William Millington filed a bill in Chancery against Dr. Bouchier and others, to establish a deed, pretended to have been made in 1703, by which it was pretended that Sir Thomas granted an annuity of 100l. a year out of his estate to said William. Suggests that the deed was lost by a fire at his house; it will appear he himself set the house on fire to get the insurance money; part of Sir Thomas's estate sold by his daughter. No mention of any charge upon it. In 1747 Fox and the executors went to Bloxholm, and there they raised the report of

a relationship between Francis and Sir Thomas. George Taylor swears he was an apprentice to George Frogly, joiner, at Oxford, with Edward, son of Francis Millington; Edward was bound apprentice to Frogly for seven years on 24th March, 1682. George Taylor was not bound apprentice to Frogly till 2nd April, 1691, long after Edwards' apprenticeship ended, and Sir Thomas left All Souls in 1679, in which year he married, before Edward was apprentice or lived at Oxford, and yet they say Edward visited Sir Thomas at All Souls, and was owned by him as his nephew. They plead that Francis died in 1702, and was in that year horsewhipt by Sir Thomas in London; proved that Francis had the palsy and kept his bed at Bloxholm a year before that time; they swear that Sir Thomas and his daughters sent presents to Francis at Bloxholm; the upper servants [522] in their family swear they never heard of any, or any money given by them to any one at Bloxholm; they have pleaded that Elizabeth Ford, wife of Dr. Ford, was sister to Sir Thomas, and she owned Marchant for her niece. We have proved Mrs. Ford was not a Millington but a Toms; they have pleaded owning of Marchant's family by some of the Bouchier family; the contrary is proved; they have failed in all instances of owning from Sir Thomas and his known relations, and their witnesses are clearly perjured. We pray our interest may be pronounced for, and the interest of all the rest may be pronounced against with ample costs. All the witnesses produced to support Marchant's interest were produced by Furst and Jobber, who are made executors in her will. They have put their case on these points: 1st. Owning of Francis by Sir Thomas as his brother. 2nd. Owning by Sir Thomas's children of Francis's children, in both of which they have totally failed.

Dr. Finfold for the executors of Alice Marchant. We claim under Alice Marchant, first cousin to deceased. We admit Dr. Bouchier to be first cousin once removed, but not next of kin. We derive from Thomas Millington of Newberry, who had six children, among them Francis, who married Alice Clever, and had issue Alice Marchant; in old Thomas's will his son Francis is mentioned, and in the register of Newberry, Francis's baptism is entered in 1630. Francis died at Bloxholm, in 1702, aged 72; that correspondence of age shews the identity of the person. Francis always declared he was born at Newberry. The grand question is whether Francis of Blox-[523]-holm was brother to Sir Thomas Millington. We do not rely on the evidence of Thomas Fox and William Millington, and shall not read them, but we shall shew Francis always called himself brother to Sir Thomas, and was so esteemed by his neighbours; declared he had money from Sir Thomas, and he received presents from him, and lived in a more handsome manner than his own income would support; his neighbours believed that he was assisted, and therefore trusted him; Sir Thomas visited him at Bloxholm, as it was reported there, and Francis's wife borrowed things to entertain him. Francis had four daughters and three sons; his daughter, Elizabeth, married Garfield, a joiner, but before that lived with Lady Millington as her niece, who gave her a diamond ring and a silver cup. Ann, another daughter, had the evil, and came with her mother to town to be touched by King James; they were at Sir Thomas's house, and brought down clothes and things they said he gave them. Edward, son of Francis, was owned by the Bouchiers, and was relieved by Mrs. Cousens, sister of Dr. Thomas Bouchier, as his relation, and at his death the Cousens family attended his funeral. Mary, another daughter of Francis, married one Parker, and spoke of Sir Thomas as her uncle. We say Sir Thomas's sister Elizabeth married Dr. Ford, and Mrs. Ford owned Alice Marchant to be her niece, and that the Fords and Bouchiers owned each other as relations. Sir Thomas's son owned Alice Marchant as his cousin; they give no account of what became of Francis.

N.B.—Alice Marchant married a smith, and died in an almshouse in St. Luke's parish, Middle-[524]-sex, and her sister Mary Parker was a bed-maker at Oxford.

JUDGMENT—SIR GEORGE LEE. The evidence in this case was very long. Dr. Bouchier made a very full proof of his being cousin-german once removed to deceased, from all sorts of written evidence, insomuch that his relationship was confessed by the adverse party. On the other hand, the executors of Marchant did not produce one letter, or any other written evidence to prove Francis was Sir Thomas's brother, nor one witness who ever saw them together, or ever heard his children or him own or ever speak of Francis or any of his family, but the whole evidence was no more than witnesses swore they had heard Francis say he was brother to Sir Thomas, and had presents from him, and his children say they had been at Sir Thomas's house,

who received them as their uncle. It appeared clearly that many of these witnesses swore false, and three of the executor's witnesses, viz. Fox, William Millington and Drake, were so infamous and so grossly perjured that their own counsel would not read their depositions, but if they had been without exception, I should have thought that an owning on one side only without any other evidence would not be sufficient to establish an interest to destroy another interest that was clearly and indisputably proved. I therefore pronounced for the interest of Dr. Bouchier, and against the interests of all the other parties, none of whom, excepting the executors of Marchant, appeared at the hearing, either by advocates or proctors; and though it has not been usual to condemn executors in costs, yet as there appeared great reason to suspect they had knowingly carried on a bad cause by very bad means, and had themselves given in the pleas and examined all the witnesses in support of Marchant's claim, I condemned all the parties in costs, to be taxed in proportion to their respective proceedings in the cause, and swore Dr. Bouchier administrator in court, and ordered letters of administration to pass under seal immediately, though Mr. Crespigny, proctor for the executors, prayed it might not pass under seal till after fifteen days, and protested of appealing from the interlocutory decree upon the merits.

MILLINGTON against SORSBY, FORMERLY CALLING HERSELF TURBUTT. Prerogative Court, Hilary Term, January 23rd, 1754.—A release from a party in distribution to the administratrix of an intestate, held to be good till it should be set aside in a court of equity; and a bar also to a demand for an inventory and account; but not to be a bar to calling in the administration for the purpose of putting the administratrix on proof of her marriage.

Dr. Hay for Sorsby. Benjamin Turbutt died 1st November, 1751; left Elizabeth his wife, now Sorsby, and Margaret Millington his daughter. 15th November, 1751, widow took administration, and agreed with Millington and her husband to make immediate distribution; made an inventory and account, and on 5th April, 1753, Margaret and her husband gave her a release in full; in September, 1751, the daughter cited her to shew cause why the administration should not be revoked, and granted to the daughter, upon suggestion that Elizabeth was not deceased's wife, and to bring in an inventory. We offer the release in bar to any suit.

Dr. Pinfold for Millington. William Millington, Margaret's husband, at first refused to sign [526] the release, but at last did sign it, under threats of being arrested. The share Millington has received is 210l. 16s. 6½d., but much more was due to her.

Affidavit for Sorsby.

William Watts proves distribution, and that the release was drawn by consent of parties and was voluntarily executed in presence of Millington's attorney.

Affidavit for Millington.

William Millington swears he did not know of the release till it was tendered to him to sign. Swears he was indebted to Sorsby's husband who threatened to arrest him, which induced him to sign the release.

James Thompson to the same purpose. Says he persuaded Millington to sign it for fear of being ruined by an arrest.

Dr. Hay. Prerog. Sept., 1746, *Williams and Roberts*, a general release held to be a bar to a suit, and the Court would not try the validity of it.

JUDGMENT—SIR GEORGE LEE. I was of opinion I could not enquire how the release was obtained. I must take it to be a good one till it was set aside by a court of equity, and consequently that it was a bar to calling for an inventory and account, but with respect to the validity of the administration it was not a bar; the release was signed upon the supposition that Sorsby was lawful administratrix, but if she was not the widow she had no title to the administration, and therefore, I was of opinion she must bring in the administration and plead her marriage, in order to [527] shew cause why the administration should not be revoked; and I decreed accordingly.

The proctor for Sorsby prayed that Margaret Millington might be ordered to bring the money she had received for her share of the distribution into Court; but I was of opinion it was properly her own money, and that she ought not to bring it into Court unless her interest as daughter was denied.

TAYLOR against TAYLOR. Prerogative Court, Hilary Term, January 23rd, 1754.—Administration to the estate of an intestate contested by two persons, who each claimed to be his widow. Administration pendente lite granted to the nominee of the one who was living with him at the time of his death, the nominee to lodge the money as received in the bank.

[See further, p. 571, post.]

Thomas Taylor died intestate. Ann Addis claims to have been married to him on 30th June, 1738. Mary Grant claims to have been married to him on 6th September, 1747. They denied each other's interest, and they have respectively pleaded their marriages which were both at the Fleet. The deceased kept a public-house. Both sides agreed the estate was perishable, and that it was necessary to have an administrator pendente lite. Ann Addis named Richard Lawler; Mary Grant named Richard Haverhill; both offered to give security in 2000l., and the two persons named for administrators, and their respective securities, were reported sufficient by the officer of the court, and there was no objection to any of them, except that the securities proposed on the part of Mary Grant were said to be creditors of deceased's estate, but there was no evidence of that fact. Ann Addis offered that the effects, as soon as they were collected, should be lodged in the bank in the names of the administrator and of the register of the court. Mary Grant thereupon made the same offer. Grant [528] lived with deceased at his death, and has given in an inventory of his estate. Ann Addis could only give in a declaration, she having none of the effects in her hands, and at the time Addis pleads that she married deceased, it appeared from an affidavit of a person unconcerned in the cause that he lived with another woman as his wife.

Affidavits for Grant.

Mary Grant. Deponent knew the deceased and knows Mary Grant alias Taylor; has been informed, and believes, deceased in 1736 married Isabella Noble, who died in August, 1747; sets forth the places they lived at; they had two children; one born in 1739, the other in 1740: exhibits and proves certificates of their baptisms as the lawful children of deceased; says Richard Haverhill is an housekeeper; gives him a good character.

Henry Crockford. Proves Mary Grant publicly lived with the deceased as his wife, at his death.

Affidavit to prove the estate is perishable.

JUDGMENT—SIR GEORGE LEE. No affidavits were exhibited on the part of Addis. Upon these affidavits, and particularly in consideration that Mary Grant lived with deceased as his wife at his death, and by that means became properly possessed of the effects, I decreed administration pendente lite to Richard Haverhill, her nominee, undergoing a monition to lodge the money in the bank pursuant to the offer in acts of court; and he being in court, I swore him administrator, and admonished him accordingly.

[529] SHAND against GARDINER. Prerogative Court, Hilary Term, January 23rd, 1754.—An allegation admitted in an interest suit.

Dr. Hay for Francis Shand. John Shand died intestate in 1747, left Alice Shand, his widow, who took administration; she is since dead, and left effects unadministered. She made her will, and appointed Joseph Gardiner her executor and residuary legatee. He entered a caveat. Francis Shand warned it, and prayed administration de bonis non as cousin-german and next of kin to John Shand. Gardiner denied his interest, and we now offer an allegation pleading her relationship. The allegation deduced a pedigree from the common ancestor, but was not supported by any exhibits, or times or places of the several marriages, but only pleaded cohabitation, owning, and general reputation of the respective persons as husbands and wives, and of their children as legitimate.

JUDGMENT—SIR GEORGE LEE. I admitted the allegation, especially as it was a pedigree of persons in low rank, who could not be supposed to have any writings, &c. to exhibit.

COX against THOMPSON. Prerogative Court, Hilary Term, January 23rd, 1754.—The revocation of a will established.

[See p. 282, ante.]

Dr. Hay for Richard Cox. Elizabeth Street, widow, deceased, made her will on

27th January, 1752, and appointed Richard Cox executor, and gave him most of her effects. She died 2d May, 1752. Caveat entered by Smith alias Thompson, deceased's father. Cox warned it. Bellas appeared for Thompson. Cox denied him to be fa-[530]-ther to deceased, but propounded the will and allowed him to be a contradictor. Bellas propounded Thompson's son's interest as father. 1 Sess. Hil. 1753, Bellas gave an allegation pleading a revocation of all former wills. 3 Sess. Hil. 1753, Cox admitted a pauper. 6th March, 1753, Thompson's interest pronounced for, but without costs, because Thompson had gone by different names, and there was no evidence to affect Cox with the knowledge of his being deceased's father. The questions now are, first, whether the will propounded is good; secondly, whether it is revoked. Instructions given by deceased. Will duly executed in presence of three witnesses; the will wrong dated; deceased thereupon ordered a new one to be made, which she duly executed. She lost that will, and then she made and executed the present will. The paper pleaded as a revocation is dated 29th April, 1752; it was obtained by her father by undue application to her on her death-bed.

Dr. Bettesworth contra, for Thompson. Deceased died a widow without children. Admit factum of the will. Cox, who is a married man and has four children, lived in adultery with deceased, and kept her constantly drunk. In her illness she was very desirous to see her father and mother; they were privately sent for, and came to town to her. She desired her father to go to Mr. Bygrave and get a revocation made. Four witnesses prove it. Pray the Court will pronounce for the revocation, and for an intestacy.

JUDGMENT—SIR GEORGE LEE. Witnesses for Cox fully proved the will, and on [531] the other hand the witnesses for Thompson as fully proved the revocation. I therefore pronounced the deceased to be dead intestate; in this part of the case it fully appeared that Cox knew Thompson was the deceased's father when he denied his interest, and therefore costs were prayed against him to the time he was admitted a pauper; but, though he had in all respects behaved very ill, yet as he was a pauper, and had nothing to pay, I did not condemn him in costs, because Thompson could have no real benefit therefrom, but could only gratify his resentment by laying Cox in gaol, perhaps for his life.

BIRD, ALIAS BELL *against* BIRD. Arches Court, Hilary Term, February 15th, 1754.—An allegation in a suit touching the validity of a marriage, pleading irrelevant matter, rejected.

Dr. Hay for Mrs. Elizabeth Bird. Thomas Bird brought a suit of nullity of marriage against his wife, Elizabeth Bird, by reason of her former marriage, in the Commissary of St. Paul's Court. She appealed from admitting some articles of the libel. The appeal was pronounced for, and now we plead that, in April, 1722, she married Robert Bell, who, in four or five months after deserted her, and she has never seen him since; that Bird solicited her and her parents to marry him, and assured her, upon enquiry, that Bell was dead; that with consent of her parents she married Bird in 1735 by licence, and he swore her to be a widow, and lived with him as his wife till 1750, [532] when he turned her out of doors, and she has had by him eight children.

JUDGMENT—SIR GEORGE LEE. I was of opinion there was nothing in this allegation relevant, and therefore rejected it, the single question being whether Bell was living at the time she married Bird, for if he was, her marriage to Bird was clearly void, and there was not a word in this allegation to shew Bell was dead at that time; but as the case appeared to be very hard upon the woman, I would not conclude the cause, but gave her to the first day of next term to see whether she could discover that Bell was dead before she married Bird, and might (if she could make such discovery) have an opportunity to plead it.

HILLYER *against* MILLIGAN. Arches Court, Hilary Term, February 15th, 1754.—The confession of the proctor of a party contesting suit sufficient proof of the exhibits of the adverse party.

[See p. 398, ante.]

Robert Milligan farmer of the tithes of Hanslop, in Bucks, commenced a suit against Hillyer for tithes in the Consistory of Lincoln. Hillyer appeared under protestation, and alleged that he was subject only to the jurisdiction of the Commis-

sary of Bucks. His protestation being overruled, Hillyer appealed, and in the Arches Milligan pleaded the jurisdiction of the Consistory of Lincoln, I ordered the allegation to be reformed, by pleading instances of the Consistory's taking cognizance of causes arising within the Commissaryship. Milligan gave in additional articles, pleading such instances, which I admitted. Hillyer's proctor, who had a special proxy, offered [533] to confess the exhibits, containing said instances, to be true copies of their originals; but the proctor for Milligan prayed Hillyer's personal answers and a commission to examine witnesses.

Per Curiam. But I was of opinion the proctor's confession was a full proof of the exhibits, and his answers were much more proper than the answers of a farmer to Latin exhibits, which he could not read or know anything of, and as there were no facts in the allegation, or additional articles to examine witnesses upon, I also refused to grant a commission.

BARTON *against* ASHTON. Arches Court, Hilary Term, February 15th, 1754.—Articles against a parish clerk for immoral conduct and neglect of duty admitted.

[See pp. 350, 460, ante.]

Appeal from Lincoln.

Dr. Paul for Barton. Appeal from a grievance. Ashton, vicar of Lowth, articulated in Consistory of Lincoln, against Luke Barton, parish clerk, and cited him to bring in his license, and shew cause why it should not be revoked. The license had been granted by the prebendary of Lowth; they ought to have applied to him to revoke it; but they cited him into the Consistory of Lincoln, to shew cause why the license should not be revoked, and articulated against him there for offences; 15th June, 1753, appearance for Barton; prayed he might be continued in quiet possession of his office pending the suit; Barton appealed from not restoring him pending [534] the suit, and from admitting the articles; no security for payment of costs was given, though it is a cause of office.

Dr. Simpson *contra*, for Ashton. 28th May, 1753, citation against Barton to bring in his license, and to shew cause why it should not be revoked and to answer to articles; 15th June, appearance for Barton; he prayed he might be continued in quiet possession of his office. Ashton's proctor alleged that a license was duly granted to one Gray. Judge assigned Barton to exhibit his license, and Ashton to exhibit articles; 28th June, 1753, Barton exhibited license, by which it appears in the recital that he was nominated parish clerk by A. B. nuper vicarius of Lowth; 16th July, articles given in; Barton then renewed his prayer to be restored. Judge assigned to hear his pleasure on admission of the articles next Court; Barton protested of appealing from the said assignation. 31st July, judge admitted the articles and assigned to hear his pleasure on Barton's petition next Court; presertim of appeal from delaying justice, not restoring Barton, and from admitting the articles. The articles plead immoralities and neglect of duty.

The acts of Court and the articles were read which were agreeable to the opening.

Dr. Paul's argument for Barton. We had a right to be restored immediately; spoliatus ante omnia restituendus, and therefore are injured. Some of the articles are improperly laid, and others are not material. Townshend, a parish clerk, was articulated against for sodomitical practices [535], and prohibition was granted; no security given, which is a grievance; the judge, though four times requested, would not restore Barton.

Dr. Simpson for Ashton. Want of security no part of the appeal; therefore upon this hearing, which is only upon a grievance, is not to be considered. Gibson's Codex, 240. Reform. Leg. 91, Canon 1603. Parish clerk of Islington in 1710, license revoked for fornication, and penance enjoined.

JUDGMENT—SIR GEORGE LEE. I was of opinion I could not take notice of the want of security, it not being a part of the appeal, or prayed below, and security might be prayed at any time pending the suit. 2dly, that the articles which charged immoralities and neglect of duty, ought to be received, and though there might be some slight objection to the manner of pleading, that was not sufficient to take away the jurisdiction of an Inferior Court; and, 3dly, I was of opinion no grievance was done in not restoring Barton; as soon as the articles were admitted, the judge assigned to hear his pleasure the next Court upon that petition. Barton's petition was to be put into

quiet possession pending the suit; but till the articles were admitted and an issue was given there was no lis pendens, and therefore the judge had not delayed justice in that particular, and there might be reasons offered to shew he ought not to be restored, and consequently the judge did right to assign to hear before he decreed restitution, and therefore I pronounced against the appeal, and remitted the cause with 20l. costs.

[536] *BAILY against BAILY*. Arches Court, Hilary Term, February 15th, 1754.—

A divorce à mensâ et thoro, by reason of adultery, pronounced for.

This cause began originally in the Arches, by letters of request from the Commissary of Lincoln.

Mary Baily brought a suit against her husband, Joseph Baily, for a divorce for adultery. They were married in 1742. Two witnesses proved he lived and cohabited and lay with Frances Wilson as his wife, and had two children by her at a birth in 1743.

Witnesses.

1. Isabella Power. Knows Joseph Baily; he had two children by Frances Wilson in 1743; deponent has several times seen him and said Frances in bed together.

2. Isaac Ward. Has known Joseph Baily for eleven years; he has all that time lived with Frances Wilson as his wife, and had two children by her in 1743; deponent has seen said Joseph and Frances in bed together.

Mr. White, proctor for Joseph Baily, confessed his marriage to Mary by a special proxy, and Joseph, in his answers to Mary's libel, also confessed he was married to her in 1742, in manner as laid in the libel.

N.B.—She did not ask alimony; Joseph did not plead, nor did his counsel, Dr. Pinfold, make any defence for him. Though I strongly suspected collusion, I thought myself bound to give sentence for a divorce, upon the above evidence, bond being first given not to marry again.

[537] *RUMSEY against TIZARD*. Arches Court, Hilary Term, February 15th, 1754.—

A legatee brings a suit for his legacy. The executor admits the legacy, but pleads plene administravit, and exhibits an inventory and account. The legatee proceeds no further, and the executor is dismissed, but without costs.

Tunstall Tizard made his will and appointed his brother executor, who proved the will, 26th April, 1750. Rumsey, a legatee therein, brought a suit for the legacy; the executor confessed the clause in the will giving the legacy, and the identity of the legatee, but gave a negative issue to the libel, and pleaded plene administravit, and exhibited an inventory and account, by which it appeared he had paid upwards of 1111l. more than he had received; upon sight thereof, the legatee declared he would proceed no farther in the cause. Dr. Jenner moved that the executor might be dismissed with costs. Neither counsel nor proctor appeared for the legatee.

JUDGMENT—SIR GEORGE LEE. I was of opinion that the executor ought to be dismissed, but that he was not entitled to costs, for the legatee had not been guilty of any mala fides; sufficient assets were to be presumed till the contrary appeared, and in this case, as soon as the legatee found the executor had fully administered he proceeded no further; that I could not agree to what had been urged, viz. that the legatee should have called for an inventory and account in the Prerogative, and so have seen whether there were assets before he commenced his suit for the legacy, for that would be obliging a man to go through a suit in one court before he could apply for justice in another; which I thought a very extraordinary circuit; but as this was a point of practice, and I remembered no instance of this matter coming into question before, I desired the [538] opinion of the advocates and proctors. All the advocates present, viz. Drs. Paul, Simpson, Pinfold, Hay, Smalbroke, and Bettsworth, unanimously, and most of the proctors, agreed with me that the executor was not entitled in this case to costs, and I accordingly dismissed him without costs.

LEWIS against OWEN and WILLIAMS. Arches Court, Hilary Term, February 15th, 1754.—An appeal dismissed, because it had not been prosecuted within the time limited by law.

Mr. Owen, chancellor of Bangor, promoted articles against Thomas Lewis, Rice Vaughan and Mary his wife, at the instance of Williams, a proctor in the court, for erecting a pew in a church in the diocese of Bangor without a faculty. They pleaded,

but the Chancellor rejected their allegation. 6th March, 1750, the Chancellor heard the cause, and he ordered them to pull down the new erected pew, and condemned them in costs. They protested of appealing, but did not then interpose an appeal. The 8th of August following a citation was returned against them, to shew cause why said decree or sentence should not be demanded to execution. Vaughan and his wife declared they acquiesced in the sentence, but Lewis opposed the sentence. The judge decreed it to be carried into execution. Lewis interposed an appeal from this order, bearing date 17th August, 1751.

JUDGMENT—SIR GEORGE LEE. As Lewis had not appealed from the sentence given on 6th March, 1750, within the time limited by law, I was of opinion he could not appeal from the order to carry that sentence into execution, and [539] therefore, without going into the merits of the case, I remitted the cause for want of an appeal and gave 20l. costs.

HON. ROBERT HERBERT, ESQ. v. HELLYER. Archers Court, Hilary Term, February 15th, 1754.—A proceeding by a lay impropriator for the recovery of tithes under 2 Ed. 6, c. 13.

[See p. 452, ante, and p. 567, post.]

Appeal from Winchester in a cause for tithes.

Dr. Pinfold for Herbert. Mr. Herbert, as impropriator of the rectory of King's Clear, in the county of Hants, brought a suit for tithes, on the statute of 2 Ed. 6, chap. 13; for tithes arising in the said parish, on lands called Freemantle Park; charges in his libel that from Michaelmas, 1748, to Michaelmas, 1749, Hellyer did not set out the tithes arising from said lands, and therefore sues him for the double value and costs in the Court below. William Hellyer pleaded that no tithes of those lands had been paid time out of mind and that they were tithe free, which allegation was admitted. Herbert appealed; the Court here pronounced for the appeal, and rejected the allegation; because a layman cannot by law prescribe in non decimando, and if he would insist on an exemption from payment of tithes, he must shew some special cause of exemption. The cause being thus retained here, we are now before the Court upon the merits; we have examined three witnesses, and shall read Hellyer's answers; no evidence on his part; Herbert is proved to be the impropriator of the rectory of King's Clear; by his answers Hellyer owns he sowed between Mi-[540]-chaelmas, 1748, and Michaelmas, 1749, twenty-five acres with wheat, and each acre produced two quarters, each quarter value one pound six shillings, therefore the tithe on each quarter was worth 2s. 7d.; total single value of the tithe of wheat 6l. 9s. 2d. Peas, ten acres, two quarters and half on each acre; in the whole twenty-five quarters, value 1l., each tithe thereof single value 2l. 10s. Barley, twenty-five acres, three quarters on each acre, seventy-five quarters in the whole, worth 16s. per quarter; tithe, each quarter 1s. 7d., single value of the whole tithes of barley 5l. 18s. 9d. Oats, thirty acres, three quarters each acre, ninety quarters in the whole, worth 12s. each quarter; tithe, per quarter, 1s. 2½d.; total, single value of tithes of oats, 5l. 6s. 10½d. Turnips, twenty-five acres, worth 1l. an acre; tithe, 2l. 10s. Depasturage of two-hundred barren sheep for a year, worth weekly 1d. each, total, 1s. 8d. per week; the whole tithe for the year, 4l. 6s. 8d. Single value of the tithes of wheat, peas, barley, and oats, together 20l. 4s. 9½d.; the double value therefore is 40l. 9s. 7d.; to which add the tithe of turnips, single value, 2l. 10s.; and of the depasturage of the sheep, 4l. 6s. 8d.; the total due for all the tithes is 46l. 9s. 3d.

Dr. Simpson for Hellyer. Admit Dr. Pinfold has truly stated the value and quantity of the tithes from Hellyer's answers; we pleaded below, and have insisted in our answers that Herbert was impropriator and owner of the tithes of part only of the parish; the point we shall now insist on is, that there is no legal proof that Mr. Herbert is impropriator and owner of the tithes of the whole parish; on the contrary, the tithes of some part of [541] the parish belong to the vicar, and there is no proof that Freemantle Park ever paid any tithes.

Evidence for Herbert.

Hellyer's first answers. 1 art. Believes Herbert is impropriator of part of the parish of King's Clear, but not of the tithes in Freemantle Park.

2 art. Believes said park is tithe free.

4, 5, 6, 7, 8, 9. Respondent in the year libellate sowed Freemantle Park with several grains; cannot set forth the tithes particularly.

12. Respondent carried away the tithes without setting them out.

13. Respondent has refused to pay the tithes demanded.

Fuller answers.

1 art. Does not believe Herbert is owner of the tithes in Freemantle Park.

2 art. Believes Herbert, as impropiator, has right to tithes of part of the parish, but not of Freemantle Park.

4 art. In year libellate, respondent sowed twenty-five acres with wheat, each acre produced two quarters, worth 1l. 6s. a quarter, tithe 2s. 7d. a quarter.

5 art. Sowed ten acres with peas, each acre produced two quarters and a half of peas, worth 1l. a quarter, tithe 2s. per quarter.

6 art. Sowed twenty-five acres with barley, each acre produced three quarters, worth 16s. each quarter, tithe 1s. 7d. per quarter.

7 art. Sowed thirty acres with oats, each acre produced three quarters, worth 12s. each quarter, tithe 1s. 2½d. per quarter.

[542] 8 art. Sowed nine acres with vetches, which he fed his cattle with.

3 art. Sowed twenty-five acres with turnips, each acre worth 1l., tithe 2s. per acre.

10 art. Depastured two hundred barren sheep, tithe for each per week worth 1d.

Further fuller answers.

1 art. Believes Herbert is owner of part of the rectory of King's Clear, but does not believe he is owner of all the tithes of King's Clear, particularly of the tithes of Freemantle Park, and of other estates in said parish.

Witnesses.

1. William Pearce. 1 art. In April, 1748, and ever since, Herbert was and has been impropiator of all the tithes arising in the parish of King's Clear, except certain lands (which the witness names) whereof the vicar is owner.

2 art. Herbert has a right to all the tithes in the parish except those which belong to the vicar; deponent has collected great part of the tithes for Herbert.

2. Thomas Smith. 1 art. Herbert is owner of all the tithes arising in the parish of King's Clear, and is so reputed to be.

2 art. Believes Herbert has right to all the tithes articulate, and Lord de la Warr, his predecessor, had right to them.

4 art. Hellyer occupies Freemantle Park as tenant to Mr. Cottingham; believes the tithes thereof belong to Herbert. Hellyer went with deponent to Lord de la Warr as deponent understood, to hire of him the tithes of Freemantle [543] Park, and deponent understood they did not agree about them.

3. Edward Tomlins, gent. 1 art. Herbert is owner of all the tithes arising within the parish of King's Clear except the tithes of certain lands (which the witness names) which belong to the vicar.

Dr. Pinfold. Hellyer appeared simply, and did not object that Herbert was not impropiator of the whole parish.

Dr. Simpson. No evidence to shew the impropiator has never received tithes of Freemantle Park; Hellyer in his answers denies he is owner of these tithes, and the witnesses speak only to belief that he is impropiator and owner of all the tithes in the parish of King's Clear.

JUDGMENT—SIR GEORGE LEE. I was of opinion Herbert had sufficiently proved himself to be impropiator and owner of the tithes of the whole parish. The witnesses proved him to be impropiator of the rectory, which would entitle him to the tithes unless some exemption was shewn, which was not done in this case, and as to the tithes received by the vicar, they made no variation, for they were part of the rectory and were granted out of it to the vicar as his endowment, and therefore as the quantum and value of the tithes were proved by Hellyers the party's own answers, I pronounced that 20l. 4s. 9½d. was due to Herbert for the single value of the tithes of wheat, peas, barley, and oats, and because he had not set out, but had carried away said tithes contrary to the statute, I condemned him to pay [544] as much more for said tithes, viz. in the whole 40l. 9s. 7d., and I pronounced that 2l. 10s. the single value was due for tithe of turnips and 4l. 6s. 8d. the single value for the tithe of the depasturage of sheep that were barren, and therefore I pronounced him to pay in the whole for tithes to Herbert, the sum of 47l. 6s. 3d. and condemned him in costs to be taxed next court.

N.B.—Herbert did not sue for tithe of wool, nor had any been paid, but he sued

only for depasturage of barren sheep; and note, that I did not pronounce any tithe to be due for vetches, because Hellyer did not sell them, but used them to feed his own cattle.

BURROUGHS against GRIFFITHS AND HALL. Prerogative Court, By-Day after Hilary Term, February 24th, 1754.—It is not competent to a creditor to dispute the validity of a will.—Where no person who has a right to oppose a will appears, the court is not bound ex officio to call upon the next of kin to appear.

[Discussed, *Menzies v. Pulbrook*, 1841, 2 Curt. 848.]

Dr. Pinfold for Burroughs. James Strangeways, Esq., died 23rd December, 1753; left a testamentary paper, dated 27th November, 1753; directs his debts to be paid, and gives the residue of his estate to Samuel Burroughs, Esq., Master in Chancery, and appoints him executor; the paper was not wrote or executed by deceased. We are before the Court with affidavits to prove the instructions for writing said paper, and the deceased's intention in order to obtain a probate. Griffiths was the deceased's apothecary, and claims to be a creditor in the sum of 50l. Hall likewise [545] claims to be a creditor, but has not made oath of his debt; deceased was related to Mr. Burroughs's wife; deceased declared to Peele his great affection to Burroughs, and sent him to know whether Burroughs would take the executorship. 27th November, 1753, Burroughs sent his clerk, Mr. Romans, to tell deceased he would accept of being his executor; deceased then gave instructions to Romans for drawing his will; he went home and drew it, and in the afternoon carried it to deceased, who read and approved it, but said it was almost dark, and he would sign it next day. 28th, Romans came again; deceased said when he was better he would come to Burroughs's chambers and execute it. 29th November, Griffiths went to deceased, asked the nurse if deceased had made a will? she said a paper was drawn; Griffiths bid her bring it to him; she did, and he took it away with him; the next day Griffiths took deceased away from his lodgings in Chancery-lane, and put him into lodgings at Dorman's, near Exeter Exchange; there deceased declared almost daily that Burroughs should be his executor. Griffiths wrote another will, in which Dorman was executor, but deceased refused to sign it. Griffiths has no right by law to oppose the will as a creditor.

Dr. Hay for Griffiths. We as a creditor took out a citation against the next of kin to accept or refuse administration to deceased as dying intestate, or to shew cause why administration should not be granted to Griffiths. A creditor may shew defects in a will, in order to prove an intestacy to make way for an administration to be granted to him. Dorman was a relation to deceased.

[546] Affidavits for Burroughs.

1. Magdalen Hess. Deponent was intimate with deceased; Burroughs assisted him in his lawsuits; deceased had great affection for Mr. Burroughs, who was his near relation; believes deceased intended to give his effects to Burroughs.

2. John Romans. 3. Thomas Wilkinson. John Romans says Burroughs sent deponent in November to tell deceased Burroughs consented to be his executor; deceased then desired deponent to draw his will for him, and gave him instructions that his debts should be paid, and Burroughs to be his executor if he would take the trouble, and to have the residue; deponent wrote said instructions, and then drew the will agreeable to them and carried it in the afternoon to deceased, and took Wilkinson with him; deceased read it in presence of deponent and Wilkinson; deceased said he understood the contents, and desired deponent would call the next day about noon and he would then execute it; about two at noon next day, 28th November, deponent and Wilkinson went again to deceased, the deceased then said he was sorry to give them so much trouble, but he would come when he was better to the chambers, meaning Mr. Burroughs's chambers, and execute it there; deponent never saw deceased afterwards; believes he approved the will, because he did not object to it; deceased afterwards was removed to another lodging. Wilkinson deposes the same as Romans, says deceased read over the paper, and said he understood the contents of it; deceased was very weak.

4. Ann Fear. Deponent was nurse to deceased at Chancery-lane; in November deceased told [547] Mr. Peele he was desirous to make his will, and Mr. Burroughs his executor. 27th November, Romans made a will for deceased, brought it and left it on the table with deceased; deponent put it in a drawer. 29th November, Griffiths

asked deponent where the will was, and bid deponent fetch it to him; deponent did so without deceased's knowledge, and he put it in his pocket and carried it away; deponent afterwards asked him for it, but he would not give it her.

5. George Dorman, grocer. 30th November, deceased was brought to deponent's house; he never went out afterwards; deceased while at deponent's house expressed great regard for Burroughs, and said he wanted to go to him to settle his affairs, and said to that effect the day he died; verily believes deceased's intention was to make Burroughs his executor.

6. George Dorman. 7. John Romans. George Dorman says Griffiths took lodgings at deponent's house for deceased; on the 30th November he was brought to deponent's house in a chair; says Griffiths told deponent deceased twice asked in his passage where they were carrying him; verily believes he was removed by Griffiths to prevent his executing said will; has often heard Griffiths say he was resolved to prevent deceased's executing said will, for he would not have Burroughs for his paymaster; Griffiths kept said will till deceased was dead. Griffiths told deponent he would arrest deceased for his debt, but deponent begged him not; if deceased had lived a day longer Griffiths would have removed him from deponent's house; deceased frequently said he wanted to go to settle his affairs; believes de-[548]-ceased thought he should recover; he died suddenly. John Romans says he received the will from Dorman.

8. George Dorman. 9. Elizabeth Winterburn. Winterburn says deceased was brought to Dorman's by Griffiths; deceased daily talked of going to Mr. Burroughs to settle his affairs; deponent one day locked him in his room to prevent his going, he not being fit to go abroad. Griffiths wrote a will for deceased, in which Dorman was executor; he and Dorman went to deceased with it, and Griffiths read it to deceased; deceased told deponent with great vehemence that he should have gone mad if he had signed it, for Mr. Burroughs was to be his executor. Dorman says Griffiths wrote said will of his own accord without deceased's knowledge; deceased refused to sign it, and was angry with Griffiths; deponent daily heard deceased declare his intent to make Burroughs his executor.

10. Joshua Peele, gent. Deponent was solicitor for deceased in his law suits. 27th November last, viz. 1753, Griffiths told deponent deceased was very ill; deponent went to deceased and advised him to make his will; deceased intimated he should be glad if Mr. Burroughs would be his executor; deponent told deceased he would acquaint Burroughs therewith, he desired deponent would; deponent did that day tell Burroughs (who expressed a regard for deceased), and said he would send to him. 28th November, deponent met Griffiths and told him he suspected he had been endeavouring to get deceased to make a will; deponent denies he said to Griffiths, "Surely Master Burroughs can't be endeavouring to get a will from deceased," or that Burroughs's name was [549] mentioned; believes Griffiths prevailed on deceased to go to Dorman's.

Affidavits for Griffiths.

Thomas Griffiths. Deceased was indebted to deponent 50l. 26th November last Mrs. Hess told deponent deceased was gone from his lodgings, and asked deponent if he knew where he was; deponent inquired and found he was at Church's in Chancery-lane. 28th November, deponent met Peele who told deponent somebody had brought a will to deceased, and he wondered anybody should do so; deponent said he knew nothing of it; Peele replied, "Surely it can't be Master Burroughs;" deponent asked the nurse about the will, and she gave it deponent, and after he had read it he returned it to the nurse, who put it into the drawer; deponent went again that day to deceased, and deceased said he wanted to go to some other lodgings; deponent asked him if he would go to Mr. Dorman's, he said "Yes," and asked if Dorman would receive him, and keep him from signing; deponent bid nurse give him the will, and deponent took it away with him; deponent received a message from deceased to desire Dorman to come and fetch him, and soon after deponent received a message from deceased to come and accompany him to Dorman's. 30th November, deponent proposed to deceased to make his will; deceased said he would if deponent would be his executor; deponent excused himself, but advised him to make Dorman executor; deponent copied the will wherein Burroughs was made executor, only putting in Dorman's name instead of Burroughs's; deponent brought it to deceased; and he said he would consider [550] of it; cannot swear to the words of that conversation.

Act read.

Cæsar Griffiths, proctor, alleges that deceased refused to execute the will in favour of Burroughs, and is dead intestate; has heard Pyle, Dorman, and Burroughs's wife are deceased's relations, but knows not in what degree; prays citation against them.

Dr. Pinfold's argument for Burroughs. Griffiths as a creditor cannot oppose the will, he can only pray a constat of the estate; the presumption that deceased had departed from the will arising from his declining to execute it on the 27th and 28th November may be ousted by proof of his intention continuing; he declared he would come to Burroughs's chambers to execute it. 28th, Griffiths took the will away, and on the 30th November he removed deceased into his own custody, even then deceased always spoke of Burroughs as his executor, and of going to him to settle his affairs; therefore he continued in the same intention.

Dr. Hay contra, for Griffiths. If a will is invalid a creditor may shew it to be so, that he may obtain administration; a creditor for that reason may shew that a nuncupative will is not made with the formalities required by the statute; in this case there is only one witness who deposes to the instructions, and giving them is the only act deceased did in support of the will; but his refusing to execute it when he had an opportunity both on the 27th and 28th November, and his never exe- [551]-cuting it afterwards, was clearly a departure from it and rendered it invalid, as was determined by the Delegates in the cause of *Williams and Wynne* (vide supra, p. 419), and lately in this court in the cause of *Lady Ann Jekyll* against *Jekyll*, as there is no act of the testator appearing upon the paper, the Court cannot grant probate of it without first citing the next of kin.

JUDGMENT—SIR GEORGE LEE. I was of opinion a creditor had only a right to have a constat of the deceased's estate, to see whether there were assets sufficient to pay the debts, but could not controvert the validity of a will, for it was indifferent whether he should receive his debt from an executor or an administrator, and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense and delay to executors, and therefore I heard Dr. Hay's objections to the will rather as an amicus curiæ than as counsel for Griffiths.

2ndly, I was of opinion, since nobody who had a right did appear to oppose the will, that the Court was not obliged ex officio to order a citation to issue to call the next of kin: if there was evidence enough to satisfy the Court that the paper before me was the will of the deceased, I was sufficiently founded to grant probate to the executor.

3rdly, I was of opinion the affidavits sufficiently proved this will; the law did not require more than one witness to prove instructions, and they were proved by more than one witness but in few cases; the deceased voluntarily gave the instructions, sent to Mr. Burroughs to know if he [552] would be his executor; Mr. Burroughs did not see or influence him, he read the paper, knew the contents, and declared both on the 27th and 28th November, that he would execute it, though he declined doing it then; after that time it was not in his power, for both the will and the testator himself were in the custody of Griffiths, who endeavoured to get a will from him, which the deceased refused to execute, and during the whole time he was in custody to the very day of his death he constantly declared a permanency of the same intention in favour of Burroughs, which differed this case extremely from the cases that had been cited, for in those cases there were no declarations to shew a continuance of intention after the testators had declined executing them; and therefore I pronounced for the will, and decreed probate to Mr. Burroughs. I observed that only three relations to the deceased were mentioned in the act, two of whom had clearly knowledge of the will, to wit, Dorman, who had made several affidavits in the cause, and Mrs. Burroughs, wife to the executor, and yet they did not think proper to oppose the will: that creditors had not any title by law to administrations, that they were only granted to them by the practice of the Court when nobody else appeared to accept them; that Griffith's behaviour had been so bad, and his affidavit was contradicted in so many particulars by the other affidavits, that if the deceased had died intestate I would not have trusted him with the administration if any other person would have taken it. But with respect to costs, I gave only 1l. 6s. 8d., the common costs of a motion, because under the circumstances of the case, the Court could not have granted probate unless the will had been [553] proved by affidavits, and therefore Mr. Burroughs had not been put to any extraordinary expense by Griffith's opposition.

PYTT against FENDALL AND JONES. Prerogative Court, Caveat Day, March 14th, 1753.—The renunciation of an executor, rejected.

Dr. Simpson for Pytt. Rowland Pytt died a widower, March, 1746; devised a leasehold and freehold estate to Leonard Pytt, my client, by his will dated 12th Dec., 1746, and gave the residue of his estate real and personal to William Fendall and William Jones, in trust to raise money to pay his debts and legacies and mortgages, and to discharge incumbrances on the estate given to Leonard Pytt, and then in trust, to convey the remainder to his son Elijah Pytt, and made Fendall and Jones executors, he left duplicates of his will in their custody, they have not taken probate, but never renounced and have acted as executors. Leonard Pytt, in 1749, filed a bill in Chancery to establish this will, and to have the estate devised to him, discharged from the incumbrances; the executors appeared and assented to the will being established; the matter was referred to a Master. Pytt is entitled to costs, but there must be a legal representative of deceased before costs can be decreed. In January, 1753, Pytt cited Fendall and Jones to accept or refuse probate, or to shew cause why administration might not be granted to a third person to substantiate proceedings in Chancery; that citation was returned, and they did not oppose such administration, but finding that would not answer our purpose, we afterwards took out a citation to shew cause why they should not be [554] compelled to take probate, on account of their having acted as executors. We shall shew they have intermeddled, for they assented to and ordered Elijah Pytt to take possession of the real and personal estate of deceased, and joined with him in releasing a debt due to deceased from one Fling; they have assented to a legacy; a leasehold estate for years was bequeathed to Pytt on which deceased had charged a mortgage for a term of years, they joined with Pytt in taking a release from the mortgagee, and assented to its being conveyed to Pytt; they have joined with Elijah Pytt the residuary legatee in conveying real estates, which by the will were made equitable assets. We have affidavits to verify these facts; they have none to contradict them. Jones has given a proxy of renunciation, in which he does not deny having acted.

Dr. Hay contra, for Jones. Fendall is dead; the question is whether Jones is obliged to take probate; 8th January, 1753, he was cited to accept or refuse probate, or to shew cause why administration to substantiate proceedings in chancery should not be granted. Jones appeared, brought in the will, and declared he had no objection to such administration being granted; afterwards he was cited again to take probate: he did not appear; whereupon he was excommunicated; but it being done irregularly without a schedule, &c., the Court declared it void. A special proxy of renunciation is exhibited by Jones; the foundation of the motion is that Jones has acted as executor; but we shall insist he has not. Fendall and Jones were made trustees by deceased's will to pay debts &c., and then to pay the residue to Elijah [555] Pytt, deceased's son. Jones in a few days after deceased's death delivered his duplicate of deceased's will to Elijah Pytt, who took possession of the effects; that is an evidence Jones never intended to act as executor; he acted as a residuary legatee in trust, but not as executor.

Affidavit ex parte Pytt.

Leonard Pytt, 12th February, 1754. Deceased died 13th March, 1746, made Jones and Fendall executors and residuary legatees in trust for his son, who by consent of the executors, as deponent verily believes, possessed himself of deceased's effects; 17th March, 1746, Jones read deceased's will, and by consent of the executors, Elijah Pytt entered on deceased's estate. Executors acted as such in joining with the son in purchasing land of Fling, on which there was a mortgage to deceased to secure a debt of 50l. due from Fling to deceased, which the executors allowed him to retain as part of the purchase money, and gave Fling a discharge for the said 50l. as if it had been paid; they joined with the mortgagees to convey a term to deponent on the leasehold estate devised to deponent by the will; they have kept the will in their custody.

Dr. Simpson's argument. We shall shew what acts by law amount to acting as executors to oblige them to take probate. They may assent to a legacy and receive or discharge before probate, Roll's Abridgement, 417. Assenting to a legacy subjects an executor to a devastavit in case there are not sufficient assets; acquitting or releasing a debt is acting, 1 Moor, 14. 1 Anderson, 11. Entering on a term for years is acting; in this case the executors have assigned a term. Wentworth. Off Ex. says

assigning a term is acting; when an executor [556] has acted he cannot renounce, Godolph. Repert. Can. 141. 2 Jones, 72. 2 Mod. 146. 1 Vent. 303. 2 Levinz. 182. In that case, though administration is granted the ordinary may revoke it, and compel the executor to take probate, Off. Ex. f. 57. Suit against administrator; he pleaded in bar that there was an executor; held a good plea. These executors assented to the devise of the leasehold estate to Leonard Pytt, and joined in making the devise effectual. Without such joining by them, that estate would have been liable to the creditors; their assent as trustees would not discharge the estate from the creditors; they are devisees of the real estate for payment of debts, which is therefore equitable assets. Fling owed deceased 50l.; nobody but executors could give him a discharge for that debt; the law will presume they acted as executors.

Dr. Pinfold, same side. In six years' time since the testator's death somebody must have acted; none but the executors could act, because they had not renounced. Elijah Pytt could not take possession of the effects but by assent of the executors. Jones delivered the will to him and assented to his acting. Fling's estate mortgaged to deceased for 50l.; Elijah Pytt bought that estate, and the executors released that debt. Moore's Rep. *Stokes and Porter's case*, an acquittance of a debt of 7l. was held to be an administering. Prerog. *Hudson and Short*, the executor intermeddled in some slight particulars; held he could not renounce, but must take probate; none of our facts are contradicted.

Dr. Hay and Smalbroke for Jones. We admit the law as cited; but insist Jones has acted only as [557] a trustee, not as an executor, and therefore cannot be compelled to take probate; his consenting that the son as residuary legatee should act, was not an acting himself, but a declining to act as executor; it would be hard and unreasonable to compel him to take on him the burden of the executorship against his will, by which he may be involved in lawsuits for his life.

JUDGMENT—SIR GEORGE LEE. I observed it was admitted on both sides that Jones had acted under the deceased's will, and as he was both trustee and executor, and had not renounced, the law would presume he had acted in his superior capacity, that of executor; but in this case the matter does not rest on presumption, for he had clearly acted as executor in discharging the debt due from Fling, which he could not do as a trustee, but must therein act as executor, and had thereby determined the option he originally had, of taking on him the executorship or not.

I therefore rejected his renunciation, and assigned him to take probate of deceased's will by the 4th of April, 1754.(a)

COX against PECK. Prerogative Court, Caveat Day, March 14th, 1754.—In a case of intestacy the security proposed held to be sufficient.

Dr. Hay. George Weir is dean intestate, a widower; he left four daughters, Mrs. Cox, the wife [558] of the Reverend Mr. Cox, his eldest daughter, has been sworn administratrix, and has given unexceptionable security in 4000l. Caveat entered for Elizabeth Peck, another daughter, who prays administration likewise; all interests are confessed; Mary and Jane Weir, the two other daughters, by proxy consent and desire administration may be granted to Cox solely; Peck has made no objection to her; by the commission of appraisement the deceased's effects were valued at 2989l. 9s. 11d., which consists of these particulars: stock, 999l. 7s. 6½d.; arrears of rent, 1832l. 10s. 0½d.; debt by bond, 24l.; leasehold estate worth 123l. 12s. 4d.; cash, 9l. Administratrix is not to give security for her own share; Peck has made no particular objection to the persons who are the sureties, but says the penalty of the bond is not sufficient.

Per Curiam. I was of opinion the security was sufficient, and decreed administration to pass under seal to Mrs. Cox, and ordered the expences of the commission of appraisement and the proctor's bills on both sides to be paid out of the estate.

(a) After looking through a great number of cases, I find none where the Court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious, that where a party has intermeddled, he has taken upon himself the burthen, and acquired the responsibility of an executor: that was the principle of the decision in *Haywood v. Bridges*.(a)—(Sir John Nicholl's judgment in *Jackson and Wallington v. Whitehead*, 3 Phill. 579.)

HIBBEN *against* CALEMBERG AND SHERMAN. Prerogative Court, Caveat Day, March 14th, 1754.—An application to examine witnesses *de bene esse* rejected.

[See p. 655, post.]

The cause stood on the admission of Hibben's allegation, pleading her interest as sister to the deceased, General Frampton; her counsel pressed to have the allegation come on, but Dr. Jenner, on the other side, said he was not ready, and Dr. Bettesworth, who is counsel with him, is out of town. I therefore put off the debate of the al-[559]-legation till the 4th of April. Dr. Pinfold for Hibben, then moved that they might examine witnesses *de bene esse* on the 6th article, which pleaded ownings of her as their daughter by the father and mother of General Frampton, and identity of persons, upon the suggestion that two very material witnesses to prove that article were old and might probably die, and he read an affidavit, which said one of the witnesses was 78 and the other 79, but did not say either of them was ill and in danger of death.

Per Curiam. I therefore did not think there was reason upon that affidavit to alter the common course, and rejected the motion to examine them *de bene esse*.

LLOYD *against* NEVILL AND NEVILL. Prerogative Court, Easter Term, May 8th, 1754.—A will propounded not sufficiently proved to be the act of the deceased.

Dr. Pinfold for John and Elizabeth Nevill. Augustine Church, deceased, made will dated 16th October, 1749; left all his fortune to Elizabeth Nevill, at whose house he lodged, and had so done for a year, and made her and her husband executors. Will executed in the evening of 16th October, and he died in the night; proved in common form on 19th October, 1749; in April, 1752, Lloyd, the deceased's daughter, cited the executors to bring in the will, and prove it by witnesses, &c. The Nevills not related to deceased, but he had great affection for them; 16th October, deceased said he wanted to make his will, and sent Mrs. Nevill for Hodson, an attorney, but he was not at home; the next day deceased sent her again to Hodson, with directions to make a will, and give [560] her and her husband all; Hodson never saw deceased; but delivered the will to Nevill or her husband. Mrs. Nevill read the will to deceased, and he read it himself, he executed it at nine at night in presence of three witnesses; the deceased's mark appears to it, but the witnesses did not see him make his mark; he approved it by saying, "Ay, ay;" the deceased was in his senses. Lloyd has pleaded imposition; Mary Parker is their main evidence, who swears fully to the facts pleaded; but she is proved to be of an infamous character; the Nevills are persons of good character; no attempt is made to set up Parker's character. Edward Parker and Mary his wife both came to Mr. Farrer's office with the Nevills when they took probate, and then said it was a good will, and affirmed the same to Mr. Watson; Parker afterwards quarrelled with Mrs. Nevill, and carried her before a justice of peace, on pretence that she had stolen a napkin; Edward Parker expressed great malice to the Nevills. Ann Lloyd disoblged the deceased by marrying a soldier without his consent.

Dr. Hay for Lloyd. Deceased died on 18th October, 1749, about twelve at night; probate taken next day. William Nevill, nephew to deceased, produced to prove instructions; he says deceased, on 15th October, desired Mrs. Nevill to go to Hodson to get him to make his will; Hodson not at home; next day deceased again desired Mrs. Nevill to go to Hodson, and direct him to make a will for deceased and give her all. Mr. Taddy, deceased's apothecary, was then present but has not been examined; all the witnesses say he was dying at the time it is pretended he executed it. Parker says he was induced to attest the will by Nevill's [561] entreaties; I shall not read Mary Parker's deposition; I give no credit to the Parkers, but shall rely on their witnesses and two of our own. Ann Cleves fully proves deceased was not sensible when William Nevill swears the instructions were given, and when the will is said to have been executed. Hodson was an entire stranger to deceased; he received instructions only from Nevill; when Hodson brought the will to Nevill's house he desired to see deceased, but she would not let him.

Witnesses for Nevill.

1. William Nevill. Deponent knew deceased a year before his death, during which time he lodged at Nevill's. 15th October, 1749, deceased desired deponent's aunt, Mrs. Nevill, to go to Mr. Hodson, and desire him to come to him and make his will; she went, but Hodson was not at home; next day, in presence of deponent and Taddy, deceased bid her go again to Hodson and tell him to make a will, and give

all to the Nevills on account of the trouble and charge they had been at for him ; in the afternoon Elizabeth Nevill read the will pleaded to deceased, he approved it and said it was his will, and then deceased desired deponent to help him up in his bed, and he then read the will himself, and said it was to his mind, and wished he could give them more ; desired deponent to come in the evening to meet Taddy and see him execute it ; deponent went, but Taddy did not come, and deponent was obliged to go away ; deceased was of sound mind, &c.

1. Int. Deceased could write a good hand when in health.

2. Luther Gill. Deponent in October, 1749, was apprentice to Edward Parker, and went with [562] his mistress to deceased, who was a stranger to deponent, and when deponent came up Mrs. Parker said to deponent, " You must witness that will," which then lay in the room, but before deponent witnessed it she sent him for his fellow-apprentice George Smith ; Edward Parker, deponent's master, read the will twice to deceased, and asked him if it was his real will ; deceased seemed satisfied, and tried to speak but could not ; then Edward Parker said to deponent and Smith, you hear him answer as plain as he can, and bade them sign the will as witnesses ; deponent did not see deceased set his mark or seal to the will ; deceased delivered the will to Edward Parker ; deceased seemed to be in his perfect senses, though he could not speak.

1. Int. Respondent never saw deceased write. 3. Int. Believes the mark was made before deponent came into the room. 5. Int. Deceased was dying when the will was attested ; he rattled in his throat ; Mrs. Neville and Parker said to deponent, " Smith, you hear him say, Ay, ay."

3. George Smith, et. 18. Deponent knew deceased ; on the 16th October deponent was sent for to deceased's lodgings ; deponent went, and there heard Parker, to whom deponent is an apprentice, read the will pleaded three times to deceased ; Parker asked him if he approved it ; he said as well as he could, " Ay, ay ;" deponent did not see him sign it ; believes he was in his perfect senses.

3. Int. Cannot tell when the mark was made. 5. Int. Deceased appeared to be dying.

4. Edward Parker. About nine at night, in October, 1749, deponent was at Nevill's, and there for the first time saw deceased ; the mark [563] was made on the will when deponent first came in ; Nevill asked deponent to subscribe the will as a witness, which deponent and his apprentices did ; deponent did not see deceased sign or seal the will or publish it, save that deponent read it to deceased, and asked him if it was his will, and he made no other answer than " Ay, ay," and that rather as rattling in his throat than speaking ; deceased died within two hours after.

N.B.—He does not depose to sanity.

3. Int. The mark was made before deponent came to deceased. 4. Int. Does not believe he was sensible. 5. Int. Elizabeth Nevill prevailed on deponent to attest it.

Witnesses for Lloyd.

1. Stephen Hodson, gent. Deponent never saw deceased ; on the 16th October, 1749, Elizabeth Nevill, whom deponent knew, came to him, and desired him to make a will for deceased, and said deceased would give all to her, and make her and her husband executors ; deponent drew a will and carried it to Nevill's house, and asked for deceased, and said he had brought the will ; she replied, " You may leave it, and I will shew it to Mr. Church ;" deponent did not see it executed.

8. Int. The ministrants have a general good character, otherwise deponent would not have drawn a will from Mrs. Nevill's instructions. 9. Int. Edward Parker was very active for the Nevills, and insisted that the deceased had approved the will.

2. Ann Cleves. Knew deceased a year before his death ; he died in the night of the 19th October, 1749, at Nevill's house ; deponent for five days next before deceased's death, at desire of Elizabeth Nevill, assisted her at her house, and [564] daily saw deceased ; on the night but one before deceased died, deponent being in deceased's room with John, Elizabeth, and William Nevill, deceased was then speechless, and had a rattling in his throat and was insensible, and was so on the day before, and continued so to his death. Elizabeth Nevill said, " I shall be ruined if I don't get the will signed, for he owes me a great deal of money ;" Nevill fetched the will and carried it to deceased's bed, and put a pen in his hand and endeavoured to guide his hand to make a mark, but after trial, she said it would not do ; next day after deceased's death, she told deponent she had got the will signed.

Witnesses for Nevill.

1. Peter Foster. Gives good characters of John and Elizabeth Nevill.
2. William Lascelles. Same; does not believe they would obtain a will unfairly.
3. Thomas Edsell. The same.
4. Malachy Blake. Same; Mary Parker has the character of a common prostitute; some time before this cause began Parker and his wife carried Mrs. Nevill before a justice for stealing a napkin; the justice dismissed her, and then Parker said to her, "I have not done with you yet."
5. Charles Butler. Deponent well knew deceased; often heard him talk of having been in foreign countries; deceased was very intimate with the Nevills, and said he would leave all he had in the world to them, to make them amends for their care of him in his illness, and he never could do enough for them; never heard him mention his daughter; gives the Nevills good characters; Mary Parker is a person of bad character. [565] On 3rd March, 1752, Parker sent a warrant against Nevill to the deponent, as constable; the deponent carried her before a justice, who dismissed her; Edward Parker then said, "If I was sure to swear my soul to hell I would ruin the bitch."

6. Lucretia Thornton. Gives good characters of the Nevills, and bad of the Parkers. 3rd March, 1752, the justice dismissed Nevill; Edward Parker then said, "As I can't have my revenge on Nevill now, I will try what I can do in something else, for I will swear Church's will was forged, and will swear my soul to hell to ruin Nevill and his wife, if I ruin myself." In May and June, 1752, heard him say he had sworn enough to ruin the Nevills.

7. William Nevill. Deceased expressed great friendship for the Nevills; several times before and after deceased kept his bed, he said he would leave all he had to Elizabeth Nevill, and wished he could leave her more, and said he had no children.

8. Thomas Warm. Deponent is clerk to Mr. Farrer, and thereby came to know the Parkers; Edward Parker came with John and Elizabeth Nevill to prove deceased's will, and then said it was a very fair will, and that he was a witness to it.

9. William Watson. Deponent well knew deceased; he lodged some time with deponent; deceased's daughter several times came to see deceased, and he seemed displeased thereat, and afterwards he told deponent she had married a soldier against his consent, but after that he seemed very civil to her. Parker and his wife came with the Nevills to demand the goods of the deceased which were in deponent's hands; the deponent told them [566] the deceased had a daughter, and he scrupled to deliver them; whereupon Edward Parker said, as there was a will, her being daughter signified nothing.

Dr. Pinfold. Whether deceased made the mark to the will or not, if he approved it, it is a good will for personal estate. William Nevill contradicts Cleves; it is certain Edward Parker at first said it was a good will.

Dr. Hay contrâ. Question whether deceased has done the act; whether he gave instructions for the will? The will propounded is not agreeable to the instructions, as sworn to by William Nevill, for he says deceased ordered Elizabeth Nevill to tell Hodson to give his fortune to John and Elizabeth Nevill. This will was procured to secure a debt due from deceased; if it had been a sailor's will it would have been void on that account.

JUDGMENT—SIR GEORGE LEE. I was of opinion there was not a satisfactory evidence that the will propounded was the act of the deceased, and therefore pronounced against the validity of the will, and that so far as appeared to me the deceased was dead intestate, but gave no costs.

[567] THE HON. ROBERT HERBERT, ESQ. *against* HELLYAR. Arches Court, Easter Term, May 13th, 1754.—In a suit for tithes, sentence carried into execution as to costs after an appeal had been interposed.

[See pp. 452 and 539, ante.]

Hellyar appealed to the Delegates from my sentence, condemning him to pay the double value in a suit for tithes, upon stat. 2 & 3 Edw. 6, cap. 13; and now this day, Mr. Stevens, proctor for Mr. Herbert, prayed that I would, notwithstanding the appeal, put my sentence in execution as to the costs, which I had taxed at 30l.; and declared Mr. Herbert was ready to give security to repay the costs in case my sentence should be reversed. Accordingly, I decreed a monition against Hellyar to pay the costs,

pursuant to stat. 32 Hen. 8, c. 7, sect. 3, which statute is confirmed by stat. 2 & 3 Edw. 6, c. 13, sect. 1. Vide Clarke's Praxis, tit. 191, but directed that the monition should not go out till Mr. Herbert had given bond, with one surety, to repay the costs in case my sentence should be reversed.

N.B.—The oldest practisers declared they did not remember any suit for tithes wherein the like motion, grounded on the statute for carrying sentence into execution as to the costs after an appeal had been made. There being no precedent as to the bond, I directed it should be given with a surety, because in some cases the single bond of the party might not be a sufficient security for refunding the costs.

[568] JENKINS, Attorney of Morrison *against* BAYLEY ALIAS WILLIAMS. Prerogative Court, Easter Term, May 15th, 1754.—A mariner's will proved at Boston in New England not established.

John Williams, mariner, died a bachelor; left his mother, Bayley, formerly Williams, his only next of kin. She took administration to him, 11th May, 1749; a will was proved by Morrison at Boston, in New England, and afterwards he cited Bayley, alias Williams, to bring in the administration, &c. She appeared and opposed the will. The executor propounded it, and took out commissions for examining witnesses, which he never returned, nor examined any witnesses to establish the will.

Per Curiam. I therefore pronounced against the will, and that deceased, as far as appeared to me, was dead intestate, and condemned the executor in 8l. costs.

BRADDYLL, FORMERLY JEHEM, *against* JEHEM. Prerogative Court, Easter Term, May 15th, 1754.—Articles of an allegation which had been in substance pleaded before rejected, but letters allowed to be pleaded in supply of proof.

[See pp. 273 and 401, ante; 2 Lee, 193.]

Dr. Simpson for Young Jehen. John Jehen made his will, 18th October, 1749, and appointed his brother, Young Jehen, his executor; afterwards in February, 1749, he married, and his wife was with child; he died in August, 1751; the child was born after his death, and died soon; Braddyll, the deceased's widow, cited the executor to prove the will; she opposed it, and alleged it was revoked in law by the subsequent marriage and child. [569] Several pleas were given in, the brother pleaded that the wife and child had provision out of the real estate; that deceased, after his marriage, looked on this to be his will; might have destroyed it when he would; lay long ill and expected to die; and upon these pleas examined witnesses, but their depositions were not published, and now he gave in another allegation, pleading minutely circumstances relating to his illness, and several letters in proof thereof.

Per Curiam. But I was of opinion to reject those articles relating to his illness, because the substance of them was pleaded and examined to already; and it was dangerous, after witnesses had been examined, to allow another examination to the same matter, only diversified by some circumstances: but I allowed the letters to be pleaded in supply of the former allegation, and in support thereof.

SMITH *against* PRYCE. Prerogative Court, Easter Term, May 15th, 1754.—If a creditor swears to a certain sum due to him, he is entitled to an inventory of the estate of an intestate.

Joseph Smith, attorney at law, as a creditor, cited Jane Pryce, executrix of her husband, David Pryce, to bring in an inventory and account, and made affidavit of his debt, in which he swore that deceased was really and truly indebted to him at the time of his death, in the sum of 12l. and upwards for business done, and money lent him, of which he had received no part. The widow objected to the affidavit as not full and sufficient, and made affidavit that since deceased's death, she [570] had paid Smith 8l. 16s. 5d. as a debt due from deceased, and she verily believed deceased owed him nothing more, and that deceased was a bankrupt, and discharged in June, 1741; her counsel, therefore, insisted that Smith should swear precisely to the exact sum due to him, and not say 12l. and upwards, and should specify what the business he had done for deceased, and when.

Per Curiam. But I was of opinion the affidavit was full enough and sufficient; I could not try the validity of a debt, and if a creditor swore to a certain sum due to him, it was enough to entitle him to an inventory, which every executor of course by law is bound to give in. I therefore decreed Pryce to exhibit an inventory and account; but under the circumstances of this case, I did not give costs.

LADY MAYO *against* BROWN. Prerogative Court, Easter Term, May 15th, 1754.—
Objections to answers sustained.

[See p. 271, ante.]

Gertrude Aylmer died in 1729; Stephen Brown in 1732 took administration to her as husband. In 1752 Lady Mayo as daughter and next of kin to deceased, cited him to bring in the administration, and denied him to be husband to deceased, and Brown denied Lady Mayo to be deceased's legitimate daughter. They both pleaded their interests. Brown, in the first article of his allegation, alleged himself to be the lawful husband of deceased. Lady Mayo answered that she did not believe it, for that he was commonly reputed to have had a former wife at the time he married Aylmer. Brown's counsel objected to this answer as foreign to the allegation, redundant, and carrying aspersions.

[571] *Per Curiam*. But I was of opinion it was proper, because it arose naturally from the allegation, and was only giving a reason why she did not believe he was deceased's lawful husband. In the 3d article Brown pleaded a paper to be deceased's handwriting, in which she had given account of the time when Lady Mayo was born, and which was prior to deceased's marriage to Aylmer. Lady Mayo answered she did not know her mother's hand, and did not believe, but denied, the paper to be deceased's handwriting, and added that Brown could write several hands, and had been guilty of many vile acts and frauds, &c. Brown objected to this answer, and I was of opinion that part which carried reflections ought to be struck out, because they did not arise from what was pleaded, and were foreign to the cause.

TAYLOR *against* TAYLOR. Prerogative Court, Easter Term, May 15th, 1754.—Where marriage is pleaded in bar to the interest of an asserted widow, strict proof of the marriage is required.

[See p. 527, ante.]

Thomas Taylor died intestate. Mary Grant alleged herself to be his widow, and prayed administration. Ann Addis alleged and prayed the same. Hughes for Mary Grant, pleaded a marriage with deceased on 6th September, 1747. Alexander for Ann Addis, pleaded marriage with deceased 30th June, 1738. Then Grant gave in an allegation, in which she pleaded that on 30th June, 1738, the deceased was the husband of Isabella Noble, whom he married on 10th April, 1736, had two lawful children by her, and she died and was buried 21st August, 1747; they pleaded only the time of this marriage to Noble and cohabitation.

[572] Dr. Paul, counsel for Ann Addis, insisted they ought to specify where and by whom they were married.

Per Curiam. I was of opinion they ought to do so, notwithstanding both the parties were dead; because cohabitation was a proof of marriage only in favour of children or next of kin, who claimed under a marriage of their ancestor; but here the marriage between the deceased and Noble was pleaded as a bar to the interest of Addis, and to invalidate her marriage, and therefore a strict proof of that marriage with Noble was necessary; presumptions could not by law be made in favour of it.

BIRD, ALIAS BELL *against* BIRD. Arches Court, Easter Term, May 24th, 1754.—In a matrimonial suit where alimony is due, it is to be paid before the hearing of the cause.

Dr. Hay for Bell. This is a cause of nullity of marriage by reason of a former, brought by Bird against Bell, his wife, after living with her fifteen years, and having eight children by her. The Court allowed her 20l. a year for alimony, payable quarterly, pending the suit; a year's alimony was due the 8th of April last; the cause will be heard next term, by which time another quarter will be due. We pray that the Court will decree her a year and quarter's alimony, to be paid before the cause is heard, and will tax the bill of costs.

[573] JUDGMENT—SIR GEORGE LEE. I was of opinion I could only order such alimony to be paid as was now due, and that it was not usual to tax the full bill of costs, but only to allow money on account for hearing the cause, and therefore ordered that 20l. now due to her for alimony, and 30l. for hearing the cause, should be paid to her before the cause should be heard.

HURLEY *against* SIR THOMAS DYKE ACKLAND. Arches Court, Easter Term, May 24th, 1754.

Sir Thomas Ackland promoted articles against the Reverend Mr. Hurley. Hurley appealed from a grievance, and stood assigned to libel; White, his proctor, prayed further time, and the assignation was twice continued. Grene, proctor for Sir Thomas, concluding he would proceed on his appeal, compounded for the process, in order to be ready for hearing the grievance this term. On 3d session of this term, White declared he would not proceed upon the appeal; whereupon the cause was remitted with costs. The question was whether the costs according to style only should be paid, as a libel was not given or issue joined; or whether a bill of costs should be taxed.

Per Curiam. I was of opinion a bill of costs should be taxed, because, by White having prayed the assignation for giving a libel to be continued, he had drawn the adverse party into an unnecessary expence; and therefore taxed a bill of costs at 7l.

[574] ELLIOT, FORMERLY HOLWELL *against* HOLWELL. Arches Court, Easter Term, May 24th, 1754.—In a suit for legacy, held that there were sufficient assets left by the testator to pay his debts and legacies.

Appeal from Exeter.

Dr. Pinfold for William Holwell. John Holwell, the deceased, made his will 10th August, 1731; appointed his brother, Andrew Holwell, executor and residuary legatee; who took probate in 1743; he left a legacy in these words: "I give to my two cousins, William and Mary Holwell, son and daughter of my brother, William Holwell, deceased, 20l. a-piece, to be paid respectively at their respective ages of twenty-one years." Andrew, the executor, who took probate, is since dead, but made his will, and has appointed his daughter, Ann Elliot, his executrix, who has taken probate. William Holwell has brought suit at Exeter against her for his legacy of 20l., and in the libel pleaded assets, which she has denied, and has given in a plea that she has not assets, which Holwell has denied, and she has not examined any witnesses. We have examined three witnesses to prove assets. Andrew, by his will, gives his lands to his daughters, upon condition that they should pay the legacies left in John's will to William and Mary Holwell. Sentence at Exeter, for the legacy to William, from which Elliot has appealed; single question, whether the testator, John Holwell, left assets sufficient to pay his debts and legacies.

Dr. Paul for Elliot. All the legacies in deceased's will amount to 120l.; all the legacies [575] but this are paid, which has exhausted the assets; for peace sake we have tendered 4l. 14s. 2d. The will was proved before the vicars choral of Exeter; they have examined three witnesses, who have proved nothing material; no inventory is given in because they have not called for one; Elliot has sworn there are not assets.

Witnesses for Holwell.

1. William Elliot. Deponent was apprentice and servant to deceased, who was a tanner for nine years, ending about a year before his death; believes when deponent left him deceased was worth 200l.; does not know what effects he left at his death.

2. Elizabeth Green. Deponent lived with deceased; he left as she believes assets sufficient to pay his debts and legacies, but cannot say what he left; knows he lent money to Mrs. Lavinger; is not acquainted with deceased's affairs.

3. Mary Lavinger. Deceased left, as she believes, sufficient assets to pay his debts and legacies, for she saw some time before his death two promissory notes in deceased's hands, from his brother Andrew to him; one for 70l. and the other for 30l.; and deponent paid him 30l. she had borrowed of him a short time before his death; deceased then told her he did not want the money, for he had 80l. in Mr. Bince's hands; he had goods, &c. worth 30l.; and lands liable to his debts and legacies, worth 25l.; total 265l.; all his effects came to his executor.

1. Int. The producent is the respondent's son, but she has no interest in the cause.

2. Int. Respondent married deceased's brother; believes deceased's effects amounted to above 200l.; does not believe [576] the tender is the full of deceased effects by 40l.

Read the clause in Andrews' will, whereby he left his lands to his daughter, on condition of paying the legacy sued for.

Evidence for Elliot.

Her allegation pleads the legacies in the testator's will, and that they are paid;

pleads that assets did not come to her hands, and that she has tendered 4l. 14s. 2d. for peace sake.

Answers of Holwell.

Admits that all the legacies have been paid but his, and denies that there are not assets sufficient to pay his legacy. Admits an offer was made to pay him 4l. 14s. 2d., but it was not a judicial tender.

JUDGMENT—SIR GEORGE LEE. As no inventory was exhibited or any proof of deficiency of assets made, and as on the contrary the witnesses had given a probable evidence of assets, and Andrew, the first executor, had taken probate, and had paid the legacies (for anything that appeared to the contrary) voluntarily, and had in his will assented to this very legacy, I was of opinion there was a sufficient proof that the testator had left assets enough to pay all his legacies and debts, and therefore confirmed the sentence, which pronounced for William Holwell's legacy, and remitted the cause with 14l. costs.

[577] *ANDERSON against WELCH*. Prerogative Court, Trinity Term, June 12th, 1754.—A will sufficiently proved, although no proof could be given either of instruction or of the handwriting of the deceased.

Dr. Hay for John Welch. John Mackey died a bachelor; was a seaman in his majesty's ship the "Namure," which was lost, and he and most of the crew perished with her; he made his will 26th October, 1747, and appointed Welch executor, who proved the will some time after John Anderson, as father to deceased, cited Welch to prove the will by witnesses; or shew cause why administration should not be granted to him as father; Welch denied his interest; he proved it, and the Court pronounced for his interest. The identity of the deceased was fully established by Anderson's allegation. We have propounded the will, and have proved the handwriting and good characters of the subscribing witnesses, and that they were lost in the "Namure" with the deceased; but as most of the crew perished we have not been able to prove the instructions, or that the subscription to the will was the deceased's handwriting; but that is not necessary; for if he had only made his mark it had been sufficient.

Evidence for Welch.

Anderson's allegation. 6 art. Pleads that deceased went by name of Mackey, and entered by that name on board the "Namure," and was lost in that ship.

14 art. Pleads that Mackey, who was lost in [578] the "Namure," and the deceased in this cause was the same person.

Witnesses.

1. Christian Bell. Proves the name John Steward, subscribed to the will, was the handwriting of John Steward, a seaman in the "Namure," and who was lost with the ship, and proves his good character.

2. Robert Duncan. Proves the same in all respects.

3. Ambrose Bryan, gent. Deponent was on board the "Namure" with John Oldrieff, the other subscribing witness to the will; deponent was on shore when the "Namure" was lost, at St. Davids, in the East Indies; Oldrieff was lost in her; he was captain's clerk; proves the name, John Oldrieff, subscribed to the will as a witness, to be the handwriting of said John Oldrieff, and proves his good character.

4. Charles Milton, gent. Proves the same; says he was on shore when the "Namure" was lost, and Oldrieff in her.

Dr. Collier for Anderson. Insisted that the will was not sufficiently proved; because there was no evidence of instructions or of deceased's handwriting.

Per Curiam. But I was of opinion, under the circumstances of this case, that the evidence was sufficient, and gave sentence for the validity of the will.

N.B.—Anderson did not interrogate the witnesses.

[579] *FIRTH against FINCH*. Prerogative Court, Trinity Term, June 15th, 1754.—The capacity of a testator established.

[See p. 437, ante.]

Dr. Hay for William Firth. Sarah Nicholls, the deceased, made a will 5th November, 1752, Firth executor; will opposed by Sarah Finch, deceased's daughter; deceased died 25th March, 1753, a widow, and left several grandchildren by her daughter, Rose Firth, wife of the executor, and a grandson, John Nicholls; on 18th January, 1752, in the life of her daughter, Firth made a will, gave residue to her, and

made William Firth executor. On death of Rose, she made the will of 5th November, 1752, and gave residue to Rose's children, and made William Firth and John Nicholls her grandson, executors; Nicholls has renounced. Archibald Wynne was employed by deceased as an attorney, on 22d October he went to visit deceased; she talked sensibly about a cause she had, and told him she would alter her will, fetched it, desired him to read it, and gave him instructions for a new will, conformable to the will pleaded on 24th October, he brought draft of a will and a duplicate to deceased, read them to her, and she approved them, but declined executing them then because her neighbours, the Darbys, who were witnesses to her former will, were not at home. Wynne went again on 5th November for her to execute a deed, and she then fetched a will, declared she approved it, and duly executed it about noon of Sunday, 5th November. She then declared she would leave one duplicate with Mrs. Darby, which she did; and the deceased directed her in case of her death to deliver it to Jacky, her grandson; about three weeks before her death, deceased declared to [580] John Nicholls that she had made him her executor, and told him the contents of her will in manner as it appears, and said she had done so because her daughter Finch's husband had used her ill; admit she had affection for her daughter Finch; question is only as to deceased's capacity; they say she was incapable from drinking; there is a mistake in the spelling of her name to the will and the duplicate; but deceased herself took notice of it.

Dr. Paul for Finch. Strong affection for Sarah Finch; deceased was drunk every day for a year before her death; could not count money. On the 24th October put off executing the will. Wynne swears she examined the duplicates alternately; she was not in a condition to do so from drinking; she was incapable before, at, and after the execution of the will. Mr. Wynne brought his daughter with him, and met Firth and his sister at deceased's; deceased did not know how to write her name; she had not a legal capacity to make a will.

Witnesses for Firth.

1. Archibald Wynne. Deponent knew deceased seventeen years, and married her husband's niece; on the 22d October, 1752, deponent went to Aldenham, and there visited deceased; she told him she wanted to alter her will; made deponent read it; talked over her legacies, and varied them till she brought them to her mind; as deponent best remembers he minuted down the instructions; deponent advised her to have a duplicate, which she approved; 24th October, deponent carried them to deceased, and read them to her audibly, [581] she well understood and approved them, and she examined them alternately as deponent read them respectively to her; deponent then proposed to her to execute them, but she told him her neighbours the Darbys were from home, and therefore she would stay till another time; he then proposed to her to send to the next village for witnesses, but she said it would make a fuss, and she would stay till he came again, and would read them over again; deponent left them. On the 5th November, 1752, deponent went to deceased to execute a deed to which she was a party; deponent's daughter went with him to Aldenham, they first went to deceased's, and there found Firth and his sister; deceased executed the deed and then fetched the will and duplicate to execute them; deponent asked her if she knew the contents, and had heard them read? she said "Yes;" deponent then altered the date from the 24th October to the 5th November; deceased in a quick manner asked him what he was writing in her will; deponent told her he was only altering the date, and she was satisfied; deceased duly executed them, and the witnesses at her desire attested them, and the deceased declared she would lodge one duplicate with Mrs. Darby, and keep the other herself; deceased asked deponent and his daughter to dine with her, but they were engaged; deceased was of sound mind, &c.

2. Int. Deceased had great affection for her daughter Finch, but an aversion to her husband. 5. Int. Deceased left 1000l. or 1100l.; she was perfectly sober when she gave the instructions; and deponent can positively swear she knew the effect of the devise of the residue, and [582] that she knew the value of the residue, and said as Mr. Finch had treated her with contempt, but on the contrary Mr. Firth had acted well towards her, she therefore would give all the residue to her daughter Firth's children. 9. Int. Deceased had long loved drinking, but she was not always drunk, and was a woman of good sense. 19. Int. Deponent has received his legacy by a note from Firth.

2. Catherine Firth. Knew deceased ten years; was present on the 5th November,

1752, when deceased executed her will, and declared it was to her mind; confirms Wynne as to what passed about altering the date; proves the due execution and capacity, and says she is a witness to the will.

2. Int. Deceased had affection for Mrs. Finch. 7. Int. read. Was not deceased pressed to execute the will? Answers in the negative, and says it was quite her own choice. 9. Int. read. Did deceased constantly drink, and was incapable? Answers, Has heard deceased drank too much; otherwise answers in the negative. 12. Int. Deceased did know the effect of her will, and was sober at the execution of it. 18. Int. Respondent was with deceased an hour before the will was executed; went to visit deceased at her own request.

3. Elizabeth Wynne. Agrees with the other witnesses; proves execution of will and duplicate, and says she was a witness to them, and that deceased was of sound mind, &c.

8. Int. Will was executed before dinner. 12. Int. Believes the deceased knew contents of the will. 13. Int. Verily believes deceased was perfectly sober; deceased took notice she had left out a letter of her name; the deponent's father said it did [583] not signify. 18. Int. Deponent was with deceased a quarter of an hour before she executed the will.

Will read.

Witnesses for Finch.

1. Mary Mardell. Well knew deceased; proves affection to Sarah Finch; for near two years or more before her death deceased drank excessively and hurt her understanding thereby; for the last six months she could not count the change of a guinea. In October, November, and December, 1752, was commonly drunk and gave deponent improper orders for meat; could not reckon her money in paying her bills.

2. William Barton. Knew deceased forty years; proves affection to Sarah Finch; deceased grew senseless towards the last, but before was a very sensible woman; for two years before her death drank excessively, and had impaired her understanding; for eighteen months before her death she was incapable of managing her affairs, and had lost her memory for twelve months; she was esteemed mad.

3. Elizabeth Buckle Moor. Knew deceased forty years; affection to Finch; deceased was a sensible woman; for near two years before her death drank hard; for six months hardly ever sober, and behaved like a mad woman, threatened to destroy herself, could not reckon her money, and had lost her memory; verily believes for twelve months she was incapable of making a will from excessive drinking; deceased said she had never been in her senses since Molly, meaning her daughter, died; in the said Molly's illness, deceased [584] would swear at her, and bid her get up, and said she was well enough; deceased was in a state of madness, and would curse and swear and abuse people; used to forget she had paid people to whom she owed money.

4. Mary Watkins. Knew deceased for a year before her death, and was servant to her; deceased was scarce an hour in her senses, was always drunk, and incapable of making a will, threatened to drown herself, and talked madly; could not count the change of a guinea: deponent has paid a guinea a week for rum, &c. for deceased's drinking. Saturday, 4th November, 1752, deceased was very drunk and mad, and towards the evening sent deponent for quart of rum, and that evening and in the night drank near half of the quart, and by eight in the morning had drank near the whole; and was very drunk and incapable of doing any thing before, at, and after the time of the execution of the will; verily believes deceased was quite insensible.

3. Int. Deponent and her fellow-servants noted at that time that deceased was not capable of business.

5. Hannah Leach. Deponent was servant to deceased; on the 5th November, 1752, while deponent lived with her she never went to bed sober but once; from October, 1751, when her daughter Mary died, she was quite mad, and talked of hanging or drowning herself; deposes the same as the last witness, as to drinking rum on the 4th November, and as to her being insensible before, at, and after the execution of the will; deponent and Watkins observed to each other that deceased was incapable of doing business.

6. Thomas Smith. Deceased was a sensible [585] woman, but for two years before her death her senses were impaired; she was mad for twelve months, and incapable of making a will; deponent was at the deceased's house every Sunday morning; was there on Sunday morning, 5th November, 1752; she was very drunk at the time of executing her will.

7. Mary Smith. Knew deceased fifteen years; affection for producent, deceased daily was drunk, for two years before her death was incapable of managing her affairs, and sometimes could not count money; swore at her daughter Mary, when the said Mary was dying.

12. Int. About a fortnight before deceased died, she told deponent it was her desire her daughter Finch should have her mare and chaise if she died, and bid deponent take notice of it; deponent said, "If you don't tell Mr. Nicholl, or have not set it down in your will; he won't mind what I say;" she replied, "Why then, I will tell it to two or three more old women, for may-be I shan't live to see him myself, and as it is her desire, I would have her have it, and as to the rest, let them take it amongst them."

8. Samuel Gap. Has seen deceased write; she spelt her name "Sarah Nichol."

9. Edward White. The same.

Witnesses for Firth.

1. John Nicholl, examined August, 1753. Deceased was deponent's grandmother; deceased was before and after 5th November, 1752, very capable of doing business, and in August, 1752, executed a release, and received rents for deponent; she managed her affairs with good economy, regularly paid her debts; knows deceased had for several [586] years great disregard for William Finch, on account of his ill treatment of her, and she often complained of him to deponent; deceased had a great regard for William Firth and his children; he was joint executor with her to her husband, and he chiefly acted therein; Wynne did business for deceased and her husband, and made several wills for her, and made her husband's will, and deceased always consulted Wynne. About three weeks or a month before her death, deceased being of sound mind, told the deponent she had made her will, and had made the deponent joint executor with William Firth, and mentioned part of the contents of such will, and her reasons for making it different from her former wills, telling him it was because Mr. Finch had always behaved himself so ill to her, and added that she had promised her daughter Finch her horse and chaise, and as she had left them so little in her will she was desirous she might have it, and had therefore already mentioned it to Firth, and now mentioned it to deponent, that it might be confirmed, as it was not set down in the will.

1. Int. Respondent has renounced the executorship, and has received and released his legacy; respondent has a greater interest under an intestacy than under the will.

7. Int. Has heard deceased say she would make Firth amends in her will for the trouble he had in his executorship to her husband.

2. Dinah Darley. Deponent and her husband were witnesses to the deceased's cancelled will; the deceased was of sound mind long after the execution of the will pleaded, and managed her affairs; she had great disregard for William Finch, and great regard for Firth, who assisted her very [587] much in her affairs; after the death of her daughter, Rose Firth, deceased took out of deponent's hands the duplicate of her will, and said she should soon bring her another paper to keep, when she could get it prepared; in November, 1752, deceased delivered to deponent a paper sealed up, and marked "S. N." with her own hand, and said she had so marked it that it might be known it was her own doing, and desired deponent at her death would deliver it to Mr. Firth, or her grandson, John Nicholl; deponent desired her to name which, and she said "Jacky," and then said her daughter Finch was a good girl, but spoke slightly of her husband; deponent delivered the said paper to John Nicholl after deceased's death; deceased had no near neighbours but deponent's family, except cottagers.

3. William Day. Before and after date of the will deponent has conversed with deceased, and she talked very sensibly.

4. Edward Finch, jun. Deceased's last illness began on 3d February, 1753; deponent swears deceased was, long before and after the date of her will, capable of making a will; never saw her drunk but once.

4. Int. The time he saw her drunk, she remembered what she had said.

5. Richard Darley. Deponent and his wife were witnesses to deceased's cancelled will; she was capable of making a will before and after the date of the will pleaded; she paid 2l. to deponent for faggots on 21st July, 1752, and 1l. 8s. for wood on 26th December, 1752, and paid deponent a year's window tax on 19th October, 1752.

6. Sarah Foulkes. The deponent was servant [588] to William Firth; knew deceased, but never knew her to be out of her senses.

7. John Nicholl. Deponent was servant, and afterwards tenant to deceased to her death; never saw her drunk but once, and had frequent dealings with her; she transacted her business well; deponent saw her two or three times a week; she bought wood of deponent in the year 1752, and paid him without making any mistake, and seemed to be perfectly in her senses.

8. Esther Pates. Deposes to deceased's good capacity.

9. John Saunders. Deponent did work for deceased as a carpenter; she regularly paid him to her death, without making any mistake.

Cancelled will read.

Witnesses for Finch.

1. Edward White. Proves the name "Sarah Nicholl" to two receipts for rent to Gap to be deceased's handwriting.

2. Mary Watkins. Firth threatened deponent before her first examination, and said deponent was a base woman to expose her mistress.

3. Mary Smith. Deposes to a quarrel between deceased and her daughter, Rose Firth, and that deceased never saw her afterwards.

4. Charles Poulton. Deponent knew but little of deceased, but was with her in June, 1751, and Michaelmas, 1752, about a house of hers.

JUDGMENT—SIR GEORGE LEE. The only question being whether deceased had sufficient capacity to make a will, I was of [589] opinion, from the evidence, that she had sufficient capacity, and therefore pronounced for the validity of the will, but did not give costs.

N.B.—The counsel for Firth pressed to have costs from the time that Finch gave in her last allegation.

HUNT *against* SARELL. Arches Court, Trinity Term, June 17th, 1754.—The identity of a legatee established.

Appeal from Exeter in a cause of legacy.

Dr. Simpson for Sarell. John Hunt died in 1740, made his will, and gave to Richard Sarell 20l., to be paid by his executor, and appointed Wilmot Hunt, his wife, executrix and residuary legatee. She took probate 20th February, 1740, and paid all the legacies but this; has not denied assets; in April, 1744, Sarell brought a suit for this legacy. Hunt appeared; a libel given in, to which she gave a negative issue; deceased and Sarell were second cousins; we pleaded affection for Sarell, and that deceased intended this legacy for Richard Sarell, the respondent, and not for another Richard Sarell of Chadford, who was likewise cousin to deceased, but for whom deceased had a dislike; Sarell of Chadford has released all interest to Richard Sarell of Chudleigh, the respondent. Respondent was abroad from the commencement of the suit till 1752, during which [590] time the cause lay still; the Court at Exeter pronounced for the legacy, but condemned Sarell in 1l. costs. Hunt appealed from the judge below, having pronounced for the legacy, but we have not appealed from condemning Sarell in costs.

Dr. Bettesworth for Hunt. The cause was depending from the 2d April, 1744, to 23d November, 1753, when sentence was given for the legacy. Deceased had two cousins named Richard Sarell. Richard Sarell of Chadford has demanded the legacy; the uncertainty of the person of the legatee makes the legacy void.

Witness for Sarell.

William Sarell, baker. Deponent well knew deceased and plaintiff; they were cousins; deceased expressed particular regard for plaintiff; about sixteen years ago, deponent called on deceased, and he went with deponent to see plaintiff, who is deponent's brother; deceased gave plaintiff several real estates by his will; believes he never intended to leave anything to Richard Sarell of Chadford, for deceased had a great dislike to him; Mrs. Hunt declared she was willing to pay the legacy if she could be satisfied which Richard Sarell deceased meant; proves the release executed by Sarell of Chadford.

Int. Believes Richard Sarell of Chadford has demanded the legacy.

Release from Richard Sarell of Chadford read, in which he recites that he knows deceased intended the legacy in question for Richard Sarell of Chudleigh, and therefore he released to him all the interest he is supposed to have therein.

[591] Dr. Simpson's argument for Sarell. *Lord Cheny's case*, Coke's Reports, Witnesses received to ascertain who the testator intended to leave a legacy to.

Littlebury and Buckle, the same. Hunt has not put it in issue that there is another Richard Sarell besides the plaintiff, who was cousin to deceased; only a general negative issue given; she has not pleaded. We have shewn deceased had affection for plaintiff, and that he declared he would benefit him by his will.

Dr. Bettsworth, *contrà*. Two witnesses necessary to prove identity. William Sarell proves nothing. One witness, I admit, is sufficient to prove a release. 2 Peere Williams, f. 152, *Pitcaine* against *Bruce*, the widow is entitled to the legacy from the uncertainty who the testator intended to be the legatee.

JUDGMENT—SIR GEORGE LEE. I was of opinion one witness was sufficient to prove identity, which is a collateral question; but here the release of Sarell of Chadford, by which he disclaimed all right to the legacy, and declared he knew the testator meant the plaintiff, fixed the identity of the legatee by more than one witness, and as it was in evidence that the deceased had a great regard to the plaintiff, and a great dislike to the other Richard Sarell, I had no doubt but that the legacy belonged to the plaintiff, and therefore confirmed the decree of the judge below, as to pronouncing the legacy was due and payable to Richard Sarell of Chudleigh, and condemned Hunt in the costs of the appeal.

[592] GRANT *against* GRANT. Court of Peculiars, June 17th, 1754.—A suit for restitution of conjugal rights, in the case of a Fleet marriage; the marriage established.

Dr. Harris for Mrs. Grant. Mrs. Grant has brought suit against her husband for restitution of conjugal rights. 3d Sess. Trin. 1753, libel admitted. 3d Sess. Michaelmas, 1753, answers given in and the marriage denied. We pleaded courtship and marriage at the Fleet, on 18th September, 1748, and cohabitation with reputation; owning birth and baptism of a child; the fact of marriage is sworn to by two witnesses; a man by the name of Edward Grant and the plaintiff were married at the Vine and Globe, in the Fleet Market, by one Donaview, a clerk; cohabitation fully proved; the identities of both parties also fully proved by John Grant, brother to defendant; but he says that defendant, while the service was reading, declared he would not be married, and therefore the parson stopped and did not proceed; but this last fact is contrary to a declaration made by him in *recenti facto*.

Dr. Collier for Edward Grant. Mary Bennett, calling herself Grant, pleads a fact of marriage, on 18th September, 1748; she was with child at that time; cohabitation pleaded at her father's, and that she was there delivered of a female child in the January following, the time when it is pretended they were married; the stress of the evidence is upon the cohabitation; the wo-[593]-man, by her own shewing, is under sentence of excommunication for being clandestinely married, and therefore cannot sue. *Colli* against *Colli*, in Consist. London, Dr. Andrew in that case would not give sentence till Mrs. Colli was absolved; the offence for which the witnesses were excommunicated was committed in London; they should have been absolved by the chancellor of London, and not by this Court. John Grant proves Edward declared he would not be married; the parson stopped; John did not give her away, and Edward did not live with her. One of the witnesses to the fact of marriage was but sixteen years old at that time. Admit Edward's sister says she was told by John that they were married.

Dr. Collier insisted on his objection that Mary Grant could not sue because she was excommunicated by the constitution in Lindwood, de Cland. Despons.; (a) and was not absolved.

Dr. Harris said she was in Court and ready to pray absolution, as Mrs. Colli did.

Per Curiam. But I said that case of Colli was new; that it never had been the practice of this Court to absolve the party, to enable him or her to sue; and I believed it had not been the practice of Consistory except in that one instance; that I was counsel in that cause, and was extremely dissatisfied with that judgment at the time when it was given by Dr. Andrew, and saw no reason to alter my opinion; that I thought the practice by interpretation upon that constitution had gone full far enough in disabling witnesses upon an excommunication ipso [594] facto without a denunciation, and that I would not extend it farther, and introduce a new practice by disabling a party to sue, and therefore overruled the objection; and as to the witnesses,

(a) Lib. tit. 3, de Clandestina Desponsatione.

wherever the offence was committed they must be absolved ad testificandum in that Court where they were produced as witnesses.

Witnesses for Mrs. Grant.

1. John Grant, ex. 26th January, 1754. Deponent is brother to Edward Grant the party; has known Mary Bennett, the other party, for twenty years; she by some has been called Bennett, and by some Grant; about six years ago Edward, as deponent believes, courted producent, and one day in September, 1748, deponent went with producent and his brother Edward to the Fleet to be married, and deponent promised her to give her away in marriage; they went to a public house there; a parson was sent for, and a man came to officiate as such; the company all stood up, and he began to read the ceremony; but before the first prayer was read Edward said he would not be married, and they all sat down; deponent asked Edward if he intended to make a fool of the girl; and then after they had drank together, the parson began again, and in a short time Edward swore by God he would not be married; and then the parson left off; producent gave deponent a ring to give the parson, but it was not made use of; and they were not then married; Edward has not, as deponent knows or believes, owned her as his wife; nor has she been reputed to be his wife; Edward used to lie with her for two years; in the January after said 18th September, she was delivered of a daughter, in St. John's Parish, in Southwark; believes such child was baptized as [595] the child of Edward and Mary Grant; believes producent procured said child to be registered as their lawful child; proves identities of the persons mentioned in the certificate of said baptism.

2. Rachael M'Ghee, widow. In September, 1748, deponent's son, Abel Wood, kept the Vine and Globe, a public-house in the Fleet Market; about 18th of said September two men who deponent did not know, but believes were Edward and John Grant, and producent, came thither, and Francis Donaview, who used to marry, was sent for; deponent was in the room with them, and heard him begin the service, and then she went away; and after some time her said son called her up; deponent went up and on the stairs met said men and woman coming down; deponent's son said they had quarrelled about the parson's fees; deponent thereupon advised the parson to take the money they had offered; the men and woman, on being called to, came back, and deponent was present, and heard the parson perform the rest of the service, and the parson joined Edward Grant and Mary Bennett together in marriage, and pronounced them to be husband and wife; John Grant gave away said Mary; deponent particularly remembers said marriage by the dispute about the fees.

Abel Wood, æt. 21. On 18th September, 1748, two men, strangers to deponent, came to deponent's house with producent, and parson Donaview was sent for; deponent went up to them to act as clerk; the man who went by the name of Edward Grant, and producent, stood up, and the parson proceeded to that part of the ceremony where the fees are paid, and the parson insisted on more money than they would give, and they, re-[596]-fusing to give it, a dispute arose, and the men and woman went down stairs; but deponent's mother persuaded the parson to take the money they offered; whereupon they being called back, returned, and then the parson read over the rest of the ceremony and joined them in marriage; deponent made an entry of said marriage in his register book.

4. Richard Strickland. Deponent knows producent, but not Edward Grant; proves the baptism of producent's child by name of Maria, as the lawful daughter of Edward Grant by producent, and that she was registered as such; proves the certificate of said baptism to be a true extract from the parish register.

5. Susanna Howard, æt. 24. Deponent has known the parties many years; on the 18th September, 1748, Edward and John Grant called on producent at her father's house and took her out with them, and the next morning producent told deponent she was married the night before to Edward Grant; producent lived with her father to his death, which happened two years after, and Edward constantly boarded with her father, and lay with producent when he pleased; deponent lived in the house with them; Edward owned producent as his wife, and she went by name of Grant. In the March after producent's father's death, which happened in November, producent went and lived in the parish of St. Olave's, and deponent lived with her there; Edward came and lay there with producent when he pleased, but sometimes he was absent; and he owned her as his wife; deponent knows said house in St. Olave's was rated in Edward's name, and they were reputed man and wife

from September, 1748, and [597] deponent esteemed them to be such; she was delivered of a child in January, 1748-9, which was baptized as the lawful daughter of the parties, and Edward and his family owned said child as his lawful child, and said child has always gone by the name of Grant. Edward has left producent for two years past.

6. Mary Bennett. Producent's child was baptized as legitimate; Edward lay with producent at her father's when he pleased, and so he did at the house in St. Olave's, and sometimes he lay with her once and sometimes two or three times in a week, and he treated her as his wife, but never heard him speak of her as his wife, but he and his relations treated her as his wife, and called the child Grant; the house was rented in Edward's name, and producent has gone by name of Grant; they were reputed husband and wife.

7. Eleanor Fletcher. Deponent knows the parties; in February deponent was godmother to producent's child which was baptized as the lawful child of her and Edward Grant; producent goes by the name of Grant, and deponent has heard that producent and Edward were married.

8. Richard Bennett. Deponent is brother to producent and has long known Edward Grant; has heard producent and Edward were married; their child was registered as legitimate; Edward used to lie with producent at her father's house, and as he sometimes came home late, deponent's father three or four times bid him turn out; Edward replied he would come where his wife, producent, was; the house in St. Olave's was rated in Edward's name; he behaved to producent as his wife, but usually called her Poll; deponent esteemed them to be husband and wife, and they were reputed so to be.

[598] 9. Mary Taylor. Deponent is sister to Edward Grant, and well knows producent; Edward first began to court producent about eight years ago, and continued to court her till one Sunday, the end of September, or the beginning of October, 1748, when Edward and John Grant came to deponent's house to inquire for producent; deponent told them she was gone home to her father's; they said they would go to her; believes they and producent went out together that night; the next morning, John Grant, deponent's brother, told deponent that Edward and producent had been married the evening before, and from that time producent continued to live with her father till he died; Edward went to her there when he pleased, and he did the same when she lived at St. Olave's; they have constantly been esteemed man and wife; Edward has constantly owned producent as his wife, and her child as his lawful child; he has deserted producent.

N.B.—Edward did not plead nor cross-examine the plaintiff's witnesses.

Dr. Harris stated the evidence very fully and clearly, and informed the Court that his client had offered to take the suppletory oath before the cause was concluded, and was in Court ready to take it if it was thought necessary.

Dr. Collier contra, for Edward Grant. Witnesses must be persons of credit; these are infamous, though they are legal witnesses; she took the house in St. Olave's; it does not appear he knew it was rated in his name; the witnesses say Donaview usually officiated as a priest and married, [599] but they do not prove he was in orders; admit he might call her wife to cover turpitude.

JUDGMENT—SIR GEORGE LEE. I gave sentence for the marriage, and condemned him in 30l. costs, and decreed him to be admonished, to take her home and cohabit with her, and treat her kindly as his wife.

BROTHERTON, Executor of Lady Cookes Winford *against* HELLIER, BY HIS GUARDIAN.

Prerogative Court, Trinity Term, June 19th, 1754.—A party who has no interest cannot be permitted to intervene in a cause.

[See on another point, 2 Lee, 55.]

Dr. Bettesworth. Samuel Hellier, Esq., deceased, left a widow, Lady Cookes Winford, and a son, a minor, aged 18 or 19 years; he chose Sarah Harris to be his guardian, and she was appointed such to propound deceased's will on behalf of the son, which Lady Winford opposed; the minor has a grandmother living, Sarah Huntback, who is a witness in this cause; she and Dean Lyttleton are appointed guardians for his person and real estate in Chancery; the grandmother now prays that she may intervene to see justice done the minor in this cause; if the minor should die she is his next of kin. The proctor for Lady Winford might have

objected to Harris's being guardian; the only objection in the act is that her intervention will increase expense.

Dr. Hay for Samuel Hellier. The cause is now [600] ready to be heard; Sarah Huntback, the grandmother, prays to intervene. Harris was appointed guardian in 1752, upon the minor's election; nobody opposed her being guardian; the grandmother might then have interposed. Huntback has been examined as a witness in the cause; no reason for her intervention; the cause is concluded; she cannot plead; no other effect can arise from her intervention but burthening the cause with the expense of counsel and proctor for her, and more copies of the depositions; if she will appear at her own expense we will not oppose it.

JUDGMENT—SIR GEORGE LEE. I was of opinion this motion was new; it did not appear to me that her intervention could be of any use; it was not suggested that the guardian was colluding with the adverse party; that it was unprecedented to admit any person to intervene that had no interest in the cause, and therefore I rejected Sarah Huntback's petition.

WISE AND OTHERS *against* JOHNSON. Prerogative Court, Trinity Term, June 19th, 1754.—A codicil admitted to probate which had not originated with the deceased but which had been approved and executed by him.

Dr. Pinfold for Johnson. William Johnson, a pawnbroker, deceased, died a widower, without children; on 30th May, 1753, made his will, dated 2d May, 1753, all wrote by himself. This will is not disputed. Appointed Wise, Brown, and Harrison, his executors, and left the residue to his father. William Johnson, the father, has propounded a codicil, dated 21st May, 1753, which is opposed by the executors of the will. Harrison [601] and Brown were indebted to deceased. The codicil does not materially alter the will; it recites that Harrison and Brown are indebted to deceased; that the making them executors may be an extinguishment of their debts, which he does not intend; and therefore declares them trustees for his father, whom he makes his residuary legatee; appoints his father, William Johnson, joint executor with the others named in his will, and gives a legacy of five pounds to Mrs. Deborah Dorrell, which is added in deceased's own handwriting. One Singleton, a friend of deceased's, informed him that it might be a dispute whether making Brown and Harrison executors would not extinguish their debts; Walton, deceased's apothecary, at his desire, read the codicil to him on the morning of 22d of May; he approved of it, and would then have executed it, but Walton advised him to send for his will, and compare them together; deceased executed the codicil in the evening of 22d May, 1753: and it is attested by Walton and Deborah Dorrell; recognition of the codicil on 23d May; admit Singleton had not previous orders from deceased for preparing the codicil.

Dr. Paul for Wise and others. In the will deceased gives the interest of 1400l. to his father and mother for their lives, remainder to his sister's children; if she has none, to his next of kin; leaves the residue, which is about 600l., to his father absolutely; father applied to William Richardson to get deceased to make him and said Richardson executors; Richardson said he would not be an executor, but spoke to deceased to make his father executor; deceased said "No; my father shall not be executor." The father afterwards ap-[602]-plied to Singleton for the same purpose; Singleton wrote the codicil at an ale-house in Fleet-street, and sent it to deceased. We insist that the codicil was a fraud on the deceased; rely on custody and imposition, but do not object to capacity.

Witnesses for the codicil.

1. William Singleton. Deponent intimate with deceased; deponent having heard that Brown and Harrison were executors to deceased, and indebted to him in 800l.; deponent wrote to deceased and acquainted him that, by making them executors, he would extinguish their debt; deponent drew the codicil pleaded, and sent it to deceased with said letter, by his father; the legacy in codicil to Mrs. Dorrell is wrote by deceased; deceased, on 23d May, told deponent he had executed said codicil; deceased would have had deponent write said codicil on the will, and said he would execute it again, but deponent told him it would be as well to seal it on to the will, which deponent did; deceased was then of sound mind, &c.

2. Int. Deceased did not give instructions for the codicil. 5. Int. Respondent contrived it.

2. John Walton, apothecary. On 22d May, 1753, in the morning, deponent went to deceased, and found him reading a letter which deceased gave deponent to read; it was a letter from Singleton; deponent read it and the codicil to deceased, and by deceased's order deponent burnt the letter; deceased said he would then execute the codicil, but deponent advised him to send for his will first; in the evening deponent went to deceased again, and he said he would then execute the codicil, and he did execute it in presence of deponent and Deborah Dorrell, who attested it; [603] the deceased was of sound mind, &c.; the deceased with his own hand inserted the legacy to Dorrell in deponent's presence.

6. Int. Gives an account of the contents of Singleton's letter. 8. Int. Respondent and Dr. Schomberg ordered deceased should be kept quiet, and see no company unnecessarily.

3. Deborah Dorrell. Deponent well knew deceased for seven years before his death; Walton told deponent that the deceased desired her to set her name to the codicil; deponent said she could not write, but deceased said she might set her mark, which, at deceased's request, she did, but did not see deceased sign, or hear him publish it; he was of sound mind, &c.

2. Int. Believes the codicil was drawn at the request of deceased's father. 8. Int. Wise, who was deceased's uncle, was often with him, but deceased's father bid deponent not let deceased see Brown and Harrison. 9. Int. Deponent has received her legacy.

4. Thomas Dunson. Proves the legacy to Dorrell to be the deceased's handwriting.

7. Int. Brown was indebted to deceased. 1. Int. Has heard the father applied to Singleton to get deceased to alter his will.

Codicil read.

Witnesses for Wise and others.

1. William Richardson. Brown and Harrison were intimate with deceased; about a week before deceased's death, Johnson told deponent that deceased had made his will, and Brown and Harrison his executors, and desired deponent to ask deceased to make him and deponent executors; [604] deponent refused to be executor; deponent spoke to deceased one day when they were airing in a chariot together to make his father executor; deceased seemed very uneasy thereat, and asked deponent what his father wanted, and said his father should not have the management of his affairs; deceased was much vexed at it, and fainted; deceased said afterwards that he had been talking to his father, and his father told him he was very well satisfied with his will, and deceased said it was to his father's satisfaction.

2. Hannah Blakeley. Deponent was servant to deceased; Wise was uncle to deceased, and the other executors were intimate with him; about a fortnight before deceased's death he went abroad with Richardson in a chariot, and returned home very ill, and said his father was the occasion of his illness; a short time before that the father and Thomas and Matthew Galston asked deponent to let them see deceased's will; deponent told them she could not, for it was locked up in his bureau; and Wise had the key; Matthew desired deponent to take the key out of Wise's pocket after he was a-bed, and get the will; deponent said she would, and he said he could then get a key made by that; Matthew Galston came again at night, according to appointment, to know if she could get the key, but deponent then told him she could not get it; a day or two after, at four in the morning, the father came to deponent's bedside and begged her to get him the will or the key; the father ordered deponent not to let deceased see Brown or Harrison, and he bid deponent tell Dorrell, after deceased's death, that he would pay her her legacy, if she would be a witness for him.

[605] 3. Int. Has heard Harrison owed deceased money on bond.

3. Deborah Dorrell. Deceased had a great opinion of his executors; about a week before his death deceased said he was relapsed from his father's teasing him about a thing he would never agree to; the father forbade deponent to let Brown and Harrison see deceased; deceased did not execute the codicil in deponent's presence, nor did Walton attest it in deponent's presence; deceased said nothing at that time, but bid deponent make haste, for he must go to bed.

Int. Has heard Harrison say he owed deceased money on bond.

4. Walter Rochford. Deceased had by him in pawns about 5000l. when he died; Gunson, in deponent's presence, said to deceased's father, it was an easy matter to

make a dying man do any thing, and Gunson bid deponent not to take notice of it if the father took any thing out of deceased's house after his death ; Singleton told deponent he made the codicil at an alehouse, without instructions from any one.

5. William Payne. Gives good characters of the executors ; the father seemed uneasy when deponent was with deceased, and believes he refused admittance to deceased's friends ; deponent suspected a management by the father, and therefore went to see deceased, but he would not, at that time, let deponent see him ; Singleton said he made the codicil by the father's desire.

2. Int. Deponent was told deceased must not see company.

6. Jeremiah Robins. About fifteen days before deceased's death deponent went to see deceased, but did not see him.

[606] 7. Thomas Lambert. The deceased had great regard for his executors.

8. John Dickenson. The same ; and gives them good characters.

9. Daniel Hall. The same.

JUDGMENT—SIR GEORGE LEE. I said, though the deceased had not ordered the codicil to be drawn ; yet his approving and executing it was the same thing, that it fully appeared to be his mind, by inserting, with his own hand, the legacy to Dorrell ; that he had a good foundation for making it, as he did not intend his executors should avail themselves of their debts, though the father had behaved improperly ; yet, as deceased was admitted to be in his senses, and no fraud or imposition on him, with respect to this paper, was proved, I pronounced for the validity of the codicil, but did not give costs, and at the desire of the proctor for Wise and others, that the probate should be put under seal till after fifteen days, I ordered accordingly.

Appealed. Affirmed in Delegates.(a)

[607] KEELING *against* M'EGAN. Prerogative Court, Trinity Term, June 19th, 1754.—A seaman's will made to secure a debt pronounced to be void.

Dr. Smalbroke for Keeling. Charles M'Carthy, deceased, a bachelor, made his will, dated 2d October, 1748, appointed Johanna Keeling sole executrix and universal legatee ; it is sealed and marked by the testator, and attested by two witnesses. Mary M'Egan, as sister and next of kin, opposed it ; she pleaded that the will was made as a security for a debt ; that deceased wanted to revoke it, but was hindered by Keeling. We have shewn the reason why he made the will, viz. because the deceased and Keeling were born near each other in Ireland, and she put him to sea ; he was at the hospital at Gosport, and being discharged from thence, came to London and lodged at Judith Williams's ; Keeling went to him at said lodgings ; in September, 1748, he removed to Keeling's house, and lodged there. It will appear that the deceased did not know he had any relation living ; the writer and witness to the will were persons accidentally met with ; they examined him as to his capacity. No exception to the witnesses ; there are three M'Cartheys who lived in the same street with Keeling ; Timothy M'Carthy, Dennis M'Carthy, a mariner, and Dennis M'Carthy, a labourer ; the will was made publicly ; the case will turn upon a declaration said to be made by deceased, that he had made the will to secure a debt, and that Keeling had flattered him into making it.

[608] Dr. Hay contra, for M'Egan. Keeling appeared first by name of Johanna, as she is described in the will, then her proctor alleged her name was Judith, and now she appears again by the name of Johanna ; deceased died on 8th October, 1748,

(a) The cause in the assignation book of the High Court of Delegates is entitled *Wise and Brown v. Johnston* : the final sentence was given on the 5th June, 1755. The Judges present were Mr. Justice Foster, Mr. Baron Adams, Mr. Justice Bathurst, Dr. Simpson, Dr. Collier, Dr. Ducarel, and Dr. Clarke. The sentence was as follows : —“Major exhibited his appeal ; Gosling confessed the identity and subscription. The proctors on both sides porrected definitive sentences in writing, which for their respective parties they prayed to be read, and promulged, and given. The Judges having heard advocates and proctors on both sides, ordered the sentence porrected by Gosling to be read, which was read accordingly, pronouncing, decreeing, remitting, and doing in all things as therein contained. Gosling porrected a bill of expenses ; the Judges taxed the same at the sum of 50l. of lawful money of Great Britain ; besides the monition ; Gosling made oath of the necessary expending of the same. Monition for payment thirty days after service. Many witnesses present.

had wages and prize money due to him; the witnesses admit he did not send for them; deceased, when they came, said nothing to them about a will; 27th September he came from Gosport Hospital to London; went to lodge with Judith Williams; Keeling came there and pressed him to go to her house, and promised to take great care of him; he went to her house the 30th of September or 1st of October; after the will was executed she put him in a damp cellar and used him cruelly; deceased declared she had forced a will from him, and begged to be removed, but Keeling would not suffer him to be removed; Mary Edwards, one of their witnesses, is perjured in every part of her deposition; the will was made merely to induce Keeling to take care of him, and to secure the payment of what he might owe her on that account; he declared he wanted to make another will, and said he did not know Keeling till he came to her house.

Witnesses for Keeling.

1. William Brookman. Producent told deponent at a public house that a man at her house was resolved to make his will to her, and she desired deponent to go with her to deceased to make his will; deponent and Donovan went with her to deceased; deponent asked him if he would make his will, he said "Yes;" deponent asked him to whom? he said, "to that woman," pointing to Keeling; deponent asked him if he knew her, he [609] said, "Yes, Johanna Keeling;" deponent asked him if he had no relations or friends, he said, "No;" deponent repeated the question, and he again said, "No;" he told deponent his name was Charles M'Carthy; deponent wrote the will pleaded; read it to deceased and asked him if he approved of it, and he said "Yes," and executed it in presence of deponent and Donovan, who attested it; deceased of sound mind, &c.; deceased was then a stranger to deponent; deceased went abroad to the Admiralty Office, after he had made his will, and deponent went with him.

2. Cornelius Donovan. Keeling told Brookman and deponent that deceased was recommended to her from Gosport, and that he was desirous of making his will to her; gives the same account of what passed at making the will as the former witness; same account of execution, &c.; deceased of sound mind; never saw deceased but that time.

Witnesses for M'Egan.

1. Dennis M'Carthy. Deceased lodged about eight days at Keeling's, where deponent then lodged; four days before deceased died he told deponent he had four years' wages due to him, and 100 pistoles for prizes; said he did not know whether he had any relations living, for he had been abroad a great while; Keeling and deponent went to Williams' to deceased, and found him there very ill, and Keeling pressed him to come to her house, and he at last consented; a few days after Keeling told him deceased had made his will to her; deponent that day asked him if he had made his will; he said "Yes, but it signifies nothing;" and he did it in order that Keeling might do him justice; deponent believes he made it to secure to [610] Keeling what he owed her; she afterwards used him cruelly, and laid him in a damp cellar; and deceased begged deponent and others to take him out of those lodgings; Keeling refused to let him go; deceased said he owed her about ten shillings.

2. Timothy M'Carthy. Knew deceased when deceased was a child; deponent went to see deceased, as being his countryman and namesake. Keeling used to board mariners, and is an artful woman; she used deceased very ill; deponent found him lying on straw, in a damp cellar, and he then complained of her usage, and mentioned his having made his will, as a security for what she might lay out upon him, and since he had made it she had used him very ill; there were rats and rabbits in said cellar; deponent and Dennis M'Carthy set out in order to take deceased away from Keeling's, but deponent was taken ill, and did not go on; and Keeling, as deponent heard, would not let him be removed.

3. Dennis M'Carthy, mariner. Deponent went to see deceased, and found him in a cellar lying on straw; he told deponent how he came thither, and exclaimed against Keeling, and told deponent what was the reason of his coming there, and that he had made his will to secure her debt. Keeling would not let deponent have any victuals or drink to give deceased; he desired deponent to get him removed; says Keeling would not suffer deceased to be removed; deponent saw him the day before he died; deceased declared he had made the will only for a security to Keeling, and he would make another. Keeling endeavoured to prevent any one seeing him.

4. John Barber. 5. Hubert Fox. Both gave Keeling a bad character.

[611] Keeling in acts of Court alleged her name was Judith.

4th article of Keeling's allegation. Alleges that on the 9th of September, 1748, deceased was sent to the hospital at Gosport, was discharged from thence the 27th September, and came to town to inquire for Keeling. Pleads affection from deceased to Keeling, and that deceased pressed to go to her house.

Witnesses for Keeling.

1. Mary Edwards, examined in 1752. Swears she met deceased in the street, about nine years ago; he enquired for Keeling's house, and said if he could find her he would leave all he had to her. Keeling does not keep a public-house for sailors; never heard of her having sailors' wills made to her; deponent went with Keeling to deceased at Williams's; he shewed great affection for Keeling; does not believe the will was made to secure a debt; she took great care of him; he lay in the kitchen, and had an apothecary.

2. John Hyde. Has known Keeling and her husband twenty years; they do not keep a public-house for seamen; gives them good characters.

3. James Butler. Has known Keeling and her husband twenty years; she employs poor people in quilting; gives them good characters.

4. John Cunningham. Has known the Keelings fifteen years; gives them good characters; the first time deponent saw deceased he was lying in the kitchen.

1. Int. Deceased was indebted to Keeling.

5. Mary Ayles. Gives the Keelings good cha-[612]-racters; never heard they kept a tipling-house for seamen.

JUDGMENT—SIR GEORGE LEE. I was of opinion this will was made to secure a debt,(a) and as such was void, according to the constant determination of the Court, and therefore I pronounced against the will, and condemned Keeling in costs.

LEWIS *against* JAMES. Arches Court, Trinity Term, June 25th, 1754.—A proceeding against a churchwarden, respecting his accounts, held to be vexatious; suit dismissed with costs.

(Appeal from Landaff.)

Dr. Pinfold for James. Edward James was churchwarden of Lahgattock, in Monmouthshire, for the year 1750. William Lewis was churchwarden there for 1749. James cited his predecessor Lewis to bring in his accounts for 1749, and pass them in the Consistory of Landaff. Lewis brought them in; James excepted to them. Disbursements, 5l. 12s. 1½d. Receipts, 3l. 3s. 5½d. Balance on the account due to Lewis, 2l. 8s. 8d. James excepted to four articles, 8s. 1½d. for new bell-ropes; 3s. for work done by himself; 18s. 2d. to his proctor for drawing the account; and 9s. 6d. to himself for his expenses in travelling to the Court; together 1l. 18s. 9½d. So that allowing [613] those exceptions, there remained due to Lewis on the balance 9s. 10½d. On the 22d May, 1749, an order of vestry was made that no new ropes should be put to the church bells till the old ones were worn out; no new bell ropes were wanted, but yet Lewis took away the old and put new ones contrary to the order of vestry, which he charged in his accounts at 8s. 1½d.; to this article, and to the 3s. for his own work about them the parish objected, whereupon James, the succeeding churchwarden, brought this suit. Cause was heard the 15th November, 1752. Sentence that James had proved his exceptions, and that none of the articles excepted to should be allowed, except the 3s. for work, from which decree Lewis appealed.

Dr. Jenner contra, for Lewis. Citation returned the 25th June, 1750, when Lewis went out of his office, viz. on Easter Monday, 1750, he tendered his accounts to the vestry, but they refused to receive them; the parishioners had no cause of action, and therefore what the Court below did is void. Lewis carried the old bell-ropes to the vestry and delivered them up; the proctor's bill must be allowed, for Lewis was forced into the suit, and he must be allowed his own expences. The Court below condemned him 10l. costs.

Witnesses for James.

1. James Jones. 22d May, 1749, an order was made in vestry, when Lewis was present as churchwarden, that the bell-ropes should continue till they were worn out, and should be then used to mend the old ones; the churchwarden used annu-[614]

ally to put in new ropes and take the old ones himself; new ropes were not wanted, Lewis paid 8s. 1½d. for the new ones, and took the old ones himself; Lewis's work was not worth above a shilling.

1. Int. Deponent pays no taxes. Lewis lives twenty-five miles from the Court. 3. Int. It has been the custom for the churchwarden to have the old bell ropes which were annually changed. Lewis is an illiterate man. 5. Int. Edward James received the old bell ropes from Lewis. 7. Int. Lewis tendered his accounts to the vestry, and they refused to audit them.

2. Charles Lloyd. Proves the order of vestry; believes Lewis had no right to the old bell ropes; new ones were not wanted, for the old ones were bought the year before. Lewis's wife said they would not obey the order.

1. Int. Deponent was requested by Morris, the curate, to be a witness. 3. It was the custom for the churchwarden to have the old ropes. 7. Int. The vestry refused to audit the accounts because they were overcharged.

Witnesses for Lewis.

1. James Price. Lewis took the ropes as his predecessors had done. Lewis tendered his accounts, but the vestry refused to receive or allow them.

2. Thomas Palmer. Proves the order of vestry; it was the custom for the churchwarden to put on new ropes annually, and to have the old ones for his own use.

3. John Watkins. Lewis put on new ropes, and took the old ones as usual; the old ones worth about three shillings.

4. William Jones. Lewis afterwards delivered [615] the old ropes to James Lewis; tendered his accounts to the vestry on Easter Monday, 1750, but they would not receive them, and he desired James to call a vestry that he might again tender them, but he refused.

Dr. Pinfold for James. Lewis has acted contrary to the order of vestry; the articles of the proctor's bill and Lewis's expences depend on his behaviour; there was nothing to be done by the parish but to bring him before the Court; the great question is about the costs below.

Dr. Jenner for Lewis. This is a very trifling cause; as soon as Lewis was out of his office he tendered his accounts; the order of vestry was made because he refused to be overseer of the poor; in these small matters the law leaves churchwardens to act according to their discretion. No foundation for the suit, the parish had no right to cite him; if all the exceptions had been just, a balance is still due from the parish to Lewis.

JUDGMENT—SIR GEORGE LEE. I said this was a very trifling, vexatious suit. Lewis had done wrong in acting contrary to the order of vestry, but the parish had no cause of action against him; they were in his debt beyond the article they objected to; they had their remedy in their own hands; they might have refused to allow the 8s. 1½d. for the bell ropes, and have paid him the remainder of the balance due to him, and left him to get the 8s. 1½d. as he could; the parish, being in his debt, had no right to sue him, [616] and therefore I pronounced for the appeal; reversed the sentence, dismissed Lewis, and gave him 45l. costs for the expenses below, and in the Arches.

N.B.—The bill was 50l., but the registrar reported that 45l. was justly due, and the adverse proctor did not object; and I gave full costs reported, to discourage such litigious suits.

ROBINS *against* SIR WILLIAM WOLSELEY. Arches Court, Trinity Term, June 25th, 1754.—In a suit for adultery brought by the husband, the wife appears under protest, and alleges a prior marriage.—The question of the former marriage must be determined before the question of adultery is gone into.

Appeal from Litchfield in a grievance.

Dr. Paul for Mrs. Robins. This suit was described below, Sir William Wolseley against Lady Wolseley, and was brought by Sir William against her as his wife for adultery, in order to obtain a divorce. A proctor appeared for her under protestation, and alleged her name was Ann Robins, and that she was and is the wife of John Robins, Esq. 12th February, 1754, Sir William's libel given in, in which he pleaded that he was married to the defendant on 25th September, 1752. The libel admitted quatenus, and the judge decreed for Mrs. Robins's answers to the marriage pleaded by Sir William. He allowed no time to extend our protest. We have pleaded in

writing that she married Mr. Robins on 16th June, 1752; this allegation was not opposed, and stands admitted. At the same time her proctor made an allegation *apud acta*, and protested against going [617] into the cause till the validity of her marriage to Robins was determined. The judge rejected her whole petition, and admitted and swore a witness on the libel. Mrs. Robins has appealed from the act of 26th March, 1754.

Dr. Simpson, same side. Mrs. Robins's proctor alleged a misnomer on his first appearance under protest. 12th February, 1754, libel admitted, and Robins's proctor gave a negative issue. The Court decreed for her answers. We protested of appealing therefrom. On 26th February her proctor declared he would give in an allegation in writing, pleading her marriage to Robins. On 26th March said allegation was given in, and her proctor prayed Sir William Wolseley's suit should stop, and prayed Sir William's answers to her allegation, which had been admitted without opposition; the Court decreed for her answers to Sir William's libel, and admitted a witness upon it absolutely, but did not decree for his answers to her allegation. At the same time an allegation *apud acta* was offered on behalf of Robins, but rejected by the Court. All these are grievances; but the principal grievance was in proceeding in Sir William's cause while the question of her marriage to Robins was undetermined. The appeal is from the act of 26th March, 1754.

Dr. Pinfold for Sir William Wolseley. Citation 9th October, 1753. On 23d October Robins's proctor appeared under protest. On 26th March she gave in an articulate allegation, which is admitted. Same day her proctor alleged, and prayed *apud acta* that Sir William's suit may be stayed.

[618] Act of 26th March, 1754, upon which the appeal is brought.

Tindall, proctor for Robins, prayed her articulate allegation to be admitted, and a decree against Sir William to answer to it, and alleged that Sir William's pretended marriage and suit was subsequent in time to her marriage to Robins, and that it tended to prove Mrs. Robins guilty of bigamy, and therefore prayed that Sir William's suit may be suspended till the Court had determined on her plea. Howard, proctor for Sir William, declared he did not oppose the articulate allegation, and prayed the certificate of the decree for Robins's answers to Sir William's libel to be continued.

Richard Wolseley appeared; alleged he was excommunicated for being present at a clandestine marriage, and prayed to be absolved, and to be admitted a witness on Sir William's libel. The judge absolved, and admitted him a witness, and rejected Robin's allegation *apud acta*, and petition.

Dr. Paul for Robins. No allegation admitted till 26th March, 1754; the protest is the first matter to be discussed; the judge rejected our prayer for Sir William's answers.

Dr. Simpson, same side. Judge should have assigned a time for extending our protest, but we have not appealed from that; our articulate allegation is *loco reponsi*, and the proctor below expressly declared he gave it in as such; if Mrs. Robins gives answers on oath to the libel, she may accuse herself of bigamy, contrary to the known rule that no one is to accuse himself; ordering [619] her, therefore, to answer is a grievance. 2d grievance. Not ordering Sir William to answer to our plea. 3d. Our plea is an absolute bar to the suit, and, therefore, a grievance is done in not staying the suit. 4th. A witness upon the libel ought not to have been received while our plea was depending; peremptory exceptions may be offered at any time before or after contestation of suit. Clark's Praxis, tit. 60, her non-interest may be alleged at any time and the suit shall be stayed. Maranta, par. 6, de Except. nu. 12, peremptory exceptions may be made after contestation. Our plea admits conversation with Mr. Robins; if Sir William's cause and our exception go on together a prohibition will lie, because the Court in that case will try bigamy. The grand question is, whether this suit on Sir William's part ought not to stop till we have had a determination on our plea in bar? The grievances we complain of are these: 1st. Not staying Sir William's suit; 2dly. Decreeing for Mrs. Robins's answers to his libel. 3dly. Not decreeing for Sir William's answers to our articulate allegation; 4thly. Admitting a witness on the libel.

Dr. Hay, same side. If we had insisted on the protest, that matter must have been determined before any issue could have been given to the libel. I admit a common misnomer cannot be pleaded after contestation of suit, but a peremptory plea may be offered at any time, and must stay a suit. Mrs. Robins cannot answer

to the libel, because if she confesses her marriage to Sir William she must accuse herself of a crime. Our allegation was given *loco responsi*, as her proctor alleged, in acts of court; therefore, the certificate [620] of the decree for her answers ought not to have been continued.

Drs. Pinfold and Bettesworth for Sir William. The protest was waved by an issue being given to the libel; when a Court admits a libel it is in order to proceed to proof; Consist. Lond. (a) *Adams against Adams*. Dr. Andrew would not stay this cause as to the cruelty and adultery till the question on the marriage was determined, but went on with both together; our witnesses may die and Sir William may be irreparably prejudiced if his cause is stopped.

JUDGMENT—SIR GEORGE LEE. I was of opinion the judge below had done Mrs. Robins injury by his decree. He ought to have stayed Sir William's suit till it appeared whether Mrs. Robins was married to Mr. Robins previous to the time that Sir William charges her marriage to him, for if she was, her plea was an absolute bar to the suit against her for a divorce for adultery; for if she was married first to Robins, Sir William could not accuse her of adultery, or be divorced from her, because he has no interest, for in that case she is not his wife. 2dly. As her plea was admitted *loco responsi*, she was discharged from answering on oath to the libel; besides she was not obliged to answer to a marriage with Sir William, when she insisted on a prior marriage to Robins, for if she owned a marriage to Sir William she would prove herself guilty of bigamy. 3dly. As the suit ought to have been stayed, a witness on the libel ought not to have been admitted; and, [621] 4thly, he ought to have decreed for Sir William's answers to her plea.

I therefore pronounced for the appeal; decreed Sir William's suit to be stayed till the marriage with Robins was determined; discharged her from answering to the libel, reversed the admission of the witness, and decreed for Sir William's answers to her plea, and reserved the consideration of costs in *finem litis*.

BIRD, ALIAS BELL *against* BIRD. Arches Court, Trinity Term, June 25th, 1754.—A case of nullity of marriage, by reason of a former marriage, established. Alimony to second wife refused.

This cause began before the Commissary of St. Paul's, came here upon an appeal from a grievance, and was retained.

Dr. Pinfold for Thomas Bird. Thomas Bird brought a suit against his wife for nullity of marriage, by reason of a former. Elizabeth Bird, alias Bell, whose maiden name was White, was married to Robert Bell on 5th April, 1722, at the church of St. Mary Magdalen, Old Fish Street, as appears from the registry there; 7th February, 1735, she was married to Thomas Bird at the church of St. Bennet, Paul's Wharf, as appears from the register there; we have proved general reputation of marriage to Bell, and cohabitation. Robert Bell went a soldier to Mahon, by name of James Clark; prior to marriage with Bird she wanted to know whether Bell was alive, she enquired, and was informed he was, and went by the name of Clark, and was a soldier; found at Savoy that James Clark was alive in 1744. Robert Bell came to England; spoke to several of her relations; said he would go to see her; he went; [622] she was much frightened, and said he was Bell, her husband. Most of the witnesses are her relations; no evidence on her part.

Dr. Hay for Elizabeth Bird, alias Bell. I admit she was married to Robert Bell; she was deserted by Bell in 1722, and she lived a widow, as she thought, to 1735. She did not know her first husband was living; was assured of the contrary by Bird; has had eight children by Bird. If the court should be of opinion they have proved Robert Bell was living when she married Bird; hope the court will allow her something for alimony to maintain her, as has often been done in cases of contract; the court has given a sum of money to the injured woman, though the contract has been pronounced against; the court did so in the case of *Ashby and Ward*, Dr. Bettesworth gave her 200l. though the contract was pronounced against, and Ashby had not had consummation with her; the reason is stronger in this case; she was persuaded by Bird to marry him, not knowing her first husband was alive, and has had eight children by him, and her reputation is unblemished in all other respects.

JUDGMENT—SIR GEORGE LEE. I was of opinion both the marriages were fully

(a) *Adams v. Nevill, calling herself Adams*, Deleg. 13th Feb., 1749.

established by the evidence, and that Robert Bell was living when she married Bird, and she had good reason to think he was then living. I therefore pronounced for the nullity of the marriage with Bird, but gave no costs. As to allowing her a sum of money (though I thought her case a very compassionate one), I was of opinion I had no warrant to do it by law or practice; in [623] cases of contract, long usage had made it lawful, but there was no instance of giving a woman a sum of money in a cause of nullity of marriage by reason of a former, and therefore I thought I had no authority to do it.

PLUNKET, FORMERLY SHARPE *against* SHARPE. Prerogative Court, Trinity Term, June 29th, 1754.—When the Court decrees an inventory, it expects a full and satisfactory one to be given in.

[See on another point, p. 439, ante.]

Dr. Collier for Plunkett. Thomas Sharpe, deceased, died in November, 1751, intestate; 13th December, 1751, administration was granted to John Banks, as father and guardian of Ann Plunkett, deceased's widow, and till she came to age; 29th April, 1752, she married Christopher Plunkett; in August, 1753, she being at age, and the administration to her guardian ceasing, she applied for administration in her own right. A caveat was entered in name of John Thomas; warned 4th September, 1753. Gostling prayed administration to be granted to Ann Plunkett. Bogg prayed it to be granted to William Sharpe, deceased's brother, and both proctors were assigned to answer to each other's interests. Gostling confessed Sharpe's interest, Bogg denied Plunkett's interest; she pleaded it, allegation admitted; pleaded public owning and cohabitation, and particularly owning of her as his brother's wife by said William Sharpe; publication on said allegation. Bogg gave an allegation which was admitted. Both proctors assigned to give in inven-[624]-tories. Gostling gave in a declaration. Bogg gave in an inventory, but defective both in form and substance. Deceased's father died in 1747; made his will; appointed his eldest son, William Sharpe, his executor; gave him two-thirds of his estate, and gave the other third to deceased, to be paid at his age of 22; he was past that age when he died. We pray he should set forth the particulars of his father's estate that it may appear what the third amounted to, which belonged to deceased. At the head, he styles it an inventory of all the goods, &c. of deceased that have come to his knowledge; and at the end he admits deceased was entitled to one-third of his father's estate, but says that estate is not yet liquidated, and that Plunkett is not entitled to an account of it till she has proved her interest.

JUDGMENT—SIR GEORGE LEE. I directed that the head of the inventory should be put into the usual form, viz. a true and perfect inventory of all the goods, chattels, and credits of deceased that have come to the hands, possession, or knowledge of Sharpe; and I said, when the court decrees for an inventory, a full and satisfactory one was expected; that the third of the father's estate vested in the deceased and was part of his estate, and appeared to be in the hands of Sharpe, and therefore he was obliged to give an inventory of what he had received in money or goods from the father's estate for the use of deceased, and I decreed accordingly that he should give in a fuller inventory, and set forth the same, and condemned him in 1l. 6s. 8d. costs.

[625] SAME DAY, UPON A MOTION IN CHAMBERS.

Prerogative Court, Trinity Term, June 29th, 1754.—An intestate leaves a widow and an infant; the widow takes out administration but becomes lunatic; administration granted also to the aunt of the infant, for the use and benefit of the widow and infant, during the incapacity of the widow and the minority of the infant.

By Mr. Farrer, proctor. Mr. Binfield died intestate; left a widow and an infant son; administration granted to the widow, who soon after became lunatic, is in Bedlam, and utterly incapable of acting in management of the deceased's affairs, of which full proof was made by affidavits exhibited; the estate was small, unable to bear the expense of a commission of lunacy, and there were debts owing to it which were in danger of being lost if there was no person to receive them. Whereupon, at the petition of Farrer, without revoking the administration granted to the widow, I assigned (upon the renunciation and consent of his grandmother) the infant's aunt to be his guardian, and granted administration to her also for the use and benefit of the widow and infant during the incapacity of the widow and minority of the infant,

if the widow should not sooner recover her senses, and directed this administration to be drawn in a special form, reciting the above particulars.

FANSHAW *against* VERDON. Arches Court, Trinity Term, July 2nd, 1754.—A grievance must be heard from the acts in the court below.

Appeal from Litchfield in a grievance.

Dr. Simpson for Fanshaw. Appeal from admitting an allegation. Fanshaw is seised in fee of the rectory of Dronfield in Derbyshire; he brought [626] his suit against Verdon for tithes of hay, clover, and other things; Verdon compounded for the rest, but insisted that he was not liable to pay tithes to Fanshaw of his hay and clover, pleaded that he occupies only ten acres of grass lands, which belong to an ancient messuage called Westernholm Farm, wherein he dwells, that Henlock being seized of those lands, sold them in 1626 to Greenwood, and Greenwood sold them to Springhall, who, on the 20th May, 1721, sold them to Samuel Rotheram, to whom they were conveyed by deed, and that John Rotheram, the son of said Samuel, is now entitled to the tithes of the said lands. The judge below ordered the deeds should be exhibited. Verdon gave additional articles pleading those deeds; these articles were not on stamped paper; afterwards those articles and the former allegation were made into one, and the judge rejected the first and third articles, from which Verdon has not appealed; but we have appealed from receiving said allegation, and admitting several articles thereof before any copy thereof on stamped paper was left in Court, or any copy thereof on stamped paper delivered to Fanshaw's proctor, and from not rejecting said articles. The process was transmitted imperfect. Monition was served on the registrar and Fanshaw's proctor below to transmit the omissa. The registrar returned he had transmitted all the allegations and proceedings that had been exhibited into Court. Mr. Fletcher, Fanshaw's proctor, returned that he had sent all the allegations, articles, and copies that he had to Fanshaw, who has made affidavit that the three additional articles sent by Fletcher to him are not on stamps; part of our appeal is from receiving three articles not on stamps.

[627] Dr. Pinfold for Verdon. Verdon was cited in a cause of tithes. Citation returned the 3d May, 1748. Only question is as to tithes of hay. We pleaded that we have no lands in Dronfield but Westernholm Farm, the purport of our allegation is to shew that Fanshaw is not impropiator of the tithes of these lands. By the process it did not appear whether the allegation was on stamps or not; monition pro omisissis went. The allegation transmitted thereon, as the original, is on stamps. Fanshaw has made an affidavit which cannot be received, for the Court must judge from the registrar's return.

Read allegation appealed from.

1 art. Verdon has not, since Lady-day, 1717, occupied any lands in Dronfield but what belong to an ancient messuage, which he inhabits, called Westernholm Farm, which lands are about ten acres.

N.B.—The judge rejected this article.

2 art. Henlock being seized in fee of said tithes of said lands, conveyed them in 1626 to Greenwood.

3 art. Exhibits deed of conveyance from Henlock to Greenwood.

N.B.—Judge rejected this article.

4 art. Greenwood in 1697 sold said tithes to Springhall.

5 art. Exhibits that deed of conveyance.

6 art. Springhall, in May, 1721, sold said tithes to Samuel Rotheram.

7 art. Pleads that deed.

8 art. From 1626 to 1697 Greenwood and his [628] family were owners of said tithes, and yearly received them.

9 art. From 1697 to May, 1721, Springhall was owner of said tithes, and received them.

10 art. From May, 1721, to 1743, Samuel Rotheram was owner of said tithes, and received them.

11 art. From 1743 to the present time, John Rotheram has been owner of said tithes, and is so esteemed, and has constantly received them.

12 art. Said messuage in which Verdon lives is the same as is mentioned in id deeds.

N.B.—This whole allegation is on stamps.

Buckeridge, the registrar's, return that he has transmitted all the original allegations and articles exhibited in the cause.

Read for Fanshaw.

Hand exhibited deeds to be annexed to his allegation.

Judge rejected 1st and 3rd articles of the allegation.

Mr. Fletcher, the proctor's, return certifies that he was proctor for Fanshaw, and sent to him all the allegations, articles, and copies in this cause; believes Fanshaw received them, and he has none in his hands.

Offered to read Fanshaw's affidavit that three articles not on stamps were sent by Fletcher to him. Objected to reading it.

Per Curiam. I was clearly of opinion the affidavit could not be received, because a grievance must be heard from the acts below; that the process and the registrar's return were the proper evidence to me of what had been exhibited, and it would be very [629] dangerous to admit the affidavit of a party to bring in papers which were not in the cause below, and to contradict the judge and registrar's return; therefore I rejected his affidavit.

Dr. Simpson against the allegation. 2nd art. The deed which supports it is rejected; they shew a title to the tithes conveyed originally to Henlock, or those from whom he claims from the impropiator. All the rest of the allegation must follow the fate of that 2nd article.

Dr. Hay, same side. First article being rejected, Verdon's title does not appear, and that will destroy all the rest of the articles.

2 art. should shew how the tithes came out of the impropiator's hands.

JUDGMENT—SIR GEORGE LEE. I was of opinion the whole allegation ought to have been admitted, but as Verdon had not appealed from rejecting the first and third articles, they must stand rejected, but the rest were properly admitted by the judge below. I was of opinion Verdon need not in this case shew a conveyance originally from the impropiator, because he does not attempt to shew a title to himself in the tithes, but only to shew a bar to Fanshaw's suit, by shewing that he is liable to pay them to another person, who (and those under whom he claims) have received them for many years, and not the impropiator. I pronounced against the appeal, confirmed the decree given below, and condemned Fanshaw in 20l. costs.

[630] CONRAN *against* LOWE, OTHERWISE DANIEL, CALLING HERSELF CONRAN. Arches Court, Trinity Term, July 2nd, 1754.—A question touching the validity of a Fleet marriage. Marriage not sufficiently proved.

Dr. Paul for Mary Conran. On 4th session, Michaelmas, 1749, citation was returned in Consistory of London, in a cause of restitution of conjugal rights. 1st session, Hilary Term, 1749-50, libel admitted. Marriage denied; marriage was solemnized by William Dare, priest at the Fleet, on 18th October, 1741; owning and cohabitation with reputation. William Conran gave ten guineas, and a note for forty guineas more to Watson, who had the custody of Dare's register, to tear out the leaves where the marriage was entered. Conran at that time owned it was an entry of his marriage; the fact of marriage is not proved, because the witness who was present at it is dead. When the cause was concluded, Mr. Conran made affidavit that it had lately come to his knowledge that she was married to one James Daniel, in Ireland, who was living at the time she pretends to the marriage with him, and believes he could prove it; the Chancellor of London opened the cause; Conran pleaded said former marriage, but has not proved it. Sentence in the Consistory for the marriage on 26th October, 1753, from which William Conran has appealed.

Dr. Hay *contra*, for William Conran. She has pleaded in her libel a courtship in 1741; no evidence of said courtship. Pleaded that the parson and Stephen Peters, who was present at the marriage, are dead; no proof thereof. Marriage, 8th October, 1741, at the Fleet; puts her case on co-[631]-habitation in different places; in 1743 Mr. Conran went to France, she pleaded that she received letters from him, in which he subscribed himself her loving husband, but has not produced any letters, or given an account what is become of them. The transaction about tearing the leaves out of the register book is proved only by Watson; in October, 1749, Mrs. Conran applied to Watson to search Dare's register book for a marriage between Mary Lowe and William Conran; he then said the books were at Guernsey; she told him she would

give him twenty guineas to find such an entry. Watson wrote to Mr. Conran to tell him what had passed; Conran came to him and proposed to tear out the entry; 17th December, 1749, the leaves were torn out, and William Conran paid him ten guineas, and gave him his note for forty guineas more. Upon affidavit that Mary Lowe's former marriage was *noviter perventum*, he gave in an allegation after the cause was concluded, in which he pleaded that she was the wife of Daniel who was living at the pretended time of her marriage to Conran; two witnesses say they heard in 1738 that James Daniel was married to Mary Lowe, in Ireland, and that soon after she went to London with one William Hacket. Daniel followed her to England, and on hearing he was come after her, she was frightened, and owned he was her husband; she said James Daniel had a meeting in Exeter Street, and she there owned her marriage to him, but said Conran kept her, and if he would be quiet and not expose her she would make him remittances of money to Ireland. Two points. 1st. Whether she had a right to bring this suit, she being the wife of Daniel? 2d. Supposing her marriage to [632] Daniel is not fully proved, whether she has sufficiently proved her marriage to Conran? She is proved to be a common prostitute.

Witnesses for Mary Conran.

1. Francis Barbara Dillon, examined 1750. Knows parties; in April, 1742, William Conran kept a linen draper's shop in Catherine Street, and lived with *producent* as his wife; he introduced her to deponent as such; they constantly owned each other; in July, 1747, they came and dined with deponent and owned each other as husband and wife; he asked deponent to be bail for his wife and said he had never disowned her.

2. Mary Halcot, examined 1751. Knows parties; deponent lodged at their house three months; they lived as husband and wife and were so reputed; they lived near two years in Catherine Street; he failed and went to France; they were always esteemed to be married.

2. Int. *Producent* owned herself to deponent to be a common whore, and said she lay with Lord Thomas Watson by her husband's consent; she has a bad character.

5. Int. Hacket often came to her, and she told deponent he used to lie with her in Ireland.

3. John Rainsforth, examined 1751. *Producent* came to hire lodgings at deponent's house at 5s. a week; he asked who was to pay him, she said her husband, Mr. Conran; deponent went to him, and he told deponent he would pay him for *producent*'s lodgings, or see him paid, till deponent heard further from him; *producent* was present, and said to him, "You know, my dear Billy, you are my husband, and if you don't provide for me, who will?" He replied, "You are my [633] wife to my sorrow;" *producent* lodged at deponent's house, and deponent gave his receipts to her, for rent, as the wife of Conran.

4. George Dowdall, examined 1751. Has known Conran fourteen years, and *producent* eight years, viz. from her marriage to Conran; proves owning and reputation of marriage; five years ago they lived as husband and wife in James-street.

2. Int. *Producent* has a bad character; deponent has heard she is a whore.

5. Nathaniel Quin, examined 1751. Deponent taught *producent* to write; Conran told deponent he should be paid; they were esteemed married persons; she shewed deponent letters signed "William Conran," which concluded "Your loving husband," but cannot say whether they were wrote by Conran, the party, for he does not know his handwriting.

2. Int. *Producent* has the character of being a loose woman.

6. James Kenney, examined 1751. Before Christmas, 1751, Conran and *producent* owned each other as husband and wife; deponent was often with them; when he went to France he desired deponent to take care of his wife, the *producent*; they lived together in Fountain-court as man and wife, the same in James-street; when he was in France he wrote to *producent*; deponent saw many of his letters to her, subscribed "Your loving husband, William Conran;" proves said letters were Conran's handwriting; they had a quarrel in September, 1747; and he has lived separate from her ever since; Conran allowed *producent* half-a-guinea a-week after their separation.

5. Int. Hacket kept company with *producent* when she lived in Burleigh-street, and has heard [634] he was esteemed to be her husband. 2. Int. She was maintained by Conran after separation, and he allowed her twenty-six guineas a-year; she has a bad character.

7. Barnard Baker, examined 1751. They were esteemed to be husband and wife; they often quarrelled; deponent, about 1742, blamed them for being married at the Fleet; one of them, but deponent does not remember which, said it was done in a hurry; Conran, since they parted, said to deponent he defied her to prove her marriage.

2. Int. She has a bad character.

8. Elizabeth Murphy, examined 1751. Nine or ten years ago, Conran told deponent he was going to be married; deponent asked him if he would not bring his wife to see deponent; he said "Yes;" he brought producent to see deponent, and said she was his wife; proves constant owning and reputation, when they lived in Catherine-street.

9. Edward Watson. Deponent knows the parties; first knew producent by her applying to deponent to search some Fleet registers in deponent's possession, and first knew William Conran by seeing him go to his uncle's house on Ludgate-hill, and by his applying to deponent concerning said register book in 1747; deponent purchased the books of Dare's son, in which said Dare entered his marriages in October, 1749; producent came to deponent to inquire whether deponent had Dare's register books, and said she wanted to find an entry of a marriage between William Conran and Mary Lowe, and told deponent she would give deponent twenty guineas for a certificate of such entry; deponent told her the books were at Guernsey; she called several times after, but deponent [635] having heard a bad character of her, he, by letter, acquainted William Conran with what had passed, and that he had found an entry of such marriage, which he might see; Conran came; deponent shewed him said entry of marriage on 8th October, 1741; said entry was Dare's writing; William Conran, on seeing it, said "Aye, this is the marriage, sure enough;" and said William then proposed to deponent to take out the leaf on which said entry was wrote, and said he would satisfy deponent; and he then desired deponent not to let producent see said book; deponent did not let her see it, but told her it was at Guernsey, and said the marriage was likewise entered in a memorandum book of Dare's; deponent had several meetings with Conran and Lewis Morgan, who was a writer at the Commons. On 16th December, 1749, Conran, Morgan, and deponent supped at the Rose Tavern, at Temple Bar, and deponent, in consideration of ten guineas then to be paid him by Conran, and of a note from him to deponent for forty guineas more to be paid three days after his marriage with producent should be pronounced against, agreed to suffer Conran to tear out the leaves where such marriage was wrote; next day deponent went to Morgan's lodgings, and found Conran there, who then, with the assistance of deponent and Morgan, tore out said entries, and said Conran paid deponent ten guineas, and gave him a note for forty guineas; proves said note to be wrote by Conran, in deponent's presence; identity of persons; deponent agreed to give Morgan two guineas, and gave him a note for that sum; Conran then mentioned a suit depending between him and producent.

[636] Said note read. Evidence read for her also.

Conran's allegation pleads that James Daniel courted Mary Lowe, and was married to her by one Ambrose, on 9th September, 1737, in presence of several persons named.

Evidence for William Conran.

1 art. of her libel read. Pleads courtship by Conran, and marriage by Dare, in presence of Stephen Peters, both since deceased.

Witnesses for William Conran.

1. James Gilligan. Deponent knew James Daniel and Mary Lowe in 1737; John Daniel told deponent his brother James was married to Mary Lowe, and said he was present at said marriage; soon after she went from Ireland to London with one William Hacket; in 1741 deponent heard she lived with said Hacket; in 1742 James Daniel came to London, and he told deponent he was come to search for his wife, and begged deponent to assist him; said Mary then lived with Conran; deponent went to her, and told her James Daniel was in town; next night she met deponent and Daniel at a house in Exeter-street, and she then told Daniel it was to no purpose to trouble her; it was better for him to let her live with Conran, and she would make him remittances of money to Ireland; and she gave him five guineas and a piece of linen.

2. Matthew Gall. Says John Daniel declared he was present when his brother

James was married to Mary Lowe; James came to deponent in [637] London, and told him he was married to said Mary six years before; deponent went and told her thereof; she trembled and gave evasive answers, but at last owned she was married by Ambrose to said James; but said she thought nothing of it, for she had heard he had married another woman. Deponent was at the meeting with her and James Daniel; agrees with the last witness as to what she then said, but says the five guineas and the linen were given to James afterwards.

Dr. Paul's argument for Mary Conran. Conran's giving money to destroy the register, and pleading that she was the wife of Daniel by way of bar to this suit is a full confession of the marriage in question. Her owning a former marriage cannot, by the canon, dissolve this, for, by the canon, confession of the party shall not destroy a marriage.

Dr. Bettesworth, same side. Gall does not prove identity of persons, but he is the only witness who speaks to her confession of marriage with Daniel, for Gilligan's words do not go so far.

Dr. Hay and Dr. Smalbroke contra. Gilligan and Gall fully prove her confession of marriage to Daniel; Gilligan says she told Daniel it was to no purpose to trouble her; it was better for him to let her live with Conran, and she would make him remittances, which implies necessarily that he was her husband; and there is no exception to these witnesses. Her marriage with Daniel is an incidental question, if it is not so fully proved that it could be pronounced for as a marriage; yet if the evidence creates a doubt whether she is married [638] to Daniel or not, the Court will not decree her to live with Conran. There is no proof that Stephen Peters is dead. In the case of *Bumford and Jefferson*, in Consist. Lond. the woman pleaded that she was married at a parish church, but she did not prove it, or produce a copy of the register, which Dr. Andrew held to be fatal to her, and pronounced against the marriage though cohabitation and birth of children were proved; it is necessary to prove courtship in a clandestine marriage. The woman must be of good character to establish a presumption of marriage from cohabitation, Menoch. lib. 1, presumpt. 73. The canon law does not allow presumptions inter vivos, ff. de ritu sumpt. l. 24. In the case of *Adams and Adams*, cohabitation had weight, because the woman's character was without blemish.

JUDGMENT—SIR GEORGE LEE. I was of opinion that a prior marriage of Mary with James Daniel was not proved, but, however, so much suspicion arose from her confession of such marriage that a stricter proof of her marriage with Conran was to be required; that in this case she ought to have proved the death of Stephen Peters, both to excuse herself from proving the fact of marriage, and to induce the Court to accept the minor evidence (as the best evidence that could be had) arising from cohabitation and owning. That cohabitation created a very strong presumption in favour of marriage, where the woman's character was unblemished, because the law would not suppose a woman whose character, in general, was virtuous, would live with a man as her husband who was not so; but no such presumption could be made in this case, where the woman appeared from [639] her own witnesses to be a common prostitute, both before and after the pretended time of her marriage with Conran, and therefore cohabitation was no evidence under the circumstances of this case. As to the ownings by Conran, they were, while he lived with her, and may reasonably be supposed to have been made to cover an irregular conversation with a woman who had before lived with Hackett as her husband, when he was not so; but even some of her witnesses, who depose to owning, mention some expressions from him which intimate that he was not bound to provide for her longer than he pleased. The strongest evidence against Conran was his giving Watson money to destroy the entry in the Fleet register: the whole evidence relating to that entry rests upon the testimony of Watson, who, from his own account, appears to have acted a most infamous part. That an entry was made by Dare rests wholly on his evidence: if there was such an entry, why did he tell Mary a falsehood that the books were at Guernsey, and not let her see and avail herself of it, if she could. Upon the whole of his behaviour, it seemed very probable that, on hearing the marriage was contested, he had made the entry himself with a view either of producing it in favour of the woman, or of suppressing it, as it should appear most advantageous to himself; that plainly, with this latter view, he had acquainted Conran (who was as stranger to him) of the entry, and agreed to destroy it when Conran had consented to give him his

price: that though a Fleet register was not evidence, yet Conran plainly appeared not to be lawyer enough to know it; and even though he was not married, he might think it advisable to get rid of what he imagined would be a strong evidence to prove the [640] charge of marriage upon him, and it could not be doubted but that Watson had induced him to believe that that entry would be conclusive evidence against him; and therefore, though his suppressing the entry was a very improper act, and creates great suspicion against him, yet it is not conclusive evidence of the marriage, or of his confessing a marriage. Since, therefore, there were no children to be bastardized, and the woman had no reputation to lose, and the whole proof at the utmost amounted only to presumption, I did not think there was evidence sufficient, under the circumstances of this case, to pronounce for the marriage, and to compel Mr. Conran to live with her as his wife. I therefore pronounced for the appeal, reversed the sentence of the Chancellor of London, and dismissed Mr. Conran, but without costs.

HOPPER *against* DAVIS AND OTHERS. High Court of Delegates, (a) July 5th, 1754.

—The ordinary may order a monument to be taken down, if it is inconveniently placed in a church; if it does not interfere, the parson's authority to erect it sufficient. The suit in this case was instituted in a wrong form; it ought to have been by articles.

[Discussed, *Lee v. Fagg*, 1874, L. R. 6 P. C. 43.]

Appeal from York.

Dr. Paul for Davis. Blacklock and Warcop, chapel-wardens of Barnard Castle, in the parish of Gainsford and diocese of Durham, who have [641] brought a suit against Humphrey Hopper, for erecting a monument in the said chapel without a faculty. Appearance was given for Hopper. Upon hearing the cause at Durham, the judge dismissed Hopper with costs. The chapel-wardens appealed to York. 9th November, 1752, the chancellor of York reversed the sentence, and admonished Hopper to take the monument down; from this sentence Hopper has appealed. *Marsh v. Curt*, B. R. 1737, held a man cannot erect a monument without licence of the ordinary; they say the rector or vicar approved of setting up this monument, but he could not authorise it to be done.

Dr. Simpson for Hopper. 7th January, 1748, the citation against Hopper was returned to shew cause why he should not be admonished to remove the tombstone set up without lawful authority. The judge directed the chapel-wardens to propound their interest; they pleaded that the tombstone was an inconvenience to the church, and the place where it stands is wanted to place the fire engine there. Sentence at Durham, 28th March, 1750, dismissed Hopper with costs; the tomb is brick work, and a stone laid thereon; the judge at York ordered the brick work to be taken down, and the stone to be laid level on the floor. Hopper lived at Barnard Castle for many years, and has an estate there; in 1725 his son died at Barnard Castle, he was buried in the chapel-yard there, and Hopper was going to put a handsome tombstone over him; the vicar desired the corpse might be moved into the chapel, and a tombstone set up there; this tomb was erected in 1734, without opposition; in 1744 Hopper applied to the minister for his [642] consent, and then moved for a faculty to confirm a sepulture to him in said chapel, which faculty was granted without opposition. No inconvenience to the parishioners is proved, but on the contrary, that the monument is an ornament to the chapel. We shall insist that the ordinary's consent was not necessary, as the vicar's was obtained, and no inconvenience arises from the monument.

Witnesses for Davis, &c.

1. James Clifton, æt. 80. Lord Barnard gave a fire engine to parish, which is kept in the south-west part of the chapel; if the tombstone remains in that south-west corner, it will hinder the workmen from coming to the engine, &c.; said corner is not fit for pews.

2. William Dunn, clerk. Barnard Castle is a chapelry to the parish of Gainsford; deponent is curate of said chapel; room is wanted in the chapel for the inhabitants; the fore-part of the south-west corner may be proper for pews.

3. Leonard Blacklock. The south-west corner is used for the workmen to put away their tools, &c.; seats may be erected in the said corner.

(a) Judges present—Right Honourable Sir George Lee, Mr. Justice Wright, Mr. Justice Clive, Drs. Jenner and Clark.

4. Christopher Blacklock. Said corner is always used to set things away.
 5. Timothy Westwick. Hopper lives at Black Hedley, in Northumberland, 20 miles from Barnard Castle; believes he has no estate in Barnard Castle in his own right.

6. William Westell. Hopper has no estate at Barnard, nor pays any rates there; he lives 20 miles from Barnard.

7. Timothy Scot. The south-west corner is used for workmen to set things away; Hopper has lived twenty years at Black Hedley, 20 miles from [643] Barnard; George Hopper, son of the party, lived at Barnard, and died there in 1725, aged 23, and was buried in the chapel-yard; in 1734 his body was removed, and buried in the south-west corner of Barnard Chapel, and a tombstone was put over him, a yard and quarter high, and near two yards long; but knows not by what authority.

8. Robert Spencer. The same; not room for all the inhabitants; seats may be erected in the south-west corner of the chapel.

9. John Hutchinson. The same.

10. Thomas Joplin. The same.

Faculty read, dated 19th October, 1744; confirms to Hopper a burying place in the south-west corner of Barnard Chapel, seven yards long and four yards and eight inches wide, bounded as therein described, for the sole use of Hopper, and admonishes the chapel-wardens, and all others to allow him to hold the said burying place.

Sentence at York, 9th November, 1752.

The judge pronounced for the appeal, and that the monument be taken down, and the stone with the inscription be laid over the vault, level with the floor, and a monition to Hopper for that purpose. No costs.

Evidence for Hopper.

Citation read to cite Hopper to shew cause why he should not be admonished to remove the tombstone erected by him without lawful authority.

Witnesses.

1. John Hopper, gent. The chapel of Barnard is large; the south-west corner is not so convenient a place for the fire engine as the north side of the chapel; and the best place to set away things is the belfry; from 1734 to this time, said corner has not been used for these purposes; Hopper and his wife's family have long rented large estates at Barnard Castle of Lord Barnard, and Hopper has a freehold estate there, and has always paid rates there for said estate; in 1734 George Hopper's corpse, by consent of the minister and chapel-wardens, was removed into the chapel, and a tombstone was by their consent set up; three of Hopper's grandchildren have since been buried there; the south-west corner of the chapel is twenty yards from the pulpit; the service cannot be well heard there; there are several pews vacant in the gallery; there is sufficient room for the inhabitants; there is space on the north side to build a gallery for a great number of people; the suit is prosecuted at the expence of the inhabitants of Barnard.

3. Int. Deponent has no interest in the cause.

2. Rev. Joseph Cradock. In 1742 the vicar of Gainford consented that the tombstone should continue; does not think the place where it stands would be convenient for seats; the tombstone prevents laying lumber there.

3. Joseph Hopper. The south-west corner is very inconvenient for seats; there is a convenient place for pews on the north side; the tombstone is no annoyance.

4. George Trotter. Same; deponent stood by the tombstone during divine service, last Sunday, and could not hear what the parson said.

Three more witnesses deposed to the same purpose.

The chancellor of Durham's surrogate, by the con-[645]-sent and in the presence of the proctors of both parties, took a view of the chapel and the tombstone.

His return read.

Says the tombstone is about a yard high, and two yards long, distant from the reading-desk about twenty yards, and does not incommode the minister or parishioners, or anybody else; but he knows not by what authority it was erected.

Sentence at Durham.

Hopper was dismissed with costs.

Dr. Paul's argument for the chapel-wardens. A faculty for a burying-place gives no right to erect a tomb; if this erection is legal, he may by the same reason fill the whole south-west corner with monuments. Church-wardens are the proper

officers to prosecute; length of time will not alter the case. When the tombstone was erected Hopper had not a right even to a burying-place there. The minister and churchwardens have no power to give leave to erect monuments, that can be done only by the ordinary. We pray the sentence at York may be affirmed with costs.

Dr. Pinfold, same side. This is chiefly a question of law. Hopper erected a tombstone without lawful authority; by ecclesiastical law, no part of a church can be appropriated to any one without the consent of the ordinary; the minister's consent required, but he cannot grant leave. Case of Chelsea parish, now in the Consistory of London. An organ was set up; a parishioner complained; the Court ordered it to be taken down, because no faculty had been granted; and there is now a dispute in the Consistory whether it shall not be set up [646] again. N.B.—The Court ordered it to be taken down, because it was set up in an inconvenient part of the church, and the churchwardens did not oppose its being ordered to be taken down. The dispute is now whether it shall not be set up again in another part of the church.

The decree at York does not take away the inscription, but only the upright erection. Objected that the churchwardens have no interest; they are the conservators of the rights of the parish; every faculty is a diminution of the general rights of the parishioners, and is therefore to be taken strictly.

Mr. Parrot, same side. Freehold of the church is in the parson, the use in the parishioners, and the regulation in the ordinary. No alteration can be made in the church by the minister; the ordinary's leave is previously to be obtained. The question is whether this tombstone ought not to be taken down, because it was set up without lawful authority?

Mr. Nairs, same side. The parson's right is in the soil, and therefore if the church ground is broken up, satisfaction must be made to the parson. A writ ad quod damnum cannot be executed after the road is turned; citation in order to a faculty is in nature of a writ ad quod damnum. *Cart and Marsh*, B. R. 11 Geo. 2. *Palmer* against *The Bishop of Exeter*, B. R. 10 Geo. 1. Davis's Reports, case of commendams, a faculty not good if unreasonable.

Dr. Simpson contra, for Hopper. Coke, 3 Inst. fol. 302. Erecting monuments is lawful if they do not hinder the celebration of divine service. Watson's Complete Incumbent, 389. No faculty is [647] granted for laying a tombstone in a churchyard. Parson may give leave to erect monuments in the church. Sepulchrum and monumentum signify the same, Calvin's Lexicon, verb. Monumentum. It was intended to confirm this tomb by the faculty granted in 1744; the parishioners could be cited with intimation only for that purpose, for they had nothing to do with the burial place in the chapel, that is entirely in the parson.

Dr. Hay, same side. First question, whether this, which is a civil cause, is properly instituted? The chapelwardens have no interest; but no man can commence a civil cause that has not an interest. The prosecution should have been by articles. The proper question is whether this monument is inconvenient to the chapel. Degge's Parson's Counsellor, p. 176, a parson may consent to the erecting a monument; the ordinary's authority and consent is implied in the parson's. 2 Crok. 337, the ordinary should interpose when the erection is made. The faculty granted in 1744 confirms this tombstone by confirming the sepulchre; the intimation could only be with respect to the tombstone; it cannot now be legally pulled down; (ff. lib. 47, tit. 12, l. 2, (a)¹ de sepulchro violato). If this tomb should be pulled down, Hopper may apply again to the court below for a faculty to erect a new one, and no reason appears why the Court shall not grant such faculty.

[648] Mr. Forrester, same side. Judge at York has founded his determination solely on inconvenience. Ordinary's authority is not requisite for erecting a monument; but if it is inconvenient, he may order it to be taken away.

PER CURIAM—JUDGMENT. (a)²—We were all clearly of opinion to reverse the sentence

(a)¹ Si sepulchrum quis diruit, cessat Aquilia; quod vi tamen aut clam agendum erit: et ita de statu de monumento evulsâ Celsus scribit. Idem quærit nî neque adplumbata fuit neque adfixa an pars monumenti effecta sit: an verò maneat in bonis nostris? Et Celsus scribit sic esse monumenti ut ossuariam; et ideò quod vi aut clam interdicto, locum fore.

(a)² *Seager v. Bowle*, Deleg. 1 Addams, 541; *Bardin and Edwards v. Calcott*, 1 Hagg. 14. Office of the Judge promoted by *Maidman v. Malpas*, 1 Hagg. 205.

given at York, and to affirm the sentence given at Durham. We all agreed that the tombstone was originally set up by a proper authority, it having been done with the parson's consent; for though the ordinary may interpose and order a monument to be taken down if it is inconveniently placed, yet if he does not interpose, the parson's consent is sufficient.

2dly. We were of opinion that as this tombstone was erected ten years before, the faculty obtained in 1744 must be understood to confirm it.

3dly. Supposing the faculty did not confirm it, we were of opinion the judge at Durham had properly confirmed it in this cause; for by dismissing Hopper after he had taken a view of the chapel and tombstone, he virtually declared it was legally and properly placed there; and then the only question would be whether he had used his discretion properly in confirming it; and clearly he had, for from the evidence it appeared that no inconvenience arose from the tombstone.

4thly. We were of opinion the suit was commenced in a wrong form; a prosecution of this sort ought to be by articles; and because we all thought it a very trifling and vexatious suit, we condemned the chapel-wardens in 50l. costs.

[649] FITZGERALD *against* LADY MARY FITZGERALD. Arches Court, By-Day after Trinity Term, July 2nd, 1754.—In a matrimonial cause, a husband is liable to pay the costs of the wife.

Appeal from Consistory, London, on a grievance.

Dr. Pinfold for Mr. Fitzgerald. Lady Mary brought a suit against her husband for a divorce for cruelty and adultery. Cause began 2d session of Michaelmas, 1753; By-day, 14th December, bill of costs for 63l. taxed against him; 2d session Hilary, 1754, 100l. allowed on account for alimony; By-day, Hilary, another bill of costs, 65l. taxed; 1st session Easter, a demand for more money; 2d session Easter, 10th May, that demand argued; Fitzgerald made affidavit that he was not able to pay it; the demand was for 48l. 3s. 2d. for the expences of a commission for examining witnesses in Ireland; the judge decreed him to pay that sum in fourteen days from that order. We have appealed.

Dr. Paul *contrâ*, for Lady Mary. They were married 14th April, 1747; issue born; 17th October, 1753, citation issued; 1st session Michaelmas, appearance given; 2d session, libel admitted; marriage confessed; a negative issue to the rest; motion for bona ablata, decreed to be restored; decree for answers; gave in very imperfect ones; fuller ordered. Allegation of faculties charged an estate of 1000l. a year; answers admitted; a rent roll of 900l. a year; 100l. on account, allowed for alimony; he went to Ireland. 3d session Easter, [650] a requisition for his answers; delays and expence arose from him. She examined several witnesses in Ireland; could not have the commission returned till she had paid the expenses of it, which amounted to 48l. 3s. 2d. which she made affidavit she has paid; the 100l. for alimony not yet paid; he has been in contempt in every step of the cause. We consent the cause should be retained; and when this appeal is determined, we shall pray the cause may be concluded. She had 6000l. fortune, and he made a settlement on her of 600l. a year.

Act, 10th May, 1754, from which he appealed, read.

The judge decreed Mr. Fitzgerald to pay the sum of 48l. 3s. 2d. for the expenses of the Irish commission in fourteen days. The præsertim of appeal from condemning him in the said costs, though he had alleged that he had before paid 65l. costs, and is unable to pay the alimony, as appears from his affidavit.

Affidavit of Mr. Fitzgerald.

Swears he had with difficulty paid the last 65l. costs, and cannot at present raise money to pay the alimony.

N.B.—It was admitted that Lady Mary had actually paid for the Irish commission, 48l. 3s. 2d.

Dr. Pinfold admitted that by law the husband is liable to pay the costs of suit for his wife, but the Court will consider a man's circumstances; the Chancellor admonished him to pay costs in fourteen days.

[651] JUDGMENT—SIR GEORGE LEE. I observed that the shortness of the time allowed for payment was no part of the appeal; they had appealed only from condemning him in costs, to which he was certainly liable; I pronounced, therefore, against the appeal, confirmed the decree, and gave 45l. costs upon the appeal, to be paid in sixty days.

N.B.—Though Mr. Fitzgerald was the appellant, he did not take care to get the process transmitted. Lady Mary, to expedite her cause, was at that expence, which raised her proctor's bill of costs so high upon the appeal.

WINCHLOW, Administratrix of Smith *against* SMITH. Arches Court, By-Day after Trinity Term, July 8th, 1754.—In a cause of legacy, a declaration given in instead of an inventory, pronounced not to be sufficiently full.

[See p. 416, ante.]

Dr. Jenner for Winchlow. Richard Smith, deceased, made his will, appointed his daughter, Elizabeth, executrix and residuary legatee; she renounced the executorship; administration cum testamento granted to Bateman, a creditor, he is since dead; and then administration de bonis non cum testamento was granted to William Smith, deceased's brother. Elizabeth Smith is dead, and has made her sister, Margaret Winchlow, executrix. She has brought a cause of legacy against William Smith, for the residue of Richard Smith's estate, which vested in Elizabeth, her testatrix, and has called him to give in an inventory. William has given in a declaration instead of an in-[652]-ventory. We have excepted to the declaration, and have proved that he has omitted to charge himself with 122l. which he received of Leonard Bowles, and is a part of Richard Smith's residuary estate, and becomes such in this manner. William Cullen made his will, 30th July, 1730, and appointed Richard Smith, the deceased, his executor, and gave him a moiety of the residue of his estate; Richard took probate, and after his death, William Smith took administration cum testamento de bonis non to William Cullen, and has received said 122l. from Bowles, who was executor to one Rasfield, who owed said sum on bond to Cullen, and thereby Richard Smith's estate, who was one of Cullen's residuary legatees, is entitled to it. We pray this sum may be decreed to Winchlow.

Dr. Hay *contra*. Richard Smith died in 1738. On 23d November, 1738, administration cum testamento was granted to Bateman, and after his death, to William Smith. Margaret is sister, executrix and residuary legatee to Elizabeth Smith. Distribution has been made. Cullen gives many legacies. Admit Smith has received the 122l. as administrator to Cullen, but he has paid it away in satisfaction of Cullen's debts and legacies, and he has still demands on him upon Cullen's account. The question is whether all Cullen's debts and legacies are satisfied? if they are not, this money is no part of Richard Smith's estate.

For Winchlow.

Leonard Bowles. Proves payment of 122l. to Smith as a debt due to Cullen's estate in August, [653] 1750, to whom Richard Smith was one of the residuary legatees.

Cullen's will.

Gives several legacies and annuities, and then gives half the residue to Richard Smith and Ann his wife.

JUDGMENT—SIR GEORGE LEE. I was of opinion William Smith ought in his declaration to charge himself with this 122l., but I had at present no evidence before me to prove that this money was part of Richard Smith's estate, I therefore pronounced that the declaration was not full; ordered him to give in a fuller declaration, and to charge himself with the said sum of 122l.; and rescinded the conclusion of the cause, to give opportunity to shew that a moiety of the said sum belonged to Richard Smith's estate.

RILER *against* COUSINS. Arches Court, By-Day after Trinity Term, July 8th, 1754.—

A lessee of the vicarial tithes must exhibit the original lease and agreement as the foundation of his claim.

Dr. Pinfold for Riler. This cause came appealed from Norwich, upon a grievance, and was retained here. A suit at Norwich was brought by John Cousins of Cherry Marham against Riler of the same parish, for tithes. Cousins claimed under a lease of the tithes from Mr. Chapelow, the vicar of the parish, and pleaded below his agreement with Chapelow, and the lease, which he exhibited. Riler pleaded that Chapelow had been non-resident at Cherry Marham above eighty days in a year, and therefore, by statutes of Elizabeth, [654] the lease was void. The judge below rejected this allegation, and then ordered the original lease and agreement to be delivered out of court, *factâ registratione*. Riler appealed, and this Court pronounced for the appeal.

on both points, and retained the cause. Monitions were decreed against Cousins and his proctor, and against the register and Chapelow, the vicar, to bring in the lease and agreement. In return to the monition, they have exhibited affidavits to shew the persons admonished have not the lease and agreement in their custody. The question is, whether those affidavits are satisfactory?

Dr. Paul contra, for Cousins. Edward Chapelow is vicar of Marham. Cousins has brought a suit for tithes as his lessee. Riler pleaded the lease was void by statutes 13 & 18 Eliz. c. 20. Consequence of admitting the allegation that no tithes can be paid. By Clark's Prax. tit. 104, instruments are to be delivered out factâ registratione.

Affidavit for John Cousins.

Says he delivered the lease and agreement to Spendlove, his proctor, and knows not where they are now, unless Chapelow has them.

2. Edward Chapelow. Neither the lease or agreement were for four months before, or at the time the monition was served, in deponent's hands, and he does not know where they are.

3. Spendlove. When the Court had decreed them to be delivered out, they were delivered to Chapelow.

4. Henry Field, register. The lease and agreement are not in deponent's custody.

[655] JUDGMENT—SIR GEORGE LEE. I said Cousins had no title but under the lease and agreement, if he did not produce them, he could make out no right to the tithes; I therefore decreed Riler to be dismissed from this suit, unless the original lease and agreement were brought into the registry of the Arches by the first day of next term.

HIBBEN against CALEMBERG. Prerogative Court, By-Day after Trinity Term, July 10th, 1754.—A party in possession of an administration is not bound to propound her interest, till the party calling it in question has established her own.

[S. C. 1 Phill. 166; see p. 558, ante. Discussed, *Dabbs v. Chisman*, 1810, 1 Phill. 160.]

Dr. Simpson for Hibben. Hibben prays that Calemberg may proceed to propound her interest and give in an allegation for that purpose; otherwise that administration to General Frampton may be granted to her as sister of the half-blood and next of kin. In a former cause, Mrs. Henrietta Calemberg, as cousin-german once removed, opposed deceased's will, which was propounded by Mrs. Grace, as executrix. The will was pronounced against in this Court, and administration decreed to Calemberg, who was confessed by Grace to be next of kin. Grace appealed from this sentence, and it was affirmed by the Delegates. The present cause began between Hibben and Calemberg, by a caveat entered by Sherman, a creditor. Hibben warned it, prayed the administration to be granted to her as sister. Tyndall voluntarily interposed, and alleged Calemberg to be deceased's first cousin once removed, [656] and next of kin, and that administration was decreed to her, and prayed Hibben's answer. Cæsar for Hibben, denied Calemberg's interest. Tyndall said he would propound Calemberg's interest, and denied Hibben's. Judge assigned to hear on admission of Tyndall's allegation. Tyndall now says his client is in possession of a decree for the administration, and he is not bound to propound her interest. We say Calemberg's interest was never in debate in the former cause; that Hibben was no party to that cause, and that the decree of the administration to Calemberg was only a common decree. We insist that both by law and the assignations of the Court, Tyndall is obliged to propound his client's interest, and that we have a right to what we pray.

Dr. Jenner for Calemberg. Administration was decreed to Calemberg, and that decree affirmed in the Delegates. The remission was brought in, and the Court decreed to proceed according to the tenor of former acts. Hibben then prayed administration. Parties mutually denied each other's interest. Calemberg was thereby admitted to be a contradictor. The Court has made no assignation on us to propound our interest. We have an allegation drawn, but we are not obliged to give it in.

Acts read.

By-day after Hilary Term, 28th Feb., 1754. On the remission being brought in, the Court decreed to proceed according to the form of former acts. Tyndall alleged his client to be cousin-german once removed to deceased, and that administration-[657]-tion had been decreed to her. Both proctors denied each other's interest.

4th April, Tyndall asserted he gave an allegation.

1 Sess. Easter. On admission of Tyndall's allegation. Judge admitted Cæsar's allegation; continued the assignation as to Tyndall's allegation.

4th Sess. Easter. Tyndall declared he waved giving any allegation at present on petitions of both proctors.

Dr. Simpson for Hibben. Three questions. 1st. Whether we have not a right by law to call Calemberg to propound her interest? 2nd. Whether her proctor is not bound by the assignations of the Court to propound it? 3rd. Whether if she does not propound, we have not a right by law to have the administration? The former cause cannot affect Hibben, because she was not a party. Administration was decreed to Calemberg, on an assertion only that she was next of kin; no proof was made thereof; that decree is incomplete, because administration was not under seal, and may be reversed. We shall be entitled to administration if we can shew never so remote a relationship, because Calemberg has shewn no relationship. On the 4th April Court assigned to hear on the admission of Tyndall's allegation, which was to propound Calemberg's interest. He and Dr. Pinfold and Dr. Hay, counsel with him, insisted much that, though when a person is in actual possession of letters of administration under seal, he may not be obliged to propound his interest, yet in this case, the matter was a *res integra*, because the [658] Court has gone no further than to decree administration to be granted to Calemberg.

JUDGMENT—SIR GEORGE LEE. But I was of opinion Tyndall was not obliged by the assignations of the Court to propound his client's interest. I had not ordered him to do so. I had only assigned to hear on the admission of an allegation, which he asserted he would give; but notwithstanding that assertion, he was at liberty to alter his mind, and not give it. Secondly, I was of opinion he was not obliged by law, because my sentence, which decreed the administration to Mrs. Calemberg, was become irreversible, because it was confirmed by the Court of Delegates, whose decree was a bar to all the world against objecting to Calemberg's right to have the administration, unless a nearer relationship than she claimed could be proved. Indeed, if Hibben can prove herself to be sister to the deceased, the decree for the administration, both in this Court and in the Delegates, will be void by the statute, which precisely requires the ordinary to grant administration to the next of kin; but unless Hibben proves herself to be nearer of kin to deceased than Calemberg suggests herself to be, the decree of the administration to Calemberg must stand unshaken, and administration cannot be granted to any one else, and consequently it is quite unnecessary for Calemberg's proctor to propound her interest, which is established by a sentence of the supreme court; and therefore I rejected Cæsar's petition. He protested of appealing, but did not appeal.

[659] FRANCO AND FRANCO *against* ALVARENZÁ. Prerogative Court, Caveat Day, July 31st, 1754.—When the Court of Delegates affirms the sentence of the Court of Prerogative, and remits a cause, the cause stands in the Court below on the same footing as it would have done had there been no appeal.

Dr. Paul for Alvarenza. Daniel de Flores alias de Pardo died in 1752, indebted to Isaac Lusitano de Pinna 585l. 5s. and upwards. De Pinna took benefit of an insolvent act as a bankrupt, and Alvarenza was appointed his assignee. Upon affidavits from De Pinna and Alvarenza of the debt, this Court, on 6th November, 1752, decreed a commission of appraisement and inspection, returnable the last session of that term. Messrs. Franco, who were the executors of De Flores, afterwards made affidavits in answer to those, and opposed the commission of appraisement going under seal: on 30th January, 1753, on hearing counsel, the Court was of opinion the decree made on the 6th of November preceding, for a commission of appraisement, was absolute and conclusive, and as Franco had not appealed from it, ordered the commission to go under seal, and to be returned the 15th March following: from this last order they appealed to the Delegates, who, on the 25th June, 1754, affirmed the decree of this Court, and remitted the cause. We are now absolutely entitled to the commission of appraisement by the sentences of both Courts; a debt of 585l. 5s. and upwards is sworn to; the affidavit of debt needs not set forth the exact sum that is due, for any sum is sufficient to entitle to a commission of appraisement. They have tendered 585l. 5s. with costs if any are due by law. This tender comes too late, for the commission is absolutely decreed, and the Court can but vary the decree. The question is whether the tender now is sufficient; doubtful whether it would have [660] been sufficient even in *initio litis*, for the debt is sworn to be 585l. 5s. and upwards: a tender must be with costs.

Dr. Hay, same side. The Court has pronounced for Alvarenza's interest; appraisement was decreed on 6th November, 1752, without opposition from the executors, and Messrs. Franco were admonished to produce the effects. On 30th January, 1753, this Court was of opinion the decree of 6th November was absolute, and confirmed it. The Delegates held that the decree of this Court was right, but if it had been erroneous, they could not have reversed it, because the appeal was not interposed in due time, and therefore remitted the cause for this Court to proceed according to the tenor of former acts. This Court cannot alter the decree of the Court of Delegates; the tender is not sufficient, because not made absolutely with costs. Without our consent the Court cannot vary the decree already made for a commission of appraisement. This Court is now ministerial. This tender is not of the whole demanded, for the affidavit says 535l. 5s. and upwards.

Dr. Simpson contra, for Messrs. Franco. Now the cause is remitted, it stands in the same state in this Court as if there had been no appeal. By the money being paid into Court, Alvarenza's interest is extinguished; he is no longer a creditor to the deceased, and therefore has not any right to a commission of appraisement. The word "upwards" does not ascertain any sum. Last term, in the case of *Mordecai and Mason*, an inventory and account was decreed; the executor offered to pay the debt. The Court said the creditor had no interest, since [661] an offer was made of paying her debt: the intention of the Court's decree is satisfied by this tender, and no costs are due by law.

Dr. Pinfold, same side. If we could have made this tender on 30th January, 1753, or afterwards in the Delegates, we may offer it now.

JUDGMENT—SIR GEORGE LEE. I was of opinion the tender was sufficient as to the sum; the word "upwards" implied nothing certain, and if the full debt had not been set forth in the first affidavit, De Pinna might, after the tender was made, have made a further affidavit as to the quantum of the debt; and the tender was made in the usual manner with costs, if any are due by law; that by the tender Alvarenza's interest was extinguished: and, with respect to his debt, he had greater relief by the payment of it than he could have by a commission of appraisement, which would only give him a constat of the estate; and, therefore, as to any purposes that were avowed, and which this Court could take notice of, he had the full effect of the former decree; the cause stood now in the same light as if there had been no appeal. I could have received the tender originally, and nothing barred me from receiving it now. I therefore pronounced that the tender was sufficient; that thereby Alvarenza's interest was extinguished, and he was not now entitled to have a commission of appraisement under seal; but, because the tender was made late, I condemned Messrs. Franco in 3l. 6s. 8d. for the costs of the motion, and their proctor undertook to pay the register the poundage for the said money tendered, and paid into his hands.

[662] N.B.—Franco, in the act of Court, offered to exhibit an inventory.

N.B.—After the Court was up, Alvarenza and Mr. Crespigny, his proctor, attended me in my chamber, and prayed the money might be ordered to be paid out of court to him, and said they did not move it in Court, because they were apprehensive, notwithstanding the tender, Franco would stop the money in the hands of the Court, by injunction from Chancery, on suggestion that there was no real debt due to De Pinna; but I said that, if that happened, they might apply again to the Court to issue out the commission of appraisement, but I could not properly order the money to be paid out of Court, till notice was given to the adverse proctor to be present at such order.

KILLICAN *against* LORD PARKER AND OTHERS. Prerogative Court, By-Day after Trinity Term, July 31st, 1754.—All testamentary papers are to be brought into the Prerogative Court, when required. A duplicate is a part of a will, and to be considered as a testamentary paper.

[Referred to, *Atkinson v. Morris*, [1897] P. 44.]

Jonathan Blackwell, Esq. deceased, left Lord Parker and others, his great-nephews and next of kin; made his will, dated 2d January, 1744, and appointed Samuel Killican residuary legatee, and made a duplicate thereof; Killican brought in the will and prayed probate; Lord Parker and others entered caveat, and prayed scripts and scrolls; Killican with an affidavit of scripts, brought in a former will, and set forth that he had in his custody an exact duplicate of the will, which he was ready to pro-

duce whenever the court should order, but declined bringing it in, upon suggestion that the deceased made duplicates for the greater security, and if they should both be lodged in the same [663] place, that security would be defeated; and further suggested that the will contained real as well as personal estate, and he wanted that duplicate to prove it in Chancery; Lord Parker prayed he might be obliged to bring in the duplicate, for observations may arise upon the view of it.

JUDGMENT—SIR GEORGE LEE. I was of opinion nothing was offered on the part of Killican, but what may not be suggested in every case; that as to proving it in Chancery, the course was for the officer of this Court to attend with the will for that purpose; that if it was to be lodged in Chancery, he could not perform his offer of attending with it at all times this Court should require; that it was the constant rule to bring in all testamentary papers when required, and that a duplicate is part of the will. I ordered it to be brought in, which was done accordingly.

REPORTS of CASES ARGUED and DETERMINED
in the ARCHES and PREROGATIVE COURTS
of CANTERBURY, and in the HIGH COURT
of DELEGATES: containing the JUDGMENTS
of the Right Hon. SIR GEORGE LEE. By
JOSEPH PHILLIMORE, LL.D., Advocate in
Doctors' Commons, Chancellor of the Diocese of
Oxford, and Regius Professor of Civil Law in the
University of Oxford. Vol. II. Containing Cases
from Michaelmas Term, 1754, to Michaelmas
Term, 1758, inclusive; to which are added, in an
Appendix, several Cases Determined between 1724
and 1733. London, 1832.

[1] CASES IN THE ECCLESIASTICAL COURTS, 1754 (*continued*).

BROWN against ATKINS. Prerogative Court, Michaelmas Term, November 7th, 1754.

—A creditor has a right to call for an inventory, but the Prerogative Court has no jurisdiction at the suit of a creditor to examine the particulars of an account.

Dr. Harris for Brown. Brown is a creditor of William Weston, who died in the "Namure" in 1749; deceased made his will, and appointed his daughter residuary legatee. She chose Atkins, her guardian, who took administration cum testamento. Robert Brown, the creditor, cited him to an inventory and account. 31st July, a declaration, instead of an inventory and an account, given in; the court ordered Atkins to be dismissed, if Brown's proctor did not object. We now offer an allegation, pleading exceptions to the account.

Dr. Pinfold for Atkins. We have given in a fair declaration instead of an inventory, to which no objection is made. Brown, as a creditor, has no right to object to the account, and therefore we object to the whole allegation, as pleading a matter not cognizable by this Court.

[2] *Judgment—Sir George Lee.* I was of opinion a creditor has a right only to a constat of the estate by an inventory, but that I had no jurisdiction at the instance of a creditor to examine the particulars of the account, and therefore rejected the allegation, as it excepted only to the account, and not to the declaration.

GOODMAN against GOODMAN AND OTHERS. Prerogative Court, Michaelmas Term, November 7th, 1754.—A person cannot propound a will in which he has no interest either as executor or legatee.

Dr. Paul for William Goodman. Deceased died 1st March, 1754; left my client, William Goodman, his brother, and Sarah Goodman, his sister; deceased made a will dated 27th February, 1740, whereof his sister, Sarah Goodman, is executrix, and appointed his daughter, who died before him, residuary legatee. Sarah has propounded

a schedule without date, in which she is sole executrix. We oppose it; and now offer an allegation, propounding the will of 27th February, 1740; because we shall be entitled to a share of the residue if that will takes place, as the residue is a lapsed legacy by the death of the residuary legatee before the testator.

Dr. Simpson for Sarah. We have propounded a schedule without date, and have pleaded the will of 1740 in our allegation. We object that William has no interest as executor or as a legatee, and therefore cannot propound this paper.

Judgment—Sir George Lee. I was of opinion, as William had no interest under this will as executor or as legatee, that he [3] could not propound it, and if the schedule was set aside the deceased would be dead intestate, and then he would have his share of the whole estate, which would be more beneficial than a share of the residue only, and therefore I rejected the allegation.

BAGNALL against SIR JACOB GERARD DOWNING, BART. Prerogative Court, Michaelmas Term, November 7th, 1754.—A paper pronounced to be testamentary on the ground that it was to take effect after death. It contained a direction to the executors under the will of the deceased.

Sir George Downing, Bart. died in June, 1749; left a natural daughter by Mrs. Townsend, his housekeeper, viz. Mrs. Bagnall; on 20th September, 1717, he made his will, and gave all his real and personal estate to his cousin, Sir Jacob Downing, and made him executor; on 23d December, 1727, after birth of Mrs. Bagnall, he made a codicil, and gave to Mrs. Townsend an annuity of 200l. for life, and a legacy of 100l.; and to Mrs. Bagnall he left an annuity for life of 500l. Sir Jacob has taken probate of said will and codicil; deceased lodged money in Mrs. Townsend's hands, which we say he intended should go to his daughter; he wrote with his own hand a paper attested by three witnesses, which is in these words:—

“January 16th, 1740.—This is to satisfy my executor, and all other persons, that what money Mrs. Townsend, my housekeeper, has, that was mine, I gave it her for the use of her daughter, besides what I have given to her daughter by the codicil to my will.

“G. DOWNING.

“Witnesses—John Paine, David Lewis, Richard Lunes.”

[4] Sir Jacob did not prove this paper, but brought a bill in Chancery against Mrs. Townsend and her daughter, to have the money in the mother's hands paid to him, and for a discovery of the sum. This paper was hereupon produced. Lord Chancellor doubted whether it was not testamentary, and directed it to be tried here; Bagnall thereupon cited Sir Jacob to take an additional probate with this paper. We have pleaded the deceased's declarations, that he meant the money in Townsend's hands for Bagnall; they say Sir George meant this paper only as a declaration of what money was in Townsend's hands.

Dr. Paul for Sir Jacob Downing. Deceased gave Mrs. Townsend 200l. annuity, the furniture of her room, and 100l. legacy. On 9th June, 1749, Sir George died, after his death the will and codicil were found in his custody. Townsend present at finding them, but said nothing of this paper. On 13th June Sir Jacob proved the will and codicil without opposition. No pretence then of any other testamentary paper; he filed a bill in Chancery for a discovery, and then Townsend produced this paper; the question is, whether this paper be testamentary or not; deceased, though pressed by Townsend, refused to make a new will or codicil. We might object to Townsend's evidence, because she is a trustee for Bagnall.

Witnesses for Bagnall.

1. Mary Townsend. Deponent was housekeeper to deceased for thirty years before, and to his death; 16th January, 1740, he, in deponent's presence, wrote and signed the paper pleaded by Bagnall, and then executed it; cannot be certain [5] but believes the witnesses saw him sign it; deceased delivered it to deponent and bid her take care of it, and said, “Life is uncertain; I hope you will not have any trouble, but if you should, this will secure the notes I have given you for Polly.” The deponent several times told the deceased she wished he would secure the notes for Polly some other way, for she was afraid she should have trouble after his death; he replied he knew of no other way, and said the paper he had given her would secure at his death the money and notes he had or should give her, and was in her hands at his death, and that he could give all he had by such a paper, and said, if he should give deponent but 100l. a-year, she would live on it, but Polly must not live so; and made

strong declarations of affection to deponent and her daughter; deceased said wills might be burnt, and he did not know any safer way than giving it his daughter by the paper in the deponent's custody; in the time of the rebellion, the deponent hid the money and notes; but deceased thought deponent did not hide it safely, and he sent for deponent's brother, and bid him hide it, and said it was his daughter's money.

2. Richard Lunes. Deponent is a witness to the paper pleaded; Paine had signed it when deponent came into the room; deponent does not remember he saw deceased sign it.

Witnesses for Sir Jacob Downing.

1. John Paine. Deponent is a subscribing witness to the paper pleaded; he did not apprehend deceased wrote or signed it as a testamentary paper, by reason he did not publish it as such, but after deceased had signed it he said to deponent in presence of the other subscribing wit-^[6]nesses, "Paine, this is to satisfy my executors that some money, which Mrs. Mary has of mine in her keeping in case of my death, is for her and her daughter's use till such time as their annuities become payable;" deponent believes deceased meant said notes as a declaration of trust only, as to what money said Mary Townsend had at that time of his in her hands, and not as a testamentary paper, and as such a declaration of trust, deponent then took said paper to be.

2. Int. Deponent is a riding-officer of the customs, and has 12l. a-year from Sir Jacob Downing.

2. David Lewis. Deponent was servant to deceased thirty years before, and to his death; deponent did not apprehend deceased wrote the paper pleaded as a testamentary paper, because he did not publish it; but deceased immediately after he had signed it declared that said paper was only to secure some money which Mrs. Mary then had of his in her hands, in case of his death, for her and her daughter's subsistence till their annuities were payable; from such declaration deponent believes deceased intended such paper as a memorandum only, as to what money said Mary Townsend then had of his in her hands, and not as a testamentary paper, and as such deponent then took it to be.

Read orders of the Court of Chancery for the parties to take the opinion of the Prerogative Court, whether such paper was testamentary or not.

Dr. Simpson's argument for Bagnall. There is no question as to the will and the first codicil; we have cited Sir Jacob to take an additional probate with this paper as a codicil, this paper was wrote in contemplation of death, it amounts to a direc-^[7]-tion to the executor not to demand the money of Townsend; it was to give satisfaction to the executor, and therefore was to take place at his death; he mentions the legacy given to his daughter by his codicil; none of the witnesses say the paper was intended as an absolute gift inter vivos; no declaration contrary to what appears on the paper can be received in evidence.

Drs. Pinfold and Hay, same side. Delegates; *Garden* against *The Earl of Orrery and Others*; (a) this paper alters the will and codicil, by revoking in part the will and codicil as to the residue, and therefore is testamentary.

Dr. Paul contra, for Sir Jacob. Testator must have animus testandi; Calvin's Lexicon, f. 305, donatio mortis causa et legatum, differ.

Judgment—*Sir George Lee*.—I was of opinion the paper was testamentary. The witnesses shew that the deceased intended it should take effect after his death, and upon the face of the paper it is a direction to his executor; it refers to his will and codicil, and gives the money in Townsend's hands in trust for her daughter, besides what he had given to said daughter by his codicil which had been proved. I therefore pronounced for the paper pleaded as a codicil, and assigned Sir Jacob Downing to take an additional probate of that paper by the 3rd session of this term. No Costs.

[8] HILLYER against MILLIGAN. Arches Court, 2d Session, Michaelmas Term, November 12th, 1754.—The Chancellor of Lincoln cannot exercise jurisdiction within the jurisdiction of the Archdeacon and Commissary of Buckinghamshire.

Dr. Paul for Milligan. This cause begun in the Consistory Court of Lincoln. Suit

(a) *Garden v. The Earl of Orrery and Others*, Deleg. 17th Dec., 1745. The question arose respecting a codicil to the will of the Duke of Buckingham and Normanby. The Judges present at the sentence were—Mr. Justice Burnett, Mr. Baron Clarke, Dr. Audley, Dr. Pinfold, jun., Dr. Walker, and Dr. Collier.

was brought there by Milligan, farmer of the tithes of Hanslop, in the county of Bucks, against Hillyer, an inhabitant of said parish, for tithes arising there, within the archdeaconry and commissaryship of Bucks. Hillyer appeared under protestation, and alleged he was subject only to the commissary of Bucks, in the diocese of Lincoln. There are six archdeaconries and a commissary in each; they are instituted cumulative, not exclusive of the chancellor. No suit was commenced before the commissary of Bucks when this suit was brought before the chancellor of Lincoln. The chancellor pronounced for his jurisdiction, and ordered Hillyer to appear absolutely.

Dr. Simpson, same side. Citation returned the 22nd October, 1752. Hillyer alleged he was resident in Bucks, and not subject to the chancellor's jurisdiction. Milligan insisted Hillyer was subject to both jurisdictions. Chancellor decreed Hillyer to appeal absolutely from that decree; he has appealed. We have in this Court pleaded and exhibited the chancellor's and commissary's patents. By the chancellor's patent, general jurisdiction in all ecclesiastical causes throughout [9] the diocese of Lincoln is granted to him; by the commissary's patent the same jurisdiction, except as to giving institutions, &c., is granted to him, in the county of Bucks; in 1294 a very full patent was granted to the chancellor, and the same year, the bishop appointed a commissary to go on with causes in the absence of the chancellor; in 1352 and 1405 commissaries appointed to grant probates of wills, &c.; in 1598, the chancellor holding his court at Godmanchester, in Huntingdonshire, tried a cause between two inhabitants of Bucks; in June, 1600, was the same; about the same time, a clergyman of Bucks, prosecuted before the chancellor at Godmanchester; the chancellor in like manner took cognizance of causes arising within other archdeaconries in the diocese of Lincoln.

Dr. Pinfold for Hillyer. Both the parties live at Hanslop, in Bucks, and the suit is for tithes arising there; in our protest we said that Dr. Bettesworth, as commissary, has the whole episcopal jurisdiction in Bucks by patent, and that we were not cited during an inhibition, for that the inhibition in 1752, during the bishop's visitation was relaxed five days before the citation in this cause; the proctors for Milligan did not deny these facts, but they alleged that a Consistory Court is held at Lincoln, and that in 1744 the bishop appointed a chancellor, and by his patent granted him all ecclesiastical jurisdiction throughout the diocese of Lincoln; the chancellor pronounced for his jurisdiction; Hillyer appealed; Milligan alleges a concurrency, and insists that it has been, and now is, the practice for a plaintiff to institute suits in either court at his option, [10] but all the instances they have produced are of persons cited to Godmanchester, in Huntingdonshire, and not to Lincoln; they are to prove their jurisdiction, and to shew it is now the practice, and yet their last instance is 154 years ago.

Evidence for Milligan read.

The act of court of the 27th October, 1752; Jephson appeared for Hillyer under protestation, and alleged Dr. Bettesworth's patent, by which he has a grant of all ecclesiastical jurisdiction in Bucks, except as to granting institutions and licences to clerks, and alleged that the parties live in Bucks. Inhibition relaxed the 24th August, 1752; Bradley, for Milligan, alleged that the chancellor of Lincoln for time immemorial has had jurisdiction throughout all the diocese.

Patent to Dr. Taylor in 1744, appointing him chancellor.

13th November, 1752. Act when the chancellor rejected Hillyer's protestation, and assigned him to appear simply.

Dr. Taylor's patent, dated the 9th May, 1744, gives him power to proceed in all ecclesiastical causes within the diocese and city of Lincoln; to visit the diocese when the bishop is hindered; to grant probates, &c., and licences for marriage throughout the diocese, and generally to exercise all species of ecclesiastical jurisdiction.

Extract from the Register of Lincoln.

1294. Bishop grants all sorts of ecclesiastical jurisdiction to the chancellor throughout the diocese.

B. A commission in 1293 to a commissary to [11] expedite causes at Huntingdon, in the absence of the chancellor.

D. 1342. A commission to a commissary to exercise jurisdiction as a sequestrator in the counties of Bucks, Bedford, and Northampton.

E. 1418. Like commission for Bucks and Oxon.

1598. A suit before the chancellor at Godmanchester, against Johnson, a beneficed clerk in Bucks, upon a question touching his institution; cause appealed.

Same year, a cause of defamation commenced before the chancellor at Godmanchester, between two inhabitants of Bucks; the defendant appeared. Nothing further appears of the cause.

1599. A testamentary cause commenced at Godmanchester, against an inhabitant of Bedfordshire.

1600. An inhabitant of Amersham, in Bucks, cited another inhabitant of the same before the chancellor at Godmanchester, in a cause of defamation; the defendant did not appear, and nothing further appears of the cause.

Same year, suit against the parson of Hedsore, in Bucks upon his institution.

1610. Suit at Lincoln against a parson of Leicestershire. No appearance.

1616. At a court at Grantham, the same against a parson of Leicestershire in *causâ legati*. No appearance.

1665. Suit in the Consistory of Lincoln, by a clerk of Leicestershire against his parishioner for tithes.

1721. A cause of perturbation of seat at Lincoln, between two persons of Lincolnshire.

No commissaries of Lincoln or Stow.

[12] Evidence read for Hillyer.

Dr. Bettesworth's and his predecessor's patents.

6 art. of Milligan's allegation. There are six archdeaconries in the diocese of Lincoln; and it always has been, and now is, the practice, to have a concurrency of jurisdiction between the chancellor of Lincoln and the commissaries within those archdeaconries.

Dr. Paul for Milligan. Stat. 23 H. 8, c. 9. No person shall be cited out of his diocese, ergo, he may be cited within. *Lindw. de Sequestrat. cap. Frequentes*, vicar general can do all ecclesiastical acts but giving institutions; if a bishop has two commissaries, the dignior is to be preferred. Concurrencies are lawful. Lord Cowper was of opinion the judges in the diocese of Lincoln had concurrencies. *Godolp. Repert. Can. p. 81*. Chancellor is not confined to any part of the diocese. *Ridley's View* says, chancellors are almost as old as bishops. *Hostiensis de Offic. Vicar, No. 2*, and *No. 10*. We confess both parties in this case live in Buckinghamshire; the question is, whether by law the chancellor has not a jurisdiction throughout the diocese. Chancellors older than commissaries, *Maud and Matthews, B. R.* a case often mentioned by Sir Nathaniel Lloyd. Lord Holt said, the words *constitutio &c. cancellarium nostrum*, would give a man all the rights of a chancellor, and the law will find out what those rights are.

Dr. Simpson, same side. It lies upon them to shew the commissary has an exclusive jurisdiction; there are no words in his patent to give it him; his patent is in derogation of the chancellor's; [13] but without express words he cannot take away the chancellor's right. A vicar must prove he is endowed of great tithes, because *de jure*, they belong to the rector, unless the jurisdictions are concurrent; the patents are void in law, because they are contradictory; there is an inherent jurisdiction in the bishop, and he and the chancellor are, in law, the same person; the bishop may give his inherent power to be executed as he pleases. No grant of a particular can derogate from the general jurisdiction; the instances we have read shew the chancellor has exercised jurisdiction in all the commissaryships.

Dr. Smalbroke, same side. This question relates not only to causes, but to granting probates, &c.; the true state of the question is, whether the commissary has a right exclusive of the chancellor? The exclusive right of a commissary has never been established on a contest. *Consist. Lond. 1746, Hardy and Lilly*, a man living in the commissaryship of St. Paul's, within the diocese of London, was cited in a cause of tithes before the chancellor of London. Objection made that he ought to have been cited before the commissary. Dr. Andrew said the bishop's general rights remained throughout the diocese, unless an exclusive right in the commissary had been shewn, and held the citation before him was good.

Dr. Pinfold for Hillyer. *Godolphin* speaks of the power of a chancellor where there are no commissaries. C. 1, lib. 2, tit. Gloss. Commissaries are ancient, are mentioned in stat. 23 H. 8. There were Commissaries of Bucks long prior to stat. 1 Eliz. which restrained bishops from making new [14] officers. The statute of Citations forbids citing out of peculiar jurisdictions.

Dr. Hay, same side. I deny it to be law that a commissary cannot have an

exclusive jurisdiction without express words. In *Hardy and Lilly's case* the commissary was appointed by the Dean and Chapter of St. Paul's and not by the Bishop of London; and as the chapter's right to appoint a commissary was derived from the bishop by grant or composition, it cannot be presumed he meant to give away his whole jurisdiction to another without express words. There is no instance of a voluntary jurisdiction exercised by the chancellor of Lincoln. No instance of a concurrency before the stat. 23 H. 8, and therefore the chancellor cannot cite out of the commissaryship, because he is not the immediate judge. Coke's Select Cases, 6 Jac. *Porter and Rochester's case*, p. 4, all the judges of the Common Pleas held, that the Court of Arches could not cite persons originally out of the diocese of London, though the Arches Court sits in that diocese; and the judges said, the view of the statute was, to restrain citing persons out of the jurisdiction where they live. The present claim of the chancellor has not been exercised for 154 years.

Judgment—Sir George Lee. I said, that though a bishop could not alter or limit the powers which the law gave to a chancellor, yet anciently before the restraining statutes, when bishops could create new officers, they might limit the exercise of the chancellor's authority to a part of the diocese, and might appoint commissaries to exercise the same jurisdiction in [15] other parts of the diocese; that commissaries were ancient officers, and particularly that there had been a commissary of Buckinghamshire long before the restraining statute of 1 Eliz.; that commissaries were instituted, not so much for the ease of the chancellors or vicars-general, as for the benefit of the subject, that justice might be done them near home, particularly in this diocese; it would be a very great burthen on the inhabitants of Buckinghamshire if they should be obliged to attend at Lincoln, when justice could be administered to them in their own county; that concurrencies produced many inconveniences and ought not to be established without clear evidence; that, though the chancellor's patent gave him jurisdiction in all the ecclesiastical causes throughout the diocese, and the commissary's patent gave him the same jurisdiction in the county of Buckingham, yet they were not contradictory, or necessarily implied a concurrency, for supposing the office of commissary was vacant, the chancellor would clearly, during that time, have a jurisdiction in Buckinghamshire by virtue of his patent; it was necessary therefore to shew that by practice and constant usage the chancellor had always, down to the present time, exercised a concurrent jurisdiction with the commissary, and Milligan had accordingly taken upon him to prove that fact, and had produced many instances in order to prove it, but I thought had not proved it; those instances which were brought from other commissaryships in the diocese of Lincoln, I thought were totally immaterial, for it did not appear to me that the patents of those commissaries, and the patent of the commissary of Buckinghamshire were the [16] same, and if they were, there might be a different usage in one commissaryship from what there has been in another, and therefore the only instances that could be regarded, were such as were brought from the county of Buckingham, and of those, such as were against clergymen with respect to their institutions were immaterial, because institutions, and all matters relating to them, are excepted out of the patent of the commissary of Buckinghamshire, consequently there were only two instances that properly came under consideration; first, the instance of 1598, when a citation was returned in a cause of defamation, at the suit of one inhabitant of the county of Buckinghamshire, against another inhabitant of that county, and the defendant appeared without protestation; but as it did not appear that the cause proceeded any further, and was finally determined by the chancellor, I thought little stress could be laid on it; it might fairly be presumed that the cause was dropped for want of jurisdiction. The second instance was in 1600, when an inhabitant of Amersham, in Buckinghamshire, cited another inhabitant of the same place, before the Chancellor of Lincoln, at Godmanchester, in a cause of defamation; the defendant did not appear; and it does not appear that he was proceeded against for contumacy, or that any thing more was done in that cause, and therefore that instance rather shews a want of jurisdiction in the chancellor than establishes his right; and from that time to this, which is 154 years ago, it is not pretended that the chancellor has ever attempted in any way to exercise a concurrent jurisdiction with the commissary of Buckinghamshire; I therefore pro-[17]-nounced for the appeal, reversed the chancellor's decree, ordering Hillyer to appear simply; dismissed him from the citation to appear before the chancellor of Lincoln, and condemned Milligan in 60*l.* costs.

DYER against CALWELL. Prerogative Court, Michaelmas Term, November 14th, 1754.—An application to assign a party propounding a codicil to bring in a bond, which had been fraudulently procured, and lodge it in the registry of the Court, rejected.

[See further, p. 120, post.]

William Calwell, deceased, died 14th July, 1751; made a will which is not disputed, and appointed two executors who have renounced. On 9th May, 1752, administration cum testamento was granted to Ann Calwell, deceased's widow. In January, 1753, William Dyer pretended that the deceased had, in consideration of love and affection to him, given him a bond for 200l. to be paid six months after his decease, of which he demanded payment, and at the same time produced a codicil, by which the deceased had left him a legacy of 200l. Dyer cited the widow to take administration with this codicil; she opposed it and he propounded it. She pleaded that the codicil was a fraud; and also pleaded that the said Dyer had fraudulently procured a bond from deceased for the same sum, &c. He in his answers, acknowledged that he had the said bond in his custody; whereupon Dr. Hay, the widow's counsel, moved that the Court would assign Dyer to bring and lodge in the registry the [18] said bond, on suggestion that a fraud might appear upon inspection on the face of the bond.

Judgment—Sir George Lee. But I was of opinion I had no jurisdiction to order the bond to be brought in; Dyer had not pleaded it: I could not oblige a person to produce evidence against himself, upon suggestion that he had such evidence in his custody; that the bond not being testamentary, I had no authority over it, and therefore rejected the petition.

REES against HARRIS. Arches Court, Michaelmas Term, November 21st, 1754.—
The parson has a right to carry his tithes by the usual way.

Appeal from St. David's.

John Harris, vicar of Estmeal, in the diocese of St. David's, brought a suit against Richard Rees, upon the statute of Edward 6 (2 & 3 Ed. 6, c. 13) for subtraction of tithes, and hindering the vicar from carrying them away; whereby they were lost. The vicar was endowed of one-third part of the tithes of grain arising in his parish. Rees, in 1751, occupied a farm called Broadley, and had thereon wheat, barley, and oats, the tithes of which, by valuation, were worth 2l. 5s., and the vicar's third part, therefore, was worth fifteen shillings. It appeared that Rees had duly set out the tithe, but would not suffer the vicar's agent to carry them off the [19] ground, by the usual and accustomed way; but would have them carried through a gap in the hedges of the field where the way was steep and dangerous for a cart. The vicar would not carry them that way, and Rees would not let him carry them the usual way, whereby the tithe was lost to the vicar. The judge below decreed Rees to pay to the vicar fifteen shillings, the single value of tithe, with the costs.

Rees appealed from that sentence to the Arches.

Dr. Hay, Rees' counsel, insisted that it was not necessary, within the statute of Edward 6, that the vicar should be allowed the usual way to carry off his tithe; it was sufficient if he had a way; that Harris might have carried them through the gap where Rees' car did go with one load of corn; and that this suit was frivolous and vexatious.

Judgment—Sir George Lee.(a) I was of opinion the parson has a right to carry his tithe the usual way, and the parishioner is not to allot him what way he thinks proper, without the parson's consent: that in this case it appeared clearly that the value of the vicar's tithe was fifteen shillings, and that he was prevented receiving them by the obstinacy of Rees. I therefore confirmed the sentence, remitted the cause, and condemned Rees in 13l. costs.

[20] **WHITE against WHITE.** Prerogative Court, Michaelmas Term, November 23rd, 1754.—An allegation admitted to proof, because the objection to it arose on a point of law.

On admission of an allegation.

Dr. Paul for Thomas White. John White died 1st April, 1749, left Martha his widow, Thomas his brother, Sarah Lloyd his niece, and several other nephews and

(a) *Stephens v. Webb*, vol. i. p. 262; *Burnell v. Jenkins*, 2 Phill. 391.

nieces, made a will, executed and attested by three witnesses, dated 27th March, 1747, appointed his brother Thomas sole executor, and gave many legacies, but did not dispose of the residue. Deceased's two sisters died after making said will of 27th March, which is marked A; whereupon it was suggested that deceased, with his own hand, wrote the unexecuted will marked B, dated 10th February, 1748-9. In that will he also appointed his brother Thomas sole executor, and disposed of the residue. Both wills contain real as well as personal estate. The executor took probate of the first executed will; afterwards the unexecuted will being found, the executor cited the widow and all the legatees to shew cause why the probate of the first will should not be revoked and declared void, and why probate should not be granted to him of the latter unexecuted will. The deceased's widow and Sarah Lloyd the niece appeared and opposed the last will; the executor gave in this allegation to propound it, the admission of which was opposed in general on a point of law, viz.—It was insisted that the latter will, containing both real and personal estate, and being unexecuted, and having [21] been wrote two months before the deceased's death, could not by law revoke the former executed uncancelled will, and consequently, that the allegation pleading it was irrelevant, and ought to be rejected, because it was to no purpose to admit the allegation, when, if all the facts in it were proved, the will it propounds cannot be established.

Dr. Simpson for Martha White, the widow of deceased. Executed will marked A is dated the 27th March, 1747; the unexecuted will marked B is dated the 10th February, 1748-9; the unexecuted will contains real as well as personal estate; he lived two months after the date of the will B; it is incomplete, and not signed by deceased. (N.B.—Deceased's name was inserted at the top.) It charges his real estates, but it cannot operate as to them; not carrying it into execution is a departure from it. He kept the first will in his custody uncancelled. No circumstances or declarations in favour of the last paper are pleaded.

Dr. Bettesworth for Sarah Lloyd the niece. Some of the legatees who are benefited by the real estate will lose their whole legacies, because the will B is not executed.

Dr. Paul for the executor. Residue is given to the executor by the last will. 16th June, 1724, in *Purefoy v. Purefoy*, a will made in 1696 was not executed; the testator declared he would alter his will, and was about doing it; set aside, because prepared for execution. *Hyde and Mason* (see vol. 1, p. 423, notes) against *Calamy and Limbrey*, Deleg. 1732, the Court held that a signature which shewed the testator intended [22] to execute his will, should be considered (a) as a condition that it should not operate unless it was executed. *Coombe and Coombe*, (b) Deleg. 1738, the same determination. To this will there is no signature.

Dr. Hay, same side. This Court has nothing to do with real estate; before statute of frauds the will B would have been a good will for real estate; that statute has made some alterations with respect to wills for real estates; but in this case the first will is not revoked so far as relates to the real estate, the real estate is well given by the first will, and must pass; the revocation is as to the personal estate only.

Dr. Harris, same side. Will B is a legal will, and if it stood alone would be pronounced for. Cases in Equity abridged, fol. 409, *Hyde and Mason*.

Judgment—*Sir George Lee*. I admitted the allegation, because the sole objection to it arose from a question of law, which could not be fully debated on the admission of an allegation.

L'HUILLE against WOOD. Prerogative Court, Michaelmas Term, November 23rd, 1754.—Effect given to a will which the testator had been prevented from executing by duress.

Dr. Hay for Benjamin L'Huille, the executor. Hester Pascall, widow, died the 27th March, 1749; on the 21st March, 1748-9, she gave in-[23]-structions to Charles Shearer, an attorney's clerk, in presence of Mary Lowe and William

(a) The presumption of law is against any testamentary paper which, upon the face of it, purports to have been intended to be more complete than it actually is; that presumption, however, may be repelled by circumstances. *Read v. Philips*, 2 Phill. 122; *Harris v. Bedford*, 2 Phill. 177; *Thomas v. Wall*, 3 Phill. 23; *Buckle v. Buckle*, 3 Phill. 323; *Forbes v. Gordon*, 3 Phill. 628.

(b) Mod. 759; Moore's Rep. 759; 8 Vin. Abr. 43, 22; 1 Hagg. 122; vol. i. pp. 380, 426.

L'Huille, her nephew, for making her will; he minuted them down in writing, and read them to deceased, and she approved them; the next day, the 22d March, Shearer and William L'Huille went to her again, and carried a will drawn from those instructions, in which will the deceased's brother-in-law is appointed sole executor; the deceased's daughter, Mary Wood was then with her; Wood said deceased should not make a will; Shearer read the will to deceased, she approved it, and said she was willing to execute it; the daughter sent for Richard Wood, her husband, when he came he would not suffer the deceased to sign it; the deceased declared she was desirous to sign it, but the Woods prevented her; thereupon Shearer and L'Huille went away; L'Huille went again in the evening, and was denied admittance; question is, whether the deceased was not in the custody of the Woods, and was hindered by them from making the will? The apothecary says the deceased told him she had thoughts of making a will, but was glad she was prevented.

Dr. Simpson for Wood. On deceased's death Mary Wood, her daughter, took administration to her, as dying intestate; about two years after she died, and her husband Richard Wood took administration to his wife, and administration de bonis non to deceased; Richard is since dead, and his brother James, the now party in the cause, took administration, &c. Soon after the death of his wife, L'Huille cited Richard Wood to bring in the administration to the deceased, and to shew cause why it should not be revoked and probate granted [24] to Benjamin L'Huille, the executor of the deceased's will, pending the suit in 1753, he died; then James Wood, his administrator, was cited into the cause, who is a stranger to the whole transaction, and has therefore examined only Mather, the deceased's apothecary. Lowe, a witness for L'Huille, swears the will was not read to the deceased; the deceased was sensible during all the transaction, and was not in custody of the Woods.

Witnesses for L'Huille.

1. William L'Huille. Some time before the 20th March, 1749, deponent, who was nephew to the deceased, at her desire bought an East India bond for her; the deponent carried it to her, and she said she would give it to deponent; deponent said she could not give it to him but by will, and asked her if she desired to make her will; she said it was her desire, and bid deponent bring somebody to take instructions; on the 21st March deponent carried Shearer to her, and told her he had brought a person to make her will; the deceased then gave Shearer instructions in the presence of deponent, and of Mary Lowe, the deceased's servant; he took them in writing, read them to deceased, and she approved of them; Shearer then carried them away with him to draw a will; on the 22d March, deponent and Shearer went to deceased with the said will; the deceased was in bed, and her daughter Mary Wood and Lowe were in the room with her; Wood asked what Shearer did there, he answered he had brought the deceased's will for her to sign; Wood answered, her mother should not make or sign any will; but she desired to hear it read; Shearer then read the will audibly to deceased, and asked her if she liked it, she replied, [25] it was to her mind; soon after Richard Wood came in; Shearer proposed to deceased to sign it, she answered, "I am willing to sign it, and it is my desire to do so, but my daughter will not let me;" and Richard Wood then said she should make no will, and he would not suffer the deceased to sign it, and said to Shearer he might go about his business; Shearer and deponent then went away; deceased was of sound mind, &c.; about six that evening, deponent went to deceased's lodgings, but was refused admittance to her by Richard Wood, who threatened to charge a constable with deponent; deponent met Shearer going to deceased with the will, but on deponent's telling him in what manner he was refused admittance, Shearer turned back.

2. Charles Shearer. On the 21st March deponent went with William L'Huille to deceased; she owned to deponent she desired to have a person come to her to make her will—deposes the same as L'Huille to the instructions, &c., and that Lowe was present; the deceased desired deponent to ask Benjamin L'Huille if he would be her executor; he said, "Yes;" 22d March, deponent and William L'Huille went to deceased, and carried the will with them; they found Mary Wood and Lowe with her; deceased asked deponent if her brother would be executor; deponent told her he would; Wood opposed deceased's executing it, and sent for her husband; he came, and said the deceased should execute no will; deponent asked deceased if she would sign it; deceased answered, "I am willing to sign it, but my son and daughter say I shall not, but it is my desire so to do," and Richard Wood would not suffer pen and

ink to be brought; deponent and L'Huille went away with the will; [26] at six in the evening, deponent was going to deceased with the will, but met William L'Huille, who told him he was refused admittance, and thereupon deponent turned back.

3. Ann Hall. Deceased lodged at deponent's house; one day William L'Huille came to deceased, and she seemed overjoyed at seeing him, and then said to him, she had always promised to do something for him, and she would do it, and leave him something; deponent then left the room; says she had orders from Richard Wood not to let anybody see deceased. Richard Wood turned William L'Huille out of deceased's room, and threatened him with a constable.

4. Mary Lowe. Deponent was servant to the deceased; William L'Huille came four times in a week to deceased; deponent was present at all the times, and never heard the deceased bid him bring a person to make her will; the second time he came he brought Shearer with him, who took an account in writing of some East India bonds of deceased's, which deponent by deceased's orders delivered to him to take account of them; Shearer did not then read anything to deceased; next day Shearer and William L'Huille came again, and then Shearer read to deceased some thing about giving 100l. to William L'Huille, and about other legacies, and making Benjamin L'Huille executor; the deceased made no reply; Mary Wood then coming into the room, William L'Huille said to Shearer, "We must go now and come another time;" the next day L'Huille and Shearer came again to deceased's lodgings, where deponent and Mary Wood were, and on their coming in, Wood sent for her husband; deponent told deceased that William L'Huille and the lawyer were come, de-[27]-ceased replied, "I have signed nothing, nor I have done nothing, nor nothing I will do; I never have made, nor did, nor ever will make a will, for what I have is my daughter's and no one's else;" Richard Wood told them they might go about their business, but they refused to go; Wood opened the door and told them deceased should not be disturbed; deceased same day ordered deponent to tell Mrs. Hall and her husband not to let any of the L'Huilles come to her; deponent gave such orders, and William L'Huille was thereupon refused to see her; deponent said to deceased, if they could persuade her to make a will, they wanted to get 500l. of her; deceased replied, "I have made no will, and will make none, for what I have is my daughter's;" deponent was present all the time; L'Huille and Shearer were with the deceased, and she never heard her give any instructions for a will, or heard any read, or heard her say she was willing to sign, &c.; the Woods did not say deceased should not make or sign a will, or hinder her from signing it; deponent has several times heard Mary Wood ask deceased to make a will, and she refused, and said she never would make one; did not hear Shearer read any thing to her, except as aforesaid.

3. Int. Shearer wrote an account of East India bonds. 4. Int. The will was not read to deceased in deponent's presence. 5. Int. Often heard deceased say she would make no will, and ordered Wood not to suffer L'Huille to come to her. 6. Int. L'Huille was refused admittance by deceased's orders. 7. Int. Deceased told her apothecary she had made no will, for why should she leave any thing from her daughter? She declared thus to Mather two days before she died.

[28] Will read.

Witness for Wood.

Isaac Mather, apothecary. The deponent knew deceased for twenty years, and was apothecary to her to her death; she left Mary Wood, her only child; a few days before her death, deponent spoke to her about her will, as he heard she had been about making one; the deponent spoke freely to her about it; deceased replied thus, "I had thoughts of making my will, but now I will not;" and after such discourse, Richard Wood and his wife came in, and one of them asked her if they should order young L'Huille not to be admitted her; she said "Yes."

Dr. Hay for L'Huille. Not propounding the will sooner is no objection; a will may be propounded at any time; the transaction was not clandestine but open; Lowe was present at each time. L'Huille and Shearer, against whose evidence there is no objection, prove an animus testandi, instructions, reading over to, and approbation of the will, and that she would have executed it if she had not been forcibly prevented by the Woods. Where a testator is prevented by force, the law considers the will as executed, and then her subsequent declaration to Mather could not destroy it.

Dr. Bettesworth, same side. When a testator is hindered by a person interested, the will, though not executed, is good.

Dr. Simpson contra, for Wood. If the daughter had been living when the cause began, she could have instructed it better than James Wood can, [29] who is a stranger to the whole transaction. William L'Huille is son to the executor, and Shearer is a clerk not out of his time. The motion for making a will came from one of the legatees to the deceased; she expressed no impatience to execute the will, or uneasiness at being prevented; there appears to be no force, but only persuasion by her daughter not to sign it; she put off the execution out of love to her child; she might have executed it afterwards if she would, for she lived some days after, and therefore her not doing it is to be deemed a departure from the will; and it appears she had departed from her intention by her declaration to Mather.

Dr. Pinfold, same side. Administration subsisted four years before the will was set up, and probably the debts have been paid and the estate distributed. Deceased during the whole transaction was in her senses, and expressed no indignation at her daughter or her husband for the pretended force.

Judgment—Sir George Lee. I was of opinion deceased's intention to make a will, her giving instructions for one, the will being read to, and approved by her, and her desire to execute it, if she had been suffered by the Woods to do so, were fully proved by William L'Huille and Shearer, against whose testimony (especially the last) there was no legal objection; and they were strongly supported by some, who in the main had given a very strange and incredible evidence, but they admitted that the deceased ordered her bonds to be delivered to Shearer to take an account of them, and as Shearer was a stranger to [30] her, that order could be only with a view to making her will; she admits likewise that Shearer read to the deceased a paper, in which there were legacies, and Benjamin L'Huille was executor, and she mentioned to deceased how much she had given to the L'Huilles, which she could only know by hearing the will read, and she says also that Richard Wood turned William L'Huille and Shearer out of the room, for which she does not pretend deceased gave any orders; this confirms their evidence as to forcibly hindering deceased from executing it, and Shearer also says that Richard Wood would not suffer a pen and ink to be brought into the room, and both she and Hall prove that the Woods would not suffer L'Huille to come to deceased afterwards; it is therefore plain that the deceased would have executed the paper propounded, if the Woods would have suffered her, who were to receive benefit by her not making a will; under those circumstances I was clearly of opinion, the law did consider the will as executed, and then the subsequent declaration to Mather (who seemed to me to be set on to dissuade the deceased from signing her will) could have no effect to destroy a written will, and as to what had been said, that she might have executed the will afterwards if she had pleased, I thought it had no weight, for deceased was plainly in the custody of the Woods, from the 22d of March to her death; I therefore pronounced for the validity of the will, revoked the administration, and swore Benjamin L'Huille the executor, but at the desire of Wood's proctor, ordered the probate not to pass under seal till after fifteen days.

[31] *GLEN against WEBSTER AND WILSON.* Arches Court, Michaelmas Term, December 2nd, 1754.—An executor has a remedy against his co-executor, and in the Court of Arches may, in the capacity of residuary legatee, maintain a suit for his share of the residue.

Dr. Hay for James Webster and James Wilson, executors of David Glen. David Glen made his will, appointed his wife, Mary Glen, his nephew, James Webster, and James Wilson, executors, gave the residue to his wife, Mary Glen, and James Webster. On 9th February, 1749, all the three executors proved the will. Mary Glen has now cited her two co-executors in a cause of legacy for her moiety of the residue. Smith appeared as proctor for the two executors under protest, that she could not by law sue her executors in this Court in a cause of legacy. Joint executors are in law one and the same person; an act done by one of them is the act of all. Nelson, tit. Co-executors. One executor cannot sue the other relating to the will, except in a legacy of the residue, in which case an action of trespass may be brought at law. Glen being possessed of a probate, must seek her remedy at law. Common legatees, that are not executors, have nothing to do with the assets.

Dr. Pinfold for Mary Glen. Glen has had no accounts of the residue. One executor may call another to an inventory. Glen has two capacities, executor and legatee. She has cited the executors as legatee. A man may renounce as executor and take administration as residuary legatee.

[32] *Judgment—Sir George Lee.* I was of opinion that the authority from Nelson only shewed what remedy a co-executor might have for a legacy at law, but did not exclude a remedy in the Spiritual Court; that in many cases an executor might have a remedy against his co-executor at law; and I was of opinion in this case that Glen, in the capacity of residuary legatee, might cite and maintain a suit in the Arches for her share of the residue. I therefore rejected Smith's protest, and decreed the executors to appear to the citation.

CHAPMAN *against* GUY. Prerogative Court, Michaelmas Term, December 4th, 1754.

—After sentence the Court rejected an application on behalf of the party who had established a will, offered for the purpose of shewing the mala fides of his opponent, with the view to a condemnation in costs.

John Chapman died 27th October, 1753; left his widow, Mary Chapman, and a daughter Mary Guy; made his will, dated 26th October, 1753; appointed his wife executrix and universal legatee. Mary Guy, as daughter, put the executrix upon proving it by witnesses. The executrix propounded it, gave in a common conditit, and examined the three subscribing witnesses, who proved execution and capacity, but did not prove instructions or reading the will to deceased. Guy administered interrogatories to Chapman's witnesses, but did not plead or oppose a sentence being given for the will.

I gave sentence for the will; and then the counsel for Chapman moved that they might be at [33] liberty to read affidavits to prove that Guy knew deceased was in his senses, and that she approved the will after his death, and therefore was in mala fide in opposing the will, and putting the executrix to costs, in order to have Guy condemned in costs; or if affidavits were not proper evidence, to allow them to plead the facts contained in the affidavits in an allegation; and Dr. Paul for Chapman, cited this case, Prerog. Dec. 13, 1727, *Cranwell against Edwards*: John Shilling made his will in the East Indies, and appointed John Cranwell his executor, Edwards, the deceased's sister and next of kin, had certain information of this will, but she nevertheless took administration to him as dying intestate: the Court condemned her in costs.

Judgment—Sir George Lee. I said I thought the Court had done very right in that cause, for the sister was clearly guilty of a mala fides; but in this case Guy had only done what she had a right to do as next of kin; that this attempt was entirely new; she, the executrix, might have pleaded Guy's knowledge of deceased's capacity, and her approbation of the will in the cause, instead of giving in a common conditit; but as she had neglected that opportunity, she could not now plead after sentence, or exhibit the affidavits, for that would be grafting a new cause upon the first, and would make suits endless; that the ground for giving costs must be taken from what appeared in the cause itself, and must not arise from matter subsequent; that here Guy had done no more than what, by constant practice, she had a right to do, without paying costs, as being entitled to distribution under an intestacy; and though in this case the Court had given sentence for the will, [34] yet the evidence was as slight as could be in any case, the testator being on his deathbed, and nothing being proved but a bare execution and a general capacity. I therefore rejected Chapman's petition, and refused to condemn Guy in costs; and then Guy's counsel moved that Chapman might be condemned in the costs of the day, she having given in many affidavits which Guy had been forced to answer, but I refused to give costs on either side.

ROBINS *against* SIR WILLIAM WOLSELEY. Arches Court, By-Day after Michaelmas Term, December 9th, 1754.—The declarations and affidavit of a deceased person, relating to matters in which he was himself concerned, admitted to proof.

[See on other points, pp. 149 and 421, post.]

Sir William Wolseley, in the Consistory of Litchfield, sued Ann Robins, alias Lady Wolseley, for a divorce for adultery as his wife. She pleaded in bar that she was the wife of John Robins, Esq. and was married to him on 16th June, 1752, whereas Sir William did not pretend he was married to her till 23d of September, 1752. The judge below ordered the proofs upon Sir William's libel, and her plea in bar to proceed *pari passu*; Robins appealed, and I was of opinion that the question upon the matter in bar ought first to be determined, and retained the cause. Robins' proctor repeated her allegation, in which the chief proof of her marriage appeared to

be an entry thereof in the parish register of Castle on 16th June, 1752. Sir William gave in an allegation, pleading that said entry was false, that the marriage was first entered on [35] the 9th of June upon a rasure, and afterwards was altered to the 16th of June, and that, in fact, they were married at a private house on 9th October, 1752. This allegation was greatly to be supported by the declarations, and an affidavit of Mr. Corn, the vicar of Castle, who married them, and made the entry, and is since dead. The counsel for Robins, who opposed the allegation, insisted that his declarations and affidavit could not be received, and, consequently, that so much of the allegation as depended on them ought to be rejected.

Judgment—*Sir George Lee*. But I was of opinion that the declarations and affidavit of a witness who was dead, relating to matters in question, in which he was concerned, ought to be received in proof; and it would be a future consideration what weight was to be laid thereon. I therefore admitted the allegation.

N.B.—Mr. Adderley, proctor for Mrs. Robins, protested of appealing.

PLUNKETT, FORMERLY SHARP *against* SHARP AND DAY, Executors of Sharp. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—A marriage at the Fleet sufficiently established to entitle the asserted widow to the administration of her husband's effects.

Dr. Collier for Mrs. Ann Plunkett, formerly Sharp. Thomas Sharp, the deceased, left Ann, now Plunkett, his widow, and William Sharp, his [36] brother; the deceased died the 23rd November, 1751; the brother acknowledged her as deceased's wife. Administration to deceased, who died intestate was granted to her father John Banks, as her guardian, she being a minor. William Sharp made her several payments as widow, from deceased's death till April, 1752, and at the head of his account he called her Mrs. Ann Sharp; he made no opposition to granting the administration; William recommended to her an appraiser to make an inventory; Banks, as administrator, frequently called on him to come to an account, but he put it off. In August, 1753, Mrs. Plunkett came to age, and she was at that time married to Christopher Plunkett, she then applied for administration to her first husband in her own right, caveat was entered in name of John Thomas, warned, 4th September, 1753; she prayed administration. William Sharp appeared, and first sess. Michaelmas, 1753, denied her interest; she confessed his, and propounded her interest; William pleaded in contradiction, and has examined four witnesses: William is now dead, but his executors are made parties. Plunkett has examined twenty-one witnesses, who prove that the deceased courted her in March, 1747, when she was between 14 and 15 years old, and he was about 19, and an apprentice to his brother William; she lived with her father Mr. John Banks, who kept an ale-house near Moorfields, in the neighbourhood of William Sharp's house; the courtship continued till October, 1747; William knew of it, and used to send his servant on nights to fetch him home; in said October she asked her father's consent to marry deceased privately; he consented to the marriage, but insisted she should live on with him till she was 17 years [37] old; 13th October, 1747, she acquainted her father and mother that she and deceased were to be married that day at the Fleet; in the afternoon they met at her dancing-master's house, and went to the Fleet, and were married there. We have one witness, Thomas Anderton, to the fact of the marriage, who was examined the 14th January, 1754, and was then aged 21; he proves that producent and one Thomas Sharp, in October, 1747, were married in the Fleet, at Bates's coffee-house, by Parson Dare, and that the witness Mrs. Bates, and one Foxall were present at the marriage, all of whom but deponent are dead; they were married by the name of Thomas Sharp and Ann Banks; he swears to the identity of Ann; says he called a coach for them after they were married; deceased gave Dare three guineas for marrying, but Dare insisted on half-a-guinea more for a certificate; deceased had not money enough, and therefore left his watch in pawn with Mrs. Bates for the half guinea, which, as she said, he afterwards redeemed. On the same night, about eight, she came home, shewed her father and mother a ring, and said she had been married at the Fleet; the deceased came and supped at her father's that night, and did so most nights for five or six months, but lay at home; he then told her father he was going to Bristol for a fortnight or three weeks; two or three days after she went away privately, but wrote a letter to her father to tell him she was in London with her husband; during their absence, he was under a salivation, and his wife attended him, at a lodging in Colman-street; at first he went there by the name of Clark, but afterwards he owned

his name was Sharp, and told Eugo, his nurse, that he was married to Nan-[38]-ny Banks, and sent her for his wife to come to him; she immediately came, and deceased then owned her for his wife in presence of the said nurse, and his surgeon; the deceased told Dickenson, his surgeon, that she was his wife, but desired he would keep it secret; his brother William and his wife visited deceased, and Ann was introduced to them, and they treated her as his wife; deceased owned his marriage to her father and mother; they lodged together publicly at a lodging in Moorfields, were visited and owned by the relations on both sides; she went by the name of Sharp; was at William's house at Walthamstow, and was owned there as deceased's wife; Ann miscarried, and William's wife came to her, and brought her own midwife to attend her; deceased and Ann, together with an aunt of deceased, were godfather and godmothers to a child of William's; deceased and Ann lay together at William's house in Walthamstow, by the appointment of William and his wife; at all their lodgings she was visited and owned by William and his wife. On deceased's death, William and his wife behaved to her very kindly as a sister; she then went and lived with her father, and they visited her there; deceased and Ann sometimes quarrelled; their own witnesses prove William's owning of Ann as deceased's wife, and that there was a public reputation of their being man and wife; their witnesses attack Ann's character. The principal point will be costs.

Dr. Simpson for the Executors of William Sharp. Deceased's father, by his will, made William Sharp his executor, and left two-thirds of his estate to his son William, and the other third to be paid [39] to his son Thomas at his age of 22; William is dead, his executors are just come into the cause, and are not liable to costs; Ann's behaviour was very bad, such as removes any presumption arising from cohabitation: shall insist they have not proved the fact of marriage.

Witnesses for Ann Plunkett.

1. John Banks. Producent is deponent's daughter; deceased courted her when she was between 14 and 15 years old; she was virtuously educated; deceased was then 17 or 18 years old, and lived with his brother William; deceased publicly courted producent with his brother's knowledge, who used to send his servant to deponent's house at night for deceased; producent received his courtship with deponent's consent, but deponent advised her not to marry till she was 17; deceased pressed producent, as she said, to be married privately and unknown to deponent at the Fleet; deponent consented to their being privately married there, and she was to live with deponent till she was 17. On the 13th October, 1747, producent told deponent she was to be married that day at the Fleet; she went out, and when she returned, said she had been married at the Fleet; the deceased supped that night at deponent's house, and then went home; he continued to visit her every day for five or six months, and then said he was going to Bristol for a fortnight; three or four days after, producent went away privately, but by letter informed deponent she was with her husband in London; about five or six weeks afterwards, deceased came to deponent and owned to him his marriage with producent; from that time they lived publicly together as man and wife, and [40] his brother William and his wife owned them as such; publicly lived as man and wife at all their lodgings, and were owned as such by William and his wife, and they used to carry her in their coach to William's house at Walthamstow; after deceased's death they visited producent as deceased's widow, and owned her as such, and shewed great regard to her; William recommended an appraiser to her to value deceased's goods, and make an inventory. Administration was granted to deponent as guardian to Ann; William paid deponent money as administrator for the use of Ann.

3. Int. Has heard producent was married at May Fair to Plunkett.

2. Ann Banks. Deponent is mother to producent; agrees exactly with the former witness; proves owning by deceased's brother, and his wife before and after deceased's death.

3. Jane Eugo. Deponent was sent by Wheeler, a surgeon, to attend deceased as a nurse in his salivation; he went when deponent first came to him by the name of Clark, but after lodging in Colman Street two nights, he told deponent who he was, and said he was married to Nanny Banks, and sent deponent for her to come to him; producent came; deceased received her with the greatest joy, and owned her as his wife to deponent and the surgeons; and they treated each other as husband and wife; William and his wife came to see him, and they owned Ann as his wife.

4. Keziah Allen. Deponent is cousin to producent; proves courtship in 1747; deponent was married on 12th October, and producent was at her wedding dinner; proves general reputation that deceased and producent were man and wife; [41] says deceased owned his marriage to deponent; William and his wife visited and owned her as their sister; they visited producent the night deceased was buried, and they carried her to their house in the country.

5. Sarah Wise. Deponent was servant to deceased and producent; proves general reputation, and owning by each other and by deceased's relations, and that William and his wife carried producent in their coach; producent and deceased were sponsors to a child of William's with their aunt Mrs. Webb.

2. Int. Deceased was apprentice to his brother William; and often lay with producent in the evening, and afterwards went home to his brother's. 4. Int. Gives producent a good character.

6. George Waugh. Deponent was barber to deceased and his father; proves cohabitation with reputation, and William's owning of producent.

7. Henry Dickinson. Deponent was surgeon to deceased; in 1748, when he was salivated, swears that deceased told him producent was his wife; deceased said he had been married five or six weeks, and desired deponent to keep it secret; producent went by name of Sharp.

8. Rebecca Gering. Deponent was great-aunt to deceased; she esteemed producent to be deceased's wife; proves William and his wife's owning her; and that producent was godmother to William's child, as wife to his brother.

9. Mary Webb. Deponent was aunt to deceased; fully proves cohabitation and owning by William; and that producent and deponent were godmothers to William's child; deponent always esteemed producent to be deceased's wife; William owned her after deceased's death as his sister.

[42] 10. Mary Lawley. Proves cohabitation with reputation, and William's owning producent as deceased's wife.

11. Samuel Stokes. Proves reputation of courtship and cohabitation, and owning particularly by William.

2. Int. Producent has not an ill character. 3. Int. Producent and deceased often quarrelled, but he spoke of her as his wife.

12. Thomas Anderton, æt. 21. Deponent is apprentice to Bates, a bricklayer; in October, 1747, Thomas Sharp and producent, by name of Ann Banks, came to the Fleet; Dare, a reputed parson, and Foxall, were standing at deponent's master's door, who kept a coffee house; they asked him if they wanted a clergyman, they said, "Yes," and accordingly came into the house, and were carried into a room upstairs; deponent and his mistress, Elizabeth Bates, and Foxall were present, and saw Dare marry them; all the said witnesses and the parson are dead; Thomas Sharp seemed to be about thirty years old, but producent seemed to be very young; deponent never saw Thomas Sharp but that time, but has since seen producent, and knows she is the same person he so saw married to one Thomas Sharp; deponent was told said Thomas paid Dare three guineas for marrying them; deponent afterwards called a coach for them, and Sharp gave him sixpence; deponent was present out of curiosity; Mrs. Bates, since dead, told deponent that Thomas pawned his watch to her for half-a-guinea to pay for a certificate, and afterwards came and redeemed it.

3. Int. Deponent has never seen producent but once since said marriage, and that was lately. [43] 4. Int. Never saw deceased but at the time of said marriage.

13. Mary Williams. Deponent was servant to deceased and producent; proves cohabitation as man and wife, and owning by William and his wife, and producent being at William's house at Walthamstow by invitation; deponent esteemed them to be man and wife.

14. John Cox. Deponent appraised deceased's goods, and William desired deponent to give the turn of the scale to producent; deponent apprehended producent was deceased's widow.

15. Edward Myre. Deponent was groom to deceased's father, and afterwards to his son, William; proves deceased kept company with, and was reputed to court, producent, who had a good character; says deceased owned his marriage to deponent, and he used to call producent wife; William and his wife, and producent, used to go into the country together in William's coach.

16. John Carter. Deponent was servant to John Banks; proves courtship; says

he once heard deceased ask producent to marry him ; gives producent a good character ; says deceased and producent cohabited together as man and wife.

17. Elizabeth Jenner. Proves reputation of courtship, and of producent being deceased's wife.

3. Int. Has heard producent's mother say producent was married at St. Paul's ; but before deponent thought producent had been debauched by deceased.

18. William Mead. Proves exhibit C ; but says the name, William Sharp, is a little unlike said William's hand.

19. Mary Barnard. Deponent attended producent on her miscarriage at the desire of William's [44] wife, who bid deponent go to Mrs. Sharp ; deponent is midwife to William's wife ; deponent esteemed producent to be deceased's wife.

20. Mary Siggs. Proves that producent was often at William's house ; and once producent and deceased were there together, and producent was called Mrs. Sharp, and treated as deceased's wife.

4. Int. Deponent never heard deceased call producent his wife.

21. John Bayley. William and his wife often invited deceased and producent to dinner, by name of Mr. and Mrs. Sharp ; deponent esteemed them to be man and wife ; and producent after deceased's death used to come to William's house.

Witnesses for William Sharp.

1. Eleanor Booth. Deponent knew deceased and Ann by their lodging near deponent ; she passed for deceased's wife, and went by his name, but deponent never heard him call her wife ; gives Ann a bad character ; says she kept company with lewd men while she lived with deceased, as she has herself told deponent ; and used to pick up men and bring them home with her ; and she used to get drunk.

2. Int. Deponent was acquainted with Ann only two months. 4. Int. Deponent esteemed Ann and deceased to be married ; and they owned it. 5. Int. Proves William treated ministrant as a sister ; deponent always esteemed them to be husband and wife. 17. Int. William called her by name of Sharp.

2. Elizabeth Chambers. Deponent's daughter is wife to William Sharp ; deceased and Ann did not behave to each other as man and wife ; [45] for he did not call her "my dear Nan," &c. but "Nan" and "Brim." Upon talking of marriage, Ann said she was married at Cripplegate Church ; deceased, who was present, said it was a damned lie ; from thence deponent believed they were not married.

7. Int. It was rumoured that deceased had run away with Ann Banks ; ministrant was godmother to a child of deponent's daughter. 10. Int. William entertained ministrant at his house after deceased's death.

3. Eleanor Read. Deponent is sister to William's wife ; says deceased and Ann did not live with reputation as man and wife ; she was a drunkard.

8. Int. Ministrant was at the christening of deponent's brother's child.

4. Thomas Read. Deponent is husband to Eleanor Read ; does not know whether deceased and Ann lived together as husband and wife or not.

Judgment—Sir George Lee. Upon this evidence there being some proof of a fact of marriage by one witness, and cohabitation and an uniform owning by both parties, and their relations, and particularly by William Sharp who had been the party in the cause, I pronounced for the marriage and for Ann's interest, and condemned the executors in costs, to be paid out of their testator's assets.

Upon this cause, the case of *Bond and Bond*, in the Prerogative, in which case I gave sentence on 27th November, 1754, was mentioned ; the case was thus : John Bond had lived with Sarah as his wife for many years, and had eight or nine children by [46] her, six of whom are living ; she was at first his servant, and he had a bastard by her, but afterwards he declared he had married her, and from that time they constantly lived with reputation as man and wife, and were esteemed such ; all but the first child were baptized as legitimate ; the deceased's nearest relations and neighbours, who were examined in the cause, swore they treated and esteemed her to be the deceased's wife, and particularly that William Bond, the deceased's son by a former wife, always, during his father's life, treated and behaved to her as his father's wife ; upon the deceased's death, Sarah, as widow, prayed administration, and was opposed by William Bond, the son, who denied her interest ; she pleaded a fact of marriage by a particular clergyman, one Moses Thomas, at Penkridge, in Staffordshire, but she failed as to proof of the fact of marriage, and of the death of Moses Thomas, to either of which she did not examine any witness, but she fully proved reputable

cohabitation, uniform owning, and particularly by the son, and also the birth and baptisms of several children as legitimate, and entries of such baptisms in the parish register.

Upon this evidence I pronounced for the marriage, decreed administration to her, and condemned the son in costs.

PELHAM against NEWTON. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—A testatrix directs her executors to deliver certain sealed-up parcels unopened to certain persons named. The Court decreed these parcels to be opened in the presence of the register, a schedule to be made of the contents, and to be proved as a codicil.

Lucy Woodcock, deceased, made her will, dated 21st January, 1754, and a duplicate executed in [47] presence of three witnesses; appointed Mr. Hay, Colonel Pelham, and Mr. Cust, executors, and gave the residue to Colonel Pelham. On 25th April, 1754, she made a codicil, marked B, signed by her, but not witnessed; 8th May, 1754, made a codicil, marked C, all of her own hand-writing; 13th May, 1754, made another codicil, marked D, at the bottom of her will, which she signed; 20th August, 1752, made another codicil, marked E, signed by her; 7th June, 1753, made another codicil, marked F, wrote but not signed by her, and she also wrote a paper marked G, in which she directs her executors to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened; and desired those persons would not tell one another what was contained in their respective papers. In her will there was a clause to this effect, that such papers as should be found signed by her, and such parcels as should be found directed by her, should be taken as codicils. A caveat was entered by Mrs. Newton, second cousin and next of kin to deceased, she prayed scripts and scrolls which Colonel Pelham gave in with an affidavit; Mrs. Newton's proctor declared she would give no opposition. Colonel Pelham in court declared he was willing to take probate of the will, and all the above-mentioned papers, but desired the opinion of the Court what he ought to do with respect to the parcels; whether he ought to deliver them unopened or not?

Judgment—Sir George Lee. I was of opinion he could not safely deliver them unopened, for if he should be called to an inven-[48]-tory, he could not give in one on oath, without knowing what was contained in those parcels, and if he assented to them as legacies, and there should not be assets sufficient to pay the debts, he would be guilty of a devastavit. I therefore decreed those parcels to be opened in presence of the register, to see what was contained in them; they were accordingly opened in court, and they contained bank notes, some of 20l. and some of 30l. each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the will, and decreed probate of the will, and all the aforesaid papers to the executors.

GASCOYNE against PRIDDLE, BY HER GUARDIAN. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—Objection to pleading the hand-writing of living persons, overruled.

Dr. Hay for Gascoyne. Martha Priddle, deceased, made her will, dated the 13th April, 1754, all wrote with her own hand; executed it in the presence of her mother and sister, appointed Edward Gascoyne executor and residuary legatee; Ann Priddle, deceased's sister, by her guardian opposed the will; Gascoyne propounded it, and called in the mother and all the next of kin to see the will proved by witnesses by citation with intimation; nobody appeared but the guardian for Ann Priddle; the executor gave in an allegation, in which he pleaded the hand-writing of deceased's mother and sister as witnesses to the will.

Dr. Pinfold for Ann Priddle. Said deceased had made other wills subsequent to this, by which [49] this was destroyed; and from thence the opposition to this will arose; he objected to the allegation that the mother and sister were living, and therefore their hand-writing could not be pleaded, for when persons are living, their testimony must be had either as witnesses, or by their answers.

Judgment—Sir George Lee. But I was of opinion it was proper to plead their hand-writing under the circumstances of this case; for first, without pleading their hand-

writing Gascoyne could not have their answers to that fact; secondly, the mother did not appear, and therefore, he could not have her answers; but yet as she was made a party, and they proceeded against her in *pœnam*, they could not examine her as witness, and so Gascoyne would be deprived of that material circumstance that the mother and sister attested the will, if he should not be allowed to plead and prove their hand-writing. I overruled the objection, and admitted the allegation.

STRATTON AND STRATTON *against* FORD AND OTHERS. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—Not usual to grant an administration *pendente lite* to either of the parties contesting suit, but to some indifferent person.

Dr. Hay for Susanna Stratton. John Stratton, Esq., deceased, made a will and two codicils; appointed his widow Susanna Stratton, John Stratton and William Ford executors. The will and first codicil are admitted on all hands to be good, but Mary Ford, cousin and next of kin to deceased, opposes the second codicil; by the will she has a legacy of 1500*l.*, which is revoked by the second [50] codicil; all parties agree that it is necessary to have an administration *pendente lite*, but the question is, whether it shall be granted to all the executors jointly, or to the widow, Susanna Stratton solely, or to one named by her? John Stratton has by his proxy consented that it shall be granted solely to the widow, or to a person named by her. William Ford, the other executor, who is son to Mary Ford, the party, joins with his mother in desiring it should be granted to all the executors; the widow, who has the residue of the personal estate is principally interested; the inventory amounts to 22,475*l.* 6*s.* 11*d.*; the legacies, supposing the second codicil to be good, amount only to 3600*l.*, so the residue is 18,875*l.* 6*s.* 11*d.* The effect of the administration will in a great measure be defeated if Ford the executor is joined in it.

Judgment—Sir George Lee. I thought inconvenience would arise from granting administration to all the executors; it has not been usual to grant it to any of the parties, but to some indifferent person; the widow has the greatest interest, and John Stratton joins with her. I therefore decreed administration *pendente lite* to be granted to a person to be named by the widow, giving security, who shall justify on oath to the full value of the inventory, and notice of the name of the sureties to be given to the other party three days before the administration passes under seal.

[51] GIRARDOT BUISSIÈRES *against* ALBERT, BY HER GUARDIAN. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—In cases of intestacy, nephews and nieces never take by representation. When they concur with a brother or sister, they take *per stirpes*. In other cases they take *per capita*.

Dr. Paul for the uncles. Girardot Reau deceased made a will, dated the 30th June, 1735, appointed John Macguire and Andrew Girardot executors; Macguire died before the testator; Andrew Girardot survived him, but died without taking probate; all the legatees named in the will are dead; the deceased died a bachelor, leaving three uncles by his mother, and a nephew and niece by two sisters; the uncles are in the same degree of kindred as the nephew and niece, as appears by the *arbor consanguinitatis*; this case must be ruled by the statutes. Stat. 31 Edw. 3, administration shall be granted to the next most lawful friend. Stat. 21 Hen. 8, c. 5, and stat. 22 & 23 Car. 2, c. 10, gave administration to the widow or next of kin; the only question is whether the uncles and the nephew and niece are not in the same degree of kindred to the deceased; if they are, they are equally entitled to administration and distribution.

Dr. Simpson, same side. Uncles are not excluded by nephews or nieces; civil law directs in cases testamentary, no representation beyond brothers' and sisters' children, and representation then takes place only when a brother or sister to the intestate is living. *Walsh and Walsh*, Precedents in Chancery, 754. Prerog. 1714, *Flower and Flower*. Prerog. 1736, *Pearce against Pearce*. Prerog. 1724, *Daris against Davis Harris and Page*; in all those cases, held that the uncle was in equal degree with the nephew.

[52] Dr. Hay for Ann Albert, the niece. The question is, whether the uncle is entitled to distribution with the niece? In *Flower's case* the uncle's right was deter-

mined only incidentally; the nephew or niece is entitled jure representationis by stat. 22 & 23 Car. 2, c. 10, sect. 6. Secondly, in her own right the niece is preferable to the uncle by common law; the brother as to lands is in the first degree, 1 Vent. 423, *Collingwood's case*; and so his son or daughter is in the second degree, 1 Peere Williams, fol. 50, *Blackburn and Davis*; with regard to personal estate, the law of the land is the rule. The civil law prefers the brother to the grandfather; law of the Twelve Tables, altered by the *Senatus Consultum Tertullianum*: by Code de Success. the sister is preferred to the grandmother, Novell. 118, ch. 2; Voet. lib. 38, tit. 17, st. 13; the brother succeeds with the father, Vinnius ratio succedendi, lib. 3, tit. 5; Chancery, January 14, 1754: *Evelyn against Evelyn*—John Evelyn died intestate, the question was, whether Charles Evelyn, the brother of the intestate, was entitled to his whole personal estate, or whether Sir John Evelyn, the intestate's grandfather, should share equally with him? Lord Chancellor Hardwicke decreed the whole to the brother; upon that cause these cases were cited, which are not in print—*Poole against Wilshaw*, Chan. Bill, brought by a grandmother to share the intestate's estate with the brother, held the brother should take all; 20th November, 1749, at the Rolls, *Norbury against Vicars*, same determination. By the civil law the computation of degrees is made through the grandfather to the uncle; in stat. Car. 2 there are no exclusive words to hinder a niece from taking by representation, though the intestate did not leave a [53] brother or sister; determinations should be uniform between this Court and Chancery.

Judgment—Sir George Lee. I said that it was a settled point that nephews and nieces never took by representation, but when they concurred with a brother or sister of the intestate; in other cases they took per capita in their own right, as in the case cited of *Walsh and Walsh*. The common law with respect to lands did not compute the father, but reckoned brothers in the first degree, without the mediation of the father, but that was founded on the principles of the feudal law, which would not suffer lands to ascend to the father, because he was presumed to be old, and not so fit as the brother for military service; the case of *Evelyn and Evelyn*, and the others cited in that case, were not in print, and therefore one could not see exactly upon what those determinations were founded; possibly the questions might arise upon money that, by settlements or agreements, was to be laid out in lands, and if so, it is to be considered as land; but be it as it will, I could not, upon a case mentioned, by information, vary from settled determinations in this court. The uncle and nephew are clearly, by the civil law (which rules in this court in testamentary cases) in the same degree of kindred, viz. in the third degree. Sir Charles Hedges, in *Flower's case*, and Dr. Bettesworth, in *Pearce's case*, determined that the uncle was equal in degree and distribution with the nephew; and by the statutes, the ordinary is ministerial to grant administration, and make distribution to the next of kin in equal degree. I cannot vary from the determinations of this court, and therefore I pronounce that the uncles are equally entitled to distribution with the [54] niece and nephew; and as the latter are both minors, I decree the administration to the uncle who has prayed it, viz. Buissieres.

NAYLOR, BY HER GUARDIAN *against* STAINSBY, FORMERLY LEAH. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1754.—An executrix appointed by implication.

Edward Catlin, deceased, left Naylor, a minor, his niece and next of kin: he made his will, wrote by himself, gave a legacy therein to Eleanor Taylor, who died before him, gave legacies to several other persons, among the rest, gave several legacies to his daughter-in-law, Mary Leah, now Stainsby, immediately after which legacies follow these words: "But should the within-named Mary Leah be not living, I do constitute and appoint Eleanor Taylor my whole and sole executrix of this my last will and testament, and give her the residue." The counsel for Naylor, the niece, insisted that Eleanor Taylor was appointed executrix and residuary legatee, and that she having died before the testator, he was intestate as to the residue, and that administration cum testamento must be granted to the niece, Naylor, as next of kin. On the contrary, the counsel for Mary Leah insisted that she was appointed executrix by implication, and that Eleanor Taylor was only substituted executrix, &c. in case Leah should die in the testator's lifetime, and consequently that probate ought to be granted to her; and upon consideration of the will I was of that opinion, and decreed probate

to Mary Leah now Stainsby, as executor (a) by implication, according to the tenor of the will.

[55] BROTHERTON, surviving Executor of Lady Cooper Winford, alais Hellier *against* HELLIER, BY HIS GUARDIAN, AND BARRINGTON. Prerogative Court, Dec. 16th, 17th, 1754.—A will found cancelled: doubtful whether cancelled by the deceased; but if it were, the court held to be revived by declarations of the deceased; and by the instructions he had given for making a codicil.

Dr. Hay for Samuel Hellier, by his guardian. Samuel Hellier, Esq., left at his death a widow, the Lady Cooper Winford, whose first husband was Sir Thomas Cooper Winford, and a son by a former wife, Samuel Hellier, the minor, and party in this cause; pending the suit Lady Winford died, and made Brotherton her executor. On the deceased's death, caveat was entered on behalf of the son, who chose one Elizabeth Harris, his guardian; this caveat was warned by the widow; Samuel, the son, who was the deceased's only child, propounded a will marked No. 2, which appears to be cancelled, but with which will annexed, his guardian prays administration may be granted to her, for the use and benefit of the minor; the single question will be, whether this paper was not uncanceled at deceased's death? The deceased died on Friday, 22d November, 1751; the will is dated 12th February, 1735-6; all wrote by deceased, it was executed in presence of three witnesses, this will was made during the life of his second wife, the mother of his son Samuel; but before said son was born, he made his wife sole executrix, and substituted his child, if he should have any by her. On 10th October, 1751, deceased, being then in a bad state of health, sent for Mr. John Harris, who lived about eight miles from him, in Staffordshire, and was his uncle and attorney; when he came, deceased told him he had made a will, and then gave him verbal in-[56]-structions for making a codicil, and deceased desired it might be kept private from his wife, Lady Winford, and ordered Harris to get the codicil settled at London, pursuant to his said verbal instructions, and then said his will was in his upper study; Harris drew a codicil, and shewed it to Mr. Thomas, one of the clerks in chancery, who corrected and settled it. On 12th November, 1751, Harris returned home from London; in his absence deceased sent for him, and again on the 14th November, he sent to Harris to come to him immediately on business of consequence, which he said Harris knew of, next day Harris went to deceased with the codicil marked No. 1; when Harris came, Lady Winford was in the room with deceased, and as soon as she went out of the room, deceased asked Harris if he had brought the codicil; Harris delivered it to him, and deceased began to read it, but Lady Winford returning, deceased put it into his pocket, she staid all the rest of the day in the room with deceased, but at night deceased told Harris he would rise at eight the next morning, and then the affair should be done; deceased accordingly did rise at eight the next morning, which was two hours before his usual time; Lady Winford having notice of deceased's rising, came to him in three or four minutes, and staid with him all the morning till his physician came, who allowed him to be carried downstairs, and he had company with him all that day; at night, Harris said he must go home; deceased desired him to return on Wednesday, 20th. On that day deceased was engaged in business with his tenants, and his wife was present, so nothing was done; he, Harris, staid till the next day, but deceased was still prevented from [57] doing any thing; Mr. Harris then appointed to come again on the 2d of December, deceased desired him to be punctual, one Mr. Onion was then present. The codicil, No. 1, was found in deceased's pocket the night he died. Lady Winford was deceased's third wife, he had great affection for his son. Before marriage with Lady Winford, an agreement was made that she should settle 200l. a-year of her estate on deceased for life, then to her for life, and the issue of their bodies, remainder to Mr. Hellier's heirs; and he settled 200l. a-year on her in the same manner. They were married in 1746, she never would carry this agreement into execution on her part, but he did on his; the codicil was partly made to enforce this agreement, for he left his wife legacies therein, on condition she carried the agreement into execution. The codicil revokes the appointment of Lord Ward as executor of the will, but he is not named an executor

(a) Many ways and by divers words one may be made executor, although not expressly so named in the will. Wentworth, O. E. p. 9. See also *Grant v. Leslie*, and the authorities cited on this point. 3 Phill. 116.

in the will ; Harris says it was his mistake, arising from deceased saying Lord Ward should not be executor. Search was made on 23d and 24th of November for a will in deceased's upper study, but none found till Lady Winford directed them to look in the yellow room ; it was found cancelled in a bureau in said yellow room ; Martha Founds admits she put papers by deceased's orders into said bureau. Founds, on finding the will, declared that about a fortnight before his death deceased bid her look up some papers in the said bureau, and she saw the will among them ; five or six weeks before his death, he ordered new locks to be put on this bureau ; the deceased esteemed this paper to be his will ; in 1748 he recognised it to Daniel Williamson, and said it was made in his former wife's time, [58] and that Daniel's mother was a witness to it ; she is a witness to the will pleaded ; a year before he died, he recognised it to Onion, and in the April before his death he told Sarah Huntback that he had taken care that Harris should not be a trustee for his son, and Harris's name as a trustee is struck out of this will ; Sarah Wheeler says that about a month before deceased's death, she was dusting deceased's room, and then found this will wrapt up carefully, and another witness confirms her ; Wheeler saw this will again on the 23d November, and found it in a drawer of the bureau in the bow-window room ; on the 24th November, in the evening, it was found in the yellow room ; William Tolly, deceased's servant, took his keys, did not give Harris the key where this will was, but kept it from deceased's death to the 24th November at night. We suppose Tolly took the will out of the bureau in the bow-window room and cancelled it, and then put it into the serutoire of the yellow room ; Tolly and the two Wrights are legatees in Lady Winford's will and codicils. Two points—first, we shall insist there is strong presumptive evidence that it was cancelled by direction of Lady Winford. Second, that it was not cancelled by the deceased ; many witnesses swear they believe Lady Winford would not be guilty of cancelling a will.

Dr. Smalbroke, same side. Deceased's bond for securing the marriage agreement was delivered to Mr. Willmott, Lady Winford's brother ; two years after, Willmott returned it to deceased ; about a month before deceased's death, he had his papers brought down from the upper study, and this will was brought down with them ; a fortnight [59] after, deceased ordered it to be put into the bureau in the yellow room ; Tolly was to watch the corpse the night deceased died, but his lady would not let him ; we conclude that he lay in the bow-window room in order to cancel the will. Founds swears directly contrary to her declaration ; on the 24th November, William Wright desired Sarah Wheeler to take no notice that she had seen the will before deceased died.

Dr. Pinfold contra, for the executor of Lady Winford. Deceased died about six in the evening of Friday, the 22d November, 1751 ; his son by his second wife was aged about 15 ; he appears by his guardian Elizabeth Harris ; the will is cancelled by tearing off the name and seal ; they pleaded that this will was uncanceled at deceased's death, and that Tolly saw it uncanceled after deceased's death, they moved to examine Lady Winford and Tolly on interrogatories, but the Court rejected the motion. Lady Winford's character is material ; Sarah Huntback, grandmother to the minor, swears she believes Lady Winford would not destroy a will ; though deceased was in a bad state of health, his death was sudden and unexpected, when it happened ; she fainted away on being told of it, she that night desired Mr. Draper to send for Mr. Harris, Dr. Wilkes, and Mrs. Huntback ; Harris came that night, the others the next day ; Harris said there was a will as deceased had told him in the upper study ; search continued all the 23rd and 24th November in vain ; Lady Winford asked them if they had searched the bureau in the yellow room ? they said, "No," and then went and found it cancelled in the bureau there ; no witness saw it uncanceled. [60] We have proved Lady Winford left Harris and deceased alone, and that there was full opportunity for deceased to have executed the codicil if he had thought proper. Wheeler tells a strange story about the will ; says she cannot tell whether it was uncanceled when she saw it ; Harris lay in the yellow room with Draper the night deceased died ; where the will was found ; deceased was very busy some time before his death in sorting his papers ; Tolly kept the key of this bureau in deceased's lifetime, Tolly lay with Wright in the bow-window room, they have both sworn that they were not out of their beds from about twelve of the clock that night till seven the next morning. We rely on the insufficiency of their proof.

Dr. Bettsworth, same side. There are but two of their witnesses who give Lady

Winford a bad character; a multitude of witnesses give her a very good character; Harris has spirited up this cause, and he attempted to prevent deceased's marriage with Lady Winford.

Witnesses for Hellier.

1. John Harris, Gent. Deceased's mother was deponent's sister by the half-blood; he died the 22d November, 1751. On the 10th October, 1751, deponent waited on deceased upon receiving a letter from him, deceased directed deponent to prepare a codicil to his will, which he said he had made, and was in his study called the Chaos, he gave deponent verbal instructions for a codicil; deponent prepared a codicil from such instructions; deceased did not declare that Lord Ward was an executor to his will, but said as there was likely to [61] be a dispute between Lord Ward and him, he would not have him for executor, or trustee to his son; before such dispute there was a friendship between Lord Ward and deceased, and from such discourse deponent imagined he was an executor and trustee in his will, and therefore, deponent of his own accord inserted in the codicil a revocation of Lord Ward, but had no direction from deceased to that purpose; after deponent had prepared such codicil, and had got it settled in London, deponent waited on deceased the 14th or 15th of November, and carried the codicil with him; but deceased, who deponent believes had an intention of executing it without the knowledge of Lady Winford, was prevented from doing so, or of reading it over with deponent by her frequently coming into the room; deceased began to read over said codicil, but hearing her coming into the room, he put it in a hurry into his pocket; deponent never saw said codicil after that time till deceased's death. On the 22d November, 1751, deponent went to deceased's house and lay there that night; next day deponent asked Tolly what keys deceased had in his pocket at his death, he then gave deponent two small keys, and said they were all deceased had in his pocket when he died, which keys belonged to drawers of no consequence. About six in the morning of the 24th November, by direction of Lady Winford, deponent and Draper went to search the bureau in the yellow room for the will, Tolly attended them, and took a key out of his pocket, and they opened several drawers, and there found the will cancelled; Draper found it, and in the next drawer there was a music-book on which deceased used to write. On that night, deponent asked Tolly why he locked up said book, [62] he answered that he did not know but that there might be receipts in it; Tolly said he did not give deponent the key of this bureau, because it lay on the table at deceased's death, and deponent had asked only for the keys in deceased's pockets; deceased several times told deponent of the marriage agreement, as stated above, and that he had given bond for performance on his part. The deponent knows deceased was uneasy because she would not carry the agreement into execution; and has heard him threaten to compel her; believes he continued dissatisfied when he gave the instructions for the codicil; deceased gave her legacies in the codicil, on condition of her performing said marriage agreement; proves identity of the draft of the codicil; proves exhibits K and L letters from deceased to deponent to be deceased's handwriting, deponent was attorney to deceased, never heard deceased declare the least intention of cancelling his will, when he gave instructions for the codicil, deceased expressed great displeasure at his wife's not having performed said agreement. The Sunday after deceased's death, Tolly came to deponent, and asked for a guinea to buy necessities for the family, for Lady Winford said she had no money; deponent on that day saw two purses of money on her table. The deceased had real affection for his son.

The same John Harris on another allegation. The will, No. 2, dated 12th February, 1735-6, is the deceased's writing. On 10th October, 1751, deceased sent for deponent to come to him, deponent went, deceased told deponent he had made a will, and then gave deponent instructions with great privacy, verbally, for drawing a codicil to his said will; deponent could not reduce them into [63] writing, because Lady Winford was almost all the time in the room; deceased ordered deponent to get it settled in London, and said he would then execute it, at the same time said his will was in his upper study. Deponent returned from London on 12th November, 1751, found a message from deceased, codicil was settled in London by David Thomas, deceased sent again for deponent on 14th November; deponent went to deceased with the codicil No. 1, the deceased was then sitting in the yellow room, and his wife with him: when she went out deceased asked deponent if he had brought a codicil, deponent gave it him, he began to read it, but Lady Winford returning, he put it in

his pocket; she staid all the day with deceased: at night he told deponent he would rise at eight next morning to finish the business; deceased did rise at that hour, and deponent was just come to him in the morning when Lady Winford also came, and staid with him all the morning till Dr. Wilkes came; the doctor asked deponent if deceased had made a will; deponent said, "Yes," and he had a codicil ready to execute; deceased had company all the afternoon, deponent went home that night. Deceased desired deponent to come again the Wednesday after, deponent went on Wednesday 20th November, and staid there till the evening of the 21st; Lady Winford and others were with deceased constantly both those days, deponent appointed to come again on 2d December to execute leases and settle the other affair as the deceased said; the deceased desired deponent to be punctual, for he had things of great consequence to execute. Believes deceased did not order the will to be cancelled on 20th or 21st November. Deponent went to de-[64]-ceased's house the night he died; codicil was found in deceased's pocket; Doctor Wilkes asked if Lady Winford knew where the will was, she said she believed there was none. Diligent search made for a will, but none found; about five or six in the evening of Sunday, November 24th, deponent and Draper went to Lady Winford, she asked deponent whether the will was found, deponent answered "No;" she replied, "You have not looked in the most likely place, suppose you search in the drawers in the yellow room, you don't know what luck you may have there;" she ordered Tolly to go with them, he brought the key and unlocked the drawers, they found in some of the drawers papers of consequence, but in one drawer found a music-book, which deceased used to write in, in another drawer they found the will No. 2, and a will of deceased's father's, and part of a will which the deponent believes was wrote after No. 2; Draper delivered them to deponent, deponent then declared he believed the will was cancelled since deceased's death; deponent carried the will to Lady Winford, and told her they had found the will, but somebody had torn off the name and seal; deponent read it to her, and she said she thought a paper so odd could not be the deceased's will, and she said she had seen that paper about a fortnight before, and that deceased gave it to Mrs. Founds to put in the drawer among his old or waste papers; Founds said, "My lady, it was not so," for deceased bid her lock them up for they were things of consequence; a dispute arose thereon between them, Founds said she would swear what she had said was true. Deponent on 23d November asked Tolly for all the keys he found in deceased's pocket, he gave deponent two small keys, [65] but he did not give deponent the key of the drawers in the yellow room; deponent asked Tolly why he did not deliver that key? he answered, because it was not in deceased's pocket.

2. John Kay. Deceased lay in a bedchamber below, and was carried in the day into a parlor; on 24th November, 1751, deponent was present at a search in deceased's study, says Lady Winford said she thought the most likely place to find the will was in the drawers of the yellow room among deceased's old papers; they went thither and found it; Lady Winford said, on the will being read, she thought no one in his senses could write such nonsense. Mrs. Founds said deceased delivered it to her, and she observed it was indorsed "the last will of Samuel Hellier," &c. and ordered her to lock it up with other papers in his drawers in the yellow room, and bid her not break the lock or key, for it was a thing of consequence. A dispute arose between Lady Winford and Mrs. Founds, and the last swore that what she had said was true; same night Tolly told Harris he did not give him the key of said drawers, because it was not in deceased's pocket.

3. John Stevens. Deponent was servant to deceased at his death; deceased ordered new locks to be put on the drawers in the yellow room; Lady Winford was uneasy at Harris's being with deceased; about five or six minutes after deceased's death, deponent observed a music-book in the room where he died.

4. Mary Kay. Agrees with the other witnesses as to the dispute on finding the will, and Founds's declaration thereon; Mrs. Founds said she had read that one of said papers was deceased's [66] last will; Tolly owned he had locked up the music-book after deceased's death.

5. Richard Wilkes, M.D. Deceased not capable of going up stairs without assistance; blanks left in the codicil; Harris, on 23d November, told deponent he was sure there was a will; for deceased told him so, and that it was in his upper study.

6. George Draper, Esq. Harris lay with deponent the night deceased died.

Lady Winford declared she never saw, or heard of any will, and believed there was none; Harris said he believed one reason for making the codicil was to strike out Lord Ward from being executor; Lady Winford advised them to search the drawers in the yellow room; they searched, and found the will; Harris and deponent only were present at finding it.

2. Int. Deceased died in the stone parlour below stairs; respondent was in the house when he died; Harris and deponent lay that night in the yellow room, deponent went to bed at eleven in the evening, and Harris came to bed between twelve and one, deponent in the morning left Harris in bed, and that night no person came into the room to them; deponent did not lie in that room the next night, but Dr. Wilkes lay there.

7. James Davison. Deponent was gardener to deceased; says deceased put new locks on the drawers in the yellow room; Lady Winford was remarkably diligent in attending deceased when Mr. Harris was with him, and deceased seemed uneasy thereat; Harris was at deceased's two days before his death, and Lady Winford was then constantly in the room with them; Harris was to come again in about ten days; Tolly took the codicil out of deceased's pocket; Keighton, an old [67] servant of deceased's, was sent for to give information whether he knew any thing about deceased's will; Tolly agreed to sit up with deponent to watch deceased's corpse the night he died, but Lady Winford ordered that he should not sit up, because he had been a good deal fatigued with sitting up with deceased; believes William Wright lay that night with Tolly, deponent suspected Tolly meant to make an ill use of deceased's keys, believes Tolly was not in the yellow room; deponent heard somebody walking about the bow-window chamber late at night.

8. Thomas Matthews. The beginning of October, 1751, deceased sent for Harris to come to him on business of importance to be transacted; and sent for him again on the 14th of November; Harris came, and Lady Winford staid constantly in the room with them; on 20th November, Harris came again, and Lady Winford was then always with them; deponent was in the room when deceased died; the music-book lay on the table; but deponent does not believe any key was on the table.

9. David Thomas, gent. In October or November, 1751, Harris told deponent he had instructions for making a codicil for deceased; deponent read and settled it.

10. William Tolly. Deponent was servant to deceased; about a week after deceased's death the will was found; deponent never saw it before; Harris was frequently with deceased; deceased sorted his papers and bid Mrs. Founds put them in the drawers in the yellow room, on which he had put new locks; Lady Winford used to leave deceased when Harris was with him on business; [68] deponent found the codicil in deceased's pocket and put it in the yellow room drawer; search was made for deceased's will several days after 24th November, but it was not found till about a week after; deponent had custody of deceased's keys for a month before his death, and used in a morning to lay the key of the drawers in the yellow room on deceased's table; deponent offered Harris all the keys, but he refused taking them; Harris was in a passion when the will was found cancelled; deponent never told Keighton that he had done wrong in coming to deceased's house after his death to be questioned about the will; deponent had no orders where he should lie after deceased's death; deponent and Wright lay in the bow-window room the night deceased died, and were not out of bed from twelve at night till seven the next morning.

11. Elizabeth Wright. Deponent was servant to deceased; deceased often sent for Harris a short time before his death; Lady Winford seldom staid with deceased when Harris was with him; deponent has often heard her say she wished deceased would make his will; in the evening of the 24th November, deponent went into Lady Winford's room when the will was reading by Harris, but directly went out again.

12. Sarah Chantry. Proves execution of the will dated the 12th February, 1735-6.

13. Mary Williamson. Likewise proves the execution of said will on Sunday evening, the 24th November; Founds said she had seen a paper about a fortnight before deceased's death, on which was written, "This is the last will of Samuel Hellier," and deceased bid her put that and the other papers into the drawers in the yellow [69] room, and bring him the key, for they were papers of consequence.

14. Richard Onion. On the 21st November, deponent was present when deceased

said to Harris on his going away, that he desired him to come again on the Monday se'nnight to do some business of consequence, which Harris knew of, and if he did not come he should forfeit a bowl of punch; Harris promised he would come, Lady Winford was not present. On the 24th November, Lady Winford said the most likely place to find the will was in the yellow room, Harris soon after brought the cancelled will and read it. About half a year before deceased died, he said to deponent that no person who had any thing to leave should be without a will by him.

15. William Wright. Deponent by deceased's orders brought down to him some of his papers from his upper study; deponent lay with Tolly the night deceased died; they were in bed from twelve that night till seven the next morning, and had no light in the room.

5. Int. Says his master told him Harris would give him 50l. if he would say that he saw the name and seal on deceased's will after deceased was dead, but at the same time he bid deponent not to forswear himself; deponent said he knew nothing of the will; Harris himself never offered deponent anything.

16. Martha Founds. Deponent never saw the will pleaded after or before deceased's death to her knowledge till Sunday, the 24th November; Harris said in a passion that it was cancelled; deceased bid deponent lock up some papers in his drawers, and to take care not to break the key; [70] deponent did lock them up, and gave deceased the key; deponent did not see any indorsement on any of the papers, purporting any of them to be the will of deceased, nor did know that any of them was; deceased did not say they were papers of consequence, nor bid her take care of them, but said the key was of consequence; 23rd November, Lady Winford declared she wished if deceased had made a will it might be found, but she knew of none.

17. James Davison, on a second allegation. Deceased wrote on a music-book; on Monday se'night, after deceased's death, several boxes were sent to London; deceased had great affection for his son; Lady Winford a person of indifferent character; believes she would be guilty of cancelling a will.

18. Richard Hollys. About a year before deceased's death, he was looking among papers, and taking up one of them said, "This is my will;" affection to his son; Lady Winford a person of bad character, with respect to her sobriety.

19. Mary Williamson. Deponent never was witness to any will of deceased's but that which is propounded in this cause, and deponent is a witness to this will; deponent is mother to Daniel Williamson; the evening deceased died, Mr. Founds brought a purse of money to Lady Winford; deceased had affection for his son.

20. Richard Onion. Lady Winford while deceased lay dead in the house, sang and behaved indecently; Founds brought a bag of money to her; affection to his son.

21. Sarah Huntback. Deponent is grandmother to young Sam. Hellier; Lady Winford be-[71]-haved indecently on deceased's death, she pretended she had no money, but afterwards it appeared she had.

22. Mary Kay. The music-book was of no consequence; Tolly put it into the drawers; deceased wished his second wife alive; says Lady Winford sung on the Sunday night after deceased's death, but she was then very much in liquor; she has a very bad character.

23. Rev. William Kay. Deceased expressed great dissatisfaction at his wife's not having performed her marriage agreement; deponent often talked to deceased about making his will, but he never would give deponent any answer; deceased expressed affection to his son.

24. John Kay. Lady Winford behaved indecently the night deceased was buried; believes she would not scruple to do anything bad to prejudice the minor.

25. Silas Stevenson. Gives Lady Winford a very bad character, and particularly since deceased's death; believes she would be guilty of cancelling a will.

26. Robert Lascelles. For 14 years past Lady Winford has borne a bad character.

7. Int. Does not believe she would cancel a will.

27. Rev. Charles Wilmot. Deponent is brother to Lady Winford; proves the marriage agreement; says he delivered up the bond to deceased; deceased was a good husband.

7. Int. They seemed to live affectionately together; does not believe she would cancel a will, &c.

28. Thomas Matthews. Deponent saw no key on deceased's table when he died; has heard de-[72]-ceased say he has paid several debts of his wife's; gives her a bad character, believes she would cancel a will.

29. Sarah Wheeler. Deponent was servant to deceased; all the family knew of the search for the will; three weeks or a month before deceased's death, deponent was dusting the top of a chest of drawers in the bow-window chamber, in which room deceased used to lie till a week before his death, and upon taking up some plain paper to dust under it, a written paper folded up dropped out of it, which was indorsed, "The last will and testament of Samuel Hellier;" deponent took it up, and read part of it, and it appeared to be a will of deceased's, and after deponent had read near the first side, she put it again into the paper it had dropped out of; Elizabeth Chapman was present; deponent well remembers deceased therein mentioned his precious relict Sarah Hillier, and that his late wife Margaret's remains should be removed to the family vaults. On the 23rd November deponent said she had seen a will of deceased's, and mentioned said paper, and then Mrs. Wright bid deponent go and see if she could find it; deponent went, and found it in the bottom drawer of the chest of drawers in the bow-window room; deponent went and told Wright she had found it, and they both looked over it, and then Wright went to tell her lady, and when she returned, she said her lady would leave it remain where it was, and desired deponent would say nothing of it; but deponent does not know she was enjoined secrecy by Lady Winford's order; the will propounded is the same predeposed of; cannot tell whether it was cancelled at said times when deponent saw it or not; Tolly and Wright [73] lay in the bow-window room the night deceased died, but never at other times; Lady Winford was very much addicted to drinking: William Wright came to deponent and bid her not take notice that she had seen deceased's will.

Int. Cannot say whether the interlineations were in the will when she first saw it or not.

30. Elizabeth Chapman. Confirms Sarah Wheeler as to finding the will in the bow-window room about a month before deceased's death, and says Wheeler read part of it to deponent who was then present; cannot tell if it was then torn or cancelled, but to the best of her remembrance it was not torn; on the 23rd November deponent saw said paper in a drawer in the same room; says William Wright came with a message to Sarah Wheeler.

31. John Baker, Esq. Deceased paid interest for money deponent lent to Sir Thomas Winford.

32. John Spencer. Proves deceased paid interest for a debt of Sir Thomas Winford's.

Int. Cannot think Lady Winford would cancel a will.

33. Sarah Huntback. A codicil referring to a will was found in deceased's pocket after his death; Lady Winford said she knew of no will; on Sunday evening, when they were at supper, a message came to Harris from Lady Winford, that the likeliest place to find a will was in the yellow room; when the will was found, Lady Winford said, "that old thing I saw a fortnight ago:" deponent has several times heard Mrs. Founds say deceased bid her lock up some papers, among which was the will, for they were of consequence. In April, 1751, deponent asked deceased whether he had taken care of producent? he said that he [74] had taken care of him, and made good his promise to his dead wife, that Harris should have nothing to do with his son, the producent.

1. Int. The minor is respondent's grandson; deponent was not advised with about setting up this will. 2. Int. Sarah Harris is related to the minor, but deponent knows not how. 3. Int. Sarah Harris is well acquainted with Lady Winford; said Sarah Harris was chosen guardian by means of John Harris. 6. Int. In April, 1751, deceased said he had taken care that Harris should have nothing to do with the minor. 7. Int. Deponent cannot believe that deceased's will was destroyed by Lady Winford.

34. Rev. William Kay. Lady Winford used to be very much with her husband; she said she had seen the will pleaded some time before, and Mrs. Founds said deceased bid her put it in the drawer.

35. Titus Stevenson. Mrs. Founds, on the 24th November, said she had seen the will before, and deceased bid her lock it up with other papers, and said they were of consequence.

36. Sarah Wheeler. Says exactly the same as upon her former examination.

37. Elizabeth Chapman. The same.

38. Elizabeth Wright. Tolly used to keep deceased's keys. Deponent often heard Lady Winford wish deceased would make a will; Lady Winford knew Harris was searching for a will on Saturday and Sunday; Sarah Wheeler told deponent she had seen a will of deceased's in the bow-window room, deponent went up, but found no such will, and then Wheeler went up, and said when she came down that it was in the lowest drawer, and she asked deponent if deceased's [75] former wife's name was not Sarah, deponent said "Yes;" deponent desired Wheeler to tell Harris of it, she replied she would not, and added that a bit was torn off the bottom; this conversation was on the 23rd November. Lady Winford behaved decently on deceased's death; deponent never mentioned said will to Lady Winford.

39. Daniel Williamson. In June, 1748, deceased told deponent he had been bit by his marriage with Lady Winford, but that he had taken care to prevent bad accidents by a will he had made by him; deceased said he had made his will in Mrs. Hellier's time, and that deponent's mother was a witness to it; proves exhibits K and L to be deceased's handwriting. In September, 1750, deponent went to Mr. Onion's house, next door to deceased, and staid there some time, during which time Lady Winford once told deponent that deceased had a will by him, and that it was in his room, and deponent's mother was a witness to it, and that it was made in Mrs. Hellier's lifetime, and she would, if she could, prevail on him to set that will aside and make a fresh will.

Exhibits read.

Letter K not dated.

Letter L dated 7th October, 1751.

Will propounded, marked No. 2.

Codicil exhibited, marked No. 1.

Witnesses for Lady Winford.

1. Sir Edward Blount, Bart. Gives Lady Winford a very good character; believes she would be no way concerned in cancelling a will.

1. Int. Respondent has not been conversant with her since 1730.

[76] 2. Mary Knott. Gives Lady Winford the best of characters; believes she would not cancel a will.

1. Int. Latterly respondent had not much intimacy with Lady Winford.

3. Rev. William Bradley. Deponent married Lady Winford's sister, and was very intimate with her; deceased and she lived together with great affection to his death: positively deposes that she has as good a character as any woman can have.

2. Int. Respondent was but once in her company, for three years before deceased's death.

4. Rev. Henry Saunders. Deceased and Lady Winford lived very affectionately, and she constantly attended him to his death; gives her a very good character.

5. Gilbert Founds. Deponent well knew deceased, and was very conversant in his family; when deceased was engaged in business she used to retire; great affection between deceased and her; deceased frequently said he would take care of her; she shewed great concern on his death; she bore a very good character; verily believes she would not cancel a will.

6. Martha Founds. Deponent has known Lady Winford twenty years. When Harris came to deceased, Lady Winford almost always left the room, and she did so when Harris came to deceased a short time before his death; about a week or fortnight before deceased's death Harris was alone with him for two hours, and was with him the day before deceased died. Deponent was present when the will was found in the yellow room, it was not found by any direction of Lady Winford, otherwise than asking if they had searched the yellow room; Lady Winford did not declare she had seen [77] said will a fortnight before; deponent denies she declared deceased bid her lock up the will, and said it was of consequence; the Thursday se'nnight before deceased died, deponent by his order brought him all the papers in the yellow room, and afterwards put them up again; deceased and Lady Winford lived together very affectionately; deponent heard deceased declare a short time before his death that he would take care of Lady Winford; it is a false and scandalous story that Lady Winford privately sent away deceased's effects for her own use; gives Lady Winford a very good character, verily believes she never deserved any ill to be said of her.

7. Lemuel Lowe. Lady Winford used to retire when persons were with deceased on business; deceased and she lived very affectionately; deponent received the rents of Lady Winford's estate, and paid them to deceased; verily believes deceased was benefited by his marriage with producent; she has a general good character.

1. Int. Respondent lived forty miles from deceased.

8. Richard Onion. Deponent was tenant to deceased, and lived adjoining to his house; deceased and producent behaved with great civility to each other, but never saw any great affection between them. Says Founds brought money to producent the night deceased died.

3. Int. In 1752 Martha Founds declared she would not be examined in this cause for Hellier. 7. Int. There was a dispute between Lord Ward and deceased. 8. Int. Deponent has often asked Harris, in deceased's lifetime, whether deceased had made any will; Harris said he could not tell, but about a month before deceased died Harris [78] told deponent that deceased said he had a will, and Harris said he was to make a codicil for deceased, and told deponent the contents of such codicil. 9. Int. Deceased shewed great regard to Harris. 10. Int. Deponent has often heard producent say deceased would not allow her any money, does not believe there was any real affection between them.

9. William Wright. Deponent was carpenter in deceased's house for three quarters of a year; producent always left the room when persons were with deceased on business; the night deceased died, deponent and Tolly lay together in the bow-window room, and never were out of it till they rose the next morning, and there was no candle in the room after they were in bed. Producent and deceased seemed to live in great affection; says she has a general good character; deponent never desired Sarah Wheeler not to speak of her having seen deceased's will, and never carried her any message from producent..

10. Sarah Clare. Deponent has seen producent go away and leave deceased and Harris alone together; believes deceased and producent lived affectionately; producent kept her chamber from deceased's death till after he was buried, and behaved very decently; producent bears a very good character; Tolly never declared anything about deceased's will to deponent.

11. Joseph Hindon. Deponent has known producent thirty years; deceased and she appeared to live in the greatest harmony. Deponent has heard him express a great regard for her; gives a very good character of producent, believes she would not on any account cancel a will.

[79] 1. Int. Respondent lived eight miles from deceased.

12. George Draper. Producent always quitted the room when deceased went upon business; about three weeks before deceased's death, producent left him and Harris alone, and did not go into deceased's room till Harris came out. Wednesday before deceased's death, deponent went to his house, and on the day before he died producent left deceased and Harris alone, and bid the rest of the company come away out of deceased's room with her; Harris was then alone with deceased long enough to have done any business with him, or for deceased to have executed a codicil. Producent fainted away on hearing of deceased's death; deponent lay in the yellow room the night deceased died; producent said she knew of no will, but asked Harris if he had searched in the yellow room, and thereupon he and deponent went to search, deponent found the will cancelled, tied up with his father's will, and a preamble of a will; producent did not declare she had seen that will before, nor was there any dispute between producent and Mrs. Founds; producent was a very good wife, and there was a great affection between deceased and her; says producent behaved very decently on deceased's death; says producent used the expression, "Tantarra, rogues all," upon finding Harris combining with others in her house against her; gives producent a very good character, but Harris has set about false stories of her drinking and whoring.

13. Rev. Charles Willmot. Producent did not execute what deceased desired as to the settlement of her estate, because what deceased proposed was not adequate to her fortune; producent [80] and deceased lived with great affection and respect to each other; deponent has heard many scandalous stories of producent, but he verily believes they were without foundation, and that nothing could induce her to cancel a will, &c.

5. Int. Producent was not a drunkard, but she sometimes drank more than she

ought; the deceased shewed deponent some advices he had to prevent his marrying producent, and declared that John Harris put them into his hand. 6. Int. Believes producent to be a very virtuous woman.

14. William Tolly. Harris was alone with deceased for a considerable time, at two several times, a very little while before his death. Deponent did not lie in the bow-window room the night deceased died by order of any one; William Wright and deponent were not out of bed till they rose next morning, and they had no candle after they were in bed; deponent every night locked up the music-book with deceased's papers in the yellow room, and after deceased was dead, deponent that night locked up the said book and papers, deponent never saw the will till Harris and Draper found it; deponent offered Harris the key of the drawers in the yellow room, but he refused to take it. The day deceased died, he expressed the greatest affection for producent, and said he would make his will and take special care of her, and amply provide for her; she shewed great affection to deceased; a bag of money of deceased's was delivered to Lady Winford, but by her order deponent delivered it to Harris; she never sent deponent to Harris for money.

18. Respondent knew nothing of Lady Winford's leaving him a legacy till since her death.

15. Elizabeth Wright. Harris was alone with [81] deceased the day before he died; Lady Winford was not with them for a considerable time; has often heard her say she wished deceased would make his will; the book the deceased wrote on was locked up every night; deceased and Lady Winford lived in great harmony, she behaved very decently on deceased's death; gives her a very good character; deponent never saw the will till she heard Harris read it, and then it was cancelled, Sarah Wheeler told deponent she saw an old will of deceased's in the bow-window room.

18. Int. Respondent has a legacy in Lady Winford's will. 19. Int. William Wright has also a legacy.

N.B.—All or most of these witnesses were examined after Lady Winford's death by her executor.

Dr. Hay's argument for Hellier. The only question is, whether the will was cancelled by the deceased? We admit there is no positive proof that the deceased cancelled the will, or ordered it to be done; we could not prove it was not cancelled by deceased without shewing who did cancel it, it is enough for us to shew from circumstances that it was not cancelled by deceased. Swinb. part 7, sect. 16, if a will is kept where it may be cancelled by other persons, it is to be judged by circumstances whether the testator did it or not; fraud and forgeries must be discovered by circumstances. A cancelled will is not void on course, 2 Vern., *Onions and Tyrer*, (a) a will is good if it be [82] cancelled by accident or fraud. It is clear that this will existed in 1748. Deceased had great affection for his son, who will have the whole personal estate under this will. His marriage with Lady Winford did not alter deceased's intention as to his will, as appears by his declaration in June, 1748, to Williamson; his declaration in 1751 to Huntback points directly to this will. Deceased had no access to the paper for a week before he died. Prerog. and Deleg *Slade and Burgoyne* against *Dr. Friend*.

Dr. Smalbroke, same side. Prerog. *Jones and Sir George Champion*. Prerog. (1 Lee, 76) *Grace and Calemberg*. Case in chancery of *Sir Thomas Frankland's Will*. In all those cases the fraud was proved by circumstances.

Dr. Pinfold contrâ, for executor of Lady Winford. They have undertaken by their plea to prove that the will was uncanceled at deceased's death. A will found in a testator's custody is presumed to be cancelled by himself. Harris was an enemy to Lady Winford, and yet she sent for him on deceased's death, which shews her fairness; she never went after deceased's death into his study or to his bureaux. No attempt to impeach Tolly's character. Improbable that the deceased should leave this paper on the chest of drawers for Wheeler to peruse. It does not appear the codicil refers to this will, though I admit it does refer to a will. We hope the Court will pronounce against this will with costs.

(a) Thirdly, the Lord Chancellor was of opinion that the former will stood good, for the latter will being void, and not operating as a will, would not amount to a revocation; and as to the actual cancelling of the former will, the evidence is not full and positive that it was done, &c. &c. *Onions v. Tyrer*, 2 Vern. 742.

Dr. Bettesworth, same side. They must make [83] a positive proof of fraud, or at least produce the strongest presumptions.

Judgment—Sir George Lee. I was of opinion there was no proof at all that this will was cancelled by Lady Winford, or her order, and that the character given her by the witnesses in general destroyed any presumption of her being capable of being guilty of so bad an act. As the paper was very much torn and worn out, and was proved to have been carried from place to place, possibly it might have been cancelled by accident, but supposing it was really cancelled by the deceased himself, the question would then be whether the deceased had not said and done enough to revive it. In June, 1748, he expressly declared this paper (notwithstanding his marriage to Lady Winford) to be his will, for he then spoke of having a will by him, to which Williamson's mother was a witness, but she swears she never was a witness to any will of deceased's but this, consequently his declaration is absolutely confined to this will; his declaration also to Huntback in April, 1751, clearly must relate to this will, for he told her he had made good his promise to his dead wife, and had taken care that Harris should not be a trustee for his son; now it appears upon the face of this will that Harris was made a trustee for his son, but his name is struck out, though it is still legible. It is fully proved that the deceased gave directions for drawing the codicil—that he was desirous to complete it, and if he had, it would have made the will complete, by appointing a new executor and guardian to his son, &c., instead of the deceased one named in the will—that he was in possession of the codicil several days before his death—that [84] it was in his pocket when he died, and as he was capable of reading it, the law would presume he had read it, and in the very beginning of it it is called a codicil to his will, and confirms his will, and a codicil *ex vi termini* implies a will, there are therefore the strongest declarations from the deceased that he esteemed this paper to be his will; for it is not pretended there was any other paper to which the codicil could refer: I was therefore of opinion that these declarations, and the orders given by him for making the codicil, would have been sufficient to have revived the will, even if it had been certain that the deceased had himself cancelled it, agreeable to the case of *Slade and Burgoyne* against *Dr. Friend*; (a) in that case the will was found locked up in deceased's trunk, of which she kept the key, and it did not appear that any body had access to it but herself, the will was fair and entire, except that lines were drawn over the testatrix's name, Elizabeth Hutton, which was held to be a cancellation; but it being proved that she on her death-bed being asked whether she had made a disposition of her affairs, answered, "Yes," and said it was in that trunk, pointing to the trunk where it was found, this declaration was held to be a revival of the will, and it was pronounced for both in the *Prerog.* and the *Deleg.* I therefore in this present case pronounced the paper propounded to be the last will of Samuel Hellier Esq. deceased, but did not pronounce that it was uncanceled at the time of his death.

[85] *EATON* against *BRIGHT* AND *SUNDLAND*. *Prerogative Court, Hilary Term, January 22nd, 1755.*—In an interest cause it is not necessary to prove the marriage of the common ancestors.

[See further, p. 161, post.]

Mary Nonely deceased made her will as suggested, and appointed Bright and Sundland executors; Ann Eaton claimed to be deceased's first cousin and next of kin, the executors denied her interest; she gave in an allegation to propound it, in which she pleaded the marriages of deceased's father and Cother, and of her own father and mother, and that deceased's mother and Eaton's mother were sisters, and always owned each other as such, and that deceased always owned Eaton to be her cousin, and her mother to be her aunt, but did not plead the marriage of their grandfather and grandmother in their common ancestry; it was objected that the allegation ought not to be received, because the marriage of the common ancestors was not pleaded.

Judgment—Sir George Lee. But I held it was not necessary to plead and prove the marriage of the common ancestor; in a case of interest, it was sufficient to prove owning and acknowledging, and common reputation of relationship, and I admitted the allegation.

(a) *Slade v. Friend and Others*, *Deleg.* 4th July, 1745. The Delegates present at the sentence were—Mr. Justice Wright, Mr. Baron Reynolds, Drs. Strahan, Simpson, Chapman, and Hay.

TAYLOR *against* TAYLOR. Prerogative Court, Hilary Term, January 22nd, 1755.—
An allegation admitted in pœnam.

The cause had stood upon admission of an allegation given by Alexander for some days ; Hughes, the adverse proctor, had taken no care to attend his [86] counsel, and would not appear himself in Court, but sent his clerk to get it put off.

Per Curiam. I admitted the allegation in pœnam of Hughes.

MOORE, FORMERLY HACKET *against* HACKET AND OTHERS. Prerogative Court, Hilary Term, January 22nd, 1755.—A widow propounds her husband's will as executrix.—An allegation pleading the invalidity of her marriage with the testator rejected.

Dr. Pinfold for William Hacket. William Hacket died the 29th May, 1754 ; Mary Moore, formerly Hacket, the deceased's widow, has propounded a will, dated the 27th May, 1754, in which she is executrix, William Hacket, deceased's son by a former wife, opposes the will ; he now offers an allegation, consisting of two parts, First, he pleads that the deceased's marriage to Moore was only de facto, for that she was really the wife of another man when she married the deceased, and that her first husband was living long after ; secondly, the allegation pleaded that the deceased was not in his senses, before, at, and after the time of the date of the will, and that it was made by Smith, a witness to it, from the dictation of the widow, and that the deceased gave no instructions.

Per Curiam. I rejected all that part of the allegation which related to the marriages, but admitted all that related to the will.

[87] FLORANCE *against* FLORANCE AND FLORANCE. Prerogative Court, Hilary Term, January 22nd, 1755.—The equity on statute of W. 3 cannot be extended beyond the wills of mariners.

Dr. Smalbroke for the executors. Christopher Florance, yeoman, deceased, made his will, dated the 21st July, 1753, appointed his father and brother executors, the deceased had a palsy, and therefore signed only the initial letters of his name to the will, he left a widow and a child eight months old, to whom he has given legacies ; deceased owed his father 400l. by bond, he has left him a legacy ; the widow opposes the will ; full proof of sanity and execution.

Dr. Hay for the widow. One of the witnesses swears she believes the will was made to secure a debt to the father, the effects amount only to 679l. 3s. 6d., debt to the father, 400l., the estate will not answer the debts and legacies. The deceased, therefore, who had a palsy, did not know the state of his affairs. I admit there is proof of execution and sanity, but the witnesses differ in circumstances where they had not been instructed. The will ought to be set aside, because it has been made to secure a debt ; the widow has interrogated the witnesses but has not pleaded.

Witnesses for the executors.

1. Elizabeth Tupper. In July, 1753, deceased (who lived at about four miles distance) called at deponent's husband's house ; deponent, as she went backwards and forwards, heard deceased give deponent's husband instructions for his will ; deponent's husband drew it, and read it to deceased in deponent's presence ; deceased approved and exe-[88]-cuted it in presence of deponent and her husband, and of Eleanor Libbard ; and deceased then said, his having a child born was the reason of his making a new will ; deceased was perfectly in his senses.

3. Int. Deceased had a slight palsy, but was perfectly in his senses. 5. Int. Deceased said he had done well for his wife. 6. Int. Respondent did not exactly hear all the instructions. 10. Int. Believes deceased knew the whole contents of the will. 15. Int. Believes he executed a bond to his father at the same time ; believes the will was made to secure a debt to his father.

2. Eleanor Libbard. The will was executed by deceased in deponent's presence, and of Tupper and his wife ; he was perfectly in his senses, and thanked deponent for being a witness ; deponent was a stranger to deceased.

7. Int. Deceased could be understood very well. 9. Int. None but the witnesses were present at the execution of the will. 11. Int. Deceased said his hand shook. 12. Int. Deceased executed a bond at the same time, to which deponent was a witness. 15. Int. The bond was executed immediately after the will.

3. Roger Tupper. Deponent knew deceased ; on 27th June, 1753, deceased told

deponent he would alter his will, because he had a child born; says he then gave him his old will, and instructions by word of mouth for a new will; deponent drew a new will from the said old one and the said instructions; deponent read the said new will to deceased in presence of deponent's wife; he approved and executed it in presence of deponent and his said wife and of Eleanor Libbard; deceased was perfectly in his senses.

[89] 5. Int. Deceased had a child eight months old. 9. Int. Believes the will was executed in the afternoon; deceased's father and respondent's son were present when it was executed. 12. Int. Deceased executed a bond at the same time. 13. Int. Deceased was fully in his senses. 15. Int. The bond was executed immediately after the will; does not know that the will was made to secure a debt to the father.

Dr. Hay argued that this will ought to be set aside, because it was made to secure a debt, and came within the reason of the statute of W. 3, the equity of which extended to the wills of other persons as well as to the wills of mariners.

Judgment—Sir George Lee. But I was of opinion, first, that there was not proof that this will was made to secure a debt; there was no other evidence of the fact but what Elizabeth Tupper says to the 15. Int., "That she believes the will was made to secure a debt." And, secondly, I was of opinion that the equity of the Statute of W. 3, never had been, and ought not to be, extended further than to the wills of mariners; the legislature had only in view to put a stop to the gross practice of landlords in drawing in seamen to make their wills, under pretence of securing an alehouse debt, to give them all their effects in prejudice to their wives, families, and relations, and therefore in that case the Statute had been construed liberally to extend beyond the letter to prevent that mischief, but on the other hand there would be great mischief in extending it to the wills of all persons whatsoever, for then no [90] man could make safely his creditor his executor, and therefore as the deceased's capacity and due execution were fully proved, I pronounced for the will.

HOLMES *against* HOLMES. Arches Court, Hilary Term, February 4th, 1755.—In a suit for the restitution of conjugal rights, the wife having a separate property of her own is liable to pay her own costs.

Dr. Bettesworth for Sarah Holmes. Francis Holmes brought a suit in the Consistory of London, against his wife Sarah Holmes, for restitution of conjugal rights; the marriage was confessed, and she pleaded in bar that she left him because he used her cruelly, and she could not safely live with him; the Chancellor admitted her allegation, from which the husband appealed to the Arches; no alimony or costs were settled in the Court below, or prayed; but we now make the usual motion, that the husband may be condemned in costs for carrying on the suit; the husband opposes this, and his proctor, in his act, says that the wife ought to pay alimony and costs to the husband, because she has a separate estate of above 300l. a-year, and he is a bankrupt, and is worth nothing.

Dr. Collier for the husband. Mr. Holmes has made affidavit that he is worth nothing, and that she has a separate estate, and she in her affidavit does not deny those facts; he borrowed 2000l. of her money of her trustees, and they at her instigation took out a commission of bankruptcy against him, by which he is ruined.

[91] Dr. Hay, same side. Though we have prayed it in the act, we do not insist to have alimony or costs from the wife, but we insist that we ought not in this case to pay her costs; he has sworn he is not worth twenty shillings of his own; he has not prayed to be admitted a pauper, because his wife has an estate, of which, by intendment of law he has the benefit, and therefore he cannot take the oath of a pauper.

Dr. Bettesworth for the wife, said that since he was not admitted a pauper, by the law and course of the Court, he was obliged to pay her costs.

The affidavits of both parties were read.

He swore that, with her consent, her trustees lent him 2000l. of her money (which by settlement was secured for her private use before marriage), that she, finding his affairs grew bad, persuaded her trustees to take out a commission of bankruptcy against him, by which he was utterly ruined, was now quite out of business, and was not worth twenty shillings; that she had a separate estate to her own use of 300l. a-year 2000l. in money, and plate to the value of 500l. In her affidavit, she admitted said

facts, only that her real estate, after the outgoings were paid, did not amount to 300l. a-year.

Judgment—Sir George Lee. Under the circumstances of this case I was clearly of opinion the husband ought not to pay the wife's costs; in the general course the husband pays costs, because he is supposed to have a fortune, and the wife nothing but what she had from him; but here the case was directly the reverse; I therefore rejected her petition, and mentioned the [92] case of *Turst and Turst*,^(a)¹ in the Delegates, which was a much stronger case than this, for Mr. Turst was one of the king's band of Gentlemen Pen-[93]-sioners, and had a salary of 100l. a-year; but it appearing that the wife had a separate income of much greater value, the Delegates would not allow her either alimony or costs,^(a)² and reversed Dr. Bettesworth's decree, by which he allowed her costs.

DEARLE AND DEARLE *against* SOUTHWELL. Arches Court, Hilary Term, February 4th, 1755.—Application for proceedings to be invoked from another cause, rejected.

[See further, p. 119, post.]

Appeal from Litchfield.

Dr. Smalbroke for Southwell. This is a motion to invoke proceedings: John

(a)¹ *Turst v. Turst*, Deleg. 27th January, 1740. The Judges Delegate present at the sentence were, Mr. Justice Page, Mr. Baron Carter, Dr. Kinaston, Dr. Walker, Dr. Pinfold, jun., Dr. Chapman, and Dr. Collier.

The sentence, as recorded in the Assignment Book of the Court, is as follows:—Holman prayed the Judges to pronounce for the force and validity of the appeal and complaint interposed in this cause, on behalf of his client, the said Thomas Sebastian Turst; Esq., and that the same was made and interposed for good and sufficient reasons, and for their own jurisdiction; and that the pretended definitive sentence in writing made and promulged by the Dean of the Arches, the Judge from whom, and every thing therein, pronounced, decreed, and declared, be entirely and absolutely revoked, and declared null and void to all intents and purposes in law whatsoever; and that the interlocutory order or decree heretofore made and interposed by the surrogate to the Chancellor of London, the Judge in the first instance of this cause, and from which the appeal to the Court of Arches was brought by Cheslyn's said client, be ratified and confirmed in all things. Cheslyn prayed Holman's petition to be rejected, and that the money, bank notes, lottery tickets, clothes, jewels, and other things forcibly taken away from his client, and mentioned and set forth in the schedule annexed to an affidavit, dated 3d May, 1739, made by his party in this cause, be restored; that Holman's client be condemned in the costs of suit, and alimony. The judges having heard the advocates, counsel, and proctors, on both sides, by their final interlocutory decree, having the force and validity of a sentence, did pronounce, decree, and declare for the appeal in this behalf interposed, and their jurisdiction, or rather for that of our sovereign Lord the King; and reversed the sentence of the Judge of the Arches Court of Canterbury, from whom this cause is appealed, and confirmed the decree of the Judge of the Consistory Court of London, and retained the principal cause, and decreed a compulsory, at the petition of Cheslyn.

This case (of *Turst v. Turst*) is erroneously cited in Dr. Haggard's report of Sir William Wynne's judgment in *Davis v. Davis*, Arches, 1789, under the name of *Pearce v. Pearce*.

See also on this subject *Wilson v. Wilson*, Consistory of London, 1797, 2 Hagg. 203; and *Davis v. Davis*, Arches, 1789 (in which the case of *Holmes v. Holmes* is especially referred to), notes, *ibid*.

(a)² A question of this description was raised and discussed in the case of *The Marquis v. The Marchioness of Westmeath*, Deleg. 1827. The estates of the Marquis were considerable, but much encumbered; he had however an income much greater than the separate income of the Marchioness, which was derived from several sources. No application for alimony or costs had been made in the Courts below, i.e. in the Consistory of London, or the Arches Court. In the Court of Delegates three bills of costs were brought in, and the proctor for the Marchioness prayed to be heard on taxation. An act on petition was gone into, and the Court finally acceded to the prayer of the Marchioness, so far only as regarded the costs in the High Court of Delegates, but it was generally understood that the Judges were much divided in opinion on the subject.

Dearle of the parish of St. Mary in Stafford took out citation on 22d July, 1749, to obtain a faculty for two pews in that church. On return of the citation, John Southwell appeared and alleged his claim to one of the pews; pleas were given in, and witnesses examined on both sides. On hearing the cause, the Court decreed a faculty to John Southwell (who is the master of the Free School at Stafford), provisionally, that if the parishioners did not interpose, he should have a faculty for the seat he claimed. This decree was made because South-[94]-well only intervened for his interest; he accordingly took process, then the same John Dearle and Ann his sister (who is only an inmate) appeared and opposed. Their proctor gave in an allegation in the name of Ann Dearle only. On 21st May, 1754, Southwell's proctor alleged the former proceedings, and prayed the allegation to be rejected. The Court rejected the allegation, and decreed the faculty absolutely to Southwell. John Dearle on the first sentence appealed, but by his appearing to oppose the faculty to Southwell, he has perempted his appeal. The present appeal is from rejecting the said allegation on 18th June, 1754, and decreeing the faculty to Southwell. We prayed that the proceedings in the cause between John Dearle and John Southwell may be invoked.

Dr. Simpson for John Dearle and Ann Dearle. The appeal is from a grievance, and must be heard *ex iisdem actis*; the present is an original cause distinct from that of *Dearle against Southwell*. On 26th March, 1754, first sentence given; on 23d April, 1754, Southwell prayed his citation with intimation to appropriate the pew in question. Citation returned on 7th May, 1754. John and Ann Dearle appeared, and alleged they had interest in that pew, and prayed time to set it forth: the decree in the first cause was, that John Dearle had no right to the pew he prayed a faculty for, and the judge declared that Southwell had a better right in the present cause. We gave an allegation for Ann Dearle, which the judge rejected, and decreed a faculty to Southwell. The only question is, whether the proceedings on the former cause shall be invoked?

[95] Act in the Arches upon this motion read.

Alleges that the proceedings in the first cause are part of this, because the judge in that cause ordered the citation for this cause to be taken out.

Act below on 23d April, 1754, read.

Southwell's proctor prayed citation with intimation, the judge decreed it.

Dr. Smalbroke for Southwell. The same point was under consideration in the former cause; both parties must examine again upon the same point after publication, which creates danger of perjury. Dearle claims a family right in this pew. Ann Dearle has a right to have these proceedings invoked.

Dr. Simpson *contra*. Proceedings cannot be invoked, but when the cause is between the same parties, or on the same point: in Chancery if an executor pleads *plene administravit* against a legatee, and assets are proved, and afterwards the executor pleads *plene administravit* against another legatee, the last legatee may invoke the former proceedings, because the point has been determined before against the executor.

Judgment—*Sir George Lee*. I was of opinion that this cause, in which Southwell prays a faculty, is quite distinct from that in which Dearle prayed a faculty: if Southwell's counsel thought the causes were one and the same, they ought to have prayed a monition *pro omnis*, and not an invocation of proceedings, for that *ex vi termini* implies distinct causes. I said the judge's decree on 26th March, 1754, was a strange one, for he [96] decreed a faculty to Southwell, and at the same time decreed he should not have it, unless the parishioners would not oppose it: he did not decree a citation on that day, for that was decreed upon a motion on 23d April, 1754. Southwell could not have a faculty in the first cause, for he appeared only to oppose one being granted to Dearle, in the same manner as Dearle now opposes one being granted to Southwell; perhaps neither ought to have a faculty, and yet both may have an interest to oppose each other. The points in the two causes are distinct, and therefore the proceedings ought not to be invoked; they cannot be evidence against Ann Dearle, who was no party in the first suit. I was of opinion that the proceedings in the former cause ought not to be invoked, and rejected Southwell's petition.

LODER *against* LETSOME. Arches Court, Hilary Term, February 4th, 1755.—Original minutes of a cause directed to be transmitted to the Court of Arches.

Mr. Letsome, vicar of Thame, in Oxfordshire, cited Mathew Loder, surgeon of that town, to answer (before the commissary of the dean and chapter of Lincoln,

within whose peculiar jurisdiction Thame lies) to articles for making a vault in the church for burials, without a faculty; Loder was excommunicated below for not appearing, although he was not, as alleged, assigned to appear, from which he has appealed; he employed one Mr. Prickett to apply to Mr. Bell, the registrar, for a copy of the minutes, Bell delivered him a copy of the minutes attested by himself, as registrar; the process transmitted differs essentially from those [97] minutes which are brought into this Court, with an affidavit of Prickett, that they are the same he received from Bell.

Loder's counsel moved that Bell, the registrar below, might be admonished to transmit the original minutes on oath, which I decreed accordingly.

PHILLIPS against ALCOCK. Prerogative Court, Hilary Term, February 6th, 1755.—

A husband obtains administration to his wife as dead intestate. Two wills afterwards produced. Court will not revoke the administration till one of the wills are proved to be good in law.

Dr. Simpson for Phillips. Phillips is one of the executors of Mrs. Ann Alcock, deceased; before her marriage with Arthur Alcock, she had a fortune of 2500l., and by settlement 1000l. thereof was vested in trustees, for her sole use, and at her disposal by will, &c. 20th December, 1753, she made her will, pursuant to her power, and died the 5th March, 1754; her husband, Arthur Alcock, took administration to her as dying intestate; Phillips called him to bring in the administration, and shew cause why an administration limited to the will should not be granted to him. Alcock appeared, brought in the administration and opposed the will; he was then assigned to bring in scripts and scrolls, was excommunicated for not doing it; he then appeared and brought in a will made in January, 1754, and swore he knew of no other will; there being now two wills before the Court, it appears that the husband obtained administration upon a false suggestion that his wife was dead [98] intestate; and, therefore, Phillips prays that the Court will revoke his administration.

Per Curiam. But as the husband had not admitted either of the wills to be good, I refused to revoke the administration granted to him, till a will of deceased's should be proved in due form of law.

DEARDSLEY against FLEMING. Prerogative Court, Hilary Term, February 4th, 1755.

—The will of the cooper of an Indianman does not fall within the provisions of Stat. Will. 3, it was neither embodied in a power of attorney, nor made to secure a debt.

Dr. Simpson for Fleming. William Reed, mariner, a bachelor, deceased, made a will, dated the 12th December, 1752, and appointed his mother's husband, by the description of his loving friend James Deardsley, of East Greenwich, executor and universal legatee; he afterwards made another, dated the 15th January, 1753, and appointed his loving friend, Mrs. Ann Fleming, executrix and universal legatee. Deceased was cooper of the "Monmouth" East-Indianman, and courted Ann Fleming in way of marriage, who was daughter-in-law to John Moore, a witness, and lived with him; both wills were opposed and propounded. We do not now object to the first will, because my client is executrix in a latter will; one Osborne, a pensioner in Greenwich Hospital, but who had been a schoolmaster at sea, was employed to make the last will, and he, from verbal instructions given him by deceased, filled up the blanks in a printed will, deceased approved of it, and executed it, but at the time of the execution it was attested only by Moore; William Hornby, the other sub-[99]-scribing witness to it, attested it at a different time, which is the only objection to it.

Dr. Bettesworth for Deardsley. Deceased was a bachelor, Deardsley married his mother; last will executed when he was not quite sober; it was drawn by Osborne, a pensioner of Greenwich Hospital, who has not attested it; a letter of attorney to Fleming was executed at the same time, which by construction of stat. W. 3, destroys the will.

N.B.—The will of the 12th December, 1752, was fully proved by two of the subscribing witnesses.

Witnesses for Fleming.

1. Jonathan Osborne. To the last will dated the 15th January, 1753; says he well knew deceased; in the evening of the said 15th January, John Moore

sent for deponent to come to his house; deponent went, and then found Moore and deceased together; deceased then said to deponent he wanted to have a will and power made to Ann Fleming, who deponent understood deceased courted, and at the same time, he said he would give her every thing he had, and wished it was more; a blank will being sent for, deponent filled it up from deceased's verbal instructions; proves identity of the will; deponent read it to deceased, who approved, signed, sealed, and published it, in presence of deponent and John Moore, Moore signed it as a witness, and deponent would have signed it, but deceased would not let him, saying deponent was not an housekeeper; deceased was then of sound mind, &c.; William Hornby, whose [100] name is now subscribed as a witness to said will, was not present at the execution; deceased executed a letter of attorney at the same time.

2. John Moore. Deponent well knew deceased from deceased's infancy; deceased courted Ann Fleming, deponent's daughter-in-law, and often came to her at deponent's house, and frequently declared in deponent's presence his intention of marrying her, and that when he went to sea he would leave her his will and power, and frequently desired deponent to get somebody to make his will for him, in favour of said Ann: on the 15th January, 1753, deceased, at deponent's house, desired deponent to get somebody to make his will for him; deponent then sent for Osborne, deceased gave him verbal instructions, and pursuant thereto Osborne filled up the blanks of a printed will, and Osborne read it twice to deceased, and deceased read it himself, and then he approved and executed it in presence of deponent and Osborne; deponent attested it then, but Hornby was not present, but deceased said he would go and get Mr. Hornby's name to it; deponent did not see Mr. Hornby sign it; deceased was of sound mind, &c.

1. Int. The will was executed about three in the afternoon; deceased was sober, deponent and his wife, and producent and Osborne were present.

3. William Hornby Smith. Deponent well knew deceased from his infancy; deceased, in January, 1753, came to deponent's house, and brought a paper, signed with deceased's name, and a seal to it, and attested by John Moore, and told deponent it was his will, and desired deponent would witness the same; deponent did not see the body of the will, for it was folded down, but [101] deponent, at deceased's desire, did set his name as a witness to said paper, but deponent did not see deceased execute it, but deceased told deponent it was his will; proves identity of the paper; believes deceased was not quite sober, but was in liquor when he brought the will to deponent, and deponent signed it.

Judgment—Sir George Lee. I was clearly of opinion this case did not come by any construction within the statute of King William; the will was not embodied in the letter of attorney, nor was it made to secure a debt, but was made from affection to the executrix, and it was no objection to a will that a letter of attorney was executed at the same time. With respect to the proof of this will, there was evidence of declarations previous, of instructions, of approbation, execution by deceased in presence of two witnesses, capacity, and a recognition to Hornby. I therefore pronounced for the last will.

FLEET, FORMERLY KINGSTON *against* HOLMES, FORMERLY KINGSTON. Arches Court, Hilary Term, February 13th, 1755.—In a suit for the recovery of a legacy, an inventory refused, because the executrix had, in her answers, allowed there were assets sufficient to pay the legacy, and the costs of the suit.

Dr. Paul for Fleet. Samuel Kingston, Esq. made his will on the 11th January, 1735; appointed his wife Mary, now Holmes, executrix; gave a [102] legacy to his daughter (who is now married to Mr. Fleet) of 1000l., to be paid at her age of twenty-one years. She was but four years old at the death of her father. Deceased's personal estate was upwards of 6000l. We have brought a suit for this legacy, and in our libel pray interest from the death of the testator. They have tendered the 1000l. and 60l. for interest, from the time the legatee came to age. We now pray an inventory, that we may know what the estate consisted of, and what interest was made.

Dr. Hay *contrà*, for Holmes. The executrix has in her answers acknowledged above 6000l. assets, and that she has made interest of the money. We have tendered the principal legacy with costs, if any are due by law, and interest from the time the

legatee came of age, her confession of assets in this cause will bind her. The mother has maintained her, and therefore she has no right to interest. Where a legacy is payable at a certain time, interest is not due, as may be inferred from 2 Salk. 415, *Snell and Dee* (1 Lee, 198 (n.)). The book says, when no certain time is limited for paying a legacy, it shall carry interest from a year after the testator's death; ergo, if a time is limited, interest shall not be paid. *Chanc. Cases*, 264, *Bullen and Allen*, to the same purpose.

Judgment—*Sir George Lee*. I refused to decree an inventory, because I thought it useless, for the executrix would certainly be bound in this suit by her confession of assets, and of having made interest in her answers [103] to the libel for this legacy, and therefore Fleet was already sufficiently founded to have the judgment of the Court whether she ought to have interest or not.

WARE, OTHERWISE TANK *against* JOHNSON. Arches Court, Hilary Term, February 13th, 1755.—Not material whether defamation is in writing, or by parol. Nullities are unfavourable, where they tend to obstruct justice upon matters of form only.

Dr. Paul for Johnson. Edward Johnson brought a suit in the Commissary Court of Buckinghamshire, against Joseph Ware, alias Tank, of Chesham, for defamation. The words of the defamation were in writing. Ware went to a public house in Chesham, where both he and Johnson live, and wrote these words, and signed his name to the paper: "I do hereby certify that Edward Johnson keeps a whore in his house." This paper, marked A, was pleaded and annexed to the libel, and witnesses examined thereon. Ware gave in an allegation, in which he owned that he wrote said paper, but did not do it with intention to defame Johnson, and further pleaded that Johnson had been free with several women; he did not examine on this plea. Sentence given in the Consistory Court for the defamation. Ware appealed, and after sentence he came to the registrar's office at Aylesbury, to see, and did see, the libel to which said paper was annexed, and from that time said paper has been missing.

Dr. Hay for Ware. Informations were laid before a surrogate, but the sentence runs in the name of the judge, and is therefore null.

[104] Evidence read for Johnson.

2nd article of the libel. Ware, at Chesham, in 1752, did defame Edward Johnson, and charged him with fornication, by writing a paper in these words, "I do hereby certify that Edward Johnson keeps a whore in his house."

Affidavit by Mr. Bell, the registrar, and his clerk.

That said paper was lost or stolen out of the office, as they believe by Ware, for he came to inspect the libel to which said paper was annexed, and said paper has been missing ever since.

Witnesses.

1. Joseph Freeman. Deponent saw Ware write and sign said paper marked A, and he declared the same as he wrote.

2. Charles Preston. Swears he heard Ware say Johnson kept a whore in his house, and he owned he wrote said paper, which then lay on the table.

Ware's allegation, dated the 10th May, 1753.

Confesses writing said paper, but did not do it with intent to defame Johnson; alleges that Johnson has been free with women.

For Ware, read.

The sentence, which runs in the name of Dr. Bettesworth, the judge, but is signed by his surrogate, Mr. Stevens.

Dr. Hay for Ware. Two witnesses necessary to prove defamation, must depose to a certain time; [105] identity of Ware sworn to by Freeman, but identity of Johnson not proved; the words are not actionable, because Johnson is liable to an action at law for keeping a whore in his house; the sentence is null, because it runs in the judge's name, when the cause was heard by his surrogate, in the Arches, on 11th August, 1731. In *Bull against Paine*, the objection was, that the sentence in that cause ran in the beginning and end in the name of the surrogate, but the decretory part was in the name of the chancellor of Peterborough. Dr. Bettesworth held the sentence was null, and set aside the proceedings.

Judgment—*Sir George Lee*. I was of opinion that the defamation was fully proved by two witnesses; that it was not material whether the defamation was in writing or

by parol; that these words were clearly defamatory, and were not actionable at law; for it was not said he kept a bawdy-house, which is a nuisance, and punishable at law, but that he kept a whore, which might give offence, but is not considered in law as a public nuisance.

As to the sentence, I observed that it was said at the bottom, that it was given by Mr. Stevens, the surrogate, though it run in the name of the judge; and by the minutes of the Court it appeared that the cause was heard by Stevens, who read the sentence; that, therefore, the substance of justice was preserved, and the error was only in matter of form; that nullities were unfavourable, when they tended to obstruct justice upon matters of form only; that the case cited was a strong one, but I thought went [106] too far, for the sentence only could be null, but would not destroy all the rest of the proceedings antecedent to that nullity.

I therefore by interlocutory remitted this cause, but gave no costs, on account of the irregularity of the sentence.

REPIGTON *against* HOLLAND AND REPIGTON. Prerogative Court, Hilary Term, February 18th, 1755.—A letter held to be testamentary.

[See p. 254, post.]

Dr. Hay for Ann Repington. James Repington, the deceased, left a widow, Ann Repington, my client, his mother, three brothers and a sister. In August, 1751, he went to the East Indies, as officer in the land service of the East India Company. (a) 20th February, 1753, he wrote a letter to his mother, wherein he said, "I have been very successful; and it is now in my power to do what I always desired, that is, to enable you to live comfortably the remainder of your life. As we have been in continual war here I have made my will, so that if any misfortune should happen to me, besides the one-half of my fortune, which you know who has a right to, I leave you the other, except a few legacies to my brothers and sister, [107] whom I insist on your taking to live with you." She received this letter by the post at Chester, where she lived in September, 1753. In October, 1753, the deceased died abroad. In October, 1754, John Holland, alleging himself to be an executor with the deceased's widow of a will made before the deceased left England, viz. on 15th December, 1749, took probate thereof, power being reserved to the deceased's widow. The mother did not hear of the deceased's death till after probate was taken of the said will; the mother has brought the said letter into court with affidavits to prove the deceased's handwriting and the receipt thereof, and has taken out a citation against the said Holland and the widow as executors, to bring in the said probate, and to shew cause why it should not be revoked, and why administration, with the letter annexed, should not be granted to her until the original will, or an authentic copy, is brought in. The executors have appeared under protestation, and deny that the said letter has any force or validity in law; the wife is universal legatee in the said will, but at the time of making it the deceased had nothing to leave.

Dr. Pinfold for the executors. The question is, whether the protest is justifiable. It does not appear what the deceased was worth when the will was made.

Dr. Hay. We insist that the will, dated 15th December, 1749, is revoked. The deceased in the said letter expressly says, "I have made my will," which must be in the Indies. This subsequent will is a revocation of the former, as it is incon-[108]-sistent with the first, so held in the case of *Helyar* (1 Lee, 472).

Dr. Pinfold contra. The question is, whether the mother has shewn a sufficient interest to be entitled to the effect of her process. The deceased did not intend this letter should operate as a will; the latter will may have an executor, and then the mother cannot have administration. Several ships have come from India since his death. The process is not proper; it should have been to cite the wife to accept or refuse the administration, &c.

Per Curiam. I was of opinion the letter alone was clearly testamentary, (b) and would revoke the first will, though the latter will, which the deceased declared under his hand that he had made, should have been produced.

I therefore assigned Mr. Bateman, proctor for Holland, to appear absolutely, and revoked the probate already granted, and assigned to hear on the by-day of this term,

(a) When he died it appeared that he was captain in a troop of dragoons.

(b) *Denny v. Barton and Rashleigh*, 2 Phill. 575.

on the grant of the administration with the letter annexed, limited till the will, or an authentic copy thereof, should appear.

[109] *GOODMAN against GOODMAN AND OTHERS.* Prerogative Court, Hilary Term, February 18th, 1785.—Instructions established as a will, it being clear that the deceased was prevented by death from executing a will directed to be drawn up in pursuance to such instructions.

Dr. Simpson for Sarah Goodman. Joseph Goodman, Esq. died the 1st of March, 1754, a widower, left Sarah Goodman, his sister, and Ann Lacy, another sister, and William and Thomas Goodman, his brothers, and John Johnson, Dorothy Sexton, and Elizabeth Yemans, his nephew and nieces. Sarah Goodman is appointed executrix and residuary legatee in a testamentary schedule made the 1st of March, 1754, the day he died; a probate of this schedule was granted to her on affidavits, afterwards Sarah took out a decree against all the next of kin to see it proved by witnesses. Thomas Goodman and Dorothy Sexton, by proxy, declared they would not oppose the schedule, and Mrs. Hall, the only legatee in a former will, who survived the testator, except the said Sarah Goodman, who declared she would not oppose it. The rest of the persons entitled to distribution, except William Goodman, have not appeared, and the said William Goodman, the deceased's brother, alone opposes the schedule; he pleaded the deceased's affection to Sarah, and that he had executed a will in 1740, in his daughter's life-time, in which Sarah was executrix, and had a legacy of 500*l.*, and a legacy was also left to Mrs. Hall, and the residue he gave to his three daughters. William Goodman gave in an allegation to propound the will of 1740, but as he was not named in, nor had any interest under it, the Court was of opinion he could not propound it, and rejected his plea. The deceased's daughter died before him, and his wife had been dead [110] twenty years before his death, and his sister Sarah lived with him and took care of his affairs from that time. The deceased had a dropsy for some years, but was sensible to his death. On 28th February, 1754, he sent for Mr. Clare, an attorney, to come to him, but he was not at home. The deceased sent for him again at eight in the morning of the 1st of March; he went to the deceased about nine, and the deceased then told him he sent for him to give him instructions for his will. The deceased gave him instructions for part of his will, and when he had wrote them down, he bid him go away and come again at two o'clock that afternoon. About one o'clock he again sent for Clare, he then went and took further instructions, and the deceased ordered him to come again the next morning, but before he was out of the house the deceased recalled him, and he then finished the instructions; Clare then read them over to the deceased in the presence of the said Sarah Goodman and two other persons; the deceased approved them, and directed Clare to prepare a will from them for execution. Clare went home, and while the will was engrossing, the deceased was impatient, and sent twice to Clare to hasten him, but before the engrossment was finished the deceased died. By the instructions the residue of his estate, real as well as personal, is given to Sarah. On 28th February, the deceased told his apothecary he had sent for Clare to make his will, and expressed great regard for Sarah. Another witness proves the like declaration on the morning of the 1st of March, and the deceased then said he was sorry he had not made his will sooner. There is full proof of capacity.

[111] Dr. Paul for William Goodman. The deceased died the 1st March, 1754, he had several relatives; the deceased had made his will 29th February, 1740, duly executed; the deceased left a real estate of 500*l.* a-year, and 10,000*l.* in money, he put off finishing the instructions, and they had not been finished but from the importunity of Neave; interlineations were added to the instructions by Clare, without the deceased's orders, and they were not read to him; he died as soon as the instructions were given; they do not contain the deceased's whole will; real as well as personal estate devised.

Witnesses for Sarah Goodman.

1. William Thompson, apothecary. Deponent well knew deceased many years; he died the 1st March, 1754; Sarah is his sister; the deceased was a widower, Sarah lived with him, and she appeared to have the care of his household affairs; believes the deceased had great affection for her; deponent was often with them; deceased expressed great regard for her; his daughter died before him; proves the deceased's name signed to the will made in 1740, wherein Sarah is executrix, to be the deceased's

handwriting; deceased had a dropsy and jaundice. In the afternoon of the 28th February, 1754, deceased declared to deponent he intended to make his will; next day, deponent asked him if he had made his will; he said "No," but he had sent for Mr. Clare to make it, and then expressed a particular regard to Sarah; deceased died about three that afternoon; he was sensible to within three minutes of his death.

14. Int. Deponent was present when the will of 1740 was found.

[112] 2. Edward Neave, soapmaker. Deponent well knew deceased; Sarah lived with deceased from his wife's death to his own, and managed his affairs; great affection between deceased and Sarah; deceased's daughter died before him; proves the subscription to the will of 1740 to be the deceased's handwriting; believes the deceased died of a dropsy; Clare sometimes did business for the deceased; on the morning of the 28th February, 1754, deceased told deponent he would send for Clare to make his will; the next morning, deceased told deponent he had sent for Clare and expected him soon; and afterwards that morning deceased told deponent he had given Clare some instructions; at one o'clock that day deceased gave further instructions, but did not finish them; deponent advised deceased to finish, whereupon he sent for Clare back, and gave him full instructions, and then Clare read them to deceased, in the presence of deponent and two other witnesses; the deceased was at that time of sound mind, &c.; deceased declared he intended to release Mrs. Hall's children, as well as herself from what she owed him, which deponent believes was the cause of the interlineations between the 14th and 16th lines, which were not read over to the deceased, and some few explanatory interlineations were afterwards made by Clare.

9. Int. Deceased approved the instructions, and ordered a will to be prepared from them for execution. Respondent does not remember the very words deceased used. 16. Believes deceased was worth about 4000 or 5000l.

3. James Clare, gent. Deponent well knew deceased; was often employed by him as his attorney; deponent being informed that the deceased had [113] sent for him, on the 28th February deponent went to his house that night, but did not see him, but was desired to come again the next morning; deponent was again sent for the next morning, deponent went, and deceased told him he sent for him to make his will; deponent then took part of the instructions marked A, and then deceased desired him to come again at two; about one, deceased sent for deponent again, and gave him further instructions, and then appointed deponent to come again the next morning, and said he would talk with his clerk in the mean time; deponent went down stairs, but was soon called back, and deponent then finished the instructions, and then deponent read all the instructions as they now appear in schedule A to the deceased (except some words he mentioned, which deponent afterwards interlined, as more full instructions for deponent's clerk to draw the will, and which were agreeable to deceased's intentions); deceased approved the instructions, and bid deponent prepare a will from them for execution; deceased was of sound mind, &c., the interlineations are agreeable to the deceased's declared intention; it was between one and two when deponent went home, but deceased was dead before the will was finished.

3. Int. Respondent can positively swear that the deceased ordered deponent to give all the residue of his estate real and personal to Sarah. 5. Int. Nobody was present at writing the first part of instructions; deceased said he had made a former will, but he would make another as his daughter was dead. 8. Int. Deceased approved the schedule, and bid respondent prepare a will from it.

[114] 4. Thomas Bampffield, gent. Confirms his master Clare's deposition.

5. Peter Earnshaw. Deponent was clerk to deceased for thirteen years, and to his death; Sarah lived all that time with deceased, and managed his affairs; great affection between deceased and Sarah; deceased made a will in 1740; Sarah executrix; mentions contents; deceased of sound mind; on the 28th February, 1754, deceased sent for Clare that night about a quarter before two; on the 1st March, 1754, deponent came home and was told deceased had asked for him several times; deponent went up to deceased, and he was then very sensible; Clare was just gone from him; deceased died very soon after, viz. about three o'clock.

1. Int. Respondent never heard deceased had much affection for his brother William. 5. Int. Deceased had freehold and leasehold estates to the amount of upwards of 500l. a year. 8. Int. Respondent has received the legacy the deceased left him.

6. Daniel Thomas. To 1. Int. Believes deceased had a brotherly love for William,

and he took his son George into his counting-house, but he was displeased with his behaviour, and talked of sending him home again.

The schedule read.

Dr. Simpson for Sarah. Nobody claims an interest under the will of 1740. No question as to capacity, nor as to the instructions given by the deceased. He was prevented merely by death from executing the will prepared from those instructions. Prerog. 1749, *Duke of Roxborough v. Macklean*. Deleg. *Watkinson v. Wosey*, (a)¹ [115] will for real and personal estate established under the same circumstances as this schedule stands. Deleg. 1751, *Beaumont v. Sharpe*, (a)² the same. *Sellars v. Garnett*, (b) Anderson, 38; Dyer, 72, notes were held a good will for lands before the statute of frauds, when the testator died before the will could be finished from those notes.

Dr. Pinfold, same side. Will of 1740 not propounded by any one. Deceased's intentions clear.

Dr. Hay, same side. An unexecuted paper is a good will, if the testator's intention is permanent. If real and personal estates are devised to different persons, and the will cannot operate as to the real, so that the devisee of the real estate is left without provision, contrary to the testator's intention, it shall not be a good will for either. Prerog. case of *Barrow v. Cox*. But in the present case both the real and personal estate are given to Sarah, and it would be strange doctrine to say she shall not have one, because by law she cannot take both under this paper.

Dr. Paul for William Goodman. The deceased intended an executed will; the draft is prepared for execution. Deleg. (c) *Calamy and Limbrey v. Hyde and Mason*.

[116] Dr. Collier and Dr. Bettesworth, same side. *Eccleston v. Speake* (3 Mod. 258, and Shaw, 89), a paper that cannot operate as a will shall not operate as a revocation. *Onions v. Tyrer* (1 P. Williams, 342).

Judgment—*Sir George Lee*. I pronounced for the schedule; the will of 1740 was not propounded, nor the execution of it proved, so that the schedule stood before the Court as the deceased's only testamentary disposition. His intention was clear to have executed a will pursuant to the schedule, if he had not been prevented by death, and the real as well as personal estate being given to the same person, removed all objection as to its not operating with respect to the real estate. I therefore thought it ought to be established as a good will for the personal estate, agreeable to all the cases that have been cited.

HOLMES against HOLMES. Arches Court, Hilary Term, February 25th, 1755.—In a suit for restitution of conjugal rights, no facts are sufficient to bar the proceeding, except such as would be sufficient to have entitled the party to a divorce on an original suit.

Appeal from the Chancellor of London.

Dr. Collier for Mr. Holmes. Mr. Holmes the husband brought suit against his wife for restitution of conjugal rights. They were married on the 3d of April, 1744. She was a widow, and before [117] marriage, settled all her fortune in trustees for her separate use: the husband, with her consent, borrowed of her trustees 2000l. of her money, to employ in his trade of an ironmonger; soon after which she, suspecting her husband's affairs were bad, and the said 2000l. being lent on his bond, her trustees did, at her request, take out a statute of bankruptcy against him; he was forced to abscond, and make a composition with his creditors, and she received a dividend of 436l. 19s. She went to a house of her own, and would not live with her husband, or suffer him to come and live with her. In Hilary Term, 1754, he returned a citation against her in a cause of restitution of conjugal rights; she confessed the

(a)¹ *Watkinson v. Woosey*, 24th Nov., 1738, an appeal from the Prerogative Court of York. The Judges Delegates present at the sentence were Mr. Justice Page, Mr. Justice Denton, Mr. Baron Carter, Dr. Kinaston, Dr. Simpson, Dr. Pinfold, Jun. and Dr. Edmunds.

(a)² *Beaumont v. Sharpe*, Deleg. 31st May, 1753. The Judges present at the sentence were Mr. Justice Denison, Mr. Baron Legge, Dr. Collier, Dr. Smalbroke, and Dr. Clarke.

(b) *Sellars v. Garnett*, Prerog. vide supra, vol. i. p. 509.

(c) *Hyde and Mason v. Calamy and Limbrey*, Deleg. 1731; Com. Rep. 451; vol. i. p. 423.

marriage, but gave a negative issue to the libel, and gave an allegation in bar to her being compelled to live with him, and prayed that she might be divorced from him for cruelty. The Chancellor of London admitted the allegation, from which the husband appealed to the Arches. The allegation pleaded the marriage, his borrowing the said 2000*l.*, his bankruptcy, and absconding without giving her notice, and the composition, and that she refuses to cohabit with him for good reasons, for that though he at first behaved civilly to her till he had got her money, yet he is a man of brutish cruel temper, has abused her, calling her bitch, &c., and swore at her, and on 20th April, 1754, he sent Jonathan Forward and one Clive to her house, who came in to her, and soon after he came himself, locked the parlour door, where she and the said two men were, and swore he would lie with her in presence of said men; and they said he was her husband, and had a right to do so, and they would hold her for him to lie with her; whereupon she got out [118] of the window, over a palisade, and over to the next house, whither he and the said two men followed her, and he there pulled off her cap, and dragged her by the hair of her head, and attempted to drag her home, but was prevented; and that afterwards he declared that if he could get her in his power he would send her abroad, where nobody should see her, unless she would give him her money; that, therefore, she could not live safely with him, and prayed to be separated.

Judgment—Sir George Lee. I was of opinion nothing could be offered (a) in bar to her living with her husband but such facts as would entitle her to a divorce, in case she had brought a suit against him to be separated for cruelty.

In this case she had charged nothing but words, except the single fact of his dragging her by the hair, which happened after she had separated herself from him, and that was not a cruelty sufficient to entitle her to a divorce; and it was not suggested that he had ever beat her or put her in any danger while they lived together.

I therefore pronounced for the appeal, and rejected the allegation.

She appealed to the Delegates, where my sentence was affirmed in Easter Term, 1757. (b)

[119] DEARLE AND DEARLE *against* SOUTHWELL. Arches Court, Hilary Term, February 25th, 1755.—A question raised whether an appeal was from a definitive sentence, or from a grievance.

An appeal from Litchfield.

[See p. 93, ante.]

Southwell prayed a faculty to be granted to him as schoolmaster of the Free Grammar-school at Stafford, and to his successors, schoolmasters there. Dearle, a parishioner, appeared to oppose it, gave an allegation setting forth his interest and objections; the Court rejected his allegation, and immediately granted the faculty.

Dearle appealed from both. Fanshawe, proctor for Southwell, prayed that Bishop, Dearle's proctor, might be assigned a term probatory on his libel of appeal, and that the cause might proceed as on an appeal from a definitive sentence. Bishop insisted that his appeal was from a grievance, in rejecting Dearle's allegation, and that the faculty granted ceased on course, as an act done after the appeal, and therefore he did not want a term probatory, for a grievance is to be heard *ex iisdem actis*.

Per Curiam. But I was of opinion the rejecting this allegation was a final interlocutory decree, having the effect of a definitive sentence, for it was pronouncing against Dearle's interest to oppose, after which he could have no relief in the Court below; besides the appeal was also from granting the faculty, which was the conclusive final act of the Court as to this cause. I was therefore of opinion this ap-[120]-peal was from a definitive sentence, and assigned Bishop to take a term probatory, and to call on the cause, as on an appeal from a sentence.

(a) See the case of *Foster v. Foster*, 1 Hag. Consist. p. 153; *D'Aguilar v. D'Aguilar*, 1 Hag. 784.

(b) The Judges Delegate who were present at the sentence in this case were, Mr. Justice Foster, Mr. Justice Birch, Mr. Baron Smythe, Dr. Collier, Dr. Smalbroke, and Dr. Harris.

DYER against CALWELL. Prerogative Court, By-Day after Hilary Term, February 26th, 1755.—A case of fraud not substantiated.—Greater regard should be had to the evidence of a witness on oath, than to his extrajudicial declarations.

[See p. 17, ante.]

Dr. Collier for Dyer. William Calwell, Esq. died 14th July, 1751, at Bristol, where he resided; made his will in February 1749; provided for his children, left the residue to his wife and appointed two executors; left an estate, real and personal, of about 40,000l.; was in a declining state of health, from drinking, for six months before his death. 28th February, 1750, he set out from Bristol to London, to consult Dr. Ward, at the advice of Dyer, who, with others, accompanied him to London; they made a progress on their way, staid some time in Oxford, and did not arrive in London till the 29th of March, staid there till the 14th of May following. Deceased had great friendship for Dyer, who was a saddler at Bristol. In March, 1751, deceased gave instructions in London to one Bradford, an attorney, who had lived at Bristol, to make a codicil to his will. 30th March, 1751, Bradford brought it to deceased at his lodgings, who approved and executed it in the presence of the said John Bradford, and William Lucas, the deceased's servant, who attested it. The codicil refers to the will, leaves Dyer's son, a youth at Oxford, [121] 500l., and to Dyer himself 200l., which are all the legacies in the codicil, and which are charged on all his real and personal estates; in the beginning of the codicil recites that he had made a will, or deed of gift, or some disposition of his estate, but as his papers were at Bristol, he could not say certainly what, but directs his executors to take this codicil as part of his will. When the deceased returned to Bristol, he staid at Dyer's house about a week, and then went home to his own house. The executors renounced, and on the 9th of May, 1752, deceased's widow took administration with the will annexed. Some time afterwards Dyer applied to her to pay the said legacies, she refused, and then he took out citation against her to bring in the administration, and take a new one with the will and this codicil annexed. Bradford is dead, but we have pleaded his handwriting and character. Lucas is examined, and fully proves the codicil. 23d July, 1753, the widow gave in an allegation to impeach the characters of Dyer and of the two subscribing witnesses to the codicil. No imputation on Lucas, but that he is in gaol for debt.

Dr. Hay for Mrs. Calwell. Will dated 16th February, 1749, not disputed; deceased appointed executors in trust, who renounced; died 14th July, 1751. 9th May, 1752, widow took administration cum testamento; Dyer knew thereof, but did not produce the codicil till January, 1753. Citation returned on the 23d of January, 1753. Dyer a saddler at Bristol. Recital in beginning of codicil remarkable, for it shews deceased did not know what his will was; directs the legacies to the Dyers to be paid in six months after his death. Bradford died in April, 1752; his death [122] and handwriting proved; his character doubtful. Lucas, the other subscribing witness, has a very bad character from our witnesses, and they have not attempted to set up his character; full proof of Lucas' declarations contrary to his evidence. Deceased a man of fortune, very much addicted to drinking and easy to be imposed upon. Gave bonds and notes without any consideration for them. Dyer imposed on him; persuaded him to come to town, and there encouraged him to drink; he was continually drunk while he was in town; when he returned to Dyer's house at Bristol, he was kept drunk until near his death. Deceased declared Dyer was a rogue, and endeavoured to get deceased's fortune for his son.

Witnesses for Dyer.

1. William Lucas, examined 19th May, 1753. Deponent was deceased's groom; deceased being of sound mind died in March, 1751, in deponent's presence gave instructions to Bradford for making a codicil; a few days after Bradford brought the codicil, read it to deceased, who well understood and approved it, and then duly executed it in presence of said Bradford and deponent, who attested it at deceased's request; deceased was in bad health but of sound mind; deponent often heard deceased express great regard for Dyer; he executed codicil with great satisfaction; believes Bradford is dead; he had a good character and reputation; deponent saw him sign his name as a witness to said codicil.

2. William Edwards, gent. Deponent well knew Bradford at Bristol, who is dead; he had a good character and reputation; proves said Bradford's handwriting as a witness to said codicil.

[123] 3. Charles Churchman, gent. Bradford was deponent's clerk; gives him a very good character.

4. George Par. Proves Bradford died in April, 1752; gives him a very good character.

5. John Fisher. Says Bradford was an honest man; gives him a very good character.

6. Thomas Spracher. Proves the death of Bradford; says he was esteemed an honest man.

7. Edward Young, gent. The same; never heard Bradford's honesty questioned.

N.B.—Calwell's counsel admitted Bradford's handwriting as a witness to the codicil was sufficiently proved.

Codicil read.

Witnesses for Calwell.

1. Robert Harris, merchant. Deceased drank spirituous liquors to great excess, impaired his understanding thereby; was easy to be imposed on; deceased had a good fortune; deponent never saw Bradford but once with deceased; when deceased returned from London, he staid at Dyer's house eight days; several of deceased's companions have drawn him in to give them bonds for large sums, without any value received; mentions such persons; deponent was an agent to deceased. In February, 1750, Dyer advised deceased to go to London to consult Dr. Ward; on the 28th February deceased set out for London with Mr. Dyer, Mr. Edgar, Joseph Perkins, Mr. Lucas, his servant, and deponent; deponent saw deceased every day in London, from the 20th March to the 11th April; he was all the time continually drunk, and incapable to make a will; he had strong liquors by his bedside; Dyer had great influence over [124] deceased; Bradford in deponent's presence proposed to deceased to carry him to a bawdy-house.

2. Job Gardiner, brewer. Deponent knew deceased; his senses were impaired by drinking, Dyer was his constant companion; deponent by deceased's order sent beer to Lucas's house for him to sell, which deceased paid for; William Lucas has a general bad character, and lately was in gaol for debt.

3. William Allen. Dyer and deceased often got drunk together; Lucas is a person of bad character.

4. Mary Downes, widow. Deponent is mother of Ann Calwell; the party deceased was easy to be imposed on, notes and bonds were obtained from him by Dyer and Lucas; deceased told deponent Dyer advised him to go to London to consult Dr. Ward; Dyer was paid 50l. for attending deceased to London, after deceased returned from London, he often declared Dyer was a rogue, and would, if he could, get all his fortune from him, for his said Dyer's son. On the 9th May, 1752, administration with the will taken by deceased's widow; codicil was not produced till January, 1753, Lucas has a bad character.

5. John Maunder. Deceased was much addicted to drinking, and could sometimes be easily imposed upon; deceased was often at Dyer's house, gives Bradford and Lucas bad characters.

6. Sarah Wise, widow. Lucas is a man of very bad character.

7. Alexander Edgar. Deceased was weak in his understanding from drinking, and easy to be imposed upon. In February, 1750, deponent went with deceased to London; Dyer prevailed on deceased to go by Oxford, to see Dyer's son; while [125] in London deceased was continually drunk; after the codicil was executed, Dyer took the first opportunity of leaving London; after Dyer went away, deceased lived soberly while he staid in town; the same day the codicil was executed deponent went out of town; on the Saturday evening deceased was very drunk, and he was the same when deponent saw him on the Monday following; on said Monday Lucas told deponent Dyer said to him, "Now is your time to take care of yourself, for I have done my business;" Lucas then said that Bradford read the codicil so fast that he could not understand it, and he believed his master, the deceased, could not, and said they were obliged to make him sign it in bed on a pair of bellows; deceased returned to Bristol on the 14th May, 1751, he then went to Dyer's house and staid there about eight days. Bradford had a general bad character; he brought a whore to deceased's lodgings. On the 5th May, 1753, Lucas declared to deponent and Mrs. Downes that he was called to be a witness to said will or codicil, it was signed in bed, and it was not read in his presence, and that he asked to see the contents

of it, but was denied, and he said he believed deceased did not know that he had signed it, for when deponent told deceased of it, he was very uneasy, and almost crazy about it; Lucas also said the deceased was in liquor from the time he set out from Bristol till after the codicil was executed, and that Dyer endeavoured to get every thing from deceased; Lucas has a general bad character.

8. Thomas Overbury, baker, examined 22nd October, 1753. Dyer encouraged the deceased to drink. In January, 1753, Lucas being indebted to deponent, he went to his house for the money, and his wife said that her husband was in [126] gaol, and that Dyer refused to assist him, because her husband would not wrong his conscience concerning the deed or codicil in favour of Dyer, and said her husband was very uneasy about being a witness to said codicil. On the 10th June, 1753, deponent went to Lucas in Newgate, and he then told deponent he believed Mrs. Calwell had a worse opinion of him than he deserved, and then also declared to deponent that deceased sat up drinking all night before the codicil was executed, and was as much intoxicated as ever he saw him; that when he was called to witness the same deceased was in bed, and for some time refused to execute it, but was told by the person who made it that he might sign it, and it was a thing of no consequence, and declared further that he believed deceased knew no more of the contents of it than the board he (said Lucas) then sat on; that it was not read to deceased in Lucas's hearing, and that if it had been read, deceased was not capable of understanding it; deponent has known Lucas several years, he has a very bad character.

9. Southwell Downes, merchant. Deponent is brother to producent; deceased drank to excess and was encouraged thereto by Dyer; deceased's capacity was weak, and he was easy to be imposed on; about two years before his death, one Bodville produced a bond for 400l. which appeared to be executed by deceased, but deceased denied that he knew any thing of said bond, and said it was an imposition upon him; and since deceased's death, deponent has seen a bond for 200l. from deceased to said Dyer, in which no consideration is mentioned but love and affection to Dyer; and also has seen a note from deceased to Dyer for 50l. which Dyer said deceased gave him for attending [127] him to London; has often heard deceased, when sober, say that Dyer was a rogue, and believes he heard him say that Dyer had abused him, but cannot be certain; in February, 1750, deceased, by Dyer's advice, came to London; deceased within a fortnight of his death said to deponent that Dyer was a rogue, and had done all that he could to get his fortune for his (Dyer's) son, &c.; uttered bitter imprecations against him for his villainy. It was publicly known that the widow took administration in May, 1752, but the codicil was not produced till January, 1753; after January, 1753, Lucas desiring to see the deponent he went with Edgar to him in gaol, and Lucas then several times told them that he did not believe the codicil had ever been read to deceased, or that he knew, or was capable of knowing the contents of it, for he was actually in liquor from the time he left Bristol till several days after it was executed; Lucas wrote down the said declaration and offered to swear to it; deceased has declared to deponent that Lucas had held out his leg whilst others have picked his pocket; deponent believes Lucas is a bad man, and he is so reputed.

3. Int. Deceased had a real estate of about 400l. a year. 4. Int. He left a personal estate of 33,000l. 11. Int. Cannot say of his own knowledge that Lucas was guilty of any crime.

Dr. Collier for Dyer. Upon the face of the transaction nothing irregular or suspicious appears.

Dr. Bettesworth, same side. No witness gives Dyer a bad character. Dyer could more easily have procured a codicil at Bristol than at London, with so many people about the deceased. No proof [128] that Dyer ever did impose on the deceased; Harris says he has heard Dyer claim a promise from the deceased that he would do something for him and his family, and deceased made no reply. The deceased's declarations a fortnight before his death against Dyer arose from his desiring the deceased to do still more for him and his family; if the transaction had been iniquitous, Dyer would not have disoblged Lucas. Fraud is not to be presumed.

Dr. Hay for Calwell. No attempt to support Lucas's character. No declaration leading to this codicil. 30th March, 1751, was a Saturday, and Edgar swears he was drunk that day. Dyer obtained a bond for 200l. on consideration only of deceased's affection to him.

Dr. Smalbroke, same side. It does not appear deceased knew of the codicil.

Judgment—Sir George Lee. I was of opinion that though there were many very suspicious circumstances upon the face of the paper itself, as well as from the evidence, yet that there was no proof that Dyer had imposed on the deceased in getting this codicil, or that the deceased was drunk at the time it was executed—that Lucas's character was so much impeached, and his declarations were so fully proved to be contrary to his evidence, that no regard could be had to his testimony, if it had stood alone, but greater regard was to be had to his evidence on oath than to his verbal extrajudicial declarations, and that evidence was agreeable to his act in subscribing the codicil as a witness, and if his character had been unblemished, his testimony would have been as full [129] as one witness could go to support every thing necessary to establish a codicil—that nothing material was offered to affect the character of Bradford, on the other hand his character was well established, and his subscription as a witness to the codicil being fully proved, or admitted, he must be considered as a full witness in support of Lucas to prove that every thing necessary to establish a codicil was clear—that the signature of the codicil was likewise admitted to be deceased's handwriting, and upon view it appeared to be exactly the same as his signature to the will, which was admitted on all sides to be signed by deceased; the signing to the codicil was in a fair hand, and did not appear to be the writing of a drunken man—that Edgar swears Lucas told him of this codicil the day after it was executed, and it can hardly be doubted but that Edgar, who was deceased's friend, told him of it; and yet deceased never did any act to revoke it, which in all probability he would have done, if it had been an imposition on him.

I therefore pronounced for the codicil, and decreed the widow to take a new administration, with the will and codicil also annexed.

ROBINSON *against* CHAMBERLAYNE. Prerogative Court, Caveat Day, March 21st, 1755.—Instructions neither signed by the testator nor read over to or by him, but clearly proved to have been in conformity with his intentions, admitted to probate.

Dr. Simpson for Chamberlayne. John Chamberlayne, bachelor, deceased, was murdered (as was supposed, by Ann Robinson, his grand-niece, who lived with him), in the night between the 2nd [130] and 3rd July, 1754; he left behind him William Robinson, father of the said Ann, his nephew and next of kin, and William Chamberlayne, his grand-nephew and heir at law. Robinson brought in a will, in which he was executor, but has not propounded it. William Chamberlayne has propounded a schedule, dated 27th June, 1754, which contains instructions deceased gave for making a new will, and which deceased had appointed to execute the 3rd July following. The attorney who drew the instructions proves they were given by deceased, but he thinks he did not read them to him. We have proved deceased's declarations agreeable to them. Robinson gives no opposition.

Witnesses for schedule.

1. Henry Brampton, gent. Deponent well knew deceased; it was reported he was murdered in the night between the 2nd and 3rd July, 1754; died a bachelor, leaving William Chamberlayne, his grand-nephew, and William Robinson his nephew and next of kin; deceased expressed great affection for William Chamberlayne; often declared he would make his will and leave him his estate at Englisham. On the 27th June, 1754, deceased came to deponent's house, and gave deponent instructions for his will; appointed William Chamberlayne executor and residuary legatee; sets forth the instructions agreeable to the schedule; deceased ordered him to draw a will from them, but deponent did not read them to deceased; he appointed him to come to execute it on the 3rd July following; said he was uncertain what he should leave to Hewer, and therefore a blank is left in the instructions; believes the deceased would have executed the will if he had lived.

[131] 2. Thomas Lynn. Proves deceased's frequent declarations that Chamberlayne should have his estate; the night before he died he told deponent that he would the next day give his estate to Chamberlayne.

Per Curiam. Though the instructions were neither signed by the deceased, nor read over to, or by him, yet as Brampton proved deceased gave them, and appointed to execute a will drawn from them on the 3rd July, and his declaration the night he died, agreeable to the instructions, being proved (*Lewis v. Lewis*, 3 Phill. 109), I pronounced for the schedule, and decreed probate of it to Chamberlayne, the executor.

BROTHERTON, Executor of Lady Cookes Winford *against* HELLIER, BY SARAH HARRIS, his Guardian. Prerogative Court, Caveat Day, March 21st, 1755.—The guardian of a minor is obliged to exhibit an inventory and account of an administration pendente lite.—The Court of Prerogative has as clear a right as the Court of Chancery to appoint guardians for a personal estate. The guardian appointed by this Court preferred to be confirmed in the administration to the guardian appointed by the Court of Chancery.

On grant of administration cum testamento.

Dr. Hay for Sarah Harris. Samuel Hellier, Esq., left his widow, Lady Cookes Winford, and Samuel Hellier, his son by a former wife, who was and is a minor; he made a will in his first wife's time, and appointed her executrix; this will was propounded on behalf of the minor by Sarah Harris, his guardian, assigned for the purpose of carrying on the suit. Lady Winford opposed the [132] will. Sentence for it on the 17th December, 1754. Pending the suit, Sarah Huntback, the minor's grandmother, had administration pendente lite, and now prays that administration cum testamento may be granted to her, she being assigned with Dr. Lyttleton, guardian to the minor in Chancery. The question now is, whether the said administration cum testamento shall be granted to Huntback or to Sarah Harris, who as guardian assigned by this Court, obtained sentence for the will; and she also prays that Huntback may give in an inventory and account of her administration pendente lite. When the cause upon the will was ready for hearing, Huntback appealed; alleged herself to be grandmother, and one of the guardians of the minor appointed by the Court of Chancery, and prayed that she might intervene for the minor's interest; that in July, 1754, the Court rejected her petition, he having already a guardian in this Court, and no collusion or misbehaviour of the guardian being suggested. Harris was pursuant to the minor's election appointed guardian in this Court without opposition, long before Huntback was appointed by Chancery, who likewise, together with Dr. Lyttleton, were appointed guardians there without opposition. On the 3rd February, 1755, since the sentence for the will, the minor, who is now 19 years old, confirmed by special proxy his choice of Harris as guardian, and prayed that administration cum testamento might be granted to her for his use. We pray that Huntback's petition may be rejected, and that she may be assigned to give in an inventory and account of her administration pendente lite. They allege in the act that she ought not to give in such inventory and account, because Dr. Lyttleton her [133] co-guardian has filed a bill in Chancery for a discovery of deceased's effects against her, and she ought not to be obliged to make a discovery in both Courts, but the parties in the Court of Chancery are different. At the time when sentence was given, the proctors for Huntback and Harris prayed that administration cum testamento might be granted to their respective clients.

Dr. Simpson for Huntback. We pray administration cum testamento as guardian appointed in Chancery. Dr. Lyttleton has filed a bill in Chancery against Huntback for a discovery of deceased's effects, upon which that Court (as appears by the orders, of which we have exhibited copies) has decreed to proceed. On the 15th July, 1755, subsequent to the date of the proxy that has been mentioned, the minor wrote a letter to Huntback, in which he said, that he had given a proxy to confirm Harris as his guardian, for form sake, but that she would have the administration. This letter amounted to a revocation of the proxy. The Court is bound ex officio to grant the administration to the guardian appointed by the Court of Chancery, because that Court has the general guardianship of all minors. Dr. Lyttleton does not join in praying the administration, because then he could not proceed in his bill of discovery; but he has given a proxy to consult and pray that it may be granted to Huntback. The bill of discovery is in behalf of the minor, and therefore she ought not to give in an inventory and account here, for that would put the minor's estate to a double and unnecessary expense.

[134] *Judgment*—Sir George Lee. I said there were two questions: First, whether Mrs. Huntback should be obliged to exhibit an inventory and account of her administration pendente lite? And, secondly, to whom the administration cum testamento, should be granted?

As to the first I said this is not like the case of a creditor, or next of kin, who files a bill in Chancery, and prays an inventory here; there the Court will oblige him to make the option, which Court he will proceed in; because it is unjust that the

executor or administrator should be harassed in both Courts by the same person for the same thing, but in this case there are different parties in this Court and in Chancery. It would be an effectual method to oust this Court of jurisdiction if I must not decree an account of the execution of a power granted by me, because a third person had thought fit to file a bill in Chancery; and therefore I was clearly of opinion Huntback ought to be assigned to exhibit an inventory and account.

As to the second point, I was of opinion the administration cum testamento ought to be granted to Harris; she was originally appointed guardian at the election of the minor, had been guilty of no misbehaviour, but had succeeded in the suit she had carried on for him; that she was appointed guardian to carry on that suit with all its dependents, and accordingly prayed administration at the time of giving sentence, and I thought her guardianship was not expired by the sentence, but if it was, she was elected again by the minor, who was of age to judge—that his letter was an extrajudicial declaration, which could not revoke his judicial proxy—that I was clearly not bound ex officio to [135] grant administration to Huntback, on account of her being appointed guardian in Chancery, for she could not, by the practice of the Court, have it without being assigned guardian here—that the Court had a right by law to appoint guardians for a personal estate, as well as the Chancery—that Harris was appointed here long before Huntback was appointed in Chancery, and it was strange doctrine that the acts of this Court legally executed were to be made null by a subsequent act of Chancery, and therefore, upon the whole, I confirmed the guardianship to Sarah Harris, decreed administration cum testamento to her for the use of the minor during his minority, and assigned Huntback to exhibit an inventory and an account of her administration pendente lite.

SHAND *against* GARDINER. Prerogative Court, 1st Session, Easter Term, April 16th, 1755.—An interest established in a pedigree cause.

Dr. Hay for Shand. John Shand, deceased, died intestate in 1747, left a widow, Alice Shand, but no children. In March, 1748, the widow took administration, and is since dead, leaving effects unadministered, she made her will, and appointed Joseph Gardiner executor and residuary legatee. Gardiner entered caveat in the goods of John Shand. Francis Shand appeared, warned the caveat, alleged himself to be cousin-german to the deceased John Shand, and next of kin, and prayed administration de bonis non. Gardiner denied his interest; he propounded it, and pleaded that Henry Shand of Aberneth in Scotland, the common ancestor, had issue by his wife, Ufran, a son named [136] Alexander, who by his wife had issue, John Shand the deceased, and that the said Henry and Ufran had also issue another son named Patrick or Peter, who had lawful issue, Francis Shand, the party in this cause. Alexander was a dragoon fifty years ago; Patrick was a servant in Scotland. We have no exhibits or written evidence to prove the pedigree, but having proof of owning among the several persons of the Shand family, it is sufficient.

Dr. Pinfold for Gardiner. Alice, deceased's widow, died in 1750, three years after her husband, and during all that time Francis Shand never claimed as next of kin. They say Alexander married in 1696, and had issue, John, the deceased, and that Patrick married, in 1718, to Eleanor Hutchinson and had issue Francis the party, but they have not proved either of the marriages, and there was no intercourse or correspondence between the deceased and Francis. We have not pleaded, but rest the cause upon Shand's evidence.

Witnesses for Shand.

1. James M'Cormack, æt. 59, examined in 1754. In 1722 deponent met with John Shand in London accidentally, and they being countrymen drank together, and he then said he lived in Blackfriars, and was married and had a child; and to the best of deponent's remembrance, he said his father's name was Alexander, and that he was a soldier, and his family lived in Scotland; it is about twenty-nine years since deponent has seen him. In 1708 or 1709 deponent saw one Alexander Shand, a dragoon, in Flanders, who said he [137] lived at Aberneth in Scotland, and deponent and he became intimate. Alexander spoke of his son John, who, deponent believes, was the deceased in this cause. In 1718 deponent was two months at Aberneth, and was several times there treated by one Henry Shand and Ufran his wife, who, deponent believes, were the persons articulate, and they often spoke of their son Alexander, who, they said, was in the Scotch Greys. In 1726 or 1727 deponent again met with

said Alexander in Ireland; deponent has heard that said Alexander had a brother named Patrick, and deponent heard him speak of such brother, and likewise heard Henry and his wife speak of their son Patrick; believes Francis, the party in this cause, is related to John Shand the deceased.

11. Int. Believes Francis was in London some years before John died; respondent never heard they had any intercourse together. 14. Int. Never heard of any other family called Shand.

2. William Angus, shoemaker, æt. 50. Deponent well knew deceased; first knew him by deponent's being acquainted with his father; believes Francis is the son of John Shand's uncle Peter; deponent first knew Alexander about the year 1715; he was then in the Scotch Greys, and spoke of his having a wife and child, and deponent afterwards saw said wife and her son, who deponent knows was the deceased in this cause, who was then reputed to be said Alexander's lawful child; believes said Alexander and his said wife died in Ireland; deponent made shoes for deceased and his father; Peter Shand came to Perth to see Alexander, and they often came together to deponent's father's house, and they owned each other to be brothers; deponent saw Peter about [138] thirteen years ago at Colonel Ogilvie's in Scotland; he had then a son called Francis, who he owned to be his lawful child by his then wife; deponent knows that Francis the party is the said boy.

3. Richard Jennings, æt. 66. About thirty-three years ago deponent was a soldier in Ireland, and there met with Alexander Shand, who was quarter-master in the Scotch Greys; he had then with him a woman and child, who he owned as his wife and child; does not know that deceased was the said child.

14. Int. Respondent has heard there were two families of the name of Shand in Scotland, one in Caithness and the other in Perthshire.

Read William Angus to 15 Int., who deposed that he never heard Francis was in London before John Shand died; never heard they corresponded together; believes Francis always knew of his relationship to John, but did not know of his death till after his widow Alice died; deceased and his uncle Peter corresponded together, as deponent has heard them say.

4. Sarah Brown, æt. 34. Deponent first knew deceased about twelve years ago, by lodging in the same house with him; does not know what relations he left, but as she best remembers, has heard him say his father's name was Alexander, and has heard John's mother-in-law, said Alexander's second wife, for whom said John received a pension as an officer's widow, speak of one Patrick Shand as a relation, and deponent has heard John say he had relations.

8. Int. Respondent does not know any of the family of the Shands. 15. Int. Does not know producent ever claimed to be related to deceased.

5. Mary Angus, æt. 36. Deponent did not [139] know deceased, but knew his widow, Alice; has often heard her say her husband's name was John, and his father's name was Alexander, and that he was a dragoon; has known her to be very uneasy about a young man, a relation of her husband's, but deponent did not know who he was.

Judgment—*Sir George Lee*. There being no objection to the witnesses, and William Angus having sworn to his knowledge of the parties, and the ownings of the relationship between Alexander and Peter or Patrick, as brothers, and his evidence being confirmed with respect to many circumstances by the other witnesses, I pronounced for the interest of Francis Shand, and swore him administrator de bonis non.

KING against GORDON AND OTHERS. Prerogative Court, 2nd Session, Easter Term, April 23rd, 1755.—Letters of request addressed to the Commissary for Probates in Scotland to cite a party to appear in the Prerogative Court.

At the instance of King, a creditor, I decreed letters of request to the Commissaries for Probates, &c. in Scotland, to cite the next of kin who resided in Scotland to appear and accept administration, or shew cause, &c. The commissaries accepted the letters of request, cited the parties personally, and returned a regular and proper certificate of the service, but the next of kin not appearing, I decreed administration to the creditor.

N.B.—This was the first instance of sending letters of request to Scotland to cite parties to appear in the Prerogative. The practice used to be to cite them by a process on the Royal Exchange, but it being extremely probable the next of kin

[140] living in Scotland might never hear of such process, and administration might be granted from them to their great prejudice, I tried this method of sending letters of request to the commissaries, and finding, in this instance, that they have accepted and duly executed them, I have directed that it shall be a standing rule to cite next of kin residing in Scotland by letters of request.

FLEET, FORMERLY KINGSTON *against* HOLMES, FORMERLY KINGSTON. Arches Court 3rd Session, Easter Term, April 28th, 1755.—Arches Court has no jurisdiction to determine the allowance to be made for the maintenance and education of minors.

(Upon admission of an allegation.)

Dr. Hay for Sarah Holmes. Samuel Kingston, Esq., died the 22nd June, 1736, left Sarah, now married to Holmes, his widow, and only one child, his daughter Mary, now married to the Rev. Mr. Fleet. On the 11th January, 1735, he made his will, and appointed his wife sole executrix and residuary legatee; left a legacy of 1000l. only to his daughter Mary, to be paid her when she came to the age of 21 years; she arrived at that age on the 2nd June, 1753; she then brought a suit against her mother in this Court for the said legacy of 1000l. with interest from the death of the testator; the mother appeared, and tendered the legacy of 1000l., with interest from the time Mary came of age, which Mary refused. We are now [141] before the Court with an allegation in bar to interest till Mary came of age. We set forth that Mary was but four years old when her father died, and that from that time till the 31st October, 1750, when she married, she lived with her mother, and was clothed, educated, maintained, and supplied with every thing by her, and therefore we pray the Court will pronounce no interest to be due; or at least, that the expenses for her maintenance, &c. may be allowed out of the legacy and interest, and for that purpose the allegation sets forth the annual expense and allowances craved for the several periods of the infant's minority.

Dr. Simpson *contra*, for Fleet. Deceased left his wife a large real estate, and 6000l. personal estate; she is now married to Holmes; it cannot be imagined that he intended his daughter should pay for her maintenance and education out of a small fortune of 1000l., when he left his wife, the child's own mother, so large an estate. This is a vested legacy, and being from a father to child, carries interest; they tendered the legacy and interest only from the time she came of age. We insist on interest for 17 years from deceased's death. Holmes admits in her answers that she has made interest of the money. I shall not make particular exceptions to the allegation, but shall object to the whole. This Court has not jurisdiction to determine on debts, nor on what allowance shall be made for maintenance and education of minors. Arches, 1721, an executor pleaded he had bought clothes, and paid money for the legatee, but as that was matter of account, and proper for the Chancery, it was not allowed to bar or discharge the legacy, and the allegation was rejected. [142] Upon that occasion *Fletcher's case*, to the same purpose, was cited. Arches, 3rd sess. Michaelmas, 1721, *Darby against Wiltshire*, the executor, who was a stranger, not a parent, alleged maintenance of the minor in bar to suit for a legacy; allegation rejected, for he must go to the Chancery for relief for the maintenance.

Dr. Bettesworth, same side. The allegation seems to admit that interest is due; it cannot be presumed that the testator intended the daughter should pay for maintenance out of 1000l. fortune, when he left so great estate to the mother.

Dr. Hay for Holmes. Precedents in Chancery, 337, if a father gives a legacy to a child, payable at 21, it shall carry interest, because a father is bound to maintain a child, but it is otherwise in a legacy from a stranger.

Judgment—Sir George Lee. I was of opinion this Court had not jurisdiction to try and determine upon the matters contained in the allegation, and therefore rejected it, and concluded the cause.

Holmes appealed the 25th June, 1756; the Delegates affirmed my decree; the Common-law Judges, Forster, Birch, and Smith, all clear that the Arches could not decree the maintenance.

[143] *HUSSEY against ANDREWS AND MOORE.* Arches Court, Easter Term, April 28th, 1755.—A legacy pronounced for; but without interest.

Lydia Waters made her will, and appointed Benjamin Butress and John Bearblock executors, and Judith Andrews and John Moore residuary legatees; gave a legacy of

5l. to Miss Lucy Hussey, to buy her a watch, and 10s. for a ring; executors renounced, and in 1746, administration cum testamento was granted to the residuary legatees. In 1754 Hussey brought suit for the legacies, the administrators gave a negative issue, but their proctor confessed subscription and identity of the clause of the will; afterwards, their proctor declared they would proceed no further. Hussey prayed interest from a year after the death of the testator, from December, 1747.

Judgment—Sir George Lee. I decreed the legacies to be paid, but without interest, because it did not appear that the administrators had been in mora till after the suit, and that interest was so trifling that the legatee did not insist on it, and also I did not think the legacies carried interest, but I gave 12l. costs.

CARYLL *against* KNIGHT. Prerogative Court, 3rd Session, Easter Term, April 30th, 1755.—A will established.

Dr. Hay for Knight. Charles Caryll, deceased, died on Sunday, the 27th October, 1754; about [144] two hours before his death he executed his will, and appointed Knight his executor and residuary legatee. John Caryll, as cousin and next of kin, cited Knight to prove the will by witnesses; Knight propounded it, and has examined three witnesses, who prove that on the 26th October, 1754, deceased, being very ill, Knight asked him whether he had any valuable effects by him, because he had only a nurse with him, and how he would have them secured, whether by him and Gray, who were present, or either of them; deceased said, by you; Gray withdrew, and then deceased gave Knight directions about his will. Caryll has interrogated the witnesses, but has not pleaded.

Witnesses for Knight.

1. John Gray, apothecary. Knight, deponent, and deceased were intimately acquainted together; on the evening of Saturday, the 26th October, 1754, deponent and producent were with deceased; producent asked deceased if he had anything valuable about him, as he had only a nurse with him? deceased said he had a note for 100l. in his bureau, and four or five guineas, and vouchers for two prize tickets of 10l. each in the Irish lottery; Knight asked him if he would have them secured; he said "Yes, by you;" deponent then went out of the room, and when he returned in again, deceased said to deponent, he had given deponent twenty guineas, his effects were small, and he hoped he would be satisfied with that for his trouble and attendance; Knight was going to tell deponent what had passed between deceased and him, but deceased said, "You need say no more of that;" next morning deponent went again with producent to deceased, but deponent was not then [145] in deceased's room; they then went to Mr. Brown's house, but he being at church came afterwards to producent's lodgings, and there drew the will pleaded, from instructions drawn by producent, and then they all three went to deceased with said will; when deceased was raised up in his bed, he fainted away, and had some wine and drops given him; then Brown read the will to deceased, and there being a blank for Mrs. Morgan, a legatee's christian name, deceased said it was Mary, and the blank was accordingly filled up; deceased attempted to make a mark to the will, but was so weak he could not hold the pen, and then Brown put a pen in his hand, and guided it to make a mark to the will, and then deceased in a scrambling manner took a seal off the wax, and being asked if he published it as his will, he pushed it towards producent, but said nothing; deceased was perfectly in his senses.

4. Int. Deponent was voluntarily present at the execution.

N.B.—He has renounced his legacy.

2. Edward Brown, gent. On the morning of Sunday, the 27th October, 1754, producent called on deponent to go to deceased; deponent was at church; when he came home, and heard producent wanted him, deponent went to producent's lodgings; producent there gave deponent instructions in writing, from which he then drew the will pleaded; deponent, producent, and Gray, who was present, then went to deceased; deceased was very weak and fainted, and took drops, and then deponent read the will audibly to him, and there being a blank for Mrs. Morgan's christian name, and deceased being asked, he said her name was Mary; deceased did not say he approved the [146] will, but he did not object to it; he was so weak that though he attempted he could not make his mark himself; but deponent guided his hand. Knight said to deceased, "You publish this to be your last will;" deceased did not answer, but Gray repeating the question, deceased said "Ay, ay;" when deceased took drops, before

the execution of the will, he said he had enough; deponent from the above said circumstances, verily believes deceased was perfectly sensible; deponent and Chalk witnessed it.

7. Int. Deceased was as weak as possible in body, but believes he was very sensible.

3. Mary Chalk. Deponent was nurse to deceased at his death; he died about two hours after the will was executed; producent or Brown told deponent deceased desired her to witness the will; deceased made his mark, and sealed said will, and said something, but deponent did not hear what, deponent and Brown attested it, the will was not read in deponent's presence; verily believes deceased was of sound mind, he spoke sensibly to deponent just before.

6. Int. Deceased was very weak; he made his mark himself, and his hand was not guided.

Dr. Hay for Knight. Gray deposes to deceased's recognition of the instructions; deceased himself said Morgan's name was Mary, which shews capacity; he pushed the will towards Knight, which likewise shews he knew it was a will for Knight's benefit.

Dr. Simpson for Caryll. The Court could not have pronounced for the instructions, because there is no proper proof of them; none were taken [147] down in writing on the 26th at night. Knight first shewed them to Gray on the 27th in the morning; deceased was dying, and had not a capacity sufficient to understand the effect of his will; Coke, 6 Report, f. 23, *Marquis of Winchester's case*. *Coombe's case*, Moore, 1051, a testator must have a mind adequate to what he is about; there is no proof of an animus testandi.

Judgment—Sir George Lee. Though the proof for the will was very slight, I thought myself obliged to give sentence for it upon the evidence of Gray; that deceased told him he had given him twenty guineas on 26th of October. From the evidence that deceased said Morgan's name was Mary, which shewed he knew what had been read to him was his will, and from the concurrent testimony of all the witnesses, that though the deceased was extremely weak in body, he was perfectly in his senses, and there being no contrary evidence, nor any exception to the witnesses, except what arose from slight contrarieties on circumstances, I pronounced for the will.

MOORE, FORMERLY HACKET *against* HACKET. Prerogative Court, Easter Term,

April 30th, 1755.—A will executed in conformity to instructions, established, though the testator had become incapable before the will was read over to him.

William Hacket, deceased, made his will, dated 27th May, 1754; his wife executrix and residuary legatee; left several children by a former wife; William Hacket, his eldest son, opposed this will, but afterwards gave up his opposition, and the [148] cause was heard *ex parte*. This last will was as to the general purport conformable to a former will, and was made only to provide for a child which was born after making the first will.

Witnesses.

John Smith, gent. Proves full instructions from deceased's mouth and the former will, his reading them, and deceased's approbation thereof, and that the will is exactly agreeable to the instructions, but says, while he was writing the will, deceased (who, when he gave the instructions, was perfectly in his senses) had a paralytic stroke, and he being very ill, deponent did not read the will to him. Proves execution; believes deceased knew it was his will that he executed, but thinks he had not then capacity enough to have understood the whole will, if it had been read to him.

Another witness was read, who swore to deceased's capacity at the time of giving the instructions, to execution, and to a degree of capacity at that time.

Judgment—Sir George Lee. Upon this evidence of the instructions and of the conformity of the will to them, and of his capacity at that time, and there being no opposition, I pronounced for the will.

[149] ROBINS *against* SIR WILLIAM WOLSELEY. Arches Court, 4th Session, Easter Term, May 9th, 1755.—An application for the examination of witnesses *de bene esse*, rejected.

[See on other points, p. 34, ante, and p. 421, post.]

Sir William Wolseley sued Mrs. Robins as his wife, in the Consistory of Litchfield,

by the name of Lady Wolseley, for a divorce by reason of adultery with John Robins, Esq., gave in a libel in which he pleaded that he was married to her on 23d September, 1752, and pleaded facts of adultery with Mr. Robins. She denied the marriage with Sir William, gave a general negative issue to the libel, and then, *loco responsi*, gave in an allegation in bar to the suit, in which she set forth that she was married to Mr. Robins on 16th June, 1752, prior to the time when Sir William pretended she married him; and, therefore, she being the wife of Robins, Sir William had no right to bring a suit against her. The Court admitted this plea, and ordered that the parties should proceed and examine witnesses on the libel and this plea *pari passu*, from which and other grievances she appealed to the Arches.

Judgment—Sir George Lee. I was of opinion that the cause for adultery ought to be stayed till it was determined whether she was married to Robins prior to the 23d September, 1752, for, if she was, Sir William could have no right of action against her, and I retained the cause. Sir William pleaded in the Arches in contradiction to her plea in bar, and she gave in an [150] allegation in answer to his, and now as it was likely to be some time before this previous point could be determined, Sir William prayed that he might be at liberty to examine witnesses *de bene esse* on his libel, upon a general suggestion, and an affidavit that a material witness was an officer in the army, and might be sent abroad, and that witnesses might die before the previous point was determined. But I was clearly of opinion to reject this petition, because either the witnesses must be examined *ex parte*, which would be unjust, and would deprive her of her defence, or if she put interrogatories to the witnesses, she would be forced into a suit, while it was sub judice whether she was subject to such suit or not.

SEWELL AND OTHERS *against* TWYFORD AND MANN. Arches Court, Easter Term, May 9th, 1755.—In making a church rate, the lessees of a market are to be assessed according to the real produce of the tolls, and not according to the rent only.

Appeal from the Consistory of London.

Twyford and Mann, churchwardens of the parish of St. Faith, London, brought suit in the Consistory of London against Sewell and others, for a church rate, it was pleaded in the libel that in 1753 the church was repaired by order of vestry, and a rate for that purpose was made at two-pence-halfpenny in the pound, and that Sewell and others, lessees from the city of London of the tolls of Newgate market, were duly rated, in said rate, the sum of 15l. 4s. 2d., the tolls of the said market producing annually 1460l., and that they were assessed at that rate to the land-tax; they refused to an-[151]-swer whether the tolls produced 1460l. in 1753, and whether they were assessed at the rate of 1460l. to the land-tax in that year. The Chancellor of London was of opinion they ought to answer to those facts, and decreed fuller answers. The lessees appealed to the Arches, and I confirmed the decree, but the cause was retained by consent. In their fuller answers they confessed that they were in 1753, and still are, lessees of the tolls of Newgate market; that they were assessed to the land-tax at 1460l. a-year; say they pay only 700l. a year rent to the city, and gave a fine of 700l.; that they are unequally assessed, and that they are not obliged by law to answer further.

Judgment—Sir George Lee. But I was of opinion they are to be assessed according to the real produce of the tolls, and not according to the rent only, for supposing it should be a custom in a parish for landlords to reserve very small annual rents, and take large fines, there would be little or nothing to be assessed, and so the church must go to ruin; and I was of opinion they were bound by law to answer whether the tolls in 1753 produced the sum of 1460l. or what sum, and accordingly decreed fuller answers.

FOX *against* GILBERT. Arches Court, May 26th, 1755.—Capacity established.

Appeal from Wells.

Dr. Hay for Gilbert. John Gilbert deceased made two wills, the first dated 6th July, 1750, wherein Stephen Fox was sole executor and resi-[152]-duary legatee; the second will dated 17th September, 1751. The date was a mistake, for the will was really executed on the 12th September, 1751, and that mistake is accounted for; deceased died on 15th September, in this will Luke Gilbert, who was deceased's

nephew, his heir at law, and only next of kin, was appointed sole executor and universal legatee. Fox opposed this will. Both the wills propounded; the Court at Wells gave sentence for the last will; Fox appealed, and the cause is now to be heard upon the same evidence as below. Deceased had great affection for Luke Gilbert, Fox was a stranger in blood to him, deceased lived in Somersetshire, Luke Gilbert at Deptford in Kent. The will in favour of Fox was obtained by his cajolery, who used to treat the deceased who was very covetous. In September, 1751, Luke went to see his uncle, who received him well, and then deceased declared he would make a new will, particularly that Mr. Hayman should make it for him. But we admit there is some contrary evidence of declarations that he would not alter his will; on 11th September, in the night, deceased was very ill, and then said to Thomas Millar, who sat up with him, that he would make his will; thereupon one Philip Stride, who accidentally lay that night in the house, was called up to make it, the will was made by interrogation, execution, approbation, and capacity, fully proved by all the witnesses except one, who says he was not sensible.

Dr. Simpson for Fox. Admit the last will is dated 17th September, by mistake. We have appealed from the sentence for the last will. Great intimacy between Fox and deceased; full proof of such affection continuing to deceased's death. [153] Luke applied to Fox to solicit deceased to make a will in Luke's favour, Luke himself pressed deceased on 1st of September to make a will, but he refused. On 8th September the deceased fell ill, Luke again attempted to get Fox to solicit deceased to make a will, but deceased again refused. On 10th September deceased declared he would not make a will; the same on 11th September. Millar called up Ann Buckley in the night, said he had now got deceased in the mind to make a will, and if she did not make haste he might change. He was not sensible at the time of the execution; the foundation on which their witnesses swear he was sensible is only that he answered yes to questions; no animus testandi proved, nor sufficient proof of capacity.

Witnesses for Gilbert.

1. Thomas Millar. Deponent well knew deceased; deponent's mother rented a public house of deceased, where deceased lodged and boarded at his death; on 11th September, Philip Stride lay at said house; in that night deponent asked deceased if he had made a will; he said "Yes," but it was not to his mind; deponent asked him if he would make a fresh will; he said "Yes" he would; deponent thereupon called up Stride, who he said would make deceased's will for him; they then went to deceased; deponent asked him if he was willing to make Luke Gilbert his sole executor; he said "Yes;" deponent reminded him that he had another relation, John Gilbert, and asked whether he would do anything for him, or his child, deceased answered only "Pho!" and thereupon from such answers Stride wrote the will pleaded, and read it to deceased; deponent asked deceased if [154] the will was to his content; deceased said "Yes, it is;" deponent told him if he liked it, he must sign it; deceased then took a pen and made his mark to the will; deponent then asked him if that was his last will; he said "Yes;" deponent told him he must deliver it as his last will; deceased took it out of deponent's hand and delivered it to producent, and then deponent and the others attested it, but deceased did not ask them to attest it; he was very sensible, accounts for the mistake of the date; deceased died 15th September.

2. Int. The night deceased died he was very sensible. 3. Int. No other discourse than as predeposed, passed at the execution of the will, except that deceased being asked whether he would drink, answered, "No;" but he answered distinctly to all the aforesaid questions.

2. Philip Stride. Deponent well knew deceased; on 11th September, 1751, deponent lay at Sarah King's house, where deceased then lay ill; in the night Millar called deponent up to deceased to make the will; deponent went, and Millar asked deceased if he would make a will; he said, "Yes;" deponent asked deceased how he did; he said, "Very ill;" deponent asked him if he would give anything to his poor relations, he made no answer; deponent asked him if he would give all to his kinsman, Luke Gilbert, and make him executor; he replied, "Yes;" then Millar and said Luke desired deponent to write the will; deponent did so, and then read it to deceased; deponent asked deceased if he understood it; he said "Yes;" deponent asked him if it was to his content; he said "Yes;" deponent told him he must make his mark to

the will, Sarah King guided his hand to make a mark ; Millar then bid deceased [155] deliver it, and he did deliver it to producent ; deceased answered sensibly, and deponent believes he was fully in his senses ; the will was executed early in the morning of 12th September.

3. Int. No other discourse passed at the execution.

3. Sarah King. Deceased boarded at deponent's house ; on 12th September he was very sensible, for he answered questions readily ; Stride wrote the will and read it to deceased, and he said he liked it ; proves execution and delivery of the will by deceased to Luke, and capacity.

2. Int. Deceased answered questions plainly and distinctly, but said nothing else. Read said last will.

The counsel for Gilbert admitted the first will was duly made, and the counsel for Fox read it, to shew that deceased had therein provided for Luke Gilbert, to whom he had given 100l., and for all his friends.

Witnesses for Fox.

1. Thomas Fox. Deponent is son to producent and well knew deceased ; great intimacy between producent and deceased, and producent managed business for him ; deceased never spoke to deponent of Luke Gilbert ; deponent has heard that deceased was angry at Luke's coming to him in September, 1751 ; proves the first will.

2. Joseph Brown. 3. John Weeks. Admitted ; they depose to the same effect, and prove the first will ; not read.

4. Ann Buckley. On Sunday, the 1st September, 1751, Luke, in deponent's presence, asked deceased to make another will, deceased said he [156] would not ; a day or two afterwards, Luke asked deceased where his will was ; he replied, " Stephen Fox knows of it." On the 14th September deceased was speechless ; on the 12th September, in the morning early, deponent and Sarah King being in bed together, Millar came into their room, and said he had got deceased into a mind to make his will, and he must make haste for fear he should change his mind ; they got up and went to deceased, and found Stride writing the will ; deponent heard Millar ask deceased if he would not make Luke sole executor ? he made no answer, but groaned ; deponent was twice in the room while the will was writing, and deceased did not speak ; same day, John Gilbert came to see deceased ; on the said 12th September deponent did not hear deceased speak one word, or afterwards, but he appeared senseless to his death ; after the will was made, Millar said it was done, " but I was forced to put the pen in his hand, and guide him to make the mark ; " believes deceased was never sensible after the 11th September.

5. James White. On the 8th September, 1751, Luke and Fox talked about deceased's will, Fox said he had made one, Luke desired Fox to get deceased to make a new one ; Luke said they had tried to get deceased to make a new will, but could not prevail on him to make one ; on the 10th September Fox in deponent's presence told deceased that his kinsman Luke desired he would make a new will ; deceased replied, " I will make no other will ; " on the 12th September Luke sent for deponent, and deponent went to him, Luke shewed deponent the will, and desired him to draw another will to the same effect, but in a better form ; deponent wrote one accordingly ; Luke went with [157] it to deceased, but when he came back again from deceased's room, he said deceased had a great many people with him, and he could not get it executed.

6. Elizabeth Baker. On the 10th September, 1751, Sarah King desired deponent to speak to deceased to make a new will ; deponent asked him if he had made his will, he then replied, he had made one to his mind and would not alter it, and said Luke desired him to make another will but he would not.

7. Sarah Gilbert. Deceased always spoke kindly of Fox, and said he was obliged to him for taking care of his affairs, and that he would make him amends ; has heard deceased say he never sent to Luke at Deptford ; the intimacy between deceased and Fox continued to his death ; on the 11th September deponent, in presence of John and Luke Gilbert, asked him if he had settled his affairs, and had made his will ; he answered, he had made his will, and would not alter it ; deponent asked where his effects lay ? he said " Stephen Fox ; " Luke bid deponent be quiet, for deceased was not in a condition to be talked to ; believes he was not capable of making a will after the 11th September, 1751.

Witnesses for Gilbert.

1. Sarah King, widow. Luke was deceased's nephew, next of kin, and heir at law ; deceased behaved with great affection to him ; producent often wrote letters and sent presents to deceased, which he received with great pleasure, and deceased often sent letters and cheeses to producent ; deceased could not write, and deponent's daughter wrote letters for him ; deceased kindly received [158] and entertained producent in September, 1751 ; deceased was very covetous ; deponent having observed deceased to be very uneasy, asked him what was the matter ? he said he had a will, but it was not to his mind, and said Mr. Hayman should make him a new one ; Hayman came to deponent's house, but deceased was not then at home, and deceased afterwards expressed great sorrow that he did not see him ; deponent about three weeks before deceased died, heard Mr. Webb had been to make deceased's will.

2. Thomas Millar. Deceased spoke kindly of producent, and said he wished he lived in the country ; deposes to presents and letters that passed between deceased and producent ; deceased was eighty years old, very covetous, loved to be treated, and would promise legacies to those who treated him ; about three months before his death, deceased, walking with deponent in the fields, said John Gilbert had used him ill, and said he would give him nothing more, and then declared his will was not to his mind, and he made the same declaration the night the last will was made.

4. Int. Webb came to deceased's lodgings the day he was taken ill, but did not see him.

3. Mary Clarke. Deceased spoke much in praise of producent ; the 2nd September, 1751, deponent heard deceased say that Luke was with him, and that he would make his will while he was in the country, and said he would give nothing to John Gilbert or his child.

4. John Clark. Says deceased spoke well of Luke ; on the 2nd September, 1751, deceased told deponent that Luke was with him, and said he would make his will while he was in the country, and give him all and make him executor ; said he [159] was sorry he was not at home when Hayman came to his lodgings.

5. John Clark, jun. Deposes exactly the same as the last witness as to deceased's declaration on the 2nd September, at which this witness was also present.

6. John King. Says deceased was very angry with John Gilbert, and said he would give all he had to Luke.

7. Ann Clark. Deposes to deceased's affection to Luke, and proves several letters that were sent by deceased's orders from deceased to Luke.

1. Int. Deceased said once, but deponent cannot tell the time, that he had made a will, but it was not to his mind.

Several letters from deceased to Luke read, which shew affection, and sending of presents.

Dr. Hay's argument for Gilbert. Ann Buckley, their chief witness, does not pretend deceased was incapable on the 11th September ; no imputation on the subscribing witnesses, who swear fully to capacity.

Dr. Bettesworth, same side. Hayman did not see deceased, and therefore there was nothing to examine him to. Ann Buckley supports our witnesses ; if deceased had not been in his senses, Luke could not have been weak enough to have endeavoured to have got him to execute the will made by White on the 12th of September which was only to amend that made by Stride in point of form.

Dr. Simpson for Fox. Will in favour of Fox was made subsequent to all the letters from de-[160]-ceased to Luke, except one, and therefore, those letters prove nothing in favour of Luke ; in this case the testator must have an animus revocandi, as well as testandi.

Dr. Pinfold, same side. Law presumes a permanency of intention. Original intention was not to give all to one person. Will made in great hurry ; deceased not then dying. *Coombe's case*, Moore's Reports, testator must have a mind adequate to what he is about. The witnesses differ as to the circumstances of guiding deceased's hands. No subsequent confirmation of the last will.

Judgment—Sir George Lee. As the last will was in favour of deceased's nearest relations, and the testamentary witnesses swore positively to his capacity, approbation, and execution of it, and as several witnesses swore to his declarations that the first will was not to his mind, on which declarations I thought more stress ought to be laid than on the contrary declarations, because they came voluntarily from the deceased

himself, whereas the other declarations were only answers to questions put to him by persons to whom perhaps he did not care to open his mind, I pronounced for the last will, confirmed the sentence given at Wells, with 30l. costs, and remitted the cause.

[161] *EATON against BRIGHT AND SANDLANDS*. Prerogative Court, 1st Session, Trinity Term, May 28th, 1755.—An interest established in a pedigree cause.

[See p. 85, ante.]

Dr. Bettesworth for Ann Eaton. Mary Nonelly deceased; died in September, 1751, intestate, a spinster, left Ann Eaton, her cousin-german and next of kin. Bright and Sandlands, as executors, proved a pretended will of deceased. Eaton cited them to prove it by witnesses; they appeared and denied Ann Eaton's interest; she propounded it and pleaded that Richard and Magdalen Hoggins were grandfather and grandmother of deceased and Eaton. Admit the marriage of them (which must be about 100 years ago) is not proved. They had two daughters, Ann and Elizabeth, who they always owned to be their legitimate children. Ann married Humphry Nonelly, and had issue by him, the deceased. We have proved deceased was born about 1677, but the register of that time is damaged and not legible. Elizabeth married Richard Butcher, and had issue by him Ann Eaton, the party.

Dr. Simpson contra. We have not proved. No proof of the Christian names of the grandfather and grandmother, the common ancestors. No entries of the baptisms of their daughters; only parol evidence of ownings.

Judgment—Sir George Lee. It being admitted that there was full proof that Ann and Elizabeth constantly owned each other [162] to be sisters, and that the deceased owned and used to speak of Ann Eaton as her aunt, Elizabeth Butcher's daughter, and as her cousin and next of kin, I pronounced for Ann Eaton's interest, and condemned Bright and Sandlands in costs, to be taxed moderately, because there was no evidence that affected them with the knowledge of Eaton's relationship to deceased.

SMITH against LOVEGROVE. Arches Court, 3d Session, Trinity Term, June 9th, 1755.

—The chancellor of the diocese of London is not invested with authority to grant licenses to lecturers.—The bishop has the general superintendence of the clergy within his diocese, and no one without his permission can perform the clerical functions within such diocese.

[Referred to, *Bishop of St. Albans v. Fillingham*, [1906] P. 185.]

Appeal from Consistory, London.

Dr. Bettesworth for Lovegrove. Citation issued against the Rev. Mr. John Smith, at the promotion of the judge's office, by William Lovegrove, Esq., for performing the office of lecturer of St. John's, Wapping, without licence. Articles given in and admitted, proved, and sentence against Smith, by which he was admonished not to do any duty as lecturer at St. John's or elsewhere in the diocese of London, till he first has obtained a licence.

Dr. Hay for Smith. Smith was ordained deacon on 2d of March, 1734, by the bishop of Landaff, and priest, 10th March, 1734, by the bishop of Norwich. In the last war he was a chaplain in the navy, and since has officiated occasionally for several clergymen; he has a wife [163] and three children, and no support but this lectureship. In 1750 he officiated for Bean, the then lecturer of St. John's, and on his death he was elected himself in 1752 to that lectureship; in that year he applied to the bishop of London for priests' orders, but the bishop refused to examine him. A bishop may refuse ordination without giving a reason. After his ordination as priest, he applied to the Archbishop of Canterbury to grant him a licence as lecturer; he refused, because his predecessors had not for forty years past granted licences for lectureships in other bishops' dioceses. Archbishops or bishops may grant those licences. He then applied to the Bishop of Winchester for licence to preach in his diocese, the bishop said he did not put his clergy to the expence of licences, and bid him preach without one. On 2d April, 1754, the parishioners of St. John's, in vestry, confirmed him lecturer. On 3d April, 1754, a citation issued against Smith to answer to articles for acting as lecturer without licence. The same day he applied to the Chancellor of London in his chambers, exhibited a certificate of his election, his orders, and testimonials, and prayed a licence; the judge took time to consider of it. On 10th May, 1754, a licence was again prayed, the articles were debated and admitted. Smith's proctor gave a negative issue. On 17th May, 1754, a licence was again prayed.

The judge referred Smith to the bishop. On 23rd May, upon application to the bishop, he declared, as there was a cause depending, he would neither grant or refuse a licence. On 30th May, 1754, Smith appeared in court, offered to subscribe the articles, &c. and prayed licence; the judge declared he had no power to grant licences, and he would do nothing relating to it. On 31st May Smith's proctor in-[164]-terposed an appeal from this grievance. The cause went on, and was heard ex parte on the merits of the articles on 6th December, 1754, when the judge decreed a monition against Smith not to preach or officiate as lecturer, or perform other divine service for the future in St. John's Church or elsewhere in the diocese of London, till he had first obtained a licence. Smith appealed from the said sentence. There are two questions, first, whether the chancellor did right in refusing to grant a licence on 30th May, and upon this point, whether he had power to grant licences; the Chancellors of London have granted two such licences within ten years last past; but supposing he has not power, the second question is whether he did right in decreeing a monition against Smith on the 6th of December, and condemning him in costs; we insist that he should have dismissed the cause.

Dr. Pinfold, same side. The archbishop told Smith he would grant him a licence to preach in the diocese of Canterbury, but as he had no cure there, he declined taking it.

Witnesses for Lovegrove.

1. John Norris. Deponent knows Smith; in 1751 he officiated as lecturer for Mr. Bean at St. John's; has often heard him preach there; deponent is clerk of St. John's parish; Smith was chosen lecturer in July, 1752, on the death of Bean; he performed all duties at St. John's from that time for five or six months, and then desisted till 24th March, 1754, on which day he preached again there; believes he has no licence.

2. Nathaniel King. Proves Smith's officiating at St. John's as lecturer, first for Bean in 1751, [165] and his being afterwards nominated lecturer in July, 1752; deponent was then churchwarden, and insisted on his obtaining a licence; proves his officiating as lecturer only on the next Sunday after he was chosen.

3. Ambrose Cook. Proves his reading prayers and preaching at St. John's for Bean; he was chosen lecturer in July, 1752, on Bean's death; on 24th March, 1754, deponent did not go to church because he heard Smith was to preach and he did not like his character; never heard him preach after he was chosen lecturer.

4. John Webber. Smith was chosen lecturer in the room of Bean; deponent has often heard Smith preach and read prayers at St. John's for Bean before he was chosen lecturer, but has not heard him since.

Read the monition, dated 6th December, 1754. "Monished not to preach or officiate as lecturer or perform other divine service for the future in the parish church of St. John's, Wapping, in the county of Middlesex, or elsewhere in the diocese of London, without a licence first had and obtained for that purpose, under pain of the law," &c. The Judge condemned Smith in 15l. costs.

Evidence read for Smith.

Art. 3. April, 1754, Bellas appeared for Smith, alleged citation, &c. exhibited his orders, certificate of his election to be lecturer, testimonials, &c. and prayed licence; judge took time to deliberate to next court.

10th May. Bellas prayed a licence; Townley gave articles that were debated and admitted: a negative issue was given.

[166] 17th May. Bellas prayed a licence: the Judge referred him to the bishop.

30th May, 1754. Smith, in court, exhibited three affidavits, offered to subscribe the articles, and do every thing enjoined by law, and prayed a licence. The Judge declared that the granting of licences was not in his commission, and that he apprehended he had no jurisdiction in matters of that sort, and that the prayer for a licence was improper in this cause, and that he would decree nothing in relation thereto. Smith's proctor interposed an appeal from this refusal, but did not inhibit the Judge.

Affidavits of George Bellas and Nathaniel Bishop, gent., 21st May, 1754. Bellas swears he applied on the 20th May to the bishop for a licence, pursuant to the judge's reference on the 17th; Bishop said he would neither grant or refuse a licence as there was a cause depending.

Affidavit of William Thompson, 28th May. Deponent has searched the seal book of the Consistory of London; finds there a licence to the Rev. Mr. Horton to be

lecturer of Hampton, in Middlesex, and for the Rev. Mr. Carter to be lecturer of Barking, in Essex, both granted within ten years past; believes it is not common to require lecturers in the diocese of London to be licensed.

Affidavit of the Rev. John Smith, 28th May, 1754. Deponent was chaplain in the navy, has no benefice or estate, and has a wife and three children; deponent assisted Bean as lecturer of St. John's; about two years ago, on death of Bean, the parish intended to have chosen deponent lecturer; he applied to the bishop of London to be ordained priest, [167] the bishop refused to examine him; prayed the archbishop to grant him a licence to preach; the archbishop refused, because his predecessors had not granted provincial licences for forty years past, but he offered deponent a licence to preach in the diocese of Canterbury. On the 2nd April, 1754, parishioners of St. John, in vestry, confirmed the deponent lecturer. On the 3rd April, before the deponent knew of the citation, he applied for a licence; he was cited that day; the bishop refused him a licence; deponent is informed it is not the general practice in London to license lecturers; the bishop of Winchester said he did not put his clergy to the charge of licences.

Read.

His deacon's orders by the bishop of Landaff, 2nd March, 1734. His priest's orders by the bishop of Norwich, 10th March, 1754. A certificate of his confirmation in vestry, as lecturer, 2nd April, 1754. His letters testimonial of his good character and behaviour for three years past, dated the 19th April, 1753, with view to priest's orders, and a licence; another, dated the 12th March, 1754, in order to be licensed lecturer, signed by Mr. Bate, vicar of Deptford, and others.

Dr. Bettesworth's argument for Lovegrove. The original prosecution was for preaching, &c. without licence; the Chancellor cannot legally grant licences; in the two instances mentioned, the bishop's fiats were granted. The form of ordination expressly requires a licence from the bishop himself to preach; he is articulated against for having officiated before he applied for a licence, and had obtained one, the fact is fully proved, and there-[168]-fore the Chancellor rightly laid him under a monition.

Dr. Hay's argument for Smith. Every thing relating to Smith's character is material. First question, whether the Chancellor cannot grant licences to preach. Bishop Gibson, in his Introduction to his Codex, page 23, says, "The vicar-general is locum tenens of the bishop, and can do all the acts of jurisdiction that the bishop can." The Chancellor then has this power as vicar-general, unless he is restrained by his patent, which he is not. He has expressly power to institute, a fortiori, to licence, Godolph. Repert. Can. p. 81. Canons 1640 are condemned and declared void by statute; the 11th of those canons was made to restrain chancellors from granting licences; therefore, by law they may grant them; the bishop's reference in this case to the Chancellor is a fiat; if the Chancellor had power to grant a licence, he ought to have granted it, because there is no objection to Smith; he voluntarily applied for a licence before this cause began. But supposing the Chancellor's declaration on the 30th May was right, the next question is whether his sentence on the 6th December was right. On the 24th March, 1754, Smith was not lecturer, and it does not appear that he preached after he was chosen on the 2nd April, 1754. Statute 13 & 14 Car. 2, none shall be a lecturer who neglects or refuses to take a licence; Smith worthy of, and desirous to take a licence, and therefore not criminous, and ought not to be admonished; the monition goes too far also in forbidding him to perform other divine service elsewhere in the diocese of London. Lindw. de Celebrat. Missar. cap. effrenata, verb. curis ani-[169]-marum, an incumbent may appoint a temporary vicar. Otho de Instit. Vicar. cap. ad Vicarias. John de Othon, verb. propriis personis. The canons do not require a priest to be licensed to perform divine service, but only to preach.

Dr. Pinfold, same side. The articles are singly for preaching as lecturer at St. John's church, on the 24th March, 1754, without licence, and the prayer at the end is that he may be admonished to do so no more: power of licensing often excepted out of Chancellor's patent, which shews they have such power, if not excepted; no proof that Smith has officiated as lecturer since his election on the 2nd April, and therefore the judge was not founded in admonishing him to desist, nor ought he to forbid him to perform divine service.

Dr. Bettesworth's reply. Citation from Gibson's Introduct. only shews that vicars-general had full powers anciently granted them when the bishops were abroad upon public affairs; a power of licensing is not given to the Chancellor of London.

Judgment—Sir George Lee. Upon the first appeal from the act of the 30th May, 1754, I was of opinion, 1st, that the Chancellor of London had not power to grant a licence, his commission did not give it him, and he had it not merely as vicar-general. Gibson speaks of the ancient powers granted to temporary vicars-general in the absence of the bishop, not of the powers of modern vicars-general, whose patents are for life, and who are only to be assistant to the bishop; and this appears from what he says in page 24 of his Introduction; his words are these, [170] "The power of institution was heretofore usually inserted in the commissions of chancellors, but of late days has been as usually reserved to the bishops, either by the silence of the commission as to that head, which is fully sufficient, or in majorem cautelam by an express reservation." But, further, I was of opinion that the power of granting licences could not now be legally given to a chancellor, for the Statute of Uniformity, 13 & 14 Car. 2, cap. 4, sect. 19, says that lecturers shall be licensed by the archbishop of the province or bishop of the diocese (or in case the see be void) by the guardian of the spiritualities, under his seal, and shall, in the presence of the same archbishop or bishop, or guardian of the spiritualities, read the 39 Articles, &c. Now, when an act of parliament has appointed certain persons to do a certain act, no other person can do it, and this was agreeable to the desire of the bishops long before, as appears from Archbishop Abbot's injunctions, and 11 Can. 1640. I was, therefore, clearly of opinion that the Chancellor of London had not power to grant licenses to lecturers, and in the two instances of Horton and Carter, they issued out of the chancellor's office, pursuant to the bishop's fiats, in which the chancellor was as much ministerial as the seal-keeper who set the seal to them.

Secondly, I thought he had rightly declared that a licence was improperly prayed in this cause, for this was a suit to punish Smith for offences he had committed, which the prosecutor had a right to go on with, though a licence should have been granted to Smith to preach for the future. I therefore thought the chancellor had done right on the 30th May.

The next question was, whether the articles [171] were proved. They charge that Smith preached at St. John's, and performed other divine service there, in the months of January, February, and March, 1754, and also charge any other times as shall appear from the proofs in the cause; and they pray that he may be monished not to preach and perform the office of lecturer, or do any other duties in the parish church of St. John, Wapping, or elsewhere within the diocese of London, till such time as he has obtained a licence according to law from the bishop of the diocese; four witnesses prove he many times had preached and performed divine service at St. John's church, and one witness proved particularly that he preached there on the 24th March, 1754, which I thought was a sufficient proof of the facts within the general and special times laid in the articles.

The remaining question was whether what Smith had done was an offence by law, and whether the monition had gone too far in forbidding him to perform divine service elsewhere in the diocese of London. I was clear that it was an offence; the bishop has the general superintendency of the clergy of his whole diocese, and no one could perform his clerical function there without his permission. The quotations from Lindwood and Othon do not come up to the point; Lindwood only says that incumbents may have stipendiary curates to assist them, whose salaries shall be settled by a competent judge; and Othon says a person who has the cure of souls may have an adjutor mercenarius, who may assist him temporaliter in the celebration of mass, &c. at his own pleasure, without licence of the bishop, but neither of them say an incumbent may be assisted by a clerk wholly unauthorised; on the contrary, [172] the Canons of 1603, which relate to stranger preachers, shew that no one can preach without a licence from some bishop; and the 36th and 37th of those canons shew that a clerk cannot perform any divine service without permission of the bishop of the diocese; these canons prove not only that Smith has acted contrary to law, but also that the monition does not go too far, for he does not appear to have ever had any licence to preach or perform divine service from any bishop whatever, or from either university, and he does not even appear to be a graduate, and his orders of deacon and priest only put him in a capacity to be authorized, but do not of themselves authorize him; and therefore upon the whole I affirmed the Chancellor of London's decrees of the 30th May and 6th December, 1754, and remitted the cause with 9l. costs.

TAYLOR against TAYLOR. Arches Court, Trinity Term, June 9th, 1755.—A wife is not entitled to a divorce by reason of the cruelty of her husband, unless she is a person of good temper, and has always behaved well and dutifully towards him.

(Appeal from Exeter.)

Jane Taylor sued her husband Thomas Taylor in the Consistory of Exeter for a divorce for cruelty; it appeared in evidence that he was a man of very good temper, and that she was of a very bad one, and had forced her first husband to part from her; that she and Thomas Taylor often quarrelled and fought, and she often struck and abused him, and that he upon those occasions had often struck her, particularly he gave her a kick on the shin, for which she was attended by a surgeon, who proved the fact, and that she was in danger [173] of a mortification, but he said it was owing to her bad habit of body; it further appeared that he had for some months confined her to the house, but she had first escaped from him four times, and several of the witnesses swore they had often advised her to behave better to her husband, and said he was a good-natured man, and she might live very well with him if she would; upon this evidence the Chancellor of Exeter dismissed the husband from the suit, and she appealed to the Arches.

Judgment—Sir George Lee. I was of opinion a wife was not entitled to a divorce (a) for cruelty, unless it appeared she was a person of good temper, and had always behaved well and dutifully to her husband, which the appellant had not done. I therefore affirmed the sentence, and remitted the cause.

GIBSON against CHILD. Arches Court, Trinity Term, June 16th, 1755.—A legacy pronounced for.

John Bloss, Esq., died in May, 1754; gave instructions for making his will, which were wrote by Joseph Newton; among other legacies, he bequeathed in these words, "To my cousin Ann, wife of Mr. Gibson, cousin Mary, and cousin Alice Edgar, one thousand pounds each;" in the margin were these figures, 3000l.; in the line at the end of the word "each," were these figures in a parenthesis (1200); he appointed no executor or resi-[174]-duary legatee; administration with these instructions annexed was granted to Agatha Child, one entitled to a share in the distribution of the residue; Mrs. Gibson brought a cause of legacy against her for 1200l., gave in a libel, examined one witness, and had Mrs. Child's answers.

The witness, Joseph Newton, swore deceased gave him instructions for making his will, and at first directed him to set down a legacy of a thousand pounds each to Mrs. Gibson, Mary and Alice Edgar, but on reading the instructions over, deceased said he would give them 1200l. each, and deceased with his own hand wrote the figures (1200) at the end of the word "each;" Mrs. Child in her answers swore she believed the figures (1200) were wrote with deceased's own hand, and that he intended to give Mrs. Gibson, and Mary and Alice Edgar 1200l. a-piece, but as several others were entitled to share with her in the distribution of the residue, she thought she could not safely pay Mrs. Gibson a legacy of 1200l. without the authority of the Court.

Judgment—Sir George Lee. Upon this evidence I pronounced a legacy of 1200l. to be due to Mrs. Gibson by the will of Mr. Bloss, and gave sentence accordingly.

[175] **MORRIS against DARLING.** Prerogative Court, Trinity Term, June 18th, 1755.—The Prerogative Court has no jurisdiction to enforce the payment of a debt.

Benjamin Thomas, mariner, made his will the 10th January, 1746, and appointed John Boden his executor; he proved the will, made his own will and died, and appointed John Darling executor, who took probate; Ann Morris, sister of Benjamin Thomas, pretending that deceased was indebted to her the sum of 26l. 16s. 6d., demanded it of Darling, which he accordingly paid to Lewis Davis, her attorney, for her use, for which he gave Darling a receipt, with promise therein to indemnify him from all costs, &c.; after this, Ann Morris cited Darling to bring in the will of said Thomas, and prove it by witnesses, &c., or shew cause why probate should not be granted to her of another will; Darling appeared and brought in his will. 1st Session, Hilary Term, 1755, Fanshaw, proctor for Darling, alleged the payment of the afore-

(a) See *Waring v. Waring*, 2 Phill. 132.

said debt to Lewis Davis, for the use of said Morris, and exhibited Davis's receipt proved by affidavit, and prayed that Morris might be obliged to bring and leave in the registry said sum of 26l. 16s. 6d. (as is done in cases of legacies received) before she should be allowed to proceed in the cause.

[176] *Judgment*—*Sir George Lee*. But I was of opinion this was very different from the case of a legacy received, which took its only foundation from the will, which the party who received the legacy would afterwards oppose; this money was paid as a debt by Darling, as representative de facto of deceased, and it being for a debt, this Court had no sort of jurisdiction over this money, and therefore I rejected Fanshaw's petition, and condemned his client in 13s. 4d. costs.

RODD *against* LEWIS. Arches Court, By-Day after Trinity Term, June 23rd, 1755.

—The sanity of a testatrix established, although a commission de lunatico inquirendo had held her to be incapable, from a period antecedent to the execution of the will: where a testator is in his senses, the will is read over to and approved by her, instructions are not necessary: custody disproved.

Dr. Day for Lewis. Jane Stedman, widow, deceased, made her will 2d December, 1746, appointed Humphrey Matthews and Penelope Lewis executors. Mary Rodd, spinster, niece by a sister to deceased, opposed the will in the Consistory Court of Hereford. Humphrey Matthews, who had only a legacy of 5l. for his trouble, renounced. Lewis propounded the will. She was the wife of William Lewis, now deceased, who was the testatrix's nephew; deceased gave no specific legacy to Penelope Lewis, but by her will directs that what she shall get by the executorship shall be for her separate use, exclusive of her husband. Deceased died in March, 1746. Lewis took probate in common form. Rodd called the executors to [177] prove the will by witnesses. Matthews then appeared and renounced. Deceased lodged at Lewis's house twenty years before her death. On the 2d December, 1746, Mrs. Matthews, wife of Humphrey, came to deceased to see her, deceased in bed; Matthews then asked Lewis if deceased had altered her will or made a new one; deceased asked what they were talking of, being told, she said she had not, but she would as soon as Mr. Lewis. Penelope's son, came back from Gloucester; that he had made a former will for her. Lewis, the father, was then sent for; deceased gave him instructions, but he is dead, so the instructions are not proved, but the will was twice read over to, and approved by, deceased, in the presence of the three subscribing witnesses; deceased eighty years old, and had a palsy; deceased desired somebody to assist her in signing her will; Mrs. Abrahall did assist her. She would not make a mark but would write her name, and then she sealed and published it; it was executed about nine at night. Rodd has pleaded incapacity for two years before deceased's death, particularly on Christmas day, 1744, and has pleaded a custody. Admit Lewis would not allow Mrs. Rodd to attend deceased, but the reason was because she plied her with strong liquors, which intoxicated her and hurt her health. Rodd was restrained from seeing deceased from 29th of October, 1746, to deceased's death. In February, 1746, a commission de lunatico inquirendo issued out of Chancery against the deceased the jury found her unanimously a lunatic, without lucid intervals sufficient for the government of herself and estates, and that she had been so from 26th March, 1745; deceased, nor any of her friends, had no notice of the commission till the morning it was to be exe-[178]-cuted. The commission taken out by Davis, Rodd's brother-in-law. All the commissioners strangers to deceased. We have examined deceased's physician, who swears to a recognition of this will on 18th February, 1746, and to full capacity after the execution of the commission, and he is supported by the Rev. Mr. Lewis. They have objected to our witnesses, but have proved nothing against Abrahall; and as to Fisher, the other witness objected to, they have only proved that she swore upon her examination before the commissioners, what upon an interrogatory in this cause she says she did not remember she had sworn, which will not affect her testimony. On 5th September, 1754, the Chancellor of Hereford gave sentence for the will of 2d December, 1746.

Dr. Pinfold for Rodd. Rodd was niece and next of kin to deceased. The grand question is capacity. Deceased had great affection for Rodd. She was executrix and residuary legatee in former wills of deceased; Lewis was likewise benefited in those wills; strong custody from 29th October, 1746, to deceased's death; no dispute or difference happened between deceased and Rodd; Lewis, without deceased's orders,

turned Rodd out, and would not suffer her to come to deceased, though she frequently sent messages to have leave to wait on deceased. On 4th December, 1746, Lewis wrote a letter, in which she said, "I have made them surrender my poor aunt to me." Will made by executrix's husband; no instructions; no previous declarations. Will wrote in the kitchen; deceased above stairs in bed. Will wholly for the benefit of the Lewis family; Rodd not named in it; made when deceased was very ill; two of the [179] witnesses servants to Lewis; as to capacity, deceased often did not know her niece, she fancied the parson of the parish was in love with her. He thought her mad, and therefore refused to give her the sacrament at Christmas 1744; commission of lunacy executed on 6th and 7th February, 1746; deceased brought before the commissioners, and examined by them; they found she could not give answers to common questions; told them she had made no will lately, but had made one about five years before; jury unanimously returned that she was and had been insane, and incapable of managing her affairs from March, 1745.

Witnesses for Lewis.

1. James Matthews. One day in the beginning of December, 1746, deponent went to producent's house at Ross, about nine or ten in the morning, to visit deceased, and went into her chamber, and there asked producent, if deceased had made her will, or altered her old one, as she designed to do; producent answered that she had not; deceased asked producent what deponent said; producent telling her, deceased said she had not made a new will, but would, as soon as producent's son came from Gloucester; deponent told her she believed producent's husband could do it as well; deceased said she thought not, for he had not been able to write for some time; producent said she would send and ask him; deceased desired she would do so; deceased then seemed to be of sound mind.

3. Int. Deceased for many years had a paralytic disorder, but believes it did not impair her capacity. 4. Int. Deponent never heard why Dr. Morgan refused her the sacrament.

[180] 1. Int. 3tio loco. Ministrant used to be a favourite of deceased's.

2. Betty Abrahall. The 2nd December, 1746, deponent was desired to go to Lewis's house to be a witness to deceased's will, deponent went about nine at night, Mr. Lewis produced a will, and read it over to deceased in presence of deponent and the other subscribing witnesses; producent asked deceased if it was to her mind? deceased said, "I think so;" producent replied, that is no will at all, but if it was not to her satisfaction, desired her to speak, that it might be made to her liking; then the said will was read a second time, and deceased said she did not know how to have it altered more to her satisfaction, and then the said will was laid before her, and a pen was put in her hand; she attempted to write, but was not able of herself; deponent told her she thought her mark would be sufficient, but the deceased said she would write her name at full length, and deceased desired somebody to assist her in writing her name; deponent then held her hand; deceased named each letter of her name, and deponent guided her hand to write each letter as she named it; and then deceased sealed and delivered it to Penelope Lewis as her will, in presence of the witnesses subscribed; deponent and the rest of the witnesses attested it in presence of the deceased and each other; deceased appeared to be of sound mind; deceased had her hat on, because the candle was troublesome to her eyes.

6. Int. The will was executed about nine at night. 7. Int. Respondent was formerly servant to deceased, and has been entertained by her since the will was made. 8. Int. Has often heard deceased speak well of Rodd; has heard producent [181] say Rodd was executrix of a former will. 9. Int. Producent, in October, 1746, shut Rodd out of her house, and would not suffer her to see deceased afterwards. 10. Int. Respondent did not, on her examination before the commissioners, declare that deceased was better on 6th February, 1746, than she had been for a year before.

3. Eleanor Fisher. Deponent is servant to producent; proves what passed at the execution of the will exactly the same as Abrahall; says deceased desired the persons present to be witnesses to her executing it; deceased of sound mind.

9. Int. Gives account of producent shutting Rodd out of her house. Deponent looked on deceased as capable to direct her affairs. 10. Int. Deponent did not, as she remembers, swear as interrogate at the commission of lunacy, viz. that deceased was better that day, on 6th February, 1746, than she had been for a year before.

4. Sarah Smith. Proves will was read to deceased in presence of all the witnesses ; gives exactly the same account as the two last witnesses of what passed at the execution of the will ; deceased of sound mind, &c.

1. Int. Deponent never thought deceased incapable of directing her affairs ; her memory sometimes failed her for a little while, but she soon recollected herself.
8. Int. Rodd used to attend deceased.

Will read.

Witnesses for Rodd.

1. Walter Webb. Within two months before deceased's death, deponent went to Lewis's house with a message from Mrs. Rodd to know whether [182] she would be permitted to see deceased, but nobody would come to the door to speak to deponent ; has heard deceased say she regarded Rodd as her child. 7. Int. Deceased lived twenty years with Lewis, and her husband was deceased's nephew.

2. Elizabeth Price. Deceased was, for the most part, incapable of managing her affairs. She did not sometimes know deponent, or Mrs. Rodd ; did the offices of nature without knowing it, and did not know when she was in bed ; Lewis refused to let Rodd come to deceased ; has heard Rodd was executrix of former wills.

4. Int. Deceased was light-headed when she did the offices of nature under her, but afterwards she grew better in her health.

3. Thomas Hardwick, parish clerk of Ross. About half or three quarters of a year before deceased died, deponent conversed with her in the church-yard, and she then seemed disordered in her senses ; Dr. Morgan sent deponent to tell her he could not give her the sacrament, because she was disordered in her senses, and he did refuse her in the church ; Rodd used to attend deceased.

5. Int. Deponent knows there was a correspondence between deceased and Dr. Morgan by letters and messages, for six or seven years, in which she claimed a promise of marriage from him ; deceased owned to deponent she had wrote love letters to Morgan. 7. Int. Deceased lodged at Lewis's for above twenty years.

2. Int. 2do loco. Since Christmas, 1744, Dr. Morgan's curate, by his permission, administered the sacrament at Ross church to deceased.

3. Int. Deponent went from deceased to Dr. Morgan to desire him to permit her to receive the [183] sacrament at Easter, 1745, but he refused, saying she was a crazy wicked woman, but at that time she appeared to deponent to be sensible, and as fit as anybody to receive it. 4. Int. Dr. Morgan refused to administer the sacrament, to her at Christmas, 1744 ; she retired to a pew in the church.

4. Mary Ross. Deposes to Morgan's refusing to give deceased the sacrament, and his telling her she was disordered in her senses by the letters she sent him ; says she received a letter from Penelope Lewis on 4th December, 1746, in which were these words : "I have made them surrender the custody of my poor aunt to me."

4. Int. 4to loco. Deponent once visited deceased after the 2d December, 1746 ; ministrant was very careful of deceased ; she then talked very rationally before she drank a dram, but not after.

5. Mary Webb. Sometimes deceased talked sensibly, and sometimes not ; and sometimes did not know persons, and would order her bed to be warmed when she was in it ; believes she had then a fever upon her.

6. John Puckmore. Deponent was never acquainted with deceased ; deponent was a juror on the commission of lunacy, and was present on her examination, and thought her out of her senses ; she said her husband had been dead fourteen years, whereas he had been dead thirty years ; gives several other instances of her want of memory.

3. Int. Believes she had some lucid intervals, but not long.

7. James Clark. Deponent only knew deceased by sight ; deponent was a juror on the commission ; deposes to her examination to the same purpose as the last witness, and says she told them [184] she had made no will lately, but she made one about five years ago ; believes she was not in her senses.

2. Int. She appeared to be sober. 3. Int. She did not give one rational answer.

8. John Clark. Deponent was a juror on the commission ; believes deceased was out of her senses.

2. Int. Respondent desired deceased to take time to answer questions ; repeats the questions put to her, and her answers, as the other witnesses did ; deceased was then sober. 3. Int. Does not believe she was altogether insensible.

2. Int. Tertio loco. Believes no notice was given to deceased of the commission or to any person on her behalf, till 6th February, 1746, the day it was executed.

Witnesses for Lewis.

1. Jane Matthews. Lewis was greatly benefited by former wills of deceased ; deponent has often conversed with deceased within two years of her death ; she was at those times in her senses, and particularly in the morning of the day the will was made ; after October, 1746, deponent heard deceased say Mrs. Rodd had used her ill, and she would alter her will ; believes deceased had a very good character.

2. Int. The will to which deponent was a witness was drawn by Mr. Thomas Lewis.

2. Francis Gregory, On 18th Feb., 1746, deponent attended deceased as a physician ; deponent asked her many questions, and she answered very rationally ; believes she was then capable of making a will, and has no reason to suspect the contrary ; deponent then asked deceased if she had made [185] her will ; she replied, she had made her will ; deponent said "I hope it is to your satisfaction ;" she answered it was.

8. Int. Deceased, of her own accord, expressed satisfaction in the usage she had met with from producent. 11. Int. Deceased, without direction of any person, told deponent she had made her will, and that it was to her satisfaction.

3. John Lewis, clerk. Deponent lived in the same house with deceased till October, 1745, and was again at producent's house, who is deponent's mother ; for six days in September, 1746, deponent always found deceased in her senses, and thought her so in February, 1746 ; deponent was present at the conversation between deceased and Dr. Gregory on the 18th February, 1746, and confirms said Gregory's account thereof.

4. Eleanor Fisher. Deponent knew deceased a year and quarter before her death ; she had her senses, except when intoxicated with liquor ; Rodd used to persuade deceased to drink spirituous liquors, and she was often fuddled thereby ; Lewis entreated Rodd not to give deceased any more strong liquors, but she continued to give them to deceased privately, and deceased drank as much as before ; deceased had a violent fever, Mrs. Lewis took great care of her ; Rodd took away the keys of deceased's drawers, and deceased, upon looking over her things, said Rodd had robbed her of her money, plate, clothes, &c.

4. Int. Deceased had a palsy in her head, sometimes did the offices of nature under her from weakness, but was sensible of it ; producent has sent deponent for cinnamon water for deceased. 6. Int. When Rodd went away in October producent bolted the door after her. 5. Int. Deponent has heard of a will prior to the present, in which [186] Rodd was executrix ; believes deceased was not prevailed on by threats or otherwise to execute the will pleaded.

5. Mary Newton. Deponent was servant to producent ; deceased used in general to talk sensibly, but sometimes talked otherwise ; says Rodd often sent her for aniseed water, and used to give it to deceased, which deponent believes made deceased talk irrationally.

3. Int. Deponent was a witness at the commission, and believes she might then declare that for half-a-year before, deceased was sometimes incapable and sometimes capable of managing her affairs, but believes she did not declare she was incapable on the day the commission was executed.

6. Betty Abrahall. Deceased was impaired in her understanding by age and sickness, but continued to be of sound mind.

8. Int. After the execution of the commission deceased charged Rodd with ingratitude, and said, "If I had not made my will already I would do it yet, and if it was not secured to the Lewis's it was their own fault," and that she would execute any other writing to secure it to them. 11. Int. At said time she appeared to be of sound and disposing mind.

7. Elizabeth Meredith Hill. Deponent knew deceased two years before her death, and she was all that time sensible, but weak, in body ; deponent saw her once before and once after the will was executed.

4. Int. Deceased formerly intended to benefit Rodd, and made her executor and residuary legatee.

8. Mary Hill. Deponent often conversed with deceased for two years before her death, and she was at all those times very sensible ; after Octo-[187]-ber, 1746, deceased

said Mary Rodd had used her very ill, and was a Judas to her; she spoke much in praise of Lewis, and said she would provide for her; believes deceased was sensible to her death.

3. Int. Respondent was never refused access to deceased. 4. Int. Believes deceased formerly intended to leave a share of her effects to Rodd.

Witnesses for Rodd on her exceptive allegation.

1. George Davis. Betty Abrahall and Eleanor Fisher were witnesses examined on the commission against the lunacy, and Abrahall then swore she guided deceased's hand to sign the will; Fisher swore deceased was better in her senses on the day the commission was executed than she had been for a year before; deponent was a commissioner; deceased appeared to be incapable.

3. Int. 5to loco. The commission was taken out by deponent's brother, Philip Davis, who married Rodd's sister; believes deceased made a will in 1745, and was then of sound mind; deponent was a witness to it. 7. Int. Deponent took minutes of what passed at the execution of the commission.

2. Charles Jones. Deposits the same as to Fisher's deposition on the commission as the last witness.

1. Int. Deponent only knew deceased by sight. 1. Int. 3tio loco. Deponent has heard producunt was concerned in getting the commission; the jurors unanimously signed the verdict.

3. Walter Curl. Deceased appeared insensible when she was examined on the commission.

Dr. Hay's argument for Lewis. The single question is, whether deceased had capacity to make a will on 2d December, 1746; she declared her intention to alter her will to Matthews; [188] supposing custody, it was a misbehaviour but will not affect the will. Deceased talked insensibly when she had a fever, and when she was fuddled, but not at other times. The inquisition is not conclusive evidence; upon doubtful evidence the jurors always make a return for a commission. It does not appear that the jury had any evidence to find deceased incapable from March, 1745.

Dr. Smalbroke, same side. The commission was secretly obtained.

Dr. Pinfold contra, for Rodd. I shall consider circumstances preceding and subsequent to the will; preceding—long affection to Rodd; no instance of her having disobliged deceased before the time that Lewis turned Rodd out of her house. The prior wills were in favour of Rodd: total exclusion of her in this carries the strongest suspicion of indirect practices. It does not appear that William Lewis saw deceased, to take instructions from her for the will; deceased can't be supposed to have understood the general clause, giving Mrs. Lewis to her separate use what should accrue from her executorship. A verdict of a jury on a commission has great weight, *Spike* against *Pitt*, Deleg. The recognition on the 18th February is strong, but Gregory seems to have been sent to deceased only to talk with her about her will.

Dr. Bettsworth, same side. If the court can give entire credit to the subscribing witnesses, there is a full proof of capacity. Deceased did not give Lewis orders to turn Rodd out of doors, or to prevent her coming to deceased. Lewis imposed on deceased as to Rodd's having used her ill.

[189] *Judgment—Sir George Lee.* I was of opinion deceased's capacity at the time of making the will was sufficiently established by Matthews, who deposes to deceased's intention of altering her will, and to her full capacity in the morning of the 2d December, and by all the subscribing witnesses, who give very minute accounts of what deceased said and did at the execution of the will; all of which shew capacity, and no material objection has been proved against any of those witnesses; they are supported by other witnesses as to her general capacity, and the recognitions after the commission put the matter out of doubt. Where a testator is in his senses, and the will is read over to and approved by him, instructions are not necessary; and I could not think this a custody, because nobody was restrained from coming to deceased but Mrs. Rodd. There was nothing to encumber this evidence but the verdict, which I could not think strong enough to set aside the positive evidence of sanity at the time of making the will. I therefore affirmed the sentence, and remitted the cause, but did not give costs.

RILER, ALIAS RYLER against COSEN. Arches Court, By-Day after Trinity Term, June 25th, 1755.—A lessee barred from recovering tithes, because his lease had been rendered void by the non-residence of the incumbent.

Appeal from Norwich.

John Cosen, as occupier and lessee of the tithes of Cherry Marham, in the county of Norfolk, cited Richard Riler, a parishioner there, in a cause of subtraction of tithes. Cosen gave in a libel, and pleaded that he was entitled to the tithes [190] in demand, by virtue of a lease from the Rev. Mr. Chappelow, vicar of the parish of Cherry Marham, and exhibited the lease and covenant, which Riler confessed, and then gave in an allegation pleading that Chappelow had not been resident or performed the duty of the cure of the parish of Cherry Marham, but had been absent above eighty days in every year libellate, and that therefore the lease and covenant by the statutes of 13 Eliz. c. 20, 14 Eliz. c. 11, and 18 Eliz. c. 11, were null and void, the court below rejected this allegation and Ryler appealed.

I was of opinion the allegation ought to have been admitted, and pronounced for the appeal. The proctor for Ryler repeated the allegation and examined two witnesses, to prove that Chappelow had been non-resident contrary to the statutes, in every year libellate, and Cosen did not offer any plea to shew that Chappelow had any legal excuse within those statutes for non-residence.

Witnesses for Ryler.

1. Rev. Mr. Cosen. Deponent is curate to Chappelow, at Cherry Marham; Chappelow has not for ten years past been resident there, and has done no duty except preaching twice or thrice in a year, but has absented himself for above eighty days in every year for ten years past, and lives at Dis.

2. Robert Good. From 1746 to 1752 Chappelow has not been resident at Marham, but has absented himself above eighty days in every year.

Dr. Pinfold for Ryler. (The cause standing to be heard) insisted that this absence of the lessor was a preliminary point which barred the suit, and ought to be first determined.

[191] *Judgment*—*Sir George Lee*. I was of that opinion, and having heard the two depositions above stated read, and him for Ryler, and Dr. Simpson for Cosen, I was of opinion that the lease to Cosen was void, pursuant to statute 13 Eliz. c. 20, by the non-residence of the lessor, and consequently that Cosen (who had no title but under the lease) had no right to bring this suit, and dismissed Ryler with 30l. costs.

ROWLAND against JONES. Arches Court, By-Day after Trinity Term, June 25th, 1755.—A clergyman suspended for drunkenness.

Appeal from St. David's.

Dr. Simpson for Thomas Jones. 28th August, 1753, Jones promoted articles at St. David's against the Rev. Mr. Rowland, curate or vicar of Landovv, for neglect of duty and immoralities. He gave a negative issue. The promoter examined several witnesses, but Rowland did not plead. On 23d October, 1754, the Judge, by interlocutory, decreed him to be suspended for twelve months. Constant drunkenness fully proved.

Dr. Harris for Rowland. The prosecution is founded on the 76th canon; (a) Rowland has not [192] pleaded, but relies on his cross-examination; the drunkenness the witnesses depose to in the desk at church, was three years before the prosecution; Mr. Herbert Lloyd is the principal promoter, and he is a witness in the cause. The

(a) Probably a clerical mistake for the 75th canon, which is as follows:—"No ecclesiastical person shall at any time other than for their honest necessities, resort to any taverns or alehouses; neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful games; but at all times convenient they shall hear or read somewhat of the holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God; having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures, to be inflicted with severity, according to the qualities of their offences."

sentence of suspension is irregular; ten witnesses were examined by the promoter, who proved Rowland was drunk on several days particularly mentioned, and also that he lived in a constant habitual state of drunkenness. Dr. Harris for Rowland said he should chiefly insist on the errors in the proceedings; in the citation, Rowland is only styled clerk, in the articles vicar, by the witnesses curate, and in the interlocutory he is suspended by the name of the respondent, and the interlocutory suspends him generally without saying whether *ab officio* or *à beneficio*, or from both.

Judgment—*Sir George Lee*. I was of opinion that the general term "suspension, without any additional words, always meant suspension *ab officio* only; as to the description of Mr. Rowland, I did not think it material in this case, he having joined issue, and the identity of the person being certain, and as the charge of drunkenness in the articles was very fully proved, I affirmed the decree of the judge below, and remitted the cause, with 15*l.* costs.

[193] BRADDYLL, FORMERLY JEHEN *against* JEHEN. Prerogative Court, By-Day after Trinity Term, June 25th, 1755.—Marriage and the birth of a child are a presumptive revocation of a will.—In order to revive a will made before marriage and the birth of issue, there must be a republication, or some express declaration which will amount to a republication.

Dr. Simpson for Mr. Young Jehen. John Jehen deceased died the 28th August, 1751, made his will, dated the 18th October, 1749; afterwards on the 24th February, 1749-50, married Grace Hanson; in October, 1750, she was delivered of a dead child, but after deceased's death on the 2nd January, 1751-2, she was delivered of a daughter; deceased left at his death, besides his wife and this posthumous child, a mother and Mr. Young Jehen, his brother, and a sister married to Mr. Baker; the posthumous child died in April, 1752. This suit commenced in June, 1752. Pending this suit, viz. in 1753, Mrs. Jehen, the deceased's widow, married Mr. Braddyll; Young Jehen was appointed executor of the will, she cited him to prove it by witnesses, &c.; he appeared and propounded it; she pleaded that it was revoked by the testator's subsequent marriage and birth of a child, and also pleaded affection to her, and declarations, &c. that the deceased did not intend the will should subsist. On the contrary, Jehen pleaded deceased's intention that it should stand as his will, and recognitions of it, the deceased had a real estate of 42*l.* a year, and a reversionary estate of 50*l.* a year after his mother's death, and a personal estate of near 3000*l.*; this will wholly relates to personal estate; the real estate is in gavelkind, by which tenure the widow is entitled during her [194] widowhood to a moiety of deceased's whole real estate; the deceased was about 18 years old when he made the will; he gives thereby a third part to trustees for his mother for life, and then to his brother Young Jehen, another third to him, and the remaining third to trustees for the separate use of his sister Baker; there is full proof of the factum and execution of the will, and that deceased made it voluntarily; deceased recognized it in 1749, had great affection for his relations, his affection to his wife is doubtful; deceased knew his wife was with child; she and her family knew he had a will, and had it by him; deceased's father and grandfather did not leave their estates at the disposal of their wives, he approved of their conduct, and said he would not leave his estate to his wife, which declaration he made the winter after his marriage; she expressing dissatisfaction thereat, he told her she would have half his real estate; the last year of his life he often said he should not live long; he declared to his mother it was imprudent not to have a will by her; he was in a bad state of health, and in expectation of death; even William Hanson their principal witness owns he was in an indifferent state of health, but on his second examination he retracts. Exceptions to Hanson and Martha Stopford, from their swearing he was in good health, when by letters it appears they knew the contrary; by agreement between Grace and Young Jehen she has 21*l.* a year out of deceased's gavelkind estate. Hanson and Stopford depose that deceased said a short time before his death that he would leave all to his wife; Stopford has sworn she never declared she heard deceased say that he had a will, the contrary is proved against her; deceased had frequent opportunities of [195] making a new will; recognition in November, 1750; in presence of his mother and wife, he declared he had made his will, and secured his sister's share from her husband; in March or April, 1751, declared the same again, and said "Hanson has my will;" the witnesses say they believe he intended this will should stand, notwithstanding his marriage and his wife being with child; marriage

and birth of children, without other circumstances, is not a revocation ; if it has been revoked, it is revived again by recognition.

Dr. Hay for Braddyll. The widow prays administration to the deceased as dying intestate ; this is opposed by the brother who has propounded a will dated 18th October, 1749, in which he is executor. I agree the dates are rightly stated. That the deceased had great affection for his wife appears from his letters to her ; the will was not in deceased's custody after execution, it was kept by Hanson. The first question is, whether a marriage and birth of a child subsequent to a will, is not by law a revocation ? Declarations only support the presumption of law. A widow by tenure in gavelkind loses her share if she marries. She has therefore now no sort of provision, for that is lost by her second marriage.

Admitted the will was duly executed, and Brown, a witness to it, says it was left in deceased's hands at the time of execution.

Witnesses for Braddyll.

1. William Hanson, drysalter. Deponent is brother to producent ; knew deceased three or four years before his death ; Grace married deceased 24th February 1749-50 ; she was delivered about eight or nine months after of a dead child ; [196] deceased died in August, 1751 ; in January, 1752, producent was delivered of a daughter named Elizabeth.

12. Int. About a month, or six weeks, or two months before deceased died, he told deponent that some time before his marriage he had made his will at the request of his mother and brother, but that as he was now married and his wife with child, he was determined to make a new will, and he would leave all he could to his said wife and child, and desired respondent to go with him to Mr. Nuttall, respondent's attorney ; respondent said he would go with him at any time ; deceased said as he was under age, and had some freehold and some leasehold estates, and some money on mortgage, and in the stocks, and as he was not in possession, he could not tell what he had to leave, but that when he went to Canterbury he would bring up his old will, which he said was in the hands of one Mr. Hanson, an attorney there, and that would serve him to make a new will by, but deceased never afterwards went to Canterbury ; he never said any thing else to respondent concerning his will, except that about half or three quarters of a year before, he said to respondent that his relations were all provided for, and he would leave his wife all he had, and believes he was at Canterbury after said last declarations once or twice, and staid a fortnight at a time, and that producent was with him the last time ; believes deceased had his health better at Canterbury than in Southwark ; does not believe he was in a declining state of health at that time. 13. Int. Deceased had a freehold estate of 43l. a year ; he had 100l. fortune with his wife.

2. Martha Stopford. Deponent knew deceased [197] about five years ; producent and deceased married in February, 1749-50 ; she had a dead child ; producent far gone with child at deceased's death, and she was afterwards delivered of a daughter.

11. Int. Deponent was told deceased had a will, but does not know by whom ; deponent heard deceased say within six weeks before his death, that he would make his will and give all he had to his wife ; deponent did not at any time before or after deceased's death acknowledge in the presence of any one, that she had heard deceased say he had made a will.

Elizabeth and William Bridges examined by Braddyll, but read to interrogatories by Jehen's counsel.

3. Elizabeth Bridges. 3 and 4. Int. Believes deceased to his death well knew and remembered he had made the will pleaded, and that he considered it as his will, and he twice declared to respondent that he had made his will ; the first time was in November after his marriage, when he said to respondent, who was his mother, "I wonder you won't make your will and settle your affairs, for if you should die Baker will have my sister Sally's share ; for my part I have made mine, and taken care Baker shall have nothing of mine ;" the other time was about Christmas following, when his wife was present, and he then said to respondent, "I wonder you won't make your will, you won't die the sooner if you make it ; if you don't make one, Baker will have Sally's share ; I have made mine, and taken care he shall have nothing of mine."

5. Int. At said times deceased advised her to leave to his sister as he had done, separate from [198] her husband, respondent thereby understood that he intended his will should operate ; the posthumous child died in April, 1752. 6. Int. Believes

deceased well knew his wife was with child before her miscarriage, and that she was with child at his death, and when he was at Canterbury the last time, he got green fruit for her, which she was fond of. 7. Int. The end of July or beginning of August, 1751, he said at Mr. Hanson's house, in deponent's presence, to his wife, "You have not spoke to my mother;" respondent asking about what, he said, "She knows;" respondent soon after went down stairs, and Grace and Miss Stopford came also down; respondent asked Grace what her husband wanted her to speak to deponent about; she said, to ask her advice, whether she should be blooded, and Grace then told respondent she had been quick with child about a fortnight. 8. Int. Deceased was seldom well after his marriage, he went to Canterbury twice for his health; the first time he went at Christmas and staid five weeks, and the last time he went with his wife in May, 1751, and staid eight weeks, and was very ill. 10. Int. Deceased has, in presence of his wife, said that women were not fit to be trusted with money to give to another husband, and said he would not leave what he had, at the disposal of his wife or any woman in the world; he had 100l. with his wife.

4. William Bridges. Int. 3 and 4. In November, 1750, deceased declared he had made his will and secured his sister's share; believes he intended his will should subsist; to the other interrogatories deposes the same as the last witness.

9. Int. Deceased, in June, 1751, offered Baker a wager that his, deceased's wife would be brought [199] to bed before Baker's. 10. Int. The Christmas after his marriage deceased declared no woman should have the disposal of his estate.

5. James Clark. Deceased made his addresses to his wife three or four months before his marriage.

Witnesses for Braddyll on another allegation.

1. William Hanson. Deceased and producent were very fond of each other, and continued so to his death; she, during her widowhood, had only 21l. a year out of deceased's gavelkind estate; deponent is a subscribing witness to a deed between producent and young Jehen about said estate; deceased's personal estate was about 2300l.

2. Martha Stopford. Proves affection between deceased and producent, which continued most strongly to his death; and about two hours before he died, he desired the deponent to send the producent to him to bed.

3. John Stokes, gent. In 1748 deponent came to know deceased; he shewed great love for producent, and particularly in his last illness.

4. George Crawford, gent. Deponent is attorney for producent; proves deed of assignment of moiety of gavelkind estate by young Jehen to producent; the said moiety is forfeited by her second marriage.

Witnesses for Jehen.

1. William Bridges. Deceased left a mother, who is deponent's wife, a brother and a sister, for whom he had great affection to his death; deceased was in possession of a gavelkind estate of 42l. a year, and a reversion of 50l. a year after his mother's death; believes he intended the will [200] should operate; proves same declaration in November, 1750, as he proved on interrogatories before, viz. that deceased had made his will, &c.; he was in a declining state of health, and went several times to Canterbury for his health; deceased sensible to the last; he knew his wife was with child at his death; witness deposes to same effect as he deposed to the interrogatories; deceased and Grace had sometimes quarrels; does not know the will was ever in deceased's custody.

N.B.—The citation in this cause issued 28th April, 1752.

2. Elizabeth Bridges. Proves the same as the last witness; deceased and Grace acquainted about five years before his death; believes he intended his will should stand; deposes to his declarations, that he had a will, &c.; the same as upon interrogatories; deceased was taken very ill about the 20th April, 1751, and afterwards went to Canterbury for two months; he knew his wife was with child when he died; said his wife should never have the disposal of his estate to wrong his family; deceased and Grace often quarrelled; believes he repented of his marriage.

7. Int. Believes the will was always in Hanson's custody.

3. George Baker. Deponent married deceased's sister; he had the greatest affection for his relations; deceased very ill in April, 1751, and came to Canterbury, was then in a very bad state of health; deponent is sure deceased knew his wife was with child; he used to say a man was in the wrong who left his fortune to his wife's disposal to

buy her another husband; deceased and Grace often quarrelled; believes he made the will freely.

[201] 4. Samuel Furrier. Deceased had affection for his relations; in October, or beginning of November, 1749, deceased said to deponent that he had made his will and settled his affairs.

5. Susan Wyburn. Deponent was grandmother to deceased; he had great affection for his relations; had only 100l. fortune with his wife; deceased knew his wife was with child when he died; deceased was taken ill in April, 1751, and came to Canterbury in May following; deceased sensible to his death; the last time he went to Canterbury he said there that he had done a foolish thing in marrying, and said his family would not suffer by it, and that he would not leave his estate to any wife from his children.

6. John Haywood. Proves value of deceased's estate.

7. William Wyburn. Proves deceased's affection to his relations.

6. Int. Deceased was about eighteen when he made his will; believes he made it freely. 14. Int. Believes deceased was in good health after he returned from Canterbury the last time.

8. Mary Cartwright. Deceased and his wife often quarrelled.

9. James Hanson, gent. Deponent before the will was made received a letter from deceased, with instructions for making his will; deponent drew it, and sent it to him.

7. Int. The will was wrote by Brown, deponent's clerk, and some time after the execution it was sent to deponent sealed up.

Witnesses for Braddyll.

1. William Hanson. Deposes to affection between deceased and producent; deceased returned [202] to London in July, 1751, with his wife, and he then seemed to be in perfect health, and believes he continued so till about the 10th August, 1751, when he went to Norfolk and got cold; deponent did not see him after till the day he died.

6. Int. Does not know, believe, or has heard that deceased had a slight fever at any time, except in April, 1751. 7. Int. Deponent asked Dr. Fothergill what deceased's illness was, and what he died of? he said, "of a mortification." 12. Int. Martha Stopford lives with deponent as housekeeper. 16. Int. Deponent frequently saw deceased in July, 1751, and he seemed to be in good health. 17. Int. Deceased was not for six weeks before his death in a declining state of health. 20. Int. Deceased was very ill in April, 1751. 22. Int. Deceased had a cold, but never heard he had a fever after he returned from Norfolk.

2. William Kindleside, apothecary. Deponent was apothecary to deceased, was sent for on the 26th April, 1751, and attended him till the 3rd May, it was a slight illness which confined him till the 3rd May, when he was quite recovered; believes he then went to Canterbury; deponent never saw him after till the 22nd August, 1751, and then he had a fever, occasioned by a cold and an indisposition in his bowels, and he then told deponent he had been in Norfolk; deponent attended him on the 25th August, he was then much better, but worse on the 26th, and in the evening of the 29th he grew very bad; Dr. Fothergill was sent for, but deceased died about twelve o'clock that night; deponent thinks he died of a mortification in his bowels; on the 22nd August deceased did not appear to be in danger of death; deponent [203] did not think him in danger till the evening of the 27th August.

6. Int. Deponent never heard of deceased being ill but in April and August, 1751; deponent thought it best for deceased to go to Canterbury in May, 1751.

3. Elizabeth Royle. Deceased and Grace seemed very fond of each other.

6. Int. Deponent heard Grace say deceased was weakly, and has heard he had disorders on him twelve months before he died.

4. Martha Stopford. Proves affection to Grace; on the 20th April, 1751, deceased was taken ill of a fever and cold, and in May he went to Canterbury; he returned very well; and the day before he went to Norfolk he walked with his wife and deponent to Greenwich and back again; after he returned from Norfolk he complained he had got a cold in said journey, and a stiffness in his neck; believes he died of a mortification; the apothecary declared he thought him in no danger, and he said the same in the afternoon of the day deceased died; about a fortnight before he went to Norfolk, deponent heard him say to producent, "Do not be uneasy, my dear, for I will leave you all I have."

6. Int. Has heard he had a slow fever in April, 1751. 8, 9, 10. Int. Deponent was at the races at Canterbury, in September, 1752, and talked with Mr. Bridges about this cause, and he said they had offered Grace 700l. to make up the cause; does not remember she then declared that she heard deceased say he had made his will, or any thing to that effect. 11. Int. Never declared to any such effect to Baker. 17. Int. Does not know deceased was ill when he went to Norfolk; he went seem-[204]-ingly quite well. 20. Int. Producent's brother, Henry Hanson, was present when deceased declared he would leave producent all he had.

5. John Stokes. Deceased seemed to be pretty well when he last returned from Canterbury, believes he continued so till he went to Norfolk, and the night before he seemed to be very well; he returned home ill with a cold and a stiff neck; believes the cold turned to a mortification; the day before he died his apothecary said he did not think him in danger.

6. Ralph Royle. Deceased and his wife behaved very affectionately to each other.

Several letters from deceased to his wife, written from the 2nd July, 1750, to the 15th August, 1751, inclusive, were read, which expressed the strongest affection for her.

Witnesses for Jehen.

1. William Bridges. Deceased often talked of his death; believes it arose from his ill state of health; has often heard him say it was imprudent for any man to neglect making his will; deceased commended his father for not leaving his estate at his wife's disposal; Grace was present, and said, "I find then you will leave me nothing;" he replied, "You know you will have half my real estate, die when I will." Grace said to deponent that she had frequently heard deceased say he had made his will, and particularly when the cause was beginning she said, "We all know there was a will, my Jackey told me he had made his will." Martha Stopford, in 1752, at Canterbury, said to deponent, "We all know there was a will, for I have heard Mr. Jehen say several times after his marriage that he had made his [205] will;" deponent said, "If he intended to alter his will in favor of his wife, it was a pity he had not done it;" she replied, "You know he was a close, reserved man, and would say nothing of his affairs, and I never heard him say he would alter his will."

2. George Baker. Has often heard deceased say, he believed he should not live long; has often heard him blame people for not making their wills; Grace told deponent she knew there was a will; believes he had frequent opportunities of destroying or altering his will; he was several times at Canterbury; the two last times he was in a very bad state of health; in August, 1752, Martha Stopford said, she knew nothing of deceased's affairs, for latterly he had no liking to her, and never heard him say whether he would or would not leave anything to his wife, or say anything about the disposition of his estate.

3. Elizabeth Bridges. Deceased often talked of his death, and that he should not live long; he often pressed deponent to make her will, and said it was imprudent in every body not to make their wills; in March or April, 1751, deceased, in Grace's presence, said he would never leave any woman what he had, to buy her another husband; Grace said, "Then you will leave me nothing;" he said, "Yes, you will have half my estate;" Grace said, she had often heard deceased say he had made the will pleaded; in March or April, 1751, deceased, in presence of his wife, said, "I have made my will;" deponent asked where it was; he replied, "Mr. Hanson has got and keeps it now."

4. Ann Herritage. Proves deceased coming several times after his marriage to Canterbury, and that the two last times he was very ill.

5. James Hanson. The will was kept in de-[206]-ponent's custody, and was sent him soon after the execution; deceased never sent for it from deponent.

6. Catherine Sladden. The last time deceased was at Canterbury, he said to deponent he should not live long.

7. Mary Cartwright. Deceased was ill when he came last to Canterbury.

Several letters from deceased and his wife to his relations, dated from 30th April, 1751, to his death, were read to shew he was all that time in a bad state of health.

A letter from William Hanson to Young Jehen, dated 5th September, 1751, was read to affect Hanson's testimony, in which he says, deceased died of a slow fever, d a mortification in his bowels.

Read for Braddyll.

David Henriques. 1 and 2. Int. Respondent is a subscribing witness to the deed of assignment to Grace from Jehen; William Hanson was present at the execution.

Theodore Darling. 3. Int. William Hanson was present at execution of said deed of assignment.

George Crawford. William Hanson is a man of very good credit, and is esteemed a very honest man; the deed of assignment was executed in presence of said Hanson and deponent, and they were going to witness it, but being told Mr. Jehen had named witnesses they forebore.

Six witnesses gave William Hanson a very good character.

Read the will. The deceased divides his personal estate into three parts; gives one-third to trustees for his mother, Mrs. Bridges, for life, to her sepa-[207]-rate use, and then to his brother, Young Jehen; gives another third in trust for his sister Sarah Baker, for her sole use, exclusive of her husband, and after her death to her children; and the remaining third to his brother, Young Jehen, and makes him executor.

Dr. Simpson's argument for Jehen. Several points: 1st, that marriage and birth of a child alone is not a revocation of a will; 2dly, that there are not in this case circumstances to adduce a revocation; 3dly, that there are contrary circumstances; 4thly, there are recognitions which will revive the will, if it was revoked. The statute of frauds does not extend to this case. The civil law binds no further than as it is received; though the Roman law does void a will by marriage and birth of a child, the law of England does not. The Roman law does not bind here, because it is not received; in all the former cases where wills have been set aside, there has been something more than marriage with issue. Every man may dispose of his personal estate as he pleases; deceased's not altering his will gives presumption that he resolved it should operate; he must be sensible of the change of his estate. To revoke a will, a change of mind as well as of circumstances, must appear; no evidence of intention to revoke, the will was complete and executed; the wife has 21l. a-year in land, and a reversion of 25l. a-year; deceased did not act to shew that he had any view that the will should not operate. The question is not, whether this will is just, but whether it was the deceased's intention. The case of *Gray and Altham*,^(a) at the Council Board, is not similar to this case. Croke Eliz. 721, *Coward and [208] Marshall*, a man devises land to his son, and then marries again, and makes another will, and gives those lands to his wife. The Court held the latter will was not a revocation of the former. Salk. 234, 235, *Cole and Rawlinson*,^(a) Holt said intention of a testator is to be collected from the words of the will, not from the circumstances of the testator. Marriage alone, it is admitted, does not revoke a will, *Prerogative*, 1722, *Slade's case*, nor children alone. Deleg. 1734, *Ward and Phillips*,^(b) if a man displeased with his son makes a will, and disinherits him, after is reconciled, and dies, the will is good. A will is not revoked from the hardship of a case. Swin. part 7, s. 15, no man is presumed to have revoked his will, unless it appears to be his intention. Marriage and birth of a child is not an implied revocation, but only creates a presumption of intention. Whenever a revocation is implied, something must be done inconsistent with the will. In all the cases where wills have been set aside by marriage and birth of a child, there have been inceptions of wills. In *Lugg and Lugg*,^(c) there was a will not executed, deceased [209] declared he had no

(a)¹ Cited in *Johnston v. Johnston*, 1 Phill. 485.

(a)² In *Cole v. Rawlinson*, Powys, Powell and Gould, justices, differed from Holt, C. J., and the judgment was given according to the opinion of the puisne judges. This judgment was afterwards affirmed by the House of Lords, 1 Bro. Ca. Parl. 108. See on this point, 1 Ves. 232; Rep. T. Talb. 202; Bro. Ca. Ch. 472; 2 Atk. 450. See also Powell on Devises, 540. Vi. 4 T. R. 601.

(b) *Ward v. Phillips*, specially referred to in *Shepherd v. Shepherd*, 5 T. R. and in *Johnston v. Johnston*, 1 Phill. 482. The case is styled in the Assignment Book of the Delegates, *Ward otherwise Phillips v. Phillips and Others*. The Judges Delegate present at the sentence were, Mr. Justice Denton, Mr. Baron Carter, Mr. Baron Thompson, Dr. Strahan, Dr. Audley, Dr. Islan, and Dr. Cottrell.

(c) The case as reported in Salkeld is as follows:—Before a Commission of Delegates. One being single made his will, and devised all his personal property of J. S.; afterwards he married and had several children, and died without other will or

will a week before his death. *Overbury's case* was not determined upon marriage and birth of a child only; there was a latter will, for administration with a schedule annexed was granted. *Meredith and Meredith* the same; there, likewise administration was granted with a latter will; no act done by deceased to revoke this will; declarations only that he would make a will, which will not revoke; it appears from the evidence that deceased had apprehensions of death, had opportunities of making a will, but did not, therefore it must be supposed he intended this should subsist; all deceased's letters to his wife, I confess, do shew affection, but all except three were wrote before the recognitions. When did this will first stand revoked? At the marriage or at the birth of the dead child, or at the procreation, or birth of the posthumous child? When deceased was at Canterbury, in May, 1751, he was ill, his wife with child, and the will there; then he would have made a new will, if he had intended it; marriage and the birth of a child alone do not revoke, declarations do not revoke, on the contrary, there has been a revival by his declarations that he had made his will, &c.

Dr. Bettesworth, same side. We admit marriage and issue is a strong circumstance, but it produces presumption only. A femme coverte's will is revoked by marriage, because she becomes incapable to make a will. Swinb. 7 part, s. 17, does not men-[210]-tion marriage, &c. where he speaks of revocations. Menoch, de Presumpt. Lib. Quest. 31, nu. 2, presumptio tollitur per contrariam probationem. It seems probable that he had his marriage in view when he made his will. Domat. b. 3, tit. 1, sect. 5, 6, agnatio hæredis rumpit testamentum, because it is presumed the testator was prevented from altering his will by death. *Eyre and Eyre*, testator lived long abroad, will left in England, presumed to be forgotten. Mantica de Conject. b. 12, tit. 1, s. 12, when testator can, and does not alter his will, he is presumed to intend it shall stand. Menoch, de Presumpt., b. 4, nu. 13, the same. If a child is born after a will is made, the will is good if the testator might have destroyed it, but did not; the word he uses is convalescit. The deceased does not mention a word of making a will in any of his affectionate letters. In *Barker and Pusey's case*, Prerog. there was a marriage settlement inconsistent with the will, and a mortgage, which was a revocation pro tanto. Croke Jam. 497, a revocation must be in express words of the present tense. Hanson's evidence shews deceased did not think his will was revoked by law, he therefore must have looked on it as a subsisting will; he could not have wanted his old will to make a new one, to give all to his wife and child. Full proof of a revival. 1 Vernon, 330, *Hall and Dunch*, a slight evidence will do for a republication. Roll's Abridgment, 604, case of *French and Montague*, if a man declares his will shall stand after it has been revoked, it is a good will. 2 Vernon, 209, testator said his will was in his box, this was held to be a republication. 3 Keble, a will is not revoked by every act that may appear contradictory to it.

Dr. Hay's argument for Braddyll. The will [211] was made before deceased had a view to his marriage. Courtship began on 29th October, 1749; will dated 18th October, 1749. The first question is, whether the will of a bachelor is vitiated by marriage with issue? The second, supposing it to be revoked, whether enough has been done by the testator to revive it? The will solely relates to personal estate. Statute of frauds does not extend to this case; it is not a settled point what alteration of circumstances will revoke. *Barrow and Banker*, 1695, held that marriage and birth of a child does revoke a will. *Williamson and Blakesley*, Prerog. 1751, marriage alone does not revoke, but the Judge said in that cause that marriage with issue does. Chan. 27th January, 1748, *Parsons and Lanoe*: Colonel Lanoe made a will 10th June, 1732; he was then married, for he gave his lands to his wife in case he died in Ireland, whither he was then going; he returned; had issue, a son and daughter after his return, died in 1738, leaving that will, he mentioned it as his will a short time before his death. First question, whether it was a conditional will? Second, whether the issue, born after making it, revoked the will? Several cases quoted on that occasion; Deleg. 1741, *Coombe and Coombe*; *Beresford's case*, and *Meggott and*

disposition. And now coram Delegatis, of which Treby, C. J., was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind. 2 Salk. 593.

Meggott's case. Lord Chancellor said it was a conditional devise, and therefore void by the testator's return. On the second question he said, that as to the personal estate, the case of *Lugg and Lugg*, in the Deleg. is an express authority that a will is void by subsequent marriage with issue, and that the Statute of frauds did not relate to that case, and added, that no liberal construction was to be made in favor of that will. Domat. b. 3, tit. 1, sect. 5, s. 6, the revocation in consequence of marriage and issue is founded on the law of nature, [212] by which a man is bound to provide for his child. 2 Shower's Rep., *Overbury's case*, the reporter says, by the opinion of the civilians, marriage and birth of a child voided a will; marriage, with issue, is a revocation presumptione juris. 1 Peere Williams, 304, *Cook and Oakly*, Sir John Trevor held marriage and issue to be a revocation of a will for lands. *Meredith and Meredith*, Prerog. 1711, deceased made a will in 1708, fully complete, married in 1709, and had issue; he began a new will, gave his wife a specific legacy or two; first will held to be revoked, and administration with the schedule granted to the widow. Eq. Cas. Abridg. 413, *Brown and Thompson*. Second question, whether this presumed revocation is rebutted by a revival of this will by declarations; his declarations, that he had a will, were only made to induce his mother to make her will.

Dr. Smalbroke, same side. *Eyre and Eyre's case* strong with us. The circumstance of affection to wife material. Prerog. *Joddrell and Crop's case* cited with respect to uncertainty of declarations.

Judgment—Sir George Lee. I said the civil law did not bind, but as it was received; and where it was received, it became part of the law of England; the only evidence of its being received was usage, which must be proved from the practice and determinations of Courts. That marriage, with issue, subsequent to a will for personal estate, is a revocation of the will, seemed to me to be a settled point, not only from the cases cited, but also from those of *Brown and Preston*, and of *Outram and Outram*, in the Prerog.; and Dr. Bettesworth clearly held it to be so in the case of *Barker and Pusey*, which was [213] the latest determination. I was therefore of opinion that this will was revoked by Mr. Jehem's subsequent marriage and birth of a child alive. Secondly, I was of opinion this will was not revived. In the case of *Lewis and Bulkeley*, (a) Delegates, 1732, Mrs. Hampton made her will when sole, then married, became a widow, and died leaving that will uncanceled. She made many declarations that she had her will by her, told the contents of it, and spoke of it as her will a very short time before her death, but the whole Court held that the will was revoked by her marriage, and that it could not be revived without republication, or some express declaration that would amount to a republication. I thought the same reasoning would hold in the present case, (b) and as [214] this will was revoked by

(a) 1 Lee, pp. 513 and 190, notis, and Burn's E. L. 51.

(b) The soundness of this decision has been confirmed by a variety of subsequent cases determined in different Courts, and the principle of the civil law on this branch of testamentary law may now be considered as incorporated with the law of England. The case of *Wells v. Wilson*, at the Cockpit, on an appeal from the West Indies, was decided principally on this ground. In 1770 Lord Camden sent the case of *Shepherd v. Shepherd* (reported in the notes of 5 Durnford and East, p. 51) to be tried before Dr. Hay, then Judge of the Prerogative Court, to ascertain the extent of the principle adopted by the civil law in cases of this description. In the case of *Doe on the Demise of Lancashire v. Lancashire*, Lord Kenyon, after much argument, held that marriage, and the birth of a posthumous child, amounted to an implied revocation of a will of lands made before marriage, and the puisne judges of the King's Bench were concurrent with him in this judgment. 5 Durnf. & East, 49. In 1817 Sir John Nicholl, Judge of the Prerogative Court in the case of *Johnston v. Johnston*, carried the principle further than any of his predecessors, by holding that the birth of children, combined with other circumstances, might amount to the revocation of a will of a married man. This decision, however, rests on his sole authority, for the case was not appealed to the Delegates. *Johnston v. Johnston*, 1 Phill. 447.

The cases which bear upon this subject are *Lugg v. Lugg*, Salk. 592; 1 Lord Raymond, 441; 1 Wils. 243. *Earl of Lincoln's case*, 1 Eq. Ca. Abr. 411. *Pollen v. Hubrail*, ibid. 412. *Brown v. Thompson*, ibid. 413. *Parsons v. Lanoe*, 1 Ves. 191 and Amb. 559; 4 Burr. 2171, n. *Brady v. Cubitt*, Dougl. 31. *Christopher v. Christopher*, in 1771, in the Exchequer. *Kenebel v. Scrafton*, 2 East, 550. *Ex parte Lord Ilchester*,

law, it could not be revived without a republication, or some express declaration, that the testator would have this paper operate as his will, notwithstanding his marriage and his wife's being with child, but as nothing more was proved than obiter declarations, that he had made his will, and that it was in Hanson's hands, and those declarations were not made with a view to revive the will, I was of opinion they were not sufficient to revive it, and therefore pronounced against the will, and that the deceased was dead intestate, and decreed administration to the widow, but did not give costs.

REYNOLDS, Administrator of White' *against* WHITE. Prerogative Court, By-Day after Trinity Term, June 25th, 1755.—An executed will held not to be revoked by an unexecuted schedule of a later date.

John White, Esq. deceased made his will, dated the 29th March, 1747, containing a complete disposition of his real and personal estate, and made his brother Thomas White executor, and duly executed it in presence of three witnesses; this paper is marked A; on 20th July, 1747, he made an inception of a will only, marked C, on 10th February, 1748-9, he wrote with his own hand a paper marked B, which contains a disposition of his real and personal estate, appoints his said [215] brother, Thomas White, executor and residuary legatee, and inserts a clause of revocation of all former wills; this paper is unexecuted, and there is no signature to it; the testator died in the beginning of April, 1749; on the 5th May, 1749, Thomas White took probate of the executed will, and acted under it till 1752, when the schedule B was found amongst a heap of papers; in 1754 Thomas White cited deceased's widow, and all the legatees in the executed will to shew cause why the probate of that will should not be declared void, and a new one should not be granted to him of schedule B; the deceased's widow and the legatees in the first will opposed schedule B; Thomas White propounded it; pending the suit he died, and Reynolds took administration to him, and by virtue thereof prayed administration to John White, with the schedule B annexed; on the other hand, John White's widow (as the executor named in the will A was dead, and the residue was not devised) prayed administration, with the will marked A annexed; there were no declarations or circumstances in support of schedule B.

Judgment—Sir George Lee. Upon hearing the cause, I was clearly of opinion that as schedule B was unexecuted, and therefore could not operate for the real estate, and was unsupported by any circumstances, it was not a good will for the personal estate, and therefore pronounced against schedule B with costs, and decreed administration de bonis non, with the will A to the widow of John White, the testator, there being no residuary legatee named in that will, and the executor being dead.

[216] STRATTON AND STRATTON *against* FORD. Prerogative Court, By-Day after Trinity Term, June 25th, 1755.—A next of kin condemned in costs for having pleaded insanity in a testator, and failed to establish it.

John Stratton died in June, 1754, made his will the 6th May, 1752, and a codicil of the same date; appointed his wife Susanna Stratton, John Stratton, and William Ford executors, and gave to Mary Ford, mother of said William, a legacy of 1500l.; on the 28th March, 1754, he made a second codicil, in which he revoked the legacy of 1500l. to Mary Ford; she entered caveat against proving the second codicil, as cousin-german, and one of the next of kin, and as a legatee in 1500l. in the will, which legacy is revoked by said second codicil, the caveat was warned; she declared she did not oppose the will or first codicil, but opposed the second codicil. Susanna Stratton and John Stratton propounded the second codicil, but William Ford would not join with them therein; Mrs. Ford pleaded total incapacity in the testator at the time of making the second codicil, and examined six witnesses on her plea, all of whom fully proved sanity, except the apothecary, who swore strongly to insanity; Ford's counsel admitted that the testator's sanity and the second codicil were sufficiently proved, but contended that Mrs. Ford ought not to be condemned in costs, because she was one of the next of kin, and the apothecary had proved insanity.

7 Ves. jun. 348. *Emerson v. Boville*, before Sir William Wynne, in 1802, 1 Phill. 342. *Hollway v. Clarke*, *ibid.* 339. *Wright v. Sarmuda*, 2 Phill. n. 266. *Gibbens v. Cross*, 2 Add. 455. *Talbot v. Talbot*, 1 Hagg. 710.

Judgment—Sir George Lee. But as she had not been content with putting the executors to prove the second codicil, but had pleaded insanity, by which she had given them a great deal of trouble, and put them to expense, [217] and her own witnesses had proved contrary to her plea, I was of opinion she was liable to costs, and to prevent vexatious suits, I condemned her in costs accordingly.

RANDALL AND HORDON, ON BEHALF OF THEMSELVES AND OTHERS, Parishioners and Inhabitants of Chelsea, in Middlesex *against* COLLINS AND LUDLOW. Arches Court, June 30th, 1755.—An application for the grant of a faculty to erect an organ in a parish church refused.

Appeal from the Consistory of London.

Dr. Pinfold for Collins and Ludlow. The question is whether a faculty shall be granted for erecting an organ in the west gallery of Chelsea church. The parishioners by a voluntary subscription raised 143l. for purchasing an organ, which they put up in 1745, without authority, for which reason it was in 1746 pulled down again by order of Dr. Andrew, then Chancellor of London; but on the 5th October, 1752, a vestry met on previous notice, and it was then unanimously agreed to apply for a faculty to put up an organ by voluntary subscription, and not at the parish expence. Collins and Ludlow, two parishioners, were appointed to apply for such faculty, who have petitioned accordingly, and have taken out a citation, with intimation. The organ is six feet wide, and four feet deep; it is proposed to set it at the back part of [218] the gallery at the west end of the church; the inhabitants have subscribed 20l. a-year to keep the organ in repair, and to pay the organist. Randall and Hordon opposed granting the faculty, on suggestion that many of the parishioners will be displaced to set up the organ, and also that it will bring a perpetual expence on the parish. On the 13th December, 1754, the Chancellor of London decreed a faculty, from which Randall and Hordon have appealed.

Dr. Hay for the appellants. The citation issued on 17th October, 1752, recited a voluntary subscription for an organ, and an agreement in vestry that it should be no expence to the parish. Twenty-three parishioners met at this vestry on 6th October, 1752; the minister and churchwardens were cited in special, and all others in general, to shew cause, &c. but there was no specification of the dimensions of the organ in the original citation, which we insisted made it void; but the objection was overruled. Notice was given in the church for a vestry, to agree to apply for a faculty to fix an organ in Chelsea church, by a voluntary subscription, and not at the parish expence. Randall and Hordon insisted that it should be no expence to the parish in present, or in future. The respondents alleged that it was proposed to set it up behind the pews in the west gallery, where no one sat. After the suit was begun a subscription was made for 20l. a year to pay the organist, &c., none have subscribed more than five shillings a quarter each, and most have subscribed only one shilling. Sixty-four parishioners, who pay at the rate of 1400l. a-year, rent, have signed a paper marked No. 1, desiring a faculty may not be granted. [219] The parishioners will want room. The church was built in 1669, the parish is greatly increased of late years. In 1684 there were only 164 houses and 820 inhabitants in the parish. Upon a survey in 1750, which was reported to the vestry in 1751, it appeared that there were 658 houses and 3290 inhabitants. In 1698 the church would not hold half the inhabitants, and therefore a faculty was prayed, and granted, for erecting a gallery on the south side of the church. By the pew book it appears there is a difference made between sittings and fixed seats; only 393 persons can be accommodated with certain seats. In the west gallery there are twelve pews, of which two pews must be entirely destroyed, and near half of three more; our objection is want of room in the church for the parishioners, and that it will be a future expence to the parish, which we have proved. The Chancellor decreed a faculty, and condemned Randall and Hordon in 50l. costs. There was originally no organ in this church; on the 8th November, 1745, application was first made to the then Chancellor for a faculty to erect an organ, it was opposed, and the Court refused it. In 1746 Ludlow, who was then churchwarden, put up an organ without a faculty, he was articted against, and Dr. Andrews ordered it to be taken down, and condemned him in 7l. 10s. costs.

Witnesses for Randall and Hordon.

1. William Wallace. Knows the parish of Chelsea, lives near it, and has known it from his infancy, the parish is large, and is greatly increased; in 1751 there was a

talk of rebuilding or enlarging the church; there are twelve pews in the west gallery, two of which run back into the steeple; [220] sixty people may sit in the said pews, many persons will be greatly incommoded by the organ, and many sittings lost; believes it will perpetuate an expence on the parish; the church is not large enough to contain near the number of parishioners.

2. James Tully. Deponent lives in the Fivefields, in the parish of St. George, Hanover Square; deponent well knows the parish of Chelsea; it is greatly increased, and is very large, and many new houses have been built; deponent has often been at Chelsea church; in 1751 there was a talk of rebuilding the church; six weeks ago deponent took a view of the west gallery, it contains twelve pews, four go under the steeple, they will hold sixty people; several pews must be destroyed to put up the organ, and it must cause a future expence; the church will not hold the parishioners.

3. John Clark. Deponent lives in the parish of Kensington; well knows the parish of Chelsea; on 11th May, 1754, deponent viewed the west gallery, the place proposed for the organ contains seven pews, and will well hold thirty-four persons, who must lose their places if an organ is put up.

4. Hermannus van Geen, carpenter. Deponent lives at Kensington; the parish of Chelsea is greatly increased; on 11th May, 1754, deponent took a view of the place where an organ is proposed to be fixed, it contains seven pews, which will hold thirty-four persons; it will incommode the whole gallery, and will totally exclude those who sit in the seven pews; the church will not contain the inhabitants.

5. John Holmes, gent. Deponent has lived in Chelsea thirty-five years, and been vestry clerk of that parish twenty-nine years; it is a very large parish, and is greatly increased in houses and in-[221]-habitants; the deponent was present at vestry on 2d August, 1751, when a report was made by a committee appointed by vestry on 19th July, 1751, to consider of rebuilding or enlarging the church, and to enquire into the number of houses and inhabitants in the parish, when they reported that in 1684, there were 164 houses; by the vestry book, No. 1, it appears that in 1698 the inhabitants obtained a faculty for erecting a gallery on the south side of the church. At said vestry, on 2d August, 1751, said committee reported that the church was built in 1669, and in 1684 there were 164 houses assessed, and in 1750 there were 658 houses assessed, and allowing five persons to a house in 1684, there were only 820 inhabitants; and in 1750, there being 658 houses, at the same proportion there must be 3290 inhabitants; this rule of calculation was confirmed by the difference of the baptisms and burials in 1669 and 1750; in 1669 only fifty burials, and in 1750 there were 225; the baptisms in 1669 were only thirty-four, and in 1750, 121. On 5th October, 1752, the vestry came to no agreement where the organ should be placed, though deponent believes it was talked of placing it over the west gallery. On the said 5th October, 1752, a question was put in vestry, that the subscribers should have leave to apply for a faculty at their own charge without any expence to the parish, and it was unanimously agreed to; the subscribers to the organ have, as deponent believes, raised 143l. 5s. and have bought an organ, and believes it was intended to pay the organist by a voluntary subscription without any expence to the parish.

6. William Horrod, of Chelsea. The parish is large, and the inhabitants have increased; the west gallery to the best of his remembrance contains [222] eight pews; an organ must be a general inconvenience to persons seated in the west gallery, and must exclude many; the church is always very full, and is small in proportion to the inhabitants.

Collins' and Ludlow's allegation.

1 art. The organ contains six feet in width, and four feet in depth; notice given for holding a vestry to apply for a faculty to fix an organ in the west gallery by a voluntary subscription, and not at the parish expence.

5 art. An annual voluntary subscription is raised of 20l. a-year, to pay an organist and keep the organ in repair, and the subscribers are desirous the faculty should be granted under these restrictions.

Exhibits read. Vestry book, No. 7.

2d August, 1751, entry of report from the committee of the number of houses and inhabitants.

Vestry, 29th March, 1698; entry recites that there is not room in the church for half the inhabitants; therefore, agree to pray a faculty for erecting a gallery on the south side of the church.

Witnesses for Collins and Ludlow.

1. John Holmes. The parishioners have bought an organ by voluntary subscription. On 5th October, 1752, it was unanimously agreed by the parish officers and others, that a faculty should be prayed to erect an organ by voluntary subscription; believes there were formerly great houses in Chelsea, which have been pulled down, and several small ones erected; at vestry, in 1751, it was agreed that it was not necessary to enlarge the church; at the vestry, 7th November, 1751, the meeting was so [223] numerous that they were forced to adjourn into the church, and there it was carried not to enlarge the church, &c. There are three chapels in the parish of Chelsea, one belongs to the hospital, another to Chelsea park, which is a chapel of ease to the parish church of Chelsea, and the other is a French chapel. Several of the inhabitants go to Chelsea park chapel, the hospital chapel belongs only to the officers, &c. of the hospital, some houses are inhabited by Moravians, who have a chapel of their own; there are many dissenters in said parish, but deponent cannot tell the number; cannot say whether there is or is not room in the church for the inhabitants; Randall is seated in the pew marked No. 22, and believes Hordon is seated in No. 18.

4. Int. Respondent has no seat allotted to him or his family; he applied in 1754 to the churchwarden to be seated, and was told to look out for a seat he liked, but respondent has not applied since, and he never wanted a seat when he went to the church. 10. Int. Some of the annual subscribers are lodgers in the parish, but most are parishioners and housekeepers. 12. Int. Randall has several houses in Chelsea.

2. Richard Bridge. Deponent built an organ and put it up in 1745 under an arch in the back part of the west gallery, behind some pews, which is a very convenient place for an organ; about a year after it was taken down again by order of the churchwardens; at a vestry, in 1752, it was agreed to apply for a faculty to erect an organ; 20l. a-year is sufficient to pay an organist and keep the organ in repair.

2. Int. The middle part of two long pews was taken away to erect the organ. [224] 3. John Lott. The deponent measured the place where the organ stood, and found it would not displace above nine persons, it being only six feet in depth, and four feet in width; there is a very proper place in the west gallery for an organ.

4. Hugh Cocks, organist. 20l. a-year is sufficient to pay the organist and keep the organ in repair; deponent has agreed to play it for 15l. a-year, has heard of the subscription for an annual payment of 20l. a-year, the subscribers agree to pay quarterly the sums set against their respective names.

N.B.—The highest subscription is five shillings, and the lowest one shilling a-quarter. The church contains sitting-places, as appears by the free-book, for only 393 persons.

Witnesses for Randall and Hordon.

1. Charles Turner. Proves the plan of the church; the west gallery is full of pews, there is no void space in it but the passage, which is not more than two feet six inches wide, and the entrance is through the belfry; the steeple wall projects into some of the pews; several pews must be destroyed to erect an organ.

2. John Souch. Proves the plan of the church, and that several pews must be destroyed to set up an organ.

3. William Wallace. There is no void place in the west gallery, for it is full of pews; Thomas Miller, one of the subscribers to the annual payment, has left Chelsea, and William Hunt and Elizabeth Doody are dead; the chapel in Chelsea park, and the French chapel are, as deponent has heard, private property; many persons, servants and others, stand and kneel in the place designed for an organ.

[225] 4. James Tully. There is no void place in the west gallery; Randall's brother sits in said gallery; Hunt is dead.

5. John Clark. No void space in the west gallery; many pews must be destroyed to erect an organ.

6. Hermannus van Geen. The same; does not think the church will hold more than 400 persons; believes some go to the chapels because there is not room in the church.

7. John Holmes. The same; cannot say whether the organ will be inconvenient; John Tokelove, a subscriber to the annual payment, is marked "poor" in the parish books; several subscribers are dead, or have left the parish, others are lodgers, the

chancel belongs to the rector only, there are private chapels on each side of the chancel which are let out by the owners, the parishioners have no right to pews but those named in the pew-book; the chapel in Chelsea park is the property of the rector of Chelsea, who has let it to another minister, who lets it out; parishioners have no right to seats in any of the chapels but by paying for them; believes many of the parishioners have no seats allotted them, but does not know any person has been refused a seat.

1. Int. It does not appear that any persons are seated in the pews marked 61 and 62. 12. Int. Believes some of Chelsea parish go to Hanover-square chapel. 16. Int. Collins and Ludlow applied for the faculty, pursuant to the order of vestry; deponent never saw the church so full as that the parishioners were obliged to go up to the west gallery.

8. William Horrod. The west gallery is quite full of pews; several must be destroyed to make [226] way for an organ. Same as the other witnesses; servants generally sit in the back seats of the west gallery, who must be displaced if an organ is put there.

Exhibit No. 1, dated in 1753, a declaration signed by 64 parishioners, who are rated to the parish taxes at upwards of 1400l. a-year rent, that they desire a faculty may not be granted.

Dr. Pinfold for Collins and Ludlow. We admit that an organ is not necessary by law; application for a faculty was made by the unanimous consent of the whole vestry in October, 1752. The Court cannot take notice of the exhibit No. 1 because it was not the act of a vestry, but a private subscription; Randall and Hordon are the only parishioners who oppose, and they have no private interest, for they do not sit in the west gallery; no one who sits in the gallery opposes; no evidence that the future expense will be too great for the parish to bear; when the organ was up it was not prejudicial to the parish; it was pulled down only because it was put up without a faculty.

Dr. Bettesworth, same side. No proof that any one who wanted could not get a seat in the church. There must be more than room, for several of the witnesses who are strangers have gone to this church.

Dr. Hay for Randall and Hordon. The consent of vestry is conditional, that the organ should never be an expence to the parish. No fund is provided; even the subscription for the annual payment began after the cause was commenced. It [227] is an old church not built for an organ. It is a parish church in which there is no choir.

Dr. Smalbroke, same side. In 1747 articles were exhibited against Ludlow for erecting this organ and the west gallery. The gallery was allowed to stand, but the organ was ordered to be taken down, which shews the organ was then thought prejudicial to the church. The original citation in this case is null, for want of setting forth the dimensions of the organ. Many persons have a possessory right in the west gallery, who must be turned out if the organ is put up.

Judgment—Sir George Lee. I was of opinion that an organ was unnecessary in all churches, and in this would be inconvenient, for it clearly appeared that the church was too small for the number of inhabitants, and would be made less by taking away several seats to make way for an organ. As to the annual subscription, I thought it merely nominal; several of the subscribers were already dead or removed, and perhaps their successors would not subscribe, but after the organ was set up by virtue of a faculty it must be supported, and consequently would become a burthen to the parish. It appeared to me that Dr. Andrew, in 1747, thought it prejudicial, for otherwise, though it was set up illegally, he might have granted a faculty to have confirmed it. Randall and Hordon, as parishioners, had a right to oppose.^(a) I thought a faculty ought not to be [228] granted, and reversed the Chancellor's decree, but without costs.

(a) See *Butterworth and Barber v. Walker and Waterhouse*, 3 Burr. p. 1689; *The Churchwardens against The Parishioners, Vicar, and Inhabitants of St. John's, Margate*, 1 Hagg. C. R. 198; and *Prideaux's Directions to Churchwardens*, p. 34.

FITZGERALD against LADY MARY FITZGERALD, his Wife. Arches Court, June 30th, 1755.—Witnesses allowed to be produced on interrogatories, a requisition having issued for the examination of witnesses without formal notice to the adverse proctor.

In this cause Mr. Farrar, proctor, for Lady Mary, prayed a requisition to Ireland, to examine witnesses on an allegation of faculties. Mr. Gostling, proctor, for Mr. Fitzgerald, was present in Court when the requisition was prayed and decreed, but Mr. Farrar took it out under seal without giving Mr. Gostling notice to annex interrogatories, upon which Gostling moved to suppress the depositions; the register and proctors agreed that it was the constant practice to give notice, when the requisition is to be taken under seal, to the adverse proctor, notwithstanding he was present when it was decreed. I therefore ordered that these witnesses should be examined on interrogatories if Mr. Fitzgerald thought fit. Gostling prayed that Lady Mary should bring them to be examined.

Judgment—*Sir George Lee*. But in this case, where the husband by law is to pay the whole expenses, and Mr. Fitzgerald had stood in contempt and never yet had paid any costs that had been taxed against him, I ordered that in case Mr. Gostling would lodge in the registry 50l. to pay the expense of the examination by a day certain, Mr. Farrar should take out the requisition, and bring the witnesses to be examined; otherwise that Gostling should be at liberty to take out a requisition if he thought proper.

[229] **BITTLESTON, BY HER GUARDIAN against CLARK**. Prerogative Court, July 3rd, 1755.—A case of incapacity established.

[See p. 248, post.]

Dr. Simpson for Ann Clark. John Clark, deceased, made his widow executrix, the will was dated 26th February, 1750, he died 27th February, 1750; gives a leasehold estate to his wife for life, remainder to Peter Donde, his wife's son, he paying annuities thereout, of ten pounds a year to each of his two sisters, to his nephew Thomas Bittleston, twenty pounds. Wife residuary legatee. Will attested by three witnesses. Testator's mark to it. Proved in common form. 2d March, 1750, executrix cited to prove the will by witnesses, by his niece and one of his next of kin, Elizabeth Bittleston, or to shew cause why deceased should not be declared to have died intestate. On 25th Feb., 1750, deceased was suddenly seized with a fit as he was walking in his garden, which deprived him of his speech and affected his senses. Some months before, he gave instructions to Mr. Green, an attorney, to make his will; he accordingly from those instructions made a draft of a will which he read to deceased, and he approved it, and desired it might be engrossed, and at that time ordered the blank, left for a legacy to his nephew, Thomas Bittleston, to be filled up with twenty pounds. Three weeks before his death he sent to Green to bring him the will to execute. He [230] made many declarations as to his will. Bittleston's family had greatly disoblged deceased. Soon after he was seized with the fit, Mrs. Clark sent to Green for the will. It was executed the next morning when deceased was calm. Two of the subscribing witnesses are persons of character. Batten, who was present, but is since dead, guided deceased's hand to make a mark; deceased was speechless, but sensible, as appeared by his behaviour. Ricketts, one of the subscribing witnesses, swears to incapacity, contrary to his attestation. Clark has propounded the will, and pleaded the instructions and draft as circumstances in support of it.

Dr. Hay, for Elizabeth Bittleston. My client is niece to deceased by a sister. Deceased left a widow and this niece, and her brother, Thomas Bittleston (who, if living, is abroad) his only next of kin. The niece is a minor, and acts by George Bittleston, her father and guardian. Deceased's intention and affection are not very material in this case, because the single question is whether deceased had capacity to execute a will on 26th February, 1750; deceased was entirely speechless from the time he was seized with the fit. The instructions pleaded are agreeable to the will, they are not dated, but Green says they were given many months before deceased's death. The draft is dated 26th February, 1750, the same day as the will. I shall not, in this case, controvert deceased's intention to make a will. Ricketts, one of the subscribing witnesses, says deceased was entirely incapable; the other two speak to appearance of capacity. The apothecary says deceased was senseless [231] when

he saw him, but he might have intervals. It is not pretended that he was capable of reading the will or publishing it, and it was not read to him.

Witnesses for Clark.

1. John Dutton. Deponent knew deceased sixteen years; in the afternoon of 26th February, 1750, deponent, being sent for, went with William Stokes to deceased's house; they found in the room with him, deceased's widow, one Batten, and John Ricketts; Batten carried the will to deceased, and told him it was his will and he must make his mark; Batten put a pen in his hand, which deceased seemed to take willingly; Batten held deceased's wrist, and he so made his mark; Batten put a seal on the wax; deceased took it off, and then deponent, Stokes, and Ricketts, witnessed the will at desire of Mrs. Clark and Batten; deceased speechless, but deponent believes he was perfectly sensible, by reason of the willingness with which he seemed to take the pen, and by making his mark and taking off the seal, and because when deponent was going away he desired deceased to give him his hand, and deceased directly turned his hand towards deponent's.

1. Int. Respondent is brother to Ann Clark, the widow, and owes her 100l. which he cannot pay. 8. Int. Cannot tell whether Green, the nurse, was in the room when the will was executed or not; Ann Clark desired deceased to sign the will, and Batten told him he must sign it, and deceased held out his hand for a pen, and believes deceased well understood what he did. 9. Int. Respondent cannot swear deceased was sensible, but believes he was.

[232] The counsel for Bittleston admitted that the death, good character, and handwriting of William Stokes, one of the subscribing witnesses, were sufficiently proved.

3. John Ricketts, miller, read for Bittleston. Deponent was servant to deceased; on 25th February, 1750, deceased was seized with a fit in his garden, and never spoke afterwards; Mrs. Clark sent her son, Peter Donde, to Mr. Green for deceased's will for him to sign; when Donde came home, he said he had staid at Green's a good while for the will was not finished; between ten and eleven in the morning of 26th February, 1750, deponent being with deceased, Dutton, Stokes, and Batten came into deceased's room, and then Mrs. Clark took a will out of her bosom and laid it on a book before deceased, and bid deponent hold him up; she said to deceased, "Pray, my dear, set your name to it," but deceased took no notice and did not offer to take the pen; she then said to Batten, "I see he can't do it, you must help him;" Batten put the pen in his hand and made the letter I, and said it would do, but she said it was not enough, and then Batten guided his hand to make the letter C, and then Dutton, Stokes, and deponent, by Mrs. Clark's direction, attested the will; it was not read to deceased; he had not capacity to make a will; took no notice of any body.

4. George Green, attorney, read for Clark. Deponent knew deceased twenty years, and was his attorney; many months before his death deceased called on deponent, and desired him to make his will; he gave deponent verbal instructions; deponent took them down in writing, and gave them to his clerk to draw a will; some time [233] afterwards, but cannot tell the time, deceased called on deponent, and deponent then read said draft to him; when deceased gave the instructions he ordered a blank to be left for the sum to be given to Thomas Bittleston, he being undetermined as to the sum, but when the draft was read to him, deceased said he would give him only twenty pounds; deponent then in deceased's presence inserted 20l. in the blank; verily believes said draft was entirely to deceased's mind, he approved of it, and desired deponent to get it engrossed, and said he would call on deponent to execute it; deceased was then of sound mind, &c.; deponent caused the will pleaded to be wrote fair from said draft, and it is in every respect agreeable to said draft so read over to the deceased the deponent having compared said draft and will; deceased never came to deponent afterwards; on the 26th February the will was sent for.

2. Int. Believes he has heard deceased was sensible to his death.

5. Dutton Greenwood. To 5th interrogatory, believes Mrs. Clark sent for Charles Cadmore to shave deceased's head after the fit, in order to lay on a blister, and deceased did not speak, but believes he was sensible.

Will read.

Witnesses for Bittleston.

1. Vincent Mawre, apothecary. Knew deceased fifteen years; was his apothecary.

cary; in the afternoon of the 25th February, deponent being sent for went to deceased's house, and found him speechless and senseless; deponent blooded him; he did not then know what was done to him; on [234] the 26th February, deponent attended him, and found him in a stupid, senseless condition; deponent said he would lay a blister on his head, for if any thing would bring him to his senses that would; believes Cadmore, the barber, shaved his head and the blister was laid on; deponent saw him afterwards; did not find it had restored him to any sense whatever; whenever deponent saw him he did not appear to have any sense, and when deponent was with him he was not capable of making a will; but cannot tell whether he had intervals when deponent was not there; deceased when in health wrote a good hand.

1. Int. Has several times heard deceased say he had given instructions to Green to make a will in favour of his wife. 2. Int. Heard him say he would leave what he had to his wife, for his relations had greatly disoblged him. 7. Int. Has heard deceased refused to see the Bittlestons. 10. Int. Has heard deceased spoke to his daughter-in-law after he was seized with the fit.

2. Mary Hewitt. On the 26th February, deponent hearing deceased had a fit, went to his house and saw him, he was then in strong convulsions, and seemed quite senseless, and next day deponent heard he was in the same condition.

3. Mary Pidgeon. Deponent was servant to deceased at his death; has heard him express great love for the Bittlestons, and expressed dislike to his wife; he had a fit on the 25th February; from that time to his death he seemed totally insensible; deponent was present when he was blooded; he shewed no signs of sense; next day Mrs. Clark desired Mawre to shake him, which he did, but deceased seemed quite senseless; proves Mrs. Clark sent Donde to Mr. Green's, and [235] he brought home a paper; Mawre ordered a blister to be laid on deceased's head, but it had no effect, and he remained all the said 25th February entirely senseless; in the morning of the 26th February, Batten was at deceased's house; does not believe deceased was ever in his senses after said fit; he wrote a good hand when he was well.

4. Charles Cadmore, barber. Deponent was barber to deceased; in the morning of the 26th February, deponent went to deceased to shave his head; deceased took no notice of deponent, and seemed entirely senseless.

5. Elizabeth Green. Well knew deceased; attended him as his nurse in his last illness; he had been blooded before deponent came; on the 26th February Mawre was with deceased, and desired him to point where his pain was; deceased lifted up his hand, but Mawre did not shake him; deceased was in great agony when his head was shaving; after his blister he seemed more composed, and would not take anything but from his wife; about 10 or 11 in the morning of the 26th February deponent fomented his belly with brandy, and he seemed displeased; believes he was not quite insensible when he was not in agony: Batten came in soon after said fomentation, and deponent went down; deceased seemed composed at that time.

3. Int. Thomas Bittleston greatly disoblged deceased, and he sent him to sea. 5. Int. Deceased declared he would leave him nothing. 6. Int. Heard he went a common soldier to the East Indies; deceased would not see Elizabeth Bittleston, or her father.

6. John Sidcoe. Has known deceased twenty-five years; deponent has been told by Elizabeth [236] Green that deceased never appeared to have any sense or spoke after his fit.

7. Sarah Sidcoe. Same as to Green's declaration, and has heard the same from deceased's other servants.

8. John Allen. Knew deceased fourteen years; proves that he fell down in a fit in his garden in the afternoon of 25th February; when he was first seized he called out, "Allen, Allen;" and deponent ran to him, he was carried into his house, and he once or twice called out "Nanny" and "Jenny," but said nothing else; deponent sat up with deceased that night, and he was sometimes composed and sometimes in agonies; deponent saw deceased several times on 26th February; he would take things from his wife which he refused from others; believes, though he was speechless, he was not totally incapable.

1. Int. Within six months of his death, deponent has heard deceased say he had given Green instructions for a will in favour of his wife. 2. Int. Declared he would leave all to his wife. 3. Int. Thomas Bittleston greatly disoblged deceased, and deceased sent him to sea. 5. Int. Has heard he ran away from his ship; has heard

deceased say he never would see him again. 7. Int. Five or six months before his death, deceased refused to see George Bittleston and his daughter, and refused to lend said George five guineas. 10. Int. Deceased, after his fit, called "Nanny" and "Jenny," the names of his daughters-in-law.

9. James Waterman. Deponent has frequently heard deceased express affection to Thomas Bittleston, and said he should be his heir, and he said so a month before his death; Cadmore told depo-[237]-nent deceased was not sensible when he shaved his head.

Witnesses for Clark.

1. Benjamin Horn, a quaker. About a month before deceased's death he told the affirmant he had given Green instructions for his will; three weeks before his death, deceased desired affirmant to call at Green's and ask if he had done his will, which affirmant did, and further knows not; believes Thomas Bittleston disobliged deceased, and he sent him to sea; he ran away, and entered himself a common soldier in the India Company's service; deceased did not intend the Bittlestons should have his effects.

2. Vincent Mawre, apothecary. Deceased told deponent he had given orders for his will to be made in favour of his wife; had great disaffection to the Bittlestons and would not see them.

3. John Allen. The same as to deceased's declaration about his will and disaffection to the Bittlestons, and deceased ordered George Bittleston and his daughter Elizabeth to be turned out of his house.

4. Richard Harden. Says deceased was disobliged by the Bittlestons, and said they should have nothing of his.

5. George Green. Deponent wrote the instructions for deceased's will in his presence; sets forth the contents of them; paper marked A is said paper of instructions; proves the paper marked B to be a draft of a will made from said instructions.

The counsel agreed that the instructions and draft are agreeable to the will pleaded.

[238] Dr. Simpson for Clark. Affection to his wife is clear from the instructions; deceased had an intention to die testate; will for personal estate need not be wrote or signed by the testator, his intention only is to be regarded; delay of execution will not affect this case, because deceased died suddenly; no circumstance to shew he had departed from his intention; full and legal proof of execution; he had capacity sufficient to know he was executing his will; *Jewkes and Parmenter*, and *Tate and Mildmay*, Deleg.; in both cases witnesses not believed who swear against their own acts. Prerogative, 30th April, 1755, *Caryll* against *Knight*, will pronounced for where the evidence of capacity was as slight as this.

Dr. Bettesworth, same side. If deceased had died without this paper being brought to him, the draft would have been a good will; deceased died in 1750, at this distance of time it is more difficult to prove instances of sanity. Skinner's Reports, *Hudson's case* and *Dix's case*, witnesses deposing contrary to their own act, committed. Ricketts says Mrs. Clark desired deceased to sign the will, she therefore thought him sensible.

Dr. Hay contra, for Bittleston. The paper is propounded as a paper duly executed; the question is whether the paper propounded is the deceased's will, and was duly executed; they should rather have propounded the draft; the fact of execution is fully proved, but whether the deceased had a capacity to do that act at that time is the question; though a man swears against his own act, he is to be believed if he is supported by circumstances and other witnesses, the draft cannot [239] be pronounced for in this case, because it is not propounded; but if it had been propounded, it could not have been established as a will.

Dr. Pinfold, same side. They have specially pleaded that the will was read over to deceased on 26th February, and that deceased was then in his senses and duly executed it; these facts are not proved; deceased bid Horne ask Green for the will, but he did not say he would execute it; deceased did not know the contents of this executed paper.

Judgment—Sir George Lee. Though I thought it was clear that the deceased intended to die testate, and to leave his estate to his widow, in the manner it is done by the will in question; yet as the instructions and draft were introduced only as circumstances in the cause, but not propounded, and the executrix had taken upon her to prove that the executed paper was the deceased's legal act, that was the only

matter in issue; and I could take notice of the draft only as a piece of evidence, and could only determine whether the executed paper was the legal act of the deceased or not, which depended on another question, whether on the 26th February, 1750, deceased had capacity enough to know what he did, and to understand that he was executing his will; and I thought from the whole tenor of the evidence on both sides that he was not sufficiently sensible to be capable of making and executing a will, and without such capacity, though his mark was set to the paper by the guidance of Batten and a seal was taken off the wax, so that there was a mechanical execution, yet it was not deceased's legal voluntary act, and therefore could not be pro-[240]-nounced for as his will; for which reason I pronounced against the validity of the will propounded, and that so far as appeared to me the deceased was dead intestate, but did not give costs.

TAYLOR against TAYLOR. Prerogative Court, Caveat Day, July 3rd, 1755.—

A party condemned in the costs retardati processûs.

Hughes had long been assigned to give an allegation, which he neglected; at last he delivered one into Court, but had not given the adverse proctor a copy, as he had been assigned to do; it was then appointed to be debated the next Court, upon which day he pretended he did not know the adverse proctor would oppose it, upon which it was put off to this day, and now he suggested that the allegation was very imperfect, prayed leave to subduct it, and time to Michaelmas Term to give in a complete allegation, and Dr. Bettesworth, his counsel, informing the Court that he had seen heads of such allegation and thought it would be material, I condemned Hughes's client in 3l. 6s. 8d. costs retardati processûs, and assigned to hear upon the admission of the allegation the first day of next Michaelmas Term, provided such costs were paid, and a copy of the allegation delivered to the adverse proctor by the caveat day in September next, otherwise the cause to be then concluded, and allowed him to subduct his allegation.

[241] *GASCOYNE against CHANDLER.* Prerogative Court, Caveat Day, July 3rd, 1755.—A legatee, having renounced administration cum testamento annexo, is not barred thereby from contesting the validity of a will.—Where the validity of testamentary papers is contested in the Court of probate, the Lord Chancellor always stays proceedings in his Court till that validity is determined upon.

[S. C. in Chancery, 3 Swanst. 418, n.]

Dr. Bettesworth for Chandler. Sabine Chandler, Esq., deceased, died in February, 1750, made a will, but appointed no executor or residuary legatee, he left Mary Chandler his widow, George Chandler, and Sarah, now the wife of Joseph Gascoyne, Esq., his children. Mary, the widow, and Sarah, the daughter, were the only legatees in the will or schedule. In May, 1750, they appeared and renounced administration cum testamento, whereupon it was granted to George Chandler as son to the deceased. 12th February, 1754, Sarah Gascoyne and her husband filed a bill in Chancery against George and Mary Chandler, prayed a discovery of assets, payment of her legacy under the will, and distribution of the rest of deceased's estate; defendants gave their answer to the bill, and then Sarah Gascoyne cited said George Chandler to bring the letters of administration into this court to prove the will by witnesses, or to shew cause why he should not be pronounced to have died intestate, and why administration should not be granted to her. She renounced both as daughter and legatee, and thereby affirmed the will, and she has likewise affirmed it in Chancery, where a suit is now depending; and she cannot legally proceed in both courts; and therefore Mr. Farrer has appeared under protestation, and has alleged that his client is not lawfully cited, and is not bound to answer in this cause.

Read an affidavit to prove the proceedings in Chancery.

[242] Dr. Hay for Gascoyne. Deceased died the 6th February, 1749; left an imperfect schedule, therein gave 6000l. to his daughter, it was of deceased's handwriting. We admit the widow and daughter renounced administration with the will annexed, as next of kin and as legatee. Citation to shew cause why deceased should not be pronounced to have died intestate, or to prove the will by witnesses; her renunciation does not bar her from contesting the will; the Court of Chancery cannot affirm or set aside the will.

Judgment—Sir George Lee. I was of opinion she was no more barred by her

renunciation of the administration from contesting the will than a legatee is who has received a legacy; nay, that case is stronger, for a legatee by acceptance of the legacy does affirm the will, but a renunciation does not; and yet a legatee under those circumstances is constantly admitted to controvert a will. With respect to the proceedings in Chancery, her bill there, wherein she prayed payment of the legacy under the will, is inconsistent with her suit here to set the will aside; and therefore the proceedings in that Court will be stayed till the validity of the will is determined here. The Lord Chancellor has often directed the validity of papers to be tried here, and has stayed the proceedings in Chancery, as he did lately in the case of *Baynall and Sir Jacob Downing*. I therefore ordered Mr. Farrer to appear absolutely, which he did.

[243] *COUSSMAKER against CHAMBERLAYNE*. Prerogative Court, Caveat Day, July 3rd, 1755.—Where a trust is coupled in a will with an executorship, and the executor does not prove the will, the representative of that executor cannot take probate of it.—A mere trustee has no right by law to claim an administration.

Dr. Pinfold for Coussmaker. John Latton deceased died in November, 1727; on the 30th October, 1727, he made his will, appointed Samuel Wincop, Esq., Sir James Edwards, Bart., and John Coussmaker, Esq., executors and residuary legatees in trust, gave 60l. a-year for life to his brother William Latton, to his grand-daughter Frances Johnson 1000l., to Mr. Wincop, jun., 200l., and to William Latton, 500l., to be paid as hereafter mentioned; gives all the residue to the executors in trust, and to the survivor of them, and the executors and administrators of the survivor during the life of his brother, and of his (the deceased's) widow, to whom he gave for life all the produce of his estate beyond the 60l. a-year to his brother, and after their deaths, the said legacies to be paid, and then gave the remainder after payment of the said legacies to his grand-daughter, Ann Chamberlayne. Mr. Wincop alone proved the will, the other executors did not renounce, but did not act; John Coussmaker survived the other two executors, made his will, and appointed his son, George Coussmaker, the party in this cause, his executor, who proved his will; deceased's brother died in 1732, and his widow on the 29th January, 1754; the question is, whether administration de bonis non cum testamento shall be granted to Ann Chamberlayne, who has no interest at present, till the particular legacies are paid, but who will have the particular interest in the residue, or to Coussmaker, the executor of the surviving trustee.

[244] Dr. Bettesworth contra. Ann Chamberlayne is substituted legatee; John Coussmaker did not prove, and therefore his son and executor has no privity with the first testator.

Judgment—Sir George Lee. I was of opinion that the trust was coupled with the executorship, and therefore as John Coussmaker had not proved the will, and taken on him the trust, it was not transmitted to his representative, and the real interest being in Chamberlayne (who as administratrix would be equally subject to the demands of the particular legatees as Coussmaker would), I decreed the administration de bonis non cum testamento annexo to her.

N.B.—A mere trustee has no right by law to claim administration.

ALLEN against ALLEN. Prerogative Court, Caveat Day, July 29th, 1755.—After letters of administration have issued, the value of an estate can only be known from the inventory.—The Court will be regulated by the inventory in ascertaining whether further security may be necessary.

Dr. Harris for John Allen. Joseph Allen deceased made his will, and appointed his wife executrix, and gave the profits of his light-houses to his brothers William and John Allen, and to the sons of David Allen, another brother deceased; the executrix and deceased's brothers William and John survived the testator, but are since dead; the 17th November, 1753, on the death of the executrix, administration de bonis non cum testamento was granted to William Allen, one of the sons of David, who gave only 500l. security for his adm[ni]stration. On the 4th sess. Trinity, 1755, John Allen, a brother of the administrator, cited him to bring in the administration, to exhibit an inventory, and to give better security. On the 3d July, 1755, Mr. Cæsar, proctor for John Allen, exhibited an affidavit to shew the security was not sufficient; we move that the administration may be brought in

and revoked, unless better security is given; the affidavit proves the profits of the light-houses to be 700l. a-year, and that there are 5000l. arrears upon that account due to testator's estate.

Act of the 25th June, 1755, read.

Prays that the administration may be brought in, further security given, and an inventory exhibited. On the contrary, Altham, proctor for William Allen, alleged that he is willing to give in an inventory, but that he ought not by law to give further security, unless it shall appear from the inventory that the security already given is not sufficient, and that the administration ought not to be brought in.

Dr. Hay for William Allen. William Allen was entitled to have administration; the present question is whether the administration shall be brought into Court, on suggestion that the security is not sufficient; the affidavit is not proper evidence in this state of the cause, and therefore I oppose the reading of it; it must appear upon the face of the inventory, or upon exceptions to it pleaded and proved, that the security is insufficient.

Judgment—Sir George Lee. I was of opinion the affidavit ought not to be read; affidavits are proper evidence to ascertain [246] the value of the estate, in order to fix the quantum of the estate before administration passes under seal; but after letters of administration have passed, the value of the estate ought to appear from an inventory, and if either it shall appear upon the face of the inventory, or upon proof of omissions therein, that the security is not sufficient, the Court will order further security to be given, and if that order is not complied with, will call in and revoke the letters of administration, but not before. I therefore, at present, only decreed the administrator to exhibit an inventory.

NEAGLE against CANTILLON AND THE EARL OF CASTLEHAVEN. Prerogative Court, 3d Session, Michaelmas Term, November 24th, 1755.—Probate of a will refused, because there was lis pendens respecting the validity of a codicil.

Dr. Pinfold for the Earl of Castlehaven. Francis Garvan, Esq., deceased; upon his death several caveats were entered, but are all dropped. Neagle, who entered a caveat, proceeds no further. Cantillon and Lord Castlehaven, and the King intervening for his interest, are now the only parties; commissioners of appraisement in searching deceased's papers found a schedule, dated the 30th June, 1743, all written by deceased, wherein he makes Lord Castlehaven executor, and gives all the residue of his estate, after payment of his debts, to be distributed among the poor; the commissioners likewise found a book of accounts, in the last leaf of which is written by deceased what Cantillon has propounded as a codicil; it is dated the 25th August, 1749, by which he gives Cantillon 2700l. due from him to deceased on the balance [247] of an account; this codicil is opposed by Lord Castlehaven and the Crown; the deceased's estate is considerably indebted to Lord Castlehaven; all sides agree in the necessity of having somebody appointed to take care of deceased's estate immediately; the will is not disputed, and therefore we pray the Court to grant probate to Lord Castlehaven, the executor, who will undergo a monition to take probate hereafter of the codicil if it shall be established; or if the Court will not grant probate of the will, we pray that administration pendente lite may be granted to Lord Castlehaven's nominee, and not to Mr. Francis, the crown's nominee. Cantillon does not interpose on this point further than to pray that the administrator may give good security.

Dr. Hay for the King. By the disposal of the residue to the poor in general, without specifying what poor, the destination of the charity is in the crown. Cantillon agrees that an administration pendente lite is necessary; Lord Castlehaven is a nude executor, who can only receive and pay debts but can make no distribution of the residue. The interest in the residue is vested in the crown in this case, 1 Vern. 224, and therefore administration ought to be granted to the crown's nominee. Probate cannot be granted to the executor of the will till the question respecting the validity of the codicil is determined.

Judgment—Sir George Lee. I was of opinion, First, that probate of the will could not be granted to the executor, while a contest subsisted about the validity of the codicil, for that being undetermined, it did not appear what [248] was the will, and the executors could not take the common oath; and I knew no instance of a probate being granted under the like circumstances. Secondly, I was of opinion the king had

no interest in the grant of the administration pendente lite. The crown has interest only in the destination of the residue, which must be ordered hereafter in Chancery, when the executor had collected in the whole estate, and paid the debts, &c., and therefore I decreed the administration pendente lite to the nominee of Lord Castlehaven, the executor, good security being given.

BITTLESTON, BY HER GUARDIAN against CLARK. Prerogative Court, Michaelmas Term, November 24th, 1755.—A party cannot propound instructions as the last will of a testator in the same cause in which sentence has been given as to a will propounded, for there cannot be two definitive sentences in the same cause.

[See p. 229, ante.]

Dr. Hay for Bittleston. John Clark died 27th February, 1750, left a widow, Ann Clark, and Thomas and Elizabeth Bittleston, his nephew and niece, and next of kin; he was seized with a palsy on 25th February, 1750, and lost his speech and senses. Will of 26th February, 1750, was propounded by the widow, the executrix therein named. The court was of opinion upon the evidence that deceased was not in his senses on 26th February, when said propounded will was executed; and therefore pronounced against it, and that the deceased, so far as appeared, was dead intestate, and assigned the widow to declare whether she would accept administration in that cause. The instructions for said will were pleaded and exhibited, and Mr. Green, the writer, was examined to them. Sentence against this [249] will was given on 3d July, 1755, and Cheslyn, Clark's proctor, was assigned to declare whether she would accept administration. He can now do nothing else; but instead of declaring, he desires leave to propound those instructions in this same cause, which is unprecedented, and it would be very dangerous to allow it after an examination already had and published upon those instructions.

Dr. Pinfold, same side. They had an opportunity to have propounded this paper, but they made their option to set up the executed will, and must abide by that. A poor man may be harassed out of his right, by pleading different wills successively. *Deleg. Butler and Parmenter* (1 Lee, 145, n.), after sentence was given against a will Parmenter would have set up another of a former date; but the Court would not suffer him.

Dr. Simpson and Dr. Bettsworth for Clark. The instructions were pleaded in the former cause only as a circumstance to give strength to the will. In giving sentence the Court said he could not take notice of the instructions so as to pronounce for them as a will, because they were not propounded as such, and it would be very hard that the widow, by mistake in propounding a wrong paper, should be barred from a possibility of setting up the real will. We could not propound this paper of instructions and the executed will too. We admit the general rule that the same fact cannot be pleaded over again, but this paper is now offered *diverso intuitu*; it was then pleaded as an exhibit, it is now offered as the de-[250]-ceased's last will, and any legatee might propound it.

Judgment—Sir George Lee. I was of opinion Cheslyn was not at liberty now in this cause to propound the instructions, for he stood assigned to declare whether his client would accept the administration. Sentence was given in this cause as to the will propounded, and another will could not be set up in the same cause, for a man might leave twenty different testamentary papers, and it would be strange if the executor should be at liberty to propound them successively one after another, for then suits would be endless, and there would be twenty distinct definitive sentences in the same cause, which would be absurd and impossible. A legatee cannot set up a will after it has been litigated between the executor and next of kin, and pronounced against, unless he can shew the parties agreed to set aside the will by fraud or collusion, and so the Delegates held in the case of *Lewis and Bulkeley* (1 Lee, 513 and 190, notes); but a legatee, if he is afraid the executor will not do justice, may intervene for his interest pending a suit. These instructions cannot be propounded in this cause; but the widow may take out another citation against the next of kin in a new cause, to see these instructions propounded as deceased's last will, and proved by witnesses, and then the question will come properly whether she can propound them after having set up a former will which was pronounced against. I said I did not mean to give a determination now upon that point, but I inclined that she could not, for she had made her option, and had propounded

the executed will, when she might [251] have propounded these instructions; and therefore did not, at that time, look upon them as the deceased's will. If they had come to her knowledge since that suit, the case would have been different; but as the instructions were pleaded and examined to in that former cause, it would be very dangerous to suffer them to be examined to again, and would be very vexatious to the next of kin to be harassed with successive suits, and therefore I rejected Cheslyn's petition, and again assigned him to declare whether his client would accept administration.

Clark appealed, but never prosecuted the appeal; wherefore the Delegates remitted the cause. The remission was exhibited in the Prerogative, 4th Session, Trinity Term, 30th June, 1757, and I assigned Cheslyn to accept or refuse the administration by the next Court.

HACKMAN against BLACK. Prerogative Court, Michaelmas Term, November 24th, 1755.—A creditor has a right to call for an inventory, but has no right to interfere in an administration bond.

Jacob Hackman died intestate; caveat entered by a creditor, who made oath of his debt, and prayed an inventory and notice of the security before administration should pass under seal to the widow.

Judgment—Sir George Lee. I decreed the administration to pass under seal to the widow, she undergoing a monition to exhibit an inventory, but refused to order her to give notice of the security, because I was of opinion a creditor had nothing to do with the administration [252] bond, though Mr. Stevens, the registrar, said a creditor had lately a suit at law (a) upon an administration bond, and had recovered against the sureties, because the administrator had not exhibited an inventory. But note, an administrator is bound by statute 21 H. 8, c. 5, to exhibit an inventory, and that clause in the bond is only in affirmance of the law as it stood before the statute of distributions.

PIERREPOINT against HOLBECKE AND DARLING. Prerogative Court, Michaelmas Term, November 24th, 1755.—The identity of a will sufficiently proved.

Dr. Pinfold for Pierrepoint. John Pierrepoint is executor of John Holbecke, who died 22d December, 1754. The will is dated 16th December, 1754, attested by three witnesses, but was not executed till the 19th, and there are two codicils made 21st December, 1754, not dated or executed. [253] The will and codicils are opposed by the widow; draft of the will was brought to deceased by Mr. Kirkby, the writer. On 15th December the deceased made many alterations in it; deceased then said he would execute it; Kirkby told him it ought to be wrote over fair; deceased said he was very ill, and might die before the next day, and therefore he would execute the draft, which he did in the presence of the same three witnesses who afterwards attested the fair will. Full proof of deceased's approbation of the codicils. The witnesses say the will was executed on or about the 16th December, 1754; intention of the testator, approbation of the will and codicils, and capacity, are fully proved.

Dr. Far for Holbecke. The fair will propounded was executed on 19th December,

(a) The registrar may probably have alluded to the case of *Greenside and Others v. Benson*, decided by Lord Hardwicke, and reported in 3d Atkins, 248. Lord Mansfield subsequently in the case of *The Archbishop of Canterbury v. House* (Cowper, 140) held not only that the Ordinary could empower a creditor to put an administration bond in suit, but that it was *ex debito justitiæ* to do so, "for (he adds) though a creditor has no concern in the latter part of the condition, namely, the distribution of the surplus amongst the next of kin; yet he is most materially and principally interested in the administrator's delivering a true inventory, and in the due administration of the effects." Some of these expressions apparently conflict with the dicta of Lord Holt in *The Archbishop of Canterbury v. Willis*, 3d Salk. 316, a case probably very familiar to Sir George Lee; but the result to be arrived at from the examination and comparison of these several cases seems to be that if it is not competent to a creditor to assign the nonpayment of a debt to him as a breach of an administration bond, it is at least competent to him to assign as such a breach, the not delivering of an inventory.

Vide also an incidental reference to some of the above cases in Lord Tenterden's judgment in *The Archbishop of Canterbury v. Tappen*, 8th Barnewall and Creswell, 159.

1754, but is dated 16th December. My objection to the will propounded is that the witnesses all depose to a will executed upon the 15th December, which is the draft that is not propounded, and so they prove a will which is not propounded, and therefore cannot be pronounced for, and do not prove the will which is propounded.

Judgment—Sir George Lee. The testamentary witnesses seemed to be confused between the execution of the draft and of the fair will; but the writer expressly deposing to the will propounded, and the other witnesses to the will now shewn them at their examination, which could be no other but the will propounded, I was of opinion the identity of that will was sufficiently proved, and therefore pronounced for the will and codicils.

[254] Cause appealed; afterwards appeal deserted and the cause remitted by the Delegates on 27th January, 1757, for non-prosecution, with 20l. costs.

REPINGTON *against* HOLLAND AND REPINGTON. Prerogative Court, Michaelmas Term, December 3d, 1755.—Administration with a will annexed granted to a widow in preference to a mother.—A residuary legatee is generally entitled to an administration with the will annexed, because he is bound, for his own sake, to be careful in collecting the effects and improving the estate.

[See p. 106, ante.]

Dr. Pinfold for Elizabeth Repington, deceased's widow. James Repington died in October, 1753, in the East Indies, in the station of captain of a troop of dragoons in the East India Company's service; he left a widow, a mother, three brothers, and a sister, but no children; made a will, dated 15th December, 1749, in which he made his wife universal legatee, and appointed her and John Holland executors. In 1754 Holland took probate; on 20th February, 1753, he wrote a letter from the Indies, in which he said he had great success in increasing his fortune, and was now in a condition to do what he had always desired, to provide for her that she might live comfortably the rest of her life, and he insisted on her taking his brothers and sister to live with her, and then adds the following clause, viz.: "As we are in continual war here, I have made my will, so that if any misfortune should happen to me, besides the one half of my fortune, which you know who has a right to, I leave you the other except a few legacies for my brothers and sister, who I insist on your taking to live with you." The mother called Holland and the widow to bring in the probate of the will of 1749, and to shew cause why administration, with this letter annexed, should not be [255] granted to her till the will referred to should be brought from India. The Court has pronounced this letter to be testamentary, and a revocation of the will of 1749, and has accordingly revoked the probate granted to Holland. The question now is whether administration, with this letter, shall be granted to the widow or the mother. There is no residuary legatee, and the widow has the greatest interest, for it is agreed the testator meant her by the words "you know who has a right to."

Dr. Hay for Ann Repington insisted that the mother was residuary legatee, and as such entitled to the administration, and that she had as great an interest as the widow, for the legacies to the brothers and sister are payable out of the whole clear estate.

Judgment—Sir George Lee. I was of opinion the mother was not a residuary legatee; a residuum is something uncertain, which shall happen to be left after the debts and legacies are paid; but here the mother had a certainty left her, viz. a moiety of the estate. Secondly, I was of opinion the mother had less interest than the widow, for the legacies to the brothers and sister were payable out of her half; the words "except a few legacies," &c. being directly annexed to her moiety. I further observed that deceased by the will of 1749 had given his wife all, and made her executrix, and it did not appear that he had altered his intention with respect to her, but by the improvement of his fortune, having enough to provide for her and his relations too, he had made a new will only to provide for his relations; that a widow under an intestacy, if [256] there were no legal objections to her, was to have administration preferable to a mother. I therefore decreed administration, with this letter annexed, to the widow, till the original will, or an authenticated copy thereof, shall be brought into Court. I observed that administration was granted to a residuary legatee, because he having only what should happen to be left after all charges paid, was bound for his own sake to be careful in collecting in and improving the estate.

SMITH against ORAM. Prerogative Court, Caveat Day, January 8th, 1756.—A commission of appraisement granted to value the effects on an intestate. Objection taken to the return overruled.

[Referred to, *Leighton v. Leighton*, p. 357, post.]

John Ellis deceased made his wife executrix and residuary legatee; she died before him; he left two daughters, Mary, the wife of William Smith, and Elizabeth, the wife of ——— Oram; deceased died at Oram's house, where he had lodged some time; Elizabeth Oram took administration cum testamento to him; Smith cited her to bring in the administration, and shew cause why it should not be revoked for want of sufficient security, and to exhibit an inventory; Oram brought in the administration, and submitted to give further security if the Court thought proper to order it; it appeared that the estate was but about 700*l.*, and the quantum of the security was 2000*l.*, but it was said the securities were not worth that sum. I ordered the sureties to be reported. Smith prayed a commission of appraisement; Oram named commissioners, and joined in the execution of it, and she being in possession of deceased's effects was admonished to shew them to the commissioners; the commissioners on both sides [257] certified that she refused to shew the household goods, and alleged that they were her own, for deceased gave them to her in his lifetime as a free gift; she made affidavit of the truth of that fact, and exhibited several affidavits in support of hers, and she also in her affidavit set forth what the goods were, and the value of them.

Smith's counsel insisted that Oram was in contempt, that she ought to have shewed the goods and had them valued, and then made her claim, and that she ought to have given in an inventory setting forth the particulars and value of those goods.

Judgment—*Sir George Lee*. But there being a very probable evidence that the deceased gave the goods in question to his daughter Oram when he left his lodgings and came to live with her, and there being no evidence in contradiction, I was of opinion she was not in contempt, and rejected Smith's petition.

FOWNES against ETTRICKE. Prerogative Court, 3d Session, Hilary Term, February 7th, 1756.—An allegation pleading a pedigree admitted to proof, although the marriages of the ancestor were not set forth.

I admitted an allegation pleading a pedigree, though the marriages of the ancestors were not set forth, the latest of which was about sixty years ago; but common reputation of relationship in such a certain degree, legitimacy, and public ownings were fully pleaded, and also declarations of persons now dead, who were conversant in the families of the parties, were admitted as proof of public reputation of relationship in the degrees alleged.

[258] **MASKELINE AND BROHIER against HARRISON.** Prerogative Court, Hilary Term, February 7th, 1756.—The Courts of Common Law have ceased to object to the grant of administrations pendente lite where there is an executor named in a will propounded. Such administrations ought not to be granted without good reason.

John Harrison made his will the 1st October, 1747; appointed his brother Maurice Harrison executor; he afterwards went to the East Indies, where he died, but first made another will in 1754, and appointed Maskeline and Brohier executors; the brother as executor of a former will opposed this latter will, and prayed an administration pendente lite might be granted to a person named by him; the other parties opposed the grant of any administration pendente lite, and Dr. Simpson, their counsel, insisted, first, that an administration pendente lite could not by law be granted in any case where there was an executor, as in this case there must be one, for if the latter will wherein Maskeline and Brohier are executors should be set aside, then the first will wherein Harrison is executor would operate. Secondly, in this case there was no proof by confession, affidavit, or otherwise, that the estate or any part of it is perishable, which is essentially necessary, *Prerogative, Sutton against Smith*, 10th February, 1753.

Judgment—*Sir George Lee*. As to the first objection made by Dr. Simpson, I said that though formerly the Court of Common Law had held that administration pending a suit upon a will where there was an executor could not be granted, yet lately they

had been of a different opinion, for in B. R. 4 Geo. 2, in the case of *Woolaston and Walker*, the whole Court upon consideration held that such administration was good. [259] But as to the second point, I was clearly of opinion that administration pendente lite ought not to be granted without good reason, and I had declared so in the case cited of *Sutton against Smith* (1 Lee, 207); and as in the present case there was no evidence that an administration pendente lite was necessary or wanted for the benefit of the estate, I rejected Harrison's petition.

WILKINSON against MOSS. High Court of Delegates, (a) February 16th, 1756.—A possessory title in a church seat sustained against an application for a faculty.

Wilkinson took out a citation to shew cause why a faculty should not be granted to him for two seats in a certain pew in a church in the diocese of Durham. Moss appeared, and alleged that those seats belonged to him, and were conveyed to him by one Rippon for valuable consideration in 1731, and he had ever since been in quiet possession thereof, and opposed granting the faculty. Wilkinson alleged they were conveyed to him by Ann Woodimash in May, 1748, to whom they belonged. On the 16th March, 1753, the Court at Durham pronounced against Wilkinson, and decreed and de-[260]-clared the two seats in question to Moss. Wilkinson appealed to York from decreeing the two seats to Moss, where the sentence was confirmed; he then appealed to the Delegates.

Dr. Hay, his counsel, insisted that the sentence must be reversed, because the Judge had decreed the two seats to Moss, whereas if Wilkinson had not made out a title, he could do nothing more than dismiss the cause, and cited the case of *Dearle against Southwell* (vide supra, pp. 93, 119) in the Arches, where I had reversed the decree of a faculty granted to one who appeared only as a defendant to oppose a faculty being granted to one who prayed it.

Judgment—But the whole Court of Delegates were of opinion that Wilkinson had shewn no title; that Moss had a good possessory right, and that the decree only confirmed Moss's possession as against Wilkinson, but did not give Moss an absolute right, as the faculty in the case of *Dearle against Southwell* did, and was for that reason rightly reversed.

The Delegates therefore in this cause confirmed the two former sentences, and condemned Wilkinson in 60l. costs.

N.B.—Wilkinson examined Ann Woodimash, to prove that the two seats in question which she had conveyed to Wilkinson in 1748 were bought by Moss of Rippon in 1731, in trust for her. But [261] the whole Court was clearly of opinion she was interested in the question, and therefore rejected her deposition.

LE BRITON against LE QUESNE. Prerogative Court, Caveat Day, April 8th, 1756.

—The treasurer of the navy refuses to pay the arrears of a mariner's wages on the probate of a will granted in Jersey. A decree issues against the executor to accept or refuse administration cum testamento annexo in the Prerogative Court. No appearance being given for him, an administration cum testamento annexo was granted to the residuary legatee.

Nicholas le Quesne, of Jersey, bachelor, died in October, 1746, made his will in September, 1746, appointed his brother John le Quesne executor (who proved the will in the proper Court at Jersey), and gave the residue of his estate to his sisters Elizabeth and ——— le Quesne; the deceased was a mariner, and had wages due to him at the Pay Office, London, which the treasurer of the navy refused to pay upon the probate at Jersey, and the executor had not proved the will in the Prerogative Court. Elizabeth le Quesne as a residuary legatee took out letters of request to the magistrates at Jersey to cite the executor to accept or refuse probate in the Prerogative Court, or to shew cause why administration cum testamento should not be granted to her, and she brought the will, or an authentic copy of it into Court; the magistrates at Jersey refused to execute the letters of request, and returned that no inhabitant of Jersey ought to be cited by any ordinary but the bishop of Winchester, and that the appeal from him lay only to the king in council. Elizabeth then prayed, and I granted, a decree against the executor, to be hung [262] on the Royal Exchange, which being duly served and continued, and no appearance given for the executor, I granted

(a) Judges present—Right Honourable Sir George Lee, Mr. Justice Clive, Mr. Baron Legge, Sir Thomas Salusbury, LL.D., Dr. Collier, Dr. Ducarrel, and Dr. Smalbroke.

administration with the will annexed to Elizabeth le Quesne, as being a residuary legatee.

GORDON *against* EYRE AND DEAN. Prerogative Court, Caveat Day, April 8th, 1756.

—An administration de bonis granted to a creditor after a citation served on the Royal Exchange, against a son and another creditor who had taken out an administration.

George Nicholas Eyre, Esq., died in 1713, a widower intestate; left Charles Chester Eyre, his only child, a minor; in 1714 John Chamberlayne, his guardian, renounced the administration on behalf of the minor, and it was granted to Alexander Dean, a creditor; Daniel Hugh Gordon made oath that deceased died indebted to him 10l. 10s. by note of hand, and 100l. by decree in Chancery, and that he had sought for the said son, and Dean the administrator, for four years past, and had not been able to find them, but was informed they were both dead; whereupon Gordon took out a citation, which was served on the Royal Exchange against the son, and the said Dean, to bring in an inventory if living, or if dead, against their representatives, to shew cause why administration de bonis should not be granted to him; there being no appearance, I decreed administration de bonis non to Gordon.

SIR EDWARD HAWKE *contra* OMNES. Prerogative Court, Caveat Day, April 8th, 1756.—Administration to a creditor after a service on the Royal Exchange.

John Bladen, lieutenant of a man-of-war, died a bachelor intestate. Sir Edward Hawke made [263] affidavit that he was a creditor to the deceased, that he had enquired and could not hear of any relations the deceased had, and believed he had none, and therefore prayed a decree to be hung on the Royal Exchange, *contra omnes*, to shew cause why administration should not be granted to him as a creditor; the decree was duly served, and nobody appearing, I decreed administration to Sir Edward Hawke, as being a creditor to deceased.

FITZGERALD *against* LADY MARY FITZGERALD. Arches Court, 1st Session, Trinity Term, June 14th, 1756.—A contempt which had originated from the inability of a husband to pay alimony and costs—suspended.

Lady Mary brought a suit in the Consistory of London against George Fitzgerald, Esq., for a divorce; in the course of the cause he was in the Consistory and the Arches (where it was removed upon his appeal upon a grievance, and retained by her consent), condemned in the Consistory in 100l. for alimony, and 65l. for costs, and in the Arches, in 120l. costs, for which sums, they not being paid, he was excommunicated three times, and was once signified; the question was, whether he being in contempt and excommunicated the admission of an allegation offered by him in his defence, and which was signed by his counsel, could be debated at his petition? In order to purge his contempt, he made an affidavit that he had not money to pay according to the several orders of the Courts—that his contumacy was not voluntary but arose from his poverty—that he would com-[264]-ply with all the orders of the Court as soon as he was able, set forth what money he had received and how it was expended, and swore that he had but 120l. which was the sum last taxed, and offered to pay that sum to Lady Mary, or her proctor, with the contumacy fees thereto. She made an affidavit that she had nothing but what her friends gave her, and insisted that he could not be heard till he had purged all his contempt and was absolved, but did not deny the facts in his affidavit, and she prayed the cause to be concluded.

Judgment—Sir George Lee. I was of opinion, that as his contempts did appear from his affidavit to arise from inability to pay the money, the effect of those decrees against him ought to be suspended till he was able to obey them; and as he was ready with an allegation, which his counsel had signed, it would be unjust to hear this cause *ex parte*, and deprive him of a possibility of making his defence, and therefore directed Mr. Gosting, his proctor, to pay or make a tender to Mr. Farrer, her proctor, of 120l. with the contumacy fees thereon, as he had offered in acts of Court, and assigned to hear on the admission of Mr. Fitzgerald's allegation the next court.

GOODALL *against* GOODALL. Arches Court, Trinity Term, June 14th, 1756.—An affidavit not allowed to be read in contradiction to an allegation of faculties.

Mr. Goodall brought a suit against his wife for adultery; the libel was admitted and witnesses examined. She gave in an allegation of faculties, in which she admitted

she had a separate estate [265] of 45l. a year, but said her father's executrix would not pay her any of the income of it. The husband's counsel offered to read his affidavit as to the value of his income in contradiction to the allegation, but I was of opinion the affidavit could not be read, and admitted the allegation, and condemned him to pay her costs, but decreed nothing as to alimony till the proofs were before the court.

BUTLER against DOLBEN, CALLING HERSELF BUTLER. Arches Court, Trinity Term, June 14th, 1756.—Joint letters of request from the Chancellor of London and the Commissary of Buckinghamshire, accepted quatenus.

[See further, pp. 312 and 319, post.]

Mr. Butler, son of John Butler, of Warminghurst Park, in Sussex, Esq., a minor, aged about eighteen, was married (as suggested) to Mrs. Dolben, in parts beyond the sea; the father being desirous to annul the marriage, and it being doubtful whether she was to be deemed a resident of the commissaryship of Bucks in the diocese of Lincoln, where she lived, or of the diocese of London, she being actually at this time a prisoner in the Fleet, by a commitment of the Lord Chancellor, for marrying a ward of that Court: Mr. Butler obtained joint letters of request from Dr. Simpson, Chancellor of London, and Dr. Bettesworth, Commissary of Bucks, praying the Court of Arches to take cognizance of the cause, and to cite her to answer in a cause of jactitation of marriage to John Butler, the father, and natural guardian of the minor. The cause being new in two points, first, as to the letters of request being granted jointly by two judges; and, secondly, as Mr. Butler sued in his own right, as father and guardian by nature, and not as guardian elected by the minor, and assigned [266] by the Court, I would not decree a citation but in open court, where I took notice of the novelties in this case, and accepted the letters of request, quatenus only, which I directed to be taken down in acts, and decreed a citation as prayed, but declared I should be ready to hear any objections the defendant, when she appeared, would make to the citation, and the jurisdiction of the Court as founded on these joint letters of request.

WRIGHT against RUTHERFORD AND OTHERS. Prerogative Court, 1st Session, Trinity Term, June 16th, 1756.—The want of interest may be objected to at any time in a cause, especially before issue joined.—By the laws of Barbadoes, negroes belonging to a plantation are glebæ adscriptitii.

[See on another point, 292, post.]

Dr. Hay for Jane Wright. John Price, deceased, left Jane Wright, widow, formerly the wife of Robert Wright, his sister of the whole blood, and Martha Rutherford, his sister, of the half blood, made his will 7th March, 1734, attested by three witnesses, gave thereby his plantations in Barbadoes, with all his negroes thereon, without impeachment of waste, to his sister, Jane Wright, then the wife of Robert Wright, remainder to said Robert for life, remainder to their issue male, remainder to their issue female, remainder to his own right heirs for ever, and made Jane Wright executrix. On 13th February, 1743, he made and duly executed another will, whereby he revokes all former wills, and leaves his plantations and all the rest of his estate, real and personal, to trustees, for the sole use of Jane Wright, during her coverture, exclusive of her husband, and after the death of her husband, [267] gives the remainder to her and her heirs for ever, and appointed the trustees. John Brinsden and John Dighton, executors. The testator died 23d February, 1756. Robert Wright died before him, and left only one child by his said wife, viz. Charlotte Tyrrell, widow, a minor. Jane Wright entered a caveat. The executors appeared and renounced probate. Tyrrell appeared by her guardian to set up the first and oppose the last will. The question now is, whether Tyrrell has any interest under the first will to oppose the last will in this Court with respect to the personal estate. She has no interest by the first will in the personal estate, but has only a reversionary interest in the plantations at Barbadoes, and the negroes thereon, which by the laws of that island are all real estate. The Act of Assembly of Barbadoes in November, 1668, declares negroes belonging to a plantation to be real estate, and that is confirmed by another act in 1672, which declares that negroes shall be personal estate for payment of debts, but not to any other purpose.

Dr. Bettesworth, for Tyrrell. It is not alleged that those acts of Assembly have

been confirmed by the king, and if not, they are of no force, but if they are valid, it is too late to make the objection now, for on the 18th of April last Tyrrell's proctor was assigned to declare whether he opposed the latter will or not.

Judgment—Sir George Lee. I was of opinion the objection did not come too late, for tui non interest might be objected at any time, but more especially before issue joined, and that by the laws of Barbadoes, negroes belonging to a plantation are glebæ adscriptitii, and are part [268] of the real estate, and therefore pronounced against the interest of Mrs. Tyrrell to oppose the last will in this Court, she having no interest under the first will in the deceased's personal estate.

PEARSON against GAMON. Prerogative Court, Trinity Term, June 16th, 1756.—A creditor having made his option to sue in Chancery by a bill of discovery, must be bound by such option to proceed in that Court.

[Considered, *Walsh v. Bishop of Lincoln*, 1874, L. R. 4 Adm. & Ec. 242.]

John Hemming is the deceased; Richard Gamon is his executor. In April, 1755, Pearson, a creditor by bond, cited Gamon to bring in an inventory and to take probate; he brought in a declaration in which he said that the deceased carried effects with him abroad, of which he could not then give any account, but would when he received any. No objection was taken to the declaration, and Gamon was dismissed. In May, 1755, Pearson filed a bill in Chancery against Gamon, for a discovery of deceased's assets, to which, in July, 1755, Gamon answered, and that cause is now depending in the Court of Chancery. Pearson again cited Gamon to give an inventory in the Prerogative Court. Gamon appeared under protest, and alleged that Pearson had made his option by filing a bill for a discovery in Chancery, and that he ought not to be harassed in both courts for the same matter, and prayed to be dismissed with costs. Pearson replied that Gamon had, since filing the said bill, had an account of deceased's effects from abroad, that he could not have a full discovery of said effects under his present bill, but must amend it, which would be in nature of a new bill, and therefore that the matter was a *res integra*, and he was at liberty now to proceed in this Court.

[269] *Judgment—Sir George Lee.* But as there was now a bill for discovery of deceased's assets depending in Chancery, I was of opinion it was not a *res integra*; that he had deserted this Court where he had originally begun, and had made his option to proceed in Chancery, and could not revert to this Court while that suit was depending. I therefore rejected Pearson's petition, and condemned him in 11. 6s. 8d. costs.

CLARK against CLARK AND OTHERS. Prerogative Court, Trinity Term, June 16th, 1756.—The expenses of a commission of appraisement to be paid out of the estate of an intestate before distribution, but after the payment of the just debts.

George Clark, a freeman of London, subject to the custom, died intestate, left no children, but left a widow, Hester Clark, who is entitled by the custom to one moiety of his personal estate, and to half the other moiety also by the statute of distribution, and he also left a sister, Hester Taylor, widow, and several nephews and nieces, who are entitled to distribution. Taylor entered a caveat and prayed a commission of appraisement, in which the deceased's widow joined. Taylor now prays that the expences of the commission of appraisement may be paid out of the estate. Clark opposes it on suggestion that the estate is insolvent, in which case the court never orders expences to be paid out of the estate, because it would injure creditors.

Judgment—Sir George Lee. I decreed the expenses of the commission of appraisement to be paid out of the estate before distribution, in case it shall hereafter appear that [270] there is any estate remaining to be distributed after all the just debts are discharged.

REEVES against GLOVER AND OTHERS. Prerogative Court, 2d Session, Trinity Term, June 23rd, 1756.—An allegation propounding an unfinished paper admitted to proof.

William Finch died 5th December, 1755, made his will dated 20th June, 1743. Mrs. Reeves, executor, she propounded that will and three codicils, A, B, C; Mrs. Puddephat, one of deceased's next of kin, and a legatee in a latter as well as said will, propounded a schedule wrote by deceased in July, 1752, above three years before

his death; it contains real as well as personal estate, not executed, Mrs. Reeves is appointed executrix therein, but no residuary legatee is named; upon debate of the allegation propounding this schedule, it was urged that it ought to be rejected, because a paper under the above circumstances could not operate to revoke a former executed will.

Judgment—Sir George Lee. But I was of opinion the facts ought to appear before the court to found any observations that could arise in point of law. Possibly this schedule might not revoke the executed will, but might well consist with it when they came to be considered together, and therefore I admitted the allegation.

BRADSHAW *against* BRADSHAW. Prerogative Court, Trinity Term, June 23rd, 1756.—

The words “rest and residue” include the whole personal estate.

Robert Bradshaw died a bachelor, made his will and appointed his mother, Elizabeth Bradshaw, sole executrix, gave her a legacy of 500*l.* abso[271]-lutely, and devised to her a message with the appurtenances, &c. for life, and then gave to her the use and interest of his plate, furniture, money, stocks, and all the rest and residue of his personal estate for life; and the remainder after her death of all such effects and residue he gave to his cousin Thomas Bradshaw, his heirs &c. for ever. Thomas Bradshaw cited her to bring in an inventory and account; she gave in one setting forth the particulars, but not the appraised value of any, and said she had sold part of the plate and stocks, but did not set forth to whom, nor the value thereof. Thomas insisted that all the effects ought to be appraised, and the particular value of each thing to be specified in the inventory. Elizabeth’s counsel urged that as the will was worded, all the specific things mentioned therein belonged absolutely to her, and that only the residue exclusive of them was given to Thomas, and therefore she ought not to set forth the value, for otherwise the words “and the rest and residue” would be useless.

Judgment—Sir George Lee. But I was of opinion that the words “rest and residue” were useful to take in his whole personal estate, in case anything should be omitted in the enumeration of particulars, and that the testator gave her only for life the use of specific things, and the interest of his money, stocks, &c., and she had no power to alienate any part thereof; on the contrary, that Chancery would compel her to give security that every thing, or the value thereof, reasonable wear and tear being allowed, should be forthcoming at her death. I therefore directed that the plate, goods, &c. should be appraised, [272] and that she should give in a further inventory specifying the value of each particular.

CUNNINGHAM *against* ROSS. Prerogative Court, Trinity Term, June 16th, 1756.—

An allegation propounding a testamentary schedule admitted.

[See further, p. 478, post.]

Elizabeth Cunningham, who claimed to be the widow of David Cunningham, M.D., gave in an allegation propounding a testamentary schedule or will, in which the deceased gave to the said Elizabeth all his bills, bonds, &c. belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith.

On debate of this allegation, Dr. Hay insisted that the allegation ought to be rejected, for Elizabeth had no testamentary interest, because the devise was void; deceased having no effects at his death in the house of Mr. Smith, and cited 2 Vern. case of *The Earl and Countess of Shaftesbury*, the testator devised to his wife all his goods that should be in his house; before his death he removed all the goods from said house; held the devise was void.

Judgment—Sir George Lee. But I was of opinion this case differed from that, for there the testator devised all his goods that should be in his house, which implied that should be there at his death, but in the present case the words were only descriptive of what the testator meant to bequeath, and therefore it was immaterial whether they remained at Smith’s house at the time of his death or not. I admitted the plea.

[273] HAY *against* MULLO.(a) Prerogative Court, Trinity Term, June 23rd, 1756.

—A mariner’s will established, there being no proof that it was made to secure a debt.

(a) A report of this case is given in the notes to the case of *Zacharias v. Collis*, 3 Phill. 194.

George Hay, mariner, dying in 1749, a bachelor, left a mother and two sisters living in Scotland; on the 14th May, 1737, he with his own hand filled up the blanks of a printed will, and executed it in presence of two witnesses; appointed David Mullo, with whom he then lodged, executor and universal legatee; in December, 1750, Mullo took probate; in Michaelmas Term, 1752, the mother cited him to bring in the will and prove it by witnesses; he propounded it, and fully proved the factum of the will; the mother did not plead but cross-examined the witnesses. William Gillespie, the only surviving testamentary witness, said he had been witness to a will and power from deceased to Mullo, and on interrogatories, that he believed deceased's circumstances were not great in May, 1737, that he was then mate of a ship, but afterwards became a master, that he (the witness) does not know, nor ever heard, but believes said will was made to secure a debt to Mullo, as deceased had lodged some time at Mullo's house, and respondent has heard Mullo say deceased was indebted to him; the counsel for the mother admitted the factum of the will, but insisted it was void as being made to secure a debt.

Judgment—*Sir George Lee*. But as there was no proof that the will was made to secure a debt, but rested only on the be-[274]-lief of the witness, and on the contrary, it was proved by two witnesses that the deceased a short time before his death had expressed a great esteem, regard, and friendship for Mullo, and said his will and power were there and that he had made a will in favour of Mullo, and in fact had suffered the will to subsist for above twelve years, though he was often in England, and might have revoked it if he had intended that his relations should have his effects; I pronounced for the validity of the will.

TAYLOR against TAYLOR. Prerogative Court, Trinity Term, June 24th, 1756.—The right to an administration contested by two persons, each asserting herself to be the widow of the deceased, granted to the one whose marriage was expressly proved by two witnesses against whom there was no essential exception.—A legal marriage cannot be inferred from mere cohabitation where the actual fact of an earlier marriage is proved.

Dr. Hay for Ann Taylor alias Addis. Thomas Taylor died intestate. 1st Sess. Michaelmas, 1753, Hughes alleged Mary Grant alias Taylor to be deceased's widow, and prayed administration. Alexander, for Ann Addis alias Taylor, alleged and prayed the same; both interests denied and propounded. Ann pleaded that on or about the 30th June, 1738, deceased and she went together to a house kept by Wheeler in Turn-again-lane, in the parish of St. Sepulchre, and were lawfully married by Walter Wyatt, clerk, in presence of Samuel Grout and others. Mary pleaded that deceased and she were married at the Fleet on the 6th September, 1747. The question is, which is the lawful widow. 3d Sess. Easter, 1754, Hughes pleaded a marriage between deceased and one Isabella Noble, at the Fleet, on the 10th April, 1736, and that deceased lived with her as his wife after 1738, and that she died before the 6th September, 1747; we pleaded contrary, that deceased was born in June, 1721, and was therefore but 15 years old in 1736; and [275] that Isabella Noble was then the wife of Jacob Johnson, and was married to him the 5th February, 1734-5. We do not deny deceased lived with Noble, but we insist they have not proved deceased's marriage with Noble; they have pleaded deceased was born in 1714; the principal question is, whether Ann Addis has proved her marriage to deceased in 1738. Samuel and Mary Grout swear they were present at the marriage of deceased and Ann Addis in 1738, and that they also were married at the same time and place, and that Samuel Grout gave Ann Addis to deceased in marriage, and that after their marriages they all went together to the house of one Richardson, the Coach and Horses in Kent-street, where they all lay that night, and that deceased and Ann afterwards lived together as husband and wife with her mother for above a year, and then they parted. We admit that deceased did improperly cohabit with Noble and with Mary Grant, and had children by them, but during the time of said cohabitation he often owned he was married to Ann, by whom he had a child still-born; deceased was a lighterman, and kept a public-house, and was a person of an indifferent character; he died the 22d October, 1753; the questions will be, whether we have proved that deceased married Ann Addis in 1738, and whether they have proved that he married Isabella Noble in 1736, and that she was then a single woman.

Dr. Simpson for Mary Taylor. Deceased left Mary his widow, and four or five

children by her; no account where Ann lived from 1739 to deceased's death. We have proved uninterrupted cohabitation with reputation from 1747 to deceased's [276] death. On the 10th April, 1736, he married Isabella Noble, and lived with her till her death on the 21st August, 1747, with reputation; Isabella died in Guy's Hospital, and deceased had her corpse brought to his own house and buried from thence as his wife, and his relations attended the funeral; they say he could not be married on the 10th April, 1736, because he was then but 15, but they have not proved it; on the contrary, we have proved he was born in 1714, and was the son of Henry and Mary Taylor, and not of John and Mary, as they pleaded; they pleaded that he was bound apprentice in 1732, but we have proved he was bound in 1730; to invalidate his marriage with Noble, they have pleaded that in February, 1734-5, she was married to Jacob Johnson, and that he did not die till 1738, but his death in 1738 is not proved; they have pleaded that deceased did marry Noble on the 5th July, 1738, five days subsequent to their pretended marriage between deceased and Ann; no other evidence of that marriage but this; a sister of Ann's says she saw a certificate of said marriage at the Fleet; no cohabitation with Ann pretended but for a year, or maintenance but by one witness proved, and great exceptions to that witness; the Grouts who depose to the facts of that marriage differ widely in their evidence as to circumstances. In April, 1736, deceased's uncle swears deceased and Noble owned each other as husband and wife. The question is, whether we have not made a better proof of our marriage than they have of theirs.

Witnesses for Ann Taylor alias Addis.

1. Mary Grout, examined in 1754. Deponent knew deceased when he was an apprentice, and to his death, and knows Ann Addis; upwards of 15 [277] years ago deceased used to drink with Ann Addis, deponent and Samuel Grout; deponent's husband and deceased, and said Ann, about fifteen years ago went together to the Fleet, and were all there married by Walter Wyatt, clerk; and deponent's husband gave Addis to deceased, and deceased gave deponent in marriage to Samuel Grout; after their marriages they went to Richardson's, in Kent-street, and shewed the certificate of their marriage to Ann's mother, and they all lay that night at Richardson's, and deceased and Ann afterwards lived together at her mother's for above a year, and when deceased kept a public-house, Ann used to call there and drink, and paid for what she had; has heard deceased call her wife, and she was esteemed his wife by her relations.

10. Int. Noble was not always owned by deceased as his wife, for deponent has heard both deceased and Noble declare they were not married. 12. Int. The day they were married they went from Ann's mother's house by water through bridge from Horsleydown, and were married about ten at night.

2. Samuel Grout. In June or July, 1738, deponent and his wife and Ann Addis and deceased met together at Ann's mother's house, and went from thence across the water, and went to the Fleet, and deponent and his wife were first married, and then Ann Addis and deceased were married, and deponent gave her away, and they all went and lay at Richardson's; deceased and Ann lived together at her mother's for above a year, and Ann was reputed deceased's wife.

3. Int. Deponent does not know where his own wife has lived for two years past. 5. Int. Has heard his wife was tried at the assizes in Surry [278] since respondent left her. 10. Int. Has several times heard deceased say he was not married to Noble. 12. Int. Deceased did not make a long courtship to Ann; they went from Richardson's to the Falcon Stairs to go to be married. 4. Int. 2d loco. Deponent first knew Ann about a year before her marriage; she lives by selling packthread.

3. Mary Kevitt, widow, examined in 1754. Deponent is mother to Ann; about 15 years ago deceased and Ann told deponent they were married, and shewed her a certificate of their marriage, and they lodged in the same house with deponent for above a year; deponent has often gone to deceased with Ann, when he kept a public house, and he then owned her to be his wife.

4. John Richardson. Deponent first knew deceased about 17 years ago, and knew Ann Addis; about 15 years ago deceased and said Ann and Samuel and Mary Grout came to deponent's house together, and said they were married, and lay at deponent's house together that night.

4. Int. Never knew Ann go by any other names than Addis and Taylor.

5. Mary Lawler. Deponent is sister to Ann; about 15 years ago deceased and

Ann lived together at deponent's mother's as man and wife, and were so esteemed, and deceased owned to deponent that she was his wife.

4. Int. Ann lived with her parents till her father died, and then went to service; she now sells packthread about the streets; does not know where Addis has lived of late.

6. Deborah Edmunds. About 13 years ago deponent first came to know Ann, and first came to know deceased about 11 or 12 years ago; Ann, at deponent's house, insisted on deceased's main-[279]-taining her, and he then owned she was his wife, and said it was owing to her jealous temper they had parted; says she saw deceased once give Ann two shillings, and another time eighteen pence.

7. Thomas Wiltshire. About 10 years ago, deponent was intimate with deceased, and Ann often came to deceased; deponent heard him own her to be his wife, and said he was married to her in his nonage; Noble then lived with deceased.

11. Int. Noble was always treated by deceased as his wife to his death.

8. Mary Bencraft. Deponent knew deceased and Ann, and when deponent knew them they lived together in Great Bandy-leg Walk, and deceased owned her to be his wife. About five or six years ago, deponent and Ann being at Billingsgate, they met with deceased, and went together to drink, and deceased then swore she was his wife, and that he was first married to her.

Witnesses for Mary Grant alias Taylor.

1. Mary Grant. Deponent knew deceased to his death, and has known Mary Grant from a child; she is sister to deponent's husband; deceased, on the death of his wife, Noble, courted Mary Grant, and they, in September, 1747, lived together as husband and wife, and owned each other as such; they lived for a year and a half on Green-bank, and constantly owned each other; on 26th July, 1748, said Mary was brought to bed of a son, and said child was, in deponent's presence, baptized as their lawful child; in December, 1750, they had a daughter, which was baptized Mary, as their lawful child; sets forth divers places where they lived together, and says they at all these places lived as man and wife, and were so esteemed; in April, [280] 1752, she had another son by deceased baptized William; they cohabited together as lawful man and wife, and were so esteemed to deceased's death on 22d October, 1753; she had another child born 2d October, 1753, which deceased owned to be his lawful child, and said Mary was esteemed deceased's lawful wife.

2. Henry Crockford. To his death, deceased and Mary lived together, and constantly owned themselves to be lawful husband and wife.

3. Rebecca Jermyn. Six or seven years ago deponent became acquainted with deceased and Mary; they lived together, and constantly to his death owned each other as man and wife; proves birth and baptism of children, which they owned to be their lawful children.

4. Susanna Howard. Proves courtship between deceased and Mary, and cohabitation with reputation to his death, and birth of children.

5. Eleanor Fletcher. 6. Mary Bennett. Prove exactly the same.

The entry of the baptisms of the children were admitted to be proved.

7. Thomas Adlington. Deceased and Mary always owned each other to be husband and wife, and called one another so.

8. Hannah Smith. About seven years ago, a man, who called himself Thomas Taylor, came to deponent's house with the producent, and said he was going to be married to that woman; deponent recommended them to Stanley, who kept a marriage house in the Fleet, and they went together.

9. William Stanley. In September, 1747, deponent lived with his mother, who kept the "Two [281] Sawyers," in Fleet Lane; a person, who went by the name of Thomas Taylor, and the producent came there to be married, and one parson Tarrant, on 6th September, 1747, married them, and deponent acted as clerk, and an entry was made of said marriage.

10. Thomas Penny, apothecary.. Deponent attended Isabella Taylor, in 1747, in her illness; in 1748 deceased and producent lived together as husband and wife, and did so to his death, and they owned each other, and were so reputed.

11. William Lambell. Proves baptism of their children as legitimate.

12. Thomas Cooper. Deponent is uncle to the deceased; proves cohabitation and birth of children with reputation.

13. James Cooper. Deponent is son of Thomas Cooper; swears deceased told him he was married to Mary Grant.

14. William Hammond. Proves cohabitation. Entries of baptisms, A, B and C, read.
 Witnesses for Mary on second allegation.

1. Mary Grant. Gives deceased a good character; knew Isabella Noble; never heard any ill of her; heard deceased and she were married before he was out of his apprenticeship; deceased had children by her; Noble died in Guy's Hospital, 21st August, 1747; she and deceased constantly owned each other as husband and wife, and she was buried as his wife, and his uncle and wife attended her funeral as mourners; his relations owned said Isabella as deceased's lawful wife; deposes to entries of baptisms of children deceased had by said Isabella.

[282] 2. Thomas Cooper. Gives deceased a good character; in April, 1736, he and Isabella came to live together at his house on Greenbank as man and wife; deponent is uncle to deceased; believes he was married to Isabella in the Fleet on 10th April, 1736, for deponent has seen an entry of such marriage in the Fleet, and they were commonly reputed to be married; they had two children which were reputed legitimate; she was buried from deceased's house as his lawful wife, and deponent attended her funeral.

3. Henry Crockford. Proves cohabitation between deceased and Noble, as man and wife, to her death; believes the extract C, from Guy's Hospital, is the handwriting of Catlin the steward.

Read entries of baptisms of children of deceased and Isabella, as legitimate, and of the burial of Isabella in August, 1747.

Witnesses on Ann's second allegation.

1. Thomas Wiltshire. Has heard deceased own Ann to be his wife, and she claimed him as her husband.

2. Ann Potts, examined 1755. Deceased bore a bad character, and received some stolen goods, upon which he absconded, but Isabella was taken up; she told deponent about nine years ago that she was the wife of one Johnson, and that deceased had seduced her from her husband; Ann claimed deceased as her husband, and she used to have beer at his house without paying for it.

3. Hannah Pidgeon, examined 1755. Twenty-two years ago deponent came to know Isabella Noble; she about twenty years ago said she was married to one Johnson, who as deponent has [283] heard died about three or four years after; Isabella and Jacob Johnson owned each other for husband and wife; about eighteen years ago deponent came to know deceased; said Isabella then lived with him.

4. Margaret Byres, examined in 1755. Twenty-five years ago deponent knew Isabella Noble; on the 5th February, twenty years ago, deponent was present when Jacob Johnson and said Isabella were married together at the Fleet, and they from that time owned each other; Ann claimed deceased as her husband from Isabella.

5. Deborah Edmunds. Ann had a still-born child by deceased, which he owned as his lawful child; deceased allowed her two shillings a week for her maintenance.

6. Mary Lawler. Proves entry of baptism of Thomas, son of John and Mary Taylor; proves cohabitation between deceased and Ann.

7. Sarah Jacobs, widow. Deceased was bound apprentice to deponent's husband in 1730, and served for seven years; does not know he then lived with Noble.

Alleged by Ann that deceased was son of John and Mary Taylor, and that he was bound apprentice in 1732. N.B.—It appears from the books of the Waterman's Company that he was bound the 2d October, 1730. Pleaded, but not proved, that Jacob Johnson married Isabella in 1735, and died in 1738.

Witnesses for Mary on the third allegation.

1. Mary Lucas, examined in 1756. About fourteen years ago deponent came to know Ann Addis by deponent's son keeping company with [284] her; deponent found her in bed with deponent's son and another man; and Sir John Ladd, on deponent's application, sent her to Bridewell by name of Ann Addis; and Richard Simpson, and one Hill also kept company with her; she then went by the name of Addis, and was esteemed a common woman, and now lives, as deponent has heard, with her husband's sister.

2. Thomas Cooper. Gives Ann a bad character as a lewd woman, and never heard she took the name of Taylor till since this suit; deceased was the son of Henry and Mary Taylor, and was born in January, 1714.

3. Henry Crockford. Deceased was son of Henry and Mary Taylor.

4. William Church. Proves Exhibit B, which is an entry of the apprenticeship of Thomas Taylor, the 2d October, 1730, and of deceased's baptism in 1714, as son of Henry and Mary Taylor.

Dr. Hay for Ann. If the marriage of Ann is legally proved, it is not material whether the subsequent marriage is better proved, because the last is void; when a marriage is to be proved *inter vivos*, a stronger evidence is necessary than when the parties are dead; no legal exception to Samuel or Mary Grout, and they swear positively to Ann's marriage with deceased; upon interrogatories they agree as to the circumstances of the marriage, and therefore are to be believed; there is no proof of a fact of marriage between deceased and Noble; but to avoid the marriage of Ann in 1738 there must be a positive proof of that fact; they have not even shewed cohabitation with Noble before 1738. Prerogative, 1735, *Rolston* against [285] *Mercator*, no acquiescence in a wife will bar her claim. Prerogative, 1739, *Smith and Smith*. Arches, 1752, *Walton and Ryder* (1 Lee, 16).

Dr. Smalbroke, same side. No blemish on Ann's character before her marriage. Prerogative, *Willes and Fennell*, a slight variation among witnesses rather confirms their testimony.

Dr. Simpson for Mary. The Grouts differ upon interrogatories, in circumstances of which they were not previously apprized that they should be asked about; Mary Grout was tried at the assizes for Surry; deceased married Noble in 1736, and Cooper proves she cohabited with him in that year with reputation, consequently if he did marry Addis in 1738 that marriage was void.

Dr. Bettesworth for Mary. Mary Grout says they were married at ten at night; Samuel says at eleven at night; Richardson that (as he best remembers) they came to his house at five in the evening, and then said they were married; a regular cohabitation and owning between deceased and Noble is proved, and if a child of theirs had prayed an administration, the Court would have thought that a sufficient evidence of his parents' marriage, to have pronounced for his legitimacy, and to have decreed administration to him; Bynes swears to a particular day at twenty years' distance.

Judgment—Sir George Lee. I pronounced for the marriage between deceased and Ann Addis in 1738, and decreed administration to her, because that marriage was proved by two express witnesses, against whom (though they varied in some particulars) there was no essential exception, and they were confirmed by others, who proved that both parties owned their marriage in *recenti facto*, and several other witnesses spoke to occasional declarations to the same purpose at different times. As to the marriage with Noble, no fact was proved, nor cohabitation till after 1738, for though Cooper had deposed to a cohabitation between them in 1736, he had plainly sworn wrong, for he says they first cohabited together at deceased's house in Greenbank, whereas he did not live there till after 1738, and in 1736 was in his apprenticeship, and lived with his master; besides cohabitation alone, which only creates a presumption of marriage, is not sufficient to set aside an actual fact of marriage, and especially in this case, where the man had upon every supposition two wives at the same time, and therefore a legal marriage could not be inferred from his cohabitation, and there is great reason to believe that Isabella Noble was under the same circumstances, for there is a tolerable evidence that she married Jacob Johnson in February, 1735, and there is no evidence that he died before 1736. I thought deceased's marriage to Mary Grant was sufficiently proved, but as he was before married to Ann Addis the marriage with Mary was void.

This case was appealed, but remitted for want of exhibiting the appeal and prosecuting the cause. The remission was brought in the 3d December, 1757, and I swore Ann administratrix.

[287] HUGHES against HERBERT. Arches Court, 3d Session, Trinity Term, June 28th, 1756.—The Court of Arches has no jurisdiction to cite generally except in the cases specified in the 23 H. 8, c. 9.

Dr. Simpson for Herbert. On the 20th June, 1745, William Herbert brought a suit in the Consistory of St. David's against Margaret Williams, now Hughes, for restitution of conjugal rights; the suit depended there till the 27th May, 1746, when sentence was given that they were husband and wife, and she was decreed to cohabit with him; she has since married one Hughes. On the 7th February, 1756, she cited

William Herbert into this Court to shew cause why all the proceedings in said cause should not be declared void, because during all that suit she was a minor, and was not cited to appear by a guardian, and did not appear by one. We insist that this Court has not jurisdiction, and have appeared under protest. We object that this is an original cause of complaint and not an appeal, and therefore by statute 23 H. 8, c. 9, this Court is restrained from citing Herbert out of his diocese, unless in some of the five cases excepted in said statute; but this case does not fall under any of those exceptions; querelas are never admitted here originally; if an appeal had been brought here and deserted, they could not afterwards have brought a querela. Arches, 4th session, Hilary, 1713, *Doughty* against *Newell*; *Doughty*, a clergyman, was suspended, renounced his appeal, then brought a querela in the Arches: [288] held, it could not be here, because the Arches cannot cite originally. *Dr. Wallis's* case was cited in that cause, where it was held that the time for appealing being lapsed, a querela could not be brought in the Arches.

Dr. Hay for Hughes. Hughes was about fourteen at the time of said suit; never appeared by a guardian, and even Herbert's proctor alleged her to be a minor. The question is whether, she being then a minor, and not cited to appear lawfully, the proceedings are not void. She is now married to Mr. Hughes, and therefore brings this querela; a cause of nullity is a cause of appeal; nullity may be alleged within thirty years before the same judge, or before his superior. *Clark's* Prax. tit. 128.

Judgment—Sir George Lee. I was clearly of opinion that this was not an appeal, and if it was it was void, because not interposed within fifteen days after the sentence; that I had no authority to cite originally, except in the cases specified in statute 23 Hen. 8, c. 9, of which this is not one; that the case of *Doughty and Newell* was in point, and in all the cases I knew of where querelas had been brought in this Court, the jurisdiction was first founded by an appeal brought in due time; and I believed there was not one case to the contrary, for whatever the canon law may say concerning bringing of querelas before the superior judge, this Court is now restrained by the statute of Hen. 8. I therefore pronounced that Herbert was improperly cited, and dismissed him, and said that Hughes might bring a querela in the Court of St. David's, and if it was rejected there, [289] she might appeal therefrom to this Court as a grievance, and so it was held in the Arches, June, 1719, *Collins* against *Addison*.

I cited the following cases, in every one of which the jurisdiction of the Arches was first founded by appeals, and then querela's nullitatis were brought.

June 26, 1724, *Palmer and Jackman* against *Hicks and Lydstone*; Arches, 1726, *Lomax* against *Lomax*; Mich. By-day, 1726, *Warren* against *Culme*; Delegates, December 9, 1734, *Rushworth* against *Mason and Others*; Easter Term, May 15, 1739, *Hawkins and Sumon* against *May*; Arches, 4th Sess. Hilary, 1713, *Doughty* against *Newell*, in which case this point was expressly determined.

BRADSHAW against BRADSHAW. Arches Court, Trinity Term, June 28th, 1756.—

An application for interest on a legacy, rejected.

Dr. Bettesworth for Thomas Bradshaw. Robert Bradshaw died in March, 1745, made his will and appointed Elizabeth his wife executrix; she took probate; gave a legacy of 10l. to his nephew Thomas Bradshaw, in these words: "Item—I give to my well-beloved nephew Thomas Bradshaw, the sum of 10l., to be paid by my executrix before her death." Executrix declined paying it, and therefore we have brought this suit for the legacy, with interest from the testator's death; she has tendered 7l. 10s. and alleges she has paid for said Thomas 2l. 10s. already. The words of the will imply an immediate payment of the legacy, because it was uncertain how soon she might die. The 2l. 10s. is a debt which this Court cannot determine upon, and interest is due from her delay of payment.

[290] Dr. Hay contra. 2l. 10s. was advanced for his freedom, and she has made affidavit that Thomas applied to her for that money to pay for his freedom. The will leaves it to the discretion of the executrix to pay the legacy when she thinks fit, but I admit under those words it would be payable upon demand from the legatee, but that must be a legal demand by a suit. The principal question is, whether this legacy shall carry interest? A legacy payable at a certain day shall carry interest from the day of payment, 1 Vern. 166, *Jolliff and Crew*, Prec. in Chan. Interest cannot be due upon a 10l. legacy upon which no interest can have been made.

Judgment—Sir George Lee. I was of opinion the tender was sufficient; that the

2l. 10s., as the executrix was a stranger in blood to the legatee, must be presumed to be money advanced in part of payment of the legacy; and as to interest upon such small legacies as this, upon which no interest could be supposed to have been made, the Court never allowed interest, especially to a stranger, *de minimis non curat lex*.

[291] *SHEFFIELD against BALL AND OTHERS*, Owners of the Ship "Seipio." High Court of Delegates, (a) June 28th, 1756.—Security given in the Court of Admiralty cannot be made available in the Court of Appeal. That Court requires fresh security and a new proxy.

Appeal from the Admiralty.

Sheffield, a mariner, sued for wages in the Admiralty, 24th February, 1756. The Judge pronounced for the wages, but did not give costs. Sheffield appealed to the Delegates from not decreeing him costs. The question now was, whether the mariner should give fresh security to prosecute his appeal, &c. in the Delegates, and whether his proctor should exhibit a new proxy, or whether the security and proxy given in the Admiralty were sufficient.

Judgment—*Sir George Lee*. We were all clear that the proxy in the Admiralty was expired, and that if the cause should be retained in the Delegates, that the security given in the Admiralty cannot be made use of; and that by the practice fresh security and a new proxy are always given upon an appeal, and so is *Clark's Prax. Adm. tit. 57 and 59. Dig. lib. 46, tit. 7, l. 20.(b)*

[292] *WRIGHT against RUTHERFORD AND OTHERS*. Prerogative Court, 3d Session, Trinity Term, June 30th, 1756.—A next of kin who has declared that she will not oppose a will, may retract that declaration if she has not acted upon it.

Dr. Hay for Jane Wright. John Price, Esq. died a bachelor 23d February, 1756; made a will 7th March, 1734, written by himself; devised all his plantations in Barbadoes and his negroes to his sister Jane Wright, with remainders, and made her sole executrix and residuary legatee; made another will 13th February, 1743, in which he revokes all former wills, gives all his plantations, and all his real and personal estate to trustees, for the sole use of his sister Jane, exclusive of her husband, since deceased, and appointed John Brinsden and John Dighton executors, who have renounced. Caveats entered by Mr. Smith for deceased's half-sister Martha Rutherford, and by Mr. Farrer for Charlotte Tyrrell, widow, Jane's daughter by Robert Wright, who died in testator's lifetime. Smith, for Rutherford, alleged her to be sister by the half-blood to deceased; Stevens for Wright confessed Smith's interest; Smith declared on the 8th April that his client Rutherford would not oppose the will of February, 1743, or do any thing further in the cause; Stevens prayed administration to be granted to Wright with the said last will; Farrer, for Tyrrell, declared he opposed it; Stevens alleged she had no interest. First Session of this Trinity term, the Court determined that Tyrrell had no interest (p. 266, ante). Smith that day again [293] appeared for Rutherford, and declared she would oppose the last will. The question is, 1st, whether she is not now precluded from opposing the will, by the declaration her proctor made on 8th April, that she would not oppose it; she cannot be allowed to vary as she pleases. Prerog. 15th December, 1752, *Thomas against Davis*, Thomas had neglected to propound his interest; the Court would not afterwards allow him to propound it. (N.B.—In that case Thomas was assigned to propound his interest, which he neglected to do, and administration cum testamento was thereupon granted to the next of kin, and afterwards he called the next of kin to bring in the administration, and would then have propounded his interest, but the Court thought he was too late, it not being a *res integra*.) 2dly, she has no interest to oppose the last will, for nothing is given to her by the first will, and that first will must bar her interest as

(a) Judges present—Right Honourable Sir George Lee, Drs. Ducarell and Bettesworth.

(b) Cum apud Sempronium judicem datus reus defenderetur, stipulatione cautum est, ut quod Sempronius judex judicasset, præstaretur: à cujus sententiâ petitor appellavit: et cum apud competentem appellationi judicem res ageretur, defensore condemnato, quæsitum est, an stipulatio commissæ esset? Respondit, secundum ea, quæ proponerentur, non esse jure commissam; Claudius, ideò in stipulatione adjicitur, "Quive in ejus locum substitueretur."

next of kin. She must oppose both wills, for we have alleged in acts of court that we insist on the validity of the first will in case it is not revoked by the last will. We are ready to propound the first will in opposition to her interest, as a next of kin under an intestacy, and pray that we may have leave to do so.

Dr. Bettesworth for Mrs. Rutherford. I admit that on 8th April last Mrs. Rutherford's proctor declared he would not oppose the last will, but no act having been done in consequence, and the matter remaining a *res integra*, she is at liberty to retract. Dr. Hay begs the question, for he supposes the first will is good, but we may oppose both. An executor may renounce, and retract again before administration is granted *cum testa*-[294]-*mento*. In the act it is alleged that since the 8th April Mrs. Rutherford has been informed that the deceased was incapable when the last will was made: if the first will is not a good will to all purposes, it will not bar the next of kin.

Judgment—*Sir George Lee*. As the matter was *res integra*, I was of opinion Rutherford was still at liberty to oppose the last will, and would not allow Wright to propound the first will in order only to destroy Rutherford's interest as next of kin, for that was a new attempt to get probate of a latter will, which perhaps could not be supported upon evidence. I therefore rejected Wright's petition.

BODDICOTT AND HAMILTON *against* DALZEEL. Prerogative Court, Trinity Term, June 30th, 1756.—The office of trustee differs from that of executor. Administration *cum testamento annexo*, granted to one of the next of kin who was before the Court, in preference to the trustees for the property.

[Followed, *In the Goods of Jones*, 1861, 2 Sw. & Tr. 155. Not applied, *In re M'Kane*, 1887, 21 L. R. Ir. 7. Referred to, *In the Goods of Gray*, 1888, 21 L. R. Ir. 252.]

Dr. Simpson for Boddicott and Hamilton. Gibson Dalzeel, Esq. deceased, made his will: he had many shares in the Sun Fire Office, and in the mines in Scotland, and a lease for years of a coalmeter's place, which he gives to Boddicott, Hamilton and others, in trust for his daughter, and after several contingencies, gives remainder thereof to his son Robert, and if he dies in his minority without issue, gives the remainder thereof to the trustees, for their own use; and gives all the residue of his estate to said trustees, to pay one moiety to his daughter, Miss Dalzeel, the party, and the other moiety to his said son. Deceased had also a good estate at Jamaica, which he gave likewise to trustees, to be divided in moieties between his said son and daughter; appoints no executor. The question is, whether administration-[295]-tion with this will annexed shall be granted to Miss Dalzeel, the daughter, or to Boddicott and Hamilton, the trustees, who likewise pray that it may be granted to them. The son is a minor, and is not before the Court. The first point is, whether the trustees in this case are not to be deemed executors? The second point is, whether (supposing they are not to be looked on as executors) the residue is not devised in such manner as will entitle them to the administration *cum testamento*, in preference to the daughter? It is not necessary to appoint an executor in express words, it is enough to describe his office. The legal estate is in the trustees: the trustees are to pay one moiety of the residue to the daughter, and are to pay all the legacies, which is the business of executors. The daughter is to have only the profits of the mines, &c. for life, but if she has the administration, the whole estate will be vested in her. Deceased never meant she should have the administration. 1 Ventris, 217, *Thomas and Taylor*, held that administration, notwithstanding the statute of 21 H. 8, c. 5, should be granted to a residuary legatee; and an administration granted to a next of kin, as such, was revoked. The daughter is not in herself immediately a residuary legatee, for the residue is given to the trustees, to pay her a moiety only.

Dr. Clarke, same side. The Court in this case has a discretionary power of granting the administration, for it is a case out of the statutes. An executor, Swinburne says, may be appointed by implication. Deceased's whole fortune is vested in trustees, and if the daughter has the administration, the will cannot be performed. The daughter-[296]-ter has only the interest and profits of part of the effects for her life.

Dr. Hay *contra*, for Miss Dalzeel. There are five trustees, but only two appear to pray administration *cum testamento*. The daughter has the beneficial interest. The Court is ministerial in the grant of this administration, for she is both next of kin, and has the beneficial interest. Stat. 31 Edw. 3, and 21 H. 8, administrations must go to the next of kin, unless the residue is disposed of to another. Administra-

tion follows the real, not the legal imaginary interest. The trustees have no beneficial interest in the residue of the English estate. A trustee has very different powers from an executor. This Court has no jurisdiction over trustees, and therefore they cannot be called to account in this Court; but they can have relief against the daughter in Chancery.

Judgment—Sir George Lee. I was of opinion there were no words in the will that made the trustees executors. They had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor. That they were merely trustees, and could as such enforce the performance of the trusts in Chancery, and that all trustees might with as much propriety contend against the next of kin for administration cum testamento as these, and therefore, as the son was not before the Court, and the daughter was one of the next of kin, and had the beneficial interest in a moiety of the residue, I decreed the administration cum [297] testamento to her, but directed that it should not pass under seal within fifteen days.

LEVY against LOCKART GORDON. Prerogative Court, Trinity Term, June 30th, 1756.—In a suit for the grant of an administration, copies of two affidavits lodged in the Consistory and Arches Courts alleged in acts of Court, and attested by the respective registers, held that the opposer's proctor ought to answer to such subscriptions.

Mr. Gordon took administration to Isabella Levy as her husband. Judith Levy, deceased's mother, cited him to bring in the administration, and denied him to be deceased's husband. He propounded his interest, and examined witnesses, and published their depositions. He then, in acts of court, alleged that he made two affidavits prior to his marriage, one in order to obtain a common marriage licence in the bishop of London's office, the other in the vicar general's office, in order to obtain a special licence, and exhibited copies of the said two affidavits, attested by the respective registers; and then his proctor prayed the answer of Mrs. Levy's proctor to the subscription and identity of said affidavits, which her proctor opposed.

Judgment—Sir George Lee. As the offices are kept at Doctors' Commons, and the registers' handwritings are well known, I was of opinion that Mrs. Levy's proctor ought to answer to the subscriptions of the registers, and whether the papers exhibited are true copies of the original affidavits remaining in the respective registries, but to nothing further, and decreed accordingly.

[298] *JENKINS against MOORE.* Prerogative Court, 4th Session, Trinity Term, July 7th, 1756.—Where a customary estate is devised by will, the Prerogative Court cannot compel portions to be allotted and distribution to be made.

Dr. Simpson for Mary Stringer alias Moore. Andrew Stringer, freeman of London, died a widower 4th September, 1754. He made his will, and devised to his daughter Ann Jenkins in these words: "I give, devise and bequeath unto my daughter Ann Jenkins, the wife of Edward Jenkins, her customary part of my estate, as she is a freeman's child, according to the custom of the city of London;" and also gave to his daughter Ann Stringer, now Moore, her customary share as a freeman's child; and likewise gave to her all the residue of his estate, and made her sole executrix. In Michaelmas Term, 1754, Jenkins cited Moore to bring in an inventory and account, which she accordingly did. Hughes, Jenkins's proctor, alleged the inventory not to be full, and asserted he gave an allegation by way of exception thereto, but he gave none, and thereupon Moore was dismissed. Afterwards, on 1st session, Easter Term, 1755, Jenkins cited Moore into the Arches in a cause of legacy, which cause was dismissed also, because no libel was given in. In Easter term last, Jenkins cited Moore again into this Court, to exhibit an inventory and account, and to see portions allotted, and distribution made of the effects. Willis appeared for Moore under protestation. Here is a devise of the whole customary part. An executor cannot be called to distribution. This Court cannot make distribution under the custom. Prohibition will lie if this Court attempt to try the custom. The customary part must be sued for as a debt. If these daughters had been minors the [299] Orphans' Court would have had the cognizance. If Jenkins claims under the will, she must bring a cause of legacy.

Dr. Bettesworth for Jenkins, admitted the facts were truly stated; said his client claimed under the will, and that the suit in the Arches was not prosecuted, because till a full inventory was exhibited, the amount of the legacy was uncertain.

Judgment—Sir George Lee. I was of opinion that the part of the citation which called Moore to see portions allotted and distribution made in this Court was, in this case, where a customary estate was devised by will, illegal; and as to the other part which called her to exhibit an inventory and account, it was a matter already determined, for she had exhibited an inventory and account, and Jenkins had opportunity to have objected to it. She not having done so, it is a *res judicata*, and that inventory must be taken to be full. I therefore dismissed Moore with costs.

FORFAR AND PYTT *against* HEASTIE. Prerogative Court, Trinity Term, July 7th, 1756.—The weight of evidence preponderates in favour of last will propounded.

Dr. Hay for Forfar. Thomas Forfar is executor of Isabella M'Coul. She died a widow on 22d Jan., 1755, left George Heastie, her nephew by a brother, her only next of kin, for whom an appearance is given, but he has done nothing in the cause. She made her will 13th January, 1755, appointed Forfar her executor, and her sister-in-law, Elizabeth M'Coul, sister of deceased's late husband, universal legatee. This will is opposed by Leonard Pytt, executor of a will dated 1st [300] October, 1754. Forfar has propounded it and examined witnesses; there is full proof of capacity. Pasmore, an attorney, took instructions, by which deceased gave all to Elizabeth M'Coul; no instructions for Forfar to be executor, but the will was read to deceased, and she approved it with Forfar's name inserted therein as executor. Deceased upwards of eighty; her hand guided to make her mark; deceased delivered the will to Elizabeth; a deed of gift to Elizabeth was signed at the same time; Elizabeth gave the writer two guineas for his trouble. Pytt has examined two witnesses, who prove nothing but execution. Pytt a stranger to deceased, has pleaded incapacity on 13th January, 1755; no proof of it, on the contrary we have proved capacity.

Dr. Simpson for Pytt. On deceased's death, caveats were entered by Pytt and Heastie. Both wills were propounded by common condidits. Very full proof of Pytt's will and of deceased's capacity then. Forfar very little known to deceased; none of the subscribing witnesses to Forfar's will knew her; the writer, too, a stranger; no conversation with deceased at time of execution. Great objections to Daniel Ross's testimony. Pasmore owns he made Forfar executor without orders from deceased. Instructions by interrogation. Daniel Ross asked a person to attend to be a witness, before any pretence of instructions. The witnesses are greatly contrariant to each other. The nurse swears to capacity up to the deceased's death.

Witnesses for Forfar.

1. George Pasmore, Gent. On or about 13th January, 1755, Forfar desired deponent to go to [301] deceased; deponent went to a woman who deponent believes was deceased, but never saw her before; she was then in bed; Elizabeth M'Coul asked deceased whether she was ready to make her will, and who should have her effects; deceased answered, "take it all," and deponent, from such expression understood that she intended to leave all to Elizabeth; and deponent from those instructions drew the will at his house, and Thomas Forfar was made executor by advice of deponent, he thinking it for the interest of Elizabeth for him so to be; and deponent same day carried said will to said woman, who he believes to be the deceased, and read it all over to her audibly and distinctly, and she approved thereof; and then she, in presence of deponent, of Andrew Ross, and Anthony Martin, set her mark to it; and deponent guided her hand and she sealed it herself; deponent asked her if she published it, and she delivered it as her last will, and then they three witnessed it; deceased was very weak, but so far as appeared to deponent was in her senses.

2d Int. Producent owes deponent something. 4th Int. Deponent took the names of the parties down in writing, but no other instructions. 6th Int. Will was executed between six and seven in the evening; deponent had no particular discourse with deceased. 9th Int. Believes deceased was in her senses; deponent gave her a pen, which she took, and made a mark to the will, but it not being plain, deponent guided her hand to make it plainer. 12th Int. Deponent never saw deceased set her mark but to the will and to a deed of gift which deponent also drew, and she executed at the same time. 14th Int. Elizabeth M'Coul gave deponent two guineas.

[302] 2. Andrew Ross, tobacconist. On Sunday, 12th January, 1755, deponent

being at a public house kept by Daniel Ross, he told deponent that one Mrs. M'Coul was to make her will the next day, and desired deponent to be witness to it; deponent said he would, and next day the said Daniel carried deponent to a public house at Westminster, and Pasmore, and Forfar, and Martin came to them, and Pasmore produced the will and read it, and then they all went to deceased, who deponent never saw before; Pasmore then produced the will, and said to deceased, "I have brought your will;" she replied something, but deponent did not hear what; then Pasmore read the will audibly to deceased, and she said something, but deponent did not hear what, and then she signed and sealed the will; Pasmore asked her if she published it, she nodded, but said nothing; and then they attested it; believes deceased was of sound mind; Mr. Pytt being named at that time, deceased said Pytt had no business there.

6th Int. Deponent had no discourse with deceased. 9th Int. Deceased made the mark herself, without her hand being guided. 12th Int. She made the like mark to the deed of gift. 14th Int. Believes Pasmore was paid two guineas by Forfar. 15th Int. Deceased delivered the will to Elizabeth M'Coul.

3. Anthony Martin, Gent. Producent and deponent are troopers in the horse-guards; before 13th January, 1755, Forfar desired deponent to be a witness to deceased's will; on said 13th January, at Forfar's desire, deponent went with him to deceased's, and there met Pasmore and Andrew and Daniel Ross; deceased a stranger to deponent; Elizabeth M'Coul told deceased that Pas-[303]-more was come, then they all went to her bedside, and Pasmore read the will to her, and asked her if it was to her mind; she answered, yes, and then Pasmore gave her a pen, and she signed and sealed it, and published and declared it to be her will, and then Pasmore, Andrew Ross, and deponent attested it; and afterwards deceased delivered a paper, which deponent believes was the said will, to Elizabeth M'Coul, and said, "Here, Betty, take it, it is all for you;" before she executed her will the deceased said that Pytt had no business there; as far as appeared, the deceased was of sound mind; deponent saw deceased in her coffin, and knew her to be the person who executed said will.

6th Int. The will was executed about seven in the evening; deceased lay on her side when she executed it; deponent had no talk with her. 9th Int. She made the mark without her hand being guided.

4. Daniel Ross, victualler. Deponent well knew deceased, who lived in Angel-court, Westminster; in the morning of the day the will was executed, deponent was with deceased, and she then said to Elizabeth M'Coul, "Betty, get an honest man, and I will make my will, and all shall be yours, and Mr. Pytt has no business here;" before deponent went away Pasmore came, and then asked what he was sent for to do; both deceased and Elizabeth said, to make deceased's will; and deceased said, "Ay, do make it," and said to Elizabeth, "All shall be yours, Betty;" which were all the instructions deponent heard; deponent was present in the evening when said will was read to deceased, and she executed it, and published and declared it to be her will in deponent's presence, and then it was attested; [304] believes deceased was of sound mind; deponent has often heard deceased say that Elizabeth should have all, and express great affection for her.

4. Int. Deceased gave the instructions, which were only that Elizabeth M'Coul should have all. 6. Int. The will was executed about six in the evening; deponent had no discourse then with deceased. 9. Int. Gives same account of making the mark as Pasmore does. 14. Int. Does not know Pasmore ever did business for deceased before.

Will read—calls Forfar her loving friend.

Witnesses on Pytt's conditit.

1. Henry Taylor, Gent. Deposits to will of 1st October, 1754; deponent was intimate with deceased; on 1st October, 1754, deponent being sent for by deceased, went to her to be a witness to her will; the will pleaded was produced by Pytt ready wrote, who read it to deceased, and she approved it and set her mark to it, and sealed, published and declared it to be her will, and then deponent and Nathaniel Grant attested it; deceased was of sound mind; deponent has often seen deceased set her mark, and she always used to set the same sort of mark as is set to the will of the 1st October.

2. Nathaniel Grant, Gent. Deponent knew deceased; on or about the 1st October, 1754, Elizabeth M'Coul came to deponent, and desired him to come to deceased to

witness her will; deceased then acknowledged the mark at the bottom of said will to be her mark, and she then sealed, published and declared it to be her will, in presence of deponent and Henry Taylor, and they [305] attested it; deceased then discoursed very rationally, and was of sound mind.

Will propounded by Pytt read.

Witnesses on Pytt's allegation to impeach Forfar's will.

1. Henry Taylor, Gent. Deponent knew deceased twenty-three years before and to her death in January, 1755; deceased was eighty-five or eighty-six years old deponent was with deceased on Thursday, 16th January, 1755, and another time about a fortnight before; on 16th January deceased was wholly insensible, and took no notice of deponent, and did not seem to know him; deponent staid about three quarters of an hour; the fortnight before deponent staid with deceased three hours, and for an hour she did not know him, but afterwards she did, but had not capacity to do any serious act; she was bed-ridden for above two months before her death; deceased always consulted deponent about her writing affairs, and has often said she would sign nothing unless it was in deponent's presence, and approved of by him.

2. Int. Elizabeth M'Coul came three times to deponent, and Pytt twice, to desire deponent to be a witness to deceased's will of 1st October, and said deceased desired them to come. 3. Int. Said will was ready wrote; knows nothing of instructions for it. 12. Int. Before deceased was buried, deponent advised Elizabeth to agree with Heastie.

2. Jane Sinclair. Deponent well knew deceased; knows Henry Taylor, clerk, of the Savoy, who was commonly consulted by deceased, as deponent has heard.

[306] 3. Isabella Taylor. Deponent was intimate with deceased; deponent went to see her between two and three in the afternoon of 13th January, 1755, and staid with her half a quarter of an hour, and she then seemed to be perfectly insensible; Elizabeth M'Coul told deceased deponent was there, but deceased lay with her eyes shut, and took no notice thereof; deponent felt her pulse, and she had hardly any, and deponent could hardly perceive her to breathe; deponent told Elizabeth she thought deceased was then dying; deponent was with deceased about a week before, and she then made no answer to, or took any notice of deponent; there was great intimacy between deceased and deponent's husband, Henry Taylor.

4. William Lumley, mason. Deponent well knew deceased; knows Henry Taylor; great intimacy between deceased and him, and she consulted him very often.

5. Mary Lumley. Deponent knew deceased five years before her death, she was 87 years old, was bed-ridden from about the Christmas before her death, which happened on the 22d January, 1755; she was quite stupid, and did not know deponent, and believes she was wholly insensible; there was great intimacy between the deceased and Henry Taylor.

Witnesses for Forfar.

1. Daniel Ross. Deponent well knew deceased; deponent was with her within two or three days of her death, and she was then sensible; believes she was sensible till within a day or two of her death; within three weeks of her death she complained her hips were sore by lying in [307] bed; believes deceased had great affection for Elizabeth M'Coul, and deceased said she had been very good to her, and she should have all.

2. John Morrison. Deponent and his wife were with deceased about ten days before her death, and she was then very sensible, and deponent saw her twice before within two months; has heard the will pleaded by Forfar was executed a day or two after deponent last saw her; deceased expressed great regard for Elizabeth, and about two months before her death said Elizabeth should have all she had.

3. Elizabeth Morrison. Deponent well knew deceased; was with her on Christmas day, 1754, and the next day, and she was at both times very sensible, but very weak; deponent never saw her afterwards alive; about three weeks before said Christmas deponent was with deceased, and she had then been abroad; she then expressed great affection to said Elizabeth, and said that she should have all at her death.

4. Isabel Campbell. Deponent attended deceased daily for near four years; she was sensible to her death, and believes she was capable of making her will on the day she died; ten days before her death Pytt was with deceased, and when he was gone, deceased said "Why does that fiddling man come here, I have nothing to do with him;" deceased complained three weeks before her death of the soreness of her hips;

on the day the will was executed deponent saw deceased before and after the execution, and she then spoke sensibly to deponent; she often said that Elizabeth was more like a mother than a sister to her, and should have all she had.

8. Int. Believes Forfar was an old acquaintance [308] of deceased. 14. Int. Deponent knows Ross, whose christian name she believes is Andrew, by seeing him with deceased. 16. Int. Deceased's husband died about a year before her; deponent has several times heard deceased declare she would leave Elizabeth all she had.

5. Murdock M'Kenzie. Deceased had great affection for Elizabeth, and particularly within four months before her death, deceased said she would leave all to her.

Dr. Hay for Forfar. William Heastie, deceased's nephew, does not appear before the Court to oppose either will; two witnesses fully prove execution of the will of the 1st October, 1754, but nothing more; no evidence of relationship or affection to Pytt, but on the contrary disaffection to him, and great affection to Elizabeth M'Coul; the single question is, whether the will of the 13th January is valid; deceased had for three months intention principally to benefit Elizabeth; subsequent approbation makes the appointment of the executor good; Daniel Ross cannot write, and therefore was not a subscribing witness to the will; no expression is deposed to, that implies incapacity.

Dr. Simpson for Pytt. First will made with privity of Elizabeth M'Coul, who went to desire Taylor to be a witness to it; Forfar almost a stranger to deceased; all the witnesses and the writer likewise strangers to her; no proof that deceased desired any witnesses to be brought. Pasmore does not say Daniel Ross was present when instructions were given; circumstances of fraud, viz. Daniel asked Andrew Ross to be a witness before [309] it is pretended deceased gave instructions for a will; Forfar did the like to Martin. Andrew Ross says Pasmore shewed them the will at a public-house and they all went together to deceased; Martin says only he and Forfar went together. Deed of gift to Elizabeth shews incapacity, for thereby the deceased divested herself of her estate in her lifetime; some of the witnesses say they attested the will in the presence of the deceased, others say in the next room. Campbell, on the 4th interrogatory, says she knows Ross, whose name she believes is Andrew, by seeing him with deceased; but Andrew swears he was not acquainted with deceased. Pasmore's inserting an executor of his own head is an evidence of deceased's incapacity. Forfar, not having been named executor by deceased, cannot have a decree for the validity of the will.

Dr. Bettesworth, same side. Variations between the witnesses; proof of instructions is absolutely necessary in this case; the will did not come from deceased's own motion; why did not she make this will sooner if she intended it; it does not appear deceased ever spoke to Forfar to get a person to make her will.

Judgment—Sir George Lee. I gave sentence for the will of the 13th January, 1755, because I thought the weight of the evidence was in favour of the deceased's having a capacity adequate to making this will, whereby she gave all her effects to one person; it was agreeable to her declarations for two or three months preceding, and which arose from Elizabeth's care of her in her declining state, though the subscribing [310]-ing witnesses varied in some circumstances, yet they all agreed as to the execution of the will, and that deceased appeared to be sensible; and there was no blemish upon the characters of any of the witnesses, and therefore I must give credit to them, though there were suspicious circumstances in the cause, particularly the deed of gift, and the appointment of Forfar executor, for which the deceased gave no instruction; but as to the deed of gift it was not pleaded, but only mentioned upon interrogatories, and therefore as the contents did not appear to me, I could not lay much stress upon it; as to the appointment of the executor, though it was a very improper behaviour in Pasmore, yet as the will was read over to the deceased and approved by her, with Forfar's name inserted as executor, I thought that approbation would have the effect of prior instructions, and so says Swinburne, and especially in this case, where Forfar is a mere nude executor and takes nothing by the will by virtue of his executorship, the whole estate being disposed of, and though Dr. Bettesworth determined otherwise in the case of *The Earl of Bellamont and Bridgen* (where he ordered the name of the earl inserted as executor to be struck out, because the writer of the will said he inserted his name of his own head, though another witness swore the testatrix ordered the earl to be made executor), yet I never was satisfied with that opinion. As to Pytt's will, the execution was sufficiently proved, but he was a stranger in blood to

deceased, and no evidence of affection to him, or of declarations in his favour, either prior or subsequent to that will appeared in the cause, and therefore it might be declared revoked upon a slighter [311] evidence than is necessary when a prior will is in favor of near relations.

HERBERT against WRIGHT. Arches Court, By-Day after Trinity Term, July 13th, 1756.—Where a legacy is in gross, it is not necessary to plead the fund out of which it is to be paid.

Dr. Bettesworth for Herbert. Rebecca Wright, deceased, made her will on 14th November, 1741; Thomas Wright, executor; he took probate the 17th February, 1742; deceased left a legacy to her daughter Mary Herbert, in these words, "I give to my daughter Mary Herbert and her three children, to be divided equally, 100l., part of said 350l. South Sea annuities."

N.B.—She had before mentioned 350l. South Sea annuities; Mary Herbert received her share of 25l. soon after the death of the testatrix, but the children's shares were not payable till their apprenticeships expired. John Herbert, one of the children, brings a suit for 25l., his share, and the libel is opposed.

Dr. Simpson for Wright. The prayer of the libel is to have 25l. a fourth part of the said 100l. of South Sea annuities paid to him John Herbert. This is a specific legacy, it being a fourth part of 100l. South Sea annuities, part of 350l. South Sea annuities, they ought to plead that testatrix died possessed of 350l. South Sea annuities, and [312] should have prayed that 25l. part thereof should be transferred to the legatee, and not plead in the manner they have done, as if it had been a legacy in gross.

Judgment—Sir George Lee. But I was of opinion that it was a legacy in gross, and that the 350l. South Sea annuities was mentioned only as the fund out of which it should be paid, and therefore admitted the libel.

FITZGERALD against LADY MARY FITZGERALD. Arches Court, By-Day after Trinity Term, July 13th, 1756.—30l. ordered to be paid by the husband into the registry, towards defraying the expences of interrogatories of the wife, before a requisition was allowed to issue to Ireland, to examine witnesses on an allegation.

An allegation on behalf of Mr. Fitzgerald was admitted without opposition. Gostling his proctor prayed a requisition to examine witnesses in Ireland. Farrer, Lady Mary's proctor, prayed that it should not issue till he had deposited in the registry a competent sum of money to enable her to cross-examine his witnesses on interrogatories, and named 100l. as a competent sum. I ordered 30l. to be paid by Fitzgerald to Farrer before the requisition should issue under seal.

BUTLER against DOLBEN, CALLING HERSELF BUTLER. Arches Court, Trinity Term, July 13th, 1756.—The 23rd Hen. 8, c. 9, devolves upon the Dean of the Arches the power of accepting letters of request in matrimonial suits, without the consent of the party proceeded against. The Dean of the Arches is bound *ex debito justitiæ* to receive them. Letters of request offered by two ecclesiastical judges conjointly, not invalid on that account. In a suit for jactitation of marriage, brought by the father under the marriage act, in which the husband had appeared under protest, the Court refused him leave to extend his protest.

[See p. 265, ante, and p. 319, post.]

John Butler, Esq., as natural guardian to his son James Butler, a minor, aged about 18 years of age, brought a suit in the Arches by letters of request jointly from Dr. Simpson, Chancellor of [313] London, and Dr. Bettesworth, Commissary of Bucks, against Martha Dolben, calling herself Butler, for jactitation of marriage. She appeared to the citation under protestation: First, for that the Arches had no jurisdiction, for the letters of request being from two judges were illegal and unprecedented, and the jurisdiction could not be founded without the consent of both plaintiff and defendant. Secondly, because Mr. Butler, the father, had no interest, and could not bring this suit; the minor only, who was the party interested, could by a guardian lawfully assigned commence a suit of jactitation of marriage.

Dr. Collier, for Martha Dolben, alias Butler. This is a cause of jactitation of marriage, brought by Mr. Butler, the father, to annul the marriage of his son. Mr. Butler, jun. courted Martha Dolben, she consented, and they went abroad and were

married at Antwerp the 7th March, 1756; they consummated and lived publicly abroad as husband and wife till the 13th March, 1756, when they returned home; his father then applied to the Lord Chancellor, who committed her to the Fleet prison for marrying a ward of the Court of Chancery; before her marriage she lived at Wexham in the county of Buckingham. 1st sess. of this term, Mr. Stevens, proctor, for Butler, alleged that the husband was a minor of 18 years; that his father was his natural guardian, and that she had falsely boasted and asserted that she was married to the son, and exhibited letters of request jointly from the Chancellor of London and Commissary of Buckingham; the Court then accepted the letters of request, so far as by law they ought to be accepted; a citation pursuant thereto went out and was [314] served on her in the Fleet, which was returned the 2d session. The 3d session, Mr. Gostling said he should appear for her, but prayed time to obtain a special proxy; the Court granted it; and on the 4th session, Gostling appeared for her under protest, and objected that joint letters of request from two judges are unprecedented and contrary to the statute of citations, 23 Hen. 8, c. 9, and that the husband himself by a guardian properly assigned ought to be the plaintiff, and therefore prayed that the suit might be dismissed. Minors have always appeared by a guardian assigned.

Dr. Hay for John Butler, Esq., father to James Butler. The question now is merely preliminary. In June, 1755, Mr. Butler placed his son, a minor, with the Rev. Mr. Wray, at Wexham, in Buckinghamshire, for education; on the 21st February, 1756, he was seduced away by Martha Dolben and a relation of hers. Mr. Butler desires to have a determination whether the marriage pretended to have been celebrated at Antwerp is valid or not; doubtful what jurisdiction she belongs to, whether to the diocese of London, by being in the Fleet, or to the Commissaryship of Buckinghamshire by having resided there before she went abroad. The merits of the case will arise upon the statute 26 Geo. 2 for preventing clandestine marriages. She makes two objections to the citation: 1st, that the letters of request are improper; 2dly, that the father cannot bring this suit. I am willing to take the questions separate, and argue first upon the validity of the letters of request.

Read the act of Court and her proxy to Gost-[315]ling, by which he was authorized to protest upon both points.

Dr. Collier's argument. The question is whether this Court has any jurisdiction but upon appeals. The validity of a matrimonial cause is to be tried; a fact of marriage is admitted; upon that fact the Chancery proceeded; this is a personal action, and therefore the person of the minor must be before the Court to give answers, &c. Clark says that, in a jactitation cause, instead of a contestation of suit the defendant may plead; we have no cause of marriage with the father; we each object to the suit being in the father's name, but by a *querela nullitatis*; and as this is not an appeal, a *querela* cannot be brought. In *Herbert against Hughes* (supra, p. 288), in the Arches, this term, it was determined that after an appeal from a gravamen is pronounced against, the Court cannot hold the cause but by consent of parties. Statute 23 Hen. 8, c. 9, refers in this case to the civil and canon law; by the civil law this question is decided only in general terms; *prorogatio jurisdictionis* is voluntary or necessary by law. Maranta, part 4. Distinct. 12. *prorogatio jurisdictionis à personâ ad personam* must be with the consent of the parties. Quando *Judex habet limitatam jurisdictionem*, &c. We do not consent to this Court. *Actor sequitur forum rei*; but by this method, *reus sequitur forum actoris*. Canon Law, 94 Can. 1603, the consent of the diocesan is required to letters of request. The judge alone cannot consent without a mandate from his bishop Brossius, De Potest. Vicar., the bishop in his court of audience has a concurrent jurisdiction with his vicar-general. The jurisdiction of this Court must be founded [316] by consent both of the parties and of the bishop à quo, a judge cannot devolve his jurisdiction. Brossius, lib. 2, quæst. 251, nu. 1, a judge cannot without special mandate from his bishop devolve his jurisdiction to the metropolitan. Superior judge also cannot take the cause without consent of the bishop à quo: it does not appear that there are letters of request, because they are not under office seal. Her domicile is not now at Wexham. She is of the jurisdiction where her husband resides; *durance* does not make a domicile. She is improperly cited by the father.

Dr. Hay for Butler. I agree that *durance* does not create a domicile; where the parties do not consent, the Court must determine. The statute authorizes the Court to judge of the reasons on which letters of request are granted. This is a new case

arising upon the late statute of marriage; the doubtfulness of the jurisdiction is good ground for receiving the letters of request. Hob. 185, *Jones v. Jones*, reference from the inferior judge to the superior held to be a good ground of jurisdiction under the statute of citations.

Dr. Bettesworth, same side. The granting and receiving letters of request are discretionary; the statute does not oblige the inferior judge to take cognizance. In *Jones's case*, Hob. Rep., Dr. Talbot said the inferior judge is not bound to give reasons for devolving his jurisdiction. Hob. f. 16. Neither party can be aggrieved by the Court's accepting letters of request.

Judgment—*Sir George Lee*. I was of opinion the jurisdiction of the Court of Arches was now entirely settled by statute 23 H. 8, [317] c. 9, that the Arches is by that statute empowered to take original cognizance, by virtue of letters of request, of such causes as the civil and canon law allowed the inferior judge to devolve to the superior, which are those that are called arduous causes, of which matrimonial were always esteemed the chief, that the statute vested the power of devolving in the judge, without mentioning consent either of the bishop or parties; that in fact the bishop's consent was never required, and that if the parties' consent had ever been deemed necessary, there hardly could be a cause commenced here by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay. As to the discretion of this Court, whether it shall accept or refuse letters of request when granted by a proper judge, the Delegates held in the case of *Dr. Pelling* against *Whiston*, (a)¹ that the Dean of the Arches was bound to receive them *ex debito justitiæ*; but that it was in the discretion of the inferior judges whether he would grant them; in this case the party appeared under a protestation against the citation; first, because the request was irregularly made jointly by two judges, and secondly, because the father had no interest to commence the suit. The first point only had been argued; it was clear she must be subject either to the jurisdiction where she last had a domicile, or to that where she was locally present; for to say she must follow the forum of her husband was begging the question, when the point in issue was whether she had a husband or not; which ever of the two judges had not the [318] jurisdiction, his act in joining in the request was merely void, for he could not devolve a jurisdiction which he had not; and in this case I thought she was subject to the jurisdiction of the Chancellor of London, notwithstanding she was locally present in that diocese by durance; for the statute says that no person shall be cited out of the diocese or peculiar jurisdiction where the person cited shall be inhabiting and dwelling at the time of awarding or going forth of the citation or summons, and therefore she being inhabiting and dwelling in the Fleet at the time the letters of request were granted, and the citation issued, might have been cited by the Chancellor of London; and I thought that, notwithstanding the durance, she was citable where she was inhabiting pursuant to the statute, and great would be the mischief if a person by being in custody was privileged against being cited to do justice; persons often continued in prison for debt for many years, and had no other habitation. I therefore pronounced for the jurisdiction of the Arches Court, by virtue of the joint letters of request.

As to the other point, the suit being brought by the father, her proctor prayed time to the next term to extend his protest, and to consult his client; but that attempt being plainly to delay the cause and gain the long vacation, and as it was one of the objections to the citations upon which he was expressly authorized by his proxy to protest, I would not give further time, and Dr. Collier declaring he was not ready, and could not then argue that point, I rejected that part also of the protestation, and ordered her proctor to appear absolutely, and admitted the libel, it being a common libel of jactitation; her proctor then protested of appealing from the whole decree to the Delegates.

[319] BUTLER *against* DOLBEN, CALLING HERSELF BUTLER. High Court of Delegates, (a)² June 30th, 1757.—Sentence in the preceeding cause affirmed by the Delegates, as to the jurisdiction by virtue of the joint letters of request, but that

(a)¹ *Dr. Pelling v. Whiston*, in which cause the refusal of a citation in a libel of heresy was holden to be a good ground of appeal to the Delegates. 1 Com. Rep. 190; 2 Gib. 1007.

(a)² Judges—Mr. Baron Adams, Mr. Justice Bathurst, Dr. Walker, Dr. Ducarell, Dr. Clarke, Dr. Harris.

part of it reversed which directed the party to appear absolutely before counsel had been heard on the other branch of the protest.

The Delegates determined that my decree was right as to the jurisdiction, by virtue of the joint letters of request, but were of opinion I should have given further time for hearing her objection as to the suit being brought by his father, and that I should not have decreed her to appear absolutely till I had heard her counsel upon that point, and therefore pronounced for the appeal, and assigned to hear upon that point the 11th November next.

POHLMAN, FORMERLY UNTZELLMAN, AND APPACH, FORMERLY UNTZELLMAN *against* UNTZELLMAN AND OTHERS. Prerogative Court, By-Day after Trinity Term, July 14th, 1756.—A will made by way of provision for a wife, in contemplation of marriage, not entitled to probate in preference to a will of a later date.

Dr. Hay, for Pohlman and Appach. Peter Untzellman made his will 6th October, 1747, by way of provision for Elizabeth White, his intended wife, whom he made sole executrix, and for the children he might have by such marriage, and therein gives her, for the purpose aforesaid, all his estate real and personal, if the marriage took effect, which it did on the 10th of said October, [320] 1747; 5th August, 1751, he made a codicil, and added Israel Jalabert to his wife in the executorship: 12th March, 1755, he made a new will, all of his own handwriting, appointing Nathaniel Torriano executor, who has renounced, gave his wife a legacy of 5l. only, and having no children, gave the residue to his sisters Pohlman and Appach for life, remainder to their children. Upon his death, the widow entered caveat and prayed probate of the will of 6th October, 1747; the sisters prayed administration with the will of 12th March, 1755; the widow opposed it; the sisters propounded it and fully proved it; and now—

Dr. Simpson, for the widow, insisted that the will of 6th of October, 1747, was a provision or settlement made in view and consideration of marriage, and was in nature of a deed or marriage articles, and extended to his whole estate, and was therefore a bar to his making any other will, for it was in its nature irrevocable; and also that the deceased had nothing left in his power to bequeath, and therefore prayed that the Court would pronounce against the last will as void, in the same manner as a feme covert's will, made without consent of her husband, is void, and that probate should be granted of the first will to Mrs. Untzellman.

Judgment—Sir George Lee. But I was of opinion, if the first will could operate as marriage articles or a deed, she must go to the Court of Chancery to have it enforced there; that the question before me was only upon the factum of the two wills; that, considered as wills, the latter being fully proved did clearly revoke the former; and I could not determine that the de-[321]-ceased had, by the act of 6th October, 1747, disabled himself from making any subsequent will. He might have acquired an estate subsequent to said will, and then considering it as a deed, such subsequent estate would not pass under it, and so at all events he might have effects to bequeath. And this is not like the case of a feme covert who is rendered by the law incapable of making a will without the consent of her husband. I therefore pronounced for the will of 12th March, 1755, and decreed administration cum testamento to the sisters as being residuary legatees for life and, they living abroad, I ordered good security in 1000l. (which was admitted to be more than double the value of the estate) to be given in England. The widow's proctor prayed an inventory, she having a legacy of 5l. in the last will, and therefore having an interest; but the adverse proctor offering to pay the legacy, I refused to grant an inventory.

LLOYD *against* LLOYD. Prerogative Court, By-Day after Trinity Term, July 14th, 1756.—Administration decreed to a widow till a will should appear, in preference to the grant of a simple administration to a brother.

John Lloyd, Esq., died 25th June, 1755, left a widow, a brother, and two sisters. Upon deceased's death the widow delivered up the mansion house and every thing therein to the brother, and desired he would receive and pay deceased's debts and effects; afterwards, upon information that deceased had not long before his death made a will, and that there was reason to believe it was still subsisting, of which facts affidavits were exhibited, she prayed administration to be granted to her till a will should appear; the brother prayed a simple administration.

[322] *Judgment—Sir George Lee.* I decreed the administration to the widow till a will should appear, she giving good security and notice thereof.

N.B.—The brother in this case offered to make immediate distribution, but I did not think fit to grant administration from the widow on that account.

RAMSAY against CALCOT. Prerogative Court, By-Day after Trinity Term, July 14th, 1756.—A will made to secure a debt entitled to probate, although the testator was described as a mariner in the instrument.

Dr. Hay for Mary Ramsay. Benjamin Smith, deceased, made his will the 5th July, 1751, appointed Mary Ramsay executrix and universal legatee; left a sister, Elizabeth Calcot, who took administration to him. Ramsay cited her to bring it in. She did, and opposed the will. Deceased was a prisoner for debt in Newgate. Instructions, reading, execution, and capacity proved. Hall, who wrote the will, says he believes it was made to secure a debt, but it does not appear that the deceased was a mariner when the will was made, and deceased had great obligations to Ramsay.

Dr. Bettesworth for Calcot. Ramsay, a stranger in blood to deceased; I shall put it upon this point, that deceased was a mariner, and the will was made to secure a debt, and therefore is void.

Witnesses for Ramsay.

1. William Hall, Gent. On or about 5th July, 1751, Frederick Bride, a client of deponent's, desired deponent to go to Newgate, to make a will for a person there; deponent went, and there was introduced to a person, a stranger to deponent, [323] who called himself Benjamin Smith; said person gave deponent verbal instructions for making his will; deponent drew his will therefrom and read it to him, and he approved it, and then duly executed it in presence of deponent, of Frederick Bride, and Margaret Preston, who witnessed it; said person appeared to be of sound mind, and after he had executed it, said, "Now I am easy."

3. Int. Deceased said he was indebted to Ramsay by bond. 7. Int. Deponent believes said will was made as a security for a debt.

2. Frederick Bride. Deceased often came to see deponent; Mary Ramsay told deponent deceased wanted to make his will, and desired deponent to recommend her to a person for that purpose, and desired Margaret Preston and deponent to be witnesses; deponent was present at making the will; proves that Hall read it to deceased, and deceased also read it himself, approved and duly executed it in presence of the subscribing witnesses, and was in his senses.

3. Int. Ramsay was a creditor to deceased; she advanced money to him in his distress, and believes that induced him to make the will.

3. Margaret Filings, formerly Preston. Deponent never saw deceased but once before she saw him in Newgate; says Hall produced the will ready wrote; deceased read and published it to be his last will; he was in his senses.

The will read, in which deceased is described mariner, and it recited that he was considerably indebted by bond to Mary Ramsay.

Judgment—Sir George Lee. I was of opinion that the description of the deceased by the name of mariner in the will was not a sufficient evidence that he was really a mariner at the time of making the will; he might have been so formerly, but might have left the sea; and I was of opinion a testator ought to be proved to be an actual mariner at the time of making the will, and that it was made merely for the purpose of securing his debt to the creditor, in order to bring him within the equity of the statute of W. 3. For if a man's being barely called a mariner, and a witness saying that he believes the will was made to secure a debt was sufficient to set a will aside, it would be mischievous; for then no seaman could appoint his friend executor, if he happened to be indebted to him; and so a man's will might be set aside directly contrary to his intention; and therefore the factum of the present will being sufficiently proved, I pronounced for the validity of the will.

KEARNEY against WHITAKER. Prerogative Court, Caveat Day, July 29th, 1756.—

Administration decreed to a bond creditor, in preference to another creditor.

John Hewitt died a bachelor and intestate, 28th January, 1756, left a brother, his only next of kin, residing abroad, who was cited by process on the Royal Exchange, at the instance of Kearney, a creditor, in 200l. by bond, who prayed administration, and offered to enter into articles to pay pro ratâ. He was opposed by Whitaker,

another creditor, who made affidavit that deceased was indebted to him by bond in the sum of 279l. 15s., and further, that deceased was indebted to him money he had received for him as his agent or clerk, but that account not being settled, he could not set forth the exact sum of that debt, and offer-[325]-ed likewise to enter into articles to pay Kearney pro ratâ.

Dr. Hay, for Kearney, argued that there being an unsettled account between deceased and Whitaker, it was uncertain whether deceased was indebted to him or not, and therefore that Kearney had a preferable right to administration.

Judgment—Sir George Lee. But as Whitaker had sworn to a debt of a superior sum to Kearney's by bond, and the unsettled account appeared to be an additional debt to the bond (for, according to Whitaker's affidavit, that debt arose from the deceased's having received money for the use of Whitaker, as his agent, and did not arise from any mutual transactions between them, which might create an uncertainty to whom the balance might be due), I decreed administration according to the usual course to Whitaker, as being the greater creditor, he entering into articles according to his offer, to pay Kearney pro ratâ with himself, and ordered the expences Kearney had been at in citing deceased's brother, to be paid out of the estate.

KIRKHOUSE against FAWKENER. Prerogative Court, Caveat Day, October 8th, 1756.—

Where a person entitled to an administration is resident abroad, no decree which may affect his interest should be made till a proxy has been received from him.

[See p. 531, post.]

James Brand died a widower, intestate, in August, 1746. Administration of his effects was granted to Mary Kirkhouse, widow, his cousin-german, and next of kin. She died soon after, leaving goods unadministered. In October, 1749, Kenelm Fawkenor took administration de bonis non, [326] as a creditor to James Brand, and suggested that Mary Kirkhouse had left no relations. John Brand Kirkhouse, son to said Mary, who resides at Scanderoon in Turkey, cited Fawkenor to bring in the administration, and to shew cause why it should not be revoked, as granted under false suggestions, and why it should not be granted to him, as son and next of kin to Mary Kirkhouse. He, having lived abroad, had not taken administration to his mother Mary, to qualify himself to take the administration de bonis, which Fawkenor's counsel objected, and insisted that Kirkhouse had no right to cite him till he had actually qualified himself. It was answered, that he offered in the act of Court to take administration to his mother, and as he lived abroad, the Court would not insist on his taking administration to the mother previous to issuing this citation, but would decree both administrations together.

Judgment—Sir George Lee. I was apprehensive Kirkhouse's name might be made use of without his privity, as he lived abroad, and had suffered Fawkenor to be in possession of the administration de bonis so long, and therefore declined making any decree relative to the administration till Kirkhouse's proctor should exhibit a proxy from him.

DOBSON against CRACHERODE. Prerogative Court, Caveat Day, October 8th, 1756.

—Administration with the will annexed given to a sister who was a legatee, in preference to a brother not named in the will.

Richard Roderick, Esq., died intestate, as supposed; administration decreed to Elizabeth Dobson, widow, his cousin, and one of his next of kin. [227] Before it passed under seal, she found and brought in a will of deceased's, in which she had a legacy of 100l., and legacies were left to her children, but the executor and residuary legatee died in deceased's lifetime. She prayed administration with the will annexed. Her brother, Colonel Mordaunt Cracherode, entered caveat, and prayed administration cum testamento to be granted to him, as one of the next of kin. His counsel insisted that it ought to be granted to him, being a man, and therefore preferable to a woman. There was no personal objection to either, and therefore as the simple administration (upon supposition that deceased was dead intestate) was decreed to Mrs. Dobson, and as she had, by virtue of her legacy, an interest by the will in her own right, and also in behalf of her children, and as Colonel Cracherode was not so much as named in the will, I decreed administration with the will annexed to Mrs. Dobson.

SIR EVERARD FAWKENER AND FREEMANTLE *against* JORDAN, BY THE GUARDIAN. Prerogative Court, 2d Session, Michaelmas Term, November 15th 1756.—The Court does not grant administration to trustees, merely as such.—Testamentary guardians can only be appointed by a will executed according to stat. 12 Car. 2. Where a minor is sole next of kin and residuary legatee, she may select a guardian for all purposes in law, and especially for taking administration cum testamento annexo.

Dr. Smallbroke, for Fawkenor and Freemantle. Colonel John Jordan, deceased, made his will, dated 10th September, 1754, all wrote with his own hand, but not witnessed; gave 50l. to his servant, Ruth Netterton, to be paid in six months; all the rest of his estate, which was wholly personal, he gave to his daughter and only child, a minor, aged near fifteen years, and directed that [328] an annuity of 100l. for her life should be bought for her; and then adds that if she should marry without the consent of her guardians, she should have only one shilling, and bequeathed his estate in that case to the children of Mr. Freemantle, and desired Sir Everard Fawkenor, Mr. Hitch, and the said Mr. Freemantle to take the trust and guardianship over his daughter. The daughter chose Mr. Hitch, one of the said trustees, her sole guardian, who entered a caveat. Sir Everard and Freemantle prayed administration, with the will annexed, to be granted to them two, or to Freemantle alone, or to them two and Hitch jointly. Hitch prayed administration cum testamento to be granted to him solely, as guardian to the minor. Hitch and Freemantle are both uncles to the minor. The Court may grant administration during minority at discretion—is not bound to grant it to trustees, *Prerog. Bodicot and Hamilton against Dalzeel*, last term; 3 Peere Williams, '79, *Jones against Earl of Strafford*, Court not bound to grant it to the minor's nominee. Sir Everard and Freemantle first applied for administration.

Dr. Bettesworth, same side, urged that all three were executors by the tenor of the will, for the testator must intend they should buy the annuity for life for her, because no other person is appointed to do it; and they are trustees and guardians for the minor's person, by the intention of the testator, and therefore it will be agreeable to the testator's purpose to give them the management of the estate. The statute 12 Car. 2 does indeed empower a father to appoint guardians to his children by will attested, by two witnesses, and therefore as this will is not attested, they are not strictly testa-[329]-mentary guardians; but by the statute of frauds, 29 Car. 2, trustees may be appointed by writing without witnesses.

Dr. Simpson *contra*. These gentlemen are clearly not testamentary guardians. A minor of seven years old may by law chuse a guardian. The Court may determine whether the minor has made a proper choice, but when the guardian is approved, the Court must grant the administration to him for the minor's use. This minor has both interests, as sole next of kin and residuary legatee, vested in her.

Dr. Hay, same side. The three persons named in the will are trustees and guardians only of the minor's person. It is a common case, where administration by law is to be granted to a guardian elected by the minor for her use and benefit.

Judgment—Sir George Lee. I said an executor might be appointed by circumlocution, as well as by express words; but I saw no words of circumlocution in this will, and the parties seemed to agree there were none, for on each side they had prayed administration cum testamento. If executors had been appointed by the tenor of the will, the question would be at an end, for the Court must grant probate to them; but I thought there was no ground in this case to suggest that probate ought to be so granted. I did not know any instance where the Court, upon litigation, had ever granted administration to trustees, merely as such, without having any other title. They clearly were not testamentary guardians, for statute 12 Car. 2, having given [330] power to fathers to appoint guardians to their children by their wills, which they could not do before, and having directed that such will should be attested by two witnesses, the direction of the statute must be strictly pursued, for want of which this appointment is void. Sir Everard Fawkenor and Freemantle, then, not having title to probate as executors, nor to administration either as trustees or guardians, and having no interest under the will, they were quite out of the question, and consequently this must be considered as a common case, where a minor who was sole next of kin and residuary legatee had chosen a guardian for all purposes in law, and especially for the purpose of taking administration cum testamento. The Court might judge of the fitness of the person chosen by a minor for guardian, and might

refuse to grant guardianship to an improper person ; but when (as in the present case) a person was chosen by the minor against whom there was no exception, and the Court had appointed him guardian, he was entitled to the administration for the benefit of the minor. Here the whole interest was in the minor, both as next of kin and as residuary legatee ; and if she had been at age, the administration cum testamento annexo must have been granted to her, and while she was in minority, her guardian, duly chosen and admitted by the Court, stood in her place. I therefore decreed the administration cum testamento during her minority to Mr. Hitch, as guardian, for her use and benefit, and swore him administrator accordingly.

[331] *KIRKHOUSE against FAWKENER.* Prerogative Court, 3rd Session, Michaelmas Term, November 24th, 1756.—The exhibition of letters of administration holden to be tantamount to a proxy.

James Brand died intestate at Scanderoon. The consul appointed Messrs. Stratton, Fitzhugh, and Free, merchants, to take care of his effects in Turkey, till a proper representation should appear. Mary Kirkhouse, widow, his cousin and only next of kin, took administration to him in the Prerogative in 1746, and died intestate, leaving goods unadministered. She left a son, John Brand Kirkhouse, her only child, who resides at Aleppo. In 1749 Kenelm Fawkener took administration de bonis to Brand, upon suggestion that Mary Kirkhouse left no relation. In 1752 and 1753 John Kirkhouse wrote to Mr. Stratton (who was then come to England) to get Brand's effects out of the hands of Fawkener, and also lately wrote to Mr. Free (who was also come to England) to the same purpose. Free directed Mr. Stevens, a proctor, to take out a citation to call Fawkener to bring in his administration, and shew cause why it should not be revoked, as obtained under false suggestions ; and to shew cause why it should not be granted to him, as son to Mary Kirkhouse, deceased's sole next of kin. Mr. Collins appeared for Fawkener, and objected that Stevens had no proxy ; that it did not appear that John Kirkhouse was son to Mary Kirkhouse, and if he was, he had no right as son, not having taken administration to his mother, and therefore alleged that the administration to Fawkener ought not to be revoked, but his client ought to be dismissed with costs.

Judgment—Sir George Lee. I ordered Stevens to exhibit a proxy supra (p. 325), and on [332] this day Stevens produced the aforesaid letters, annexed to affidavits. The counsel for Fawkener admitted those letters did amount to a proxy, and the affidavits proved John to be the only child of Mary Kirkhouse, the administratrix ; so that the only question was whether the administration to Fawkener could be revoked upon this citation, John not having taken administration to his mother, to qualify him to take administration de bonis non to James Brand. But, as it was clear that Fawkener had obtained the administration de bonis non under false suggestions, and that Kirkhouse in right of his mother was entitled to all the effects of James Brand, after his debts paid, and was prevented taking administration to his mother to qualify himself to take the administration de bonis non, by residing in Turkey ; I revoked the administration granted to Fawkener, but without costs, and decreed commissions to Aleppo, returnable the last session of next Easter Term, to swear John Kirkhouse administrator, first to his mother, and then administrator de bonis non to James Brand.

WATSON against MILWARD. Prerogative Court, Michaelmas Term, November 24th, 1756.—Where the Court has decreed a commission of appraisement and an inventory, and afterwards granted an administration, the cause is not at an end till the inventory has been accepted and allowed to be complete.

Thomas Watson died intestate on the 18th October, 1756. Milward made oath that he was a creditor to deceased in upwards of two hundred pounds, and prayed a commission of appraisement, and an inventory of goods disposed of, to be exhibited by the widow, which the Court decreed. Trenley, proctor, for Milward, did not take out the commission of appraisement, but on the 6th November, 1756, Sarah Watson took administration to her deceased husband, and at the same time [333] exhibited an inventory bonorum dispositorum. Trenley objected to the inventory that several things were omitted, particularly the lease of his house, which he had for a long term of years, and now prayed a commission of appraisement. Bellas, proctor for the widow, insisted that the cause was at an end by the widow's having taken administra-

tion and exhibited an inventory, and that Trenley could now have a commission of appraisement, but must take out a new citation against the widow to exhibit a further inventory.

Judgment—Sir George Lee. I was of opinion the cause was not at an end by giving in an inventory, but that she remained before the Court till the inventory was accepted and allowed to be complete; and that Trenley had a right in this cause to plead omissions in this inventory, and to call for a further inventory; and as a commission of appraisement had often been determined to be only a more solemn inventory, and as there were affidavits of omissions in the inventory exhibited by the widow, I thought Trenley was now at liberty to pray a commission of appraisement, and accordingly I decreed such commission, and directed it to go out *ex parte*, if Bellas does not name commissioners in ten days.

HAYWARD *against* DALE. Prerogative Court, 4th Session, Michaelmas Term, December 3rd, 1756.—An executor may retract a renunciation during the life of a co-executor, or even after his death, if administration with the will annexed has not been granted to any other person.

James Hayward, deceased, was a mariner in the "Rhoda," bound to the East Indies; he made his [334] will, dated the 1st November, 1757, made his wife Ann Hayward universal legatee, and appointed her and Michael Dale executors; deceased delivered his will to his wife, and she being very ill in January, 1755, delivered it to Dale, who never would return it to her; deceased in his voyage home was pressed, and in endeavouring to escape was drowned; Dale immediately took probate without the knowledge of the widow; he then informed her of the death of her husband, that he had taken probate, that the estate was insolvent, and advised her to renounce; and on the 25th October, 1756, Dale came with her to the Commons, where she did renounce, but being afterwards informed there were assets beyond the debts, on the 19th November, 1756, she retracted her renunciation and was sworn executrix; Dale entered a caveat, and insisted she could not retract. The question was, whether she could by law retract her renunciation and take probate in the lifetime of her co-executor?

Judgment—Sir George Lee. I was clearly of opinion she might retract her renunciation at any time during the life of her co-executor, or after his death, before administration with the will annexed was granted to another. I therefore admitted her retraction, decreed probate to her jointly with Dale, and condemned him in 1l. 6s. 8d. costs.

[335] MACHIN AND TYNDALL *against* GRINDON AND OTHERS. Prerogative Court, Michaelmas Term, December 3rd, 1756.—Exhibits in the handwriting of an alleged testator allowed to be pleaded as evidence to shew dissimilarity of handwriting.

[Followed, *In the Goods of Coulthard*, 1865, 11 Jur. (N. S.) 184. Referred to, *Black v. Jobling*, L. R. 1 P. & D. 687. See, on another point, p. 406, post.]

A codicil bearing date in 1755 was propounded and pleaded to be all written by the deceased. The adverse party pleaded on the contrary that it was not his handwriting, and pleaded in supply of proof several receipts dated in 1752, which were alleged to be deceased's handwriting, and to differ from the codicil both in the character and the manner of spelling.

Dr. Simpson objected to these exhibits, as having been written three years before the codicil, in which time a man's handwriting might greatly vary, and therefore they could be no evidence to prove the codicil not to be deceased's handwriting.

Judgment—Sir George Lee. But I was of opinion they are a species of evidence that may induce a probability for or against the codicil, and that such exhibits have always been received as evidence, and therefore I admitted them.

BARROW *against* BARROW AND OTHERS. Prerogative Court, By-Day after Michaelmas Term, December 11th, 1756.—No instance of probate having been granted of a copy of instructions.—By the law of England a codicil is not destroyed by the burning of the will to which it originally belonged. In such a case a codicil may become a substantive instrument, and be *per se* entitled to probate.

John Barrow, deceased, got one John Taylor, a barber, to make his will, bearing

date the 7th November, 1752, in which he gave his wife all, except a few small legacies, and appointed her sole executrix; deceased lived at Laleham, in Middle-[336]-sex, and was head gardener to ——— Wood, Esq., of Littleton, in that neighbourhood; deceased always expressed the highest affection to his wife. On the 13th September, 1756, he being ill, requested his said master, Mr. Wood, to come to him, which he did, and he then asked deceased whether he had made his will, he said he had, and had made his wife executrix, and expressed great satisfaction therein, and said he had given her almost all, and cut off his brothers with a shilling; Mr. Wood said that looked unkind to them, and was unnecessary, and asked him if he had disposed of the residue; deceased said he did not know what the residue meant; Wood explained it, and said he might give his wife the residue by a codicil if he had omitted it in his will; deceased desired Wood to make a codicil to give the residue to his wife, which he did, and deceased signed it, and Wood attested it; the same day deceased expressed great pleasure at Mr. Wood's having made his will for him, and declared great affection to his wife, and immediately sent to Taylor to desire he would bring his will to him which was left in Taylor's hands; deceased soon after burnt said will, saying it was useless, Mr. Wood having made his will for him, deceased died on the 25th September, 1756; soon after his widow applied to Taylor, who made his said will, to give her a copy of it, which he did after some importunity; the widow then cited the next of kin (for deceased had no children) to shew cause why probate should not be granted to her, with the copy of the will bearing date the 7th November, 1752, together with the codicil dated the 13th September, 1756, annexed, or why administration with the said codicil alone should not be granted to her. Joseph [337] Barrow, one of deceased's brothers, appeared and opposed both said copy of the will and the codicil and prayed the Court to pronounce the deceased to be dead intestate. Trenley, proctor, for the widow, propounded said copy and the codicil; the brothers pleaded that said copy was not a true one, and that by the instructions from which the destroyed will was drawn legacies were left to deceased's brothers in case the widow married again, and the residue was given to them after her death, and exhibited a copy of the said instructions, and at the hearing prayed that deceased should either be pronounced to have died intestate, or that the widow should be obliged to take probate of said copy of instructions, together with the codicil.

N.B.—The widow, in her answers to the brother's allegation, confessed that she was now informed and believed the copy propounded by her is not a true copy of the will, and confesses the article to be true in which Joseph pleaded that the destroyed will was agreeable to the copy of instructions pleaded and exhibited by him. John Taylor swore to instructions for the destroyed will, due execution, &c., and that the will was agreeable in every respect to those instructions, and that the copy of instructions exhibited is agreeable to the original instructions, and that the propounded copy of the will is not a true copy of it, that he gave that copy to the widow, but left out that part relating to her marrying again, believing it would be disagreeable to her. Mr. Wood proved the facts relating to the codicil, and other witnesses proved that deceased declared great satisfaction in Mr. Wood's having made his will for him, and his affection for his wife, and that thereupon he [338] sent for and burnt the will of the 7th November, 1752.

The questions were whether probate should be granted to the widow of the propounded copy of the will, together with the codicil, or administration with the codicil alone as the widow prayed, or whether probate should be granted to her of the copy of the instructions, together with the codicil, or whether this will itself being destroyed by the deceased, the codicil as a part of it was not destroyed with it, and consequently the deceased died intestate; one of which alternatives the brothers prayed the Court to pronounce for.

Judgment—*Sir George Lee*. But I was of opinion the propounded copy could not be pronounced for, because it was confessed and proved not to be a true copy, nor had copies of instructions ever been established; the original instructions had often; nor could these be pronounced for, because they were not propounded. As to the codicil, I was clear that by the law of England, it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition, and decreed administration to the

widow, with that schedule annexed, and swore her administratrix in Court; but at the desire of the proctor for the brother, ordered that the letters of administration should not pass under seal till after fourteen days. The brother prayed costs, but I gave none on either side.

[339] MASTER *against* STONE AND POOLE. Prerogative Court, Caveat Day, January 8th, 1757.—Not proved that the will of a carpenter of a man of war was made to secure a debt, and if it had been proved, the facts of the case would not have brought it within the operation of the statute of W. 3.

Dr. Hay for Thomas Master. John Stone, carpenter of the "Rose" man of war, died on 10th January, 1755, at Deptford. Amy Stone, as widow to deceased, and also as executrix of a former will, entered caveat against proving deceased's last will, dated 7th January, 1755, in which Thomas Master was appointed executor. Master denied her to be deceased's widow, but admitted her to be a contradictor to the last will. Hughes, proctor, for Master, gave in a common conditit, and examined two of the subscribing witnesses, viz. Peter Marriage the writer, and Henry Cradick, who was boatswain of the "Rose;" the third witness, Stuart, who was surgeon's mate of said ship, and attended deceased in his last illness, could not be examined, he being gone to sea. Cheslyn, proctor for Stone, pleaded her marriage to deceased on a certain day; Hughes on the contrary pleaded that deceased was at that time married to another woman who was still alive, but it was afterwards agreed by the proctors in acts of court, not to examine on either side to the interest. Deceased by his last will gives a shilling to his daughter, and all the rest to his friend Thomas Master, and appoints him executor. Master fetched the writer to deceased, but did not stay in the room while he gave instructions for the will; full evidence of execution and capacity.

Dr. Bettesworth for Amy Stone. In the first will dated 8th September, 1742, deceased styles Amy his wife; we propounded a marriage on 8th February, 1740, at St. George's church, and birth [340] of a daughter on 6th April, 1742, who is now living; but afterwards it was agreed not to proceed on the interest. Master was related to deceased only by being cousin to Amy Stone; deceased died on Friday, 10th January, 1755, he was taken ill the Saturday before, and from that time was in a stupid condition. Master importuned him to make a will to secure a debt deceased owed him, and swore he would not leave him till he had made a will; Master went to one Curry to make the will, who declined it, and then he got Peter Marriage to make it; I admit that a factum of the will is proved, but I object that it was made to secure a debt, and that deceased did not do it as his free voluntary act, but was compelled by Master to make it.

Witnesses for Master.

1. Peter Marriage, writing master. Master came to deponent on 7th January, 1755, to make a will for John Stone, who lodged at Charles Poole's at Deptford, whom deponent had seen, but was a stranger to him; deponent went with him to deceased, and Master told deceased that deponent was come to make his will, and then Master went out of the room; deceased told deponent that Master was the only friend he had in the world; and if he had never so much he would leave all to him, and then gave deponent instructions conformable to the will; deponent took them down in writing and then went home and filled up the blanks in a printed will, and carried it to deceased and read it to him in presence of Thomas Stuart his surgeon, and of Henry Cradick; deceased approved and executed it in their presence, [341] and they attested it; verily believes deceased was of a sound mind, for he talked sensibly.

9th Int. Deceased executed the will readily and of his own accord. 10th Int. He sat up in his bed and executed it without assistance. 12th Int. Deceased delivered the will to Master. 15th Int. Deponent in the will styled Master brother to deceased; deceased said he was not his brother, and bid deponent style him his friend, and deponent altered the will so. 20th Int. Thomas Stuart, one of the witnesses to the will, is beyond sea.

2. Henry Cradick. Deponent was boatswain of the "Rose" when deceased was carpenter of it; Master came to deponent and desired him to go to deceased, who told deponent he had a will and power to make, and asked deponent to witness them; Stuart then came in and asked deceased if the will was to his mind; deceased said it was, and that he had no friend but Master, and if he had a thousand pounds he

would give it to him ; proves execution and capacity ; the will was read to deceased in deponent's presence by Marriage and Stuart.

9th Int. Deceased executed it of his own accord. 10th Int. He was not assisted in executing it. 12th Int. By deceased's desire Master took the will. 20th Int. Stuart is surgeon of a ship and is now at sea.

Witnesses for Stone.

1. Ann Poole. Deceased lodged at deponent's house for five weeks before his death ; he left Amy Stone his widow, and Sarah Stone his daughter, aged about fourteen ; deceased was taken ill the Saturday before he died, which happened on the Friday, and from that time was stupid and unfit [342] to make a will ; Master several times asked him to make a will to him, but deceased refused, and said he had made a will and had no call to make another, but Master insisted he should make a will to secure the money deceased owed him, and said, "I will not leave the house till I have a will made to secure my money," and was in a great passion ; Master staid at deponent's house all the Monday night without going to bed, and on Tuesday morning, 7th January, he asked deponent who made wills in that town ; deponent recommended him to Mr. Curry ; Master went twice to Mr. Curry, but he did not come ; Master then asked deponent if there was nobody else that made wills ; deponent told him of Peter Marriage, and he went and fetched him ; Master insisted deceased should make his will ; deponent was not turned out of the room, but might have staid if she had pleased ; believes deceased did not know of a person being sent for to make his will ; Master on the Monday night took deceased's keys and possessed himself of his effects in his cabin, deponent heard deceased say he had about 120l. besides his tools ; has heard Master was related to deceased by marriage.

1. Int. Deceased was indebted to respondent's husband, and Amy Stone has promised to pay the debt if she prevails. 2. Int. Deposes that deceased spoke slightly of Master.

2. Susan Board. Deponent was nurse to deceased ; he lay in a stupid condition, could give a sensible answer to a single question, but could not to two questions together ; believes he had not sense enough to make a will ; Master on the Monday told deceased he owed him twenty pounds and how should he get it, and insisted on his [343] making a will ; agrees with the former witness on all particulars.

3. Int. Respondent don't know deceased had any regard for Master.

3. Edward Curry, attorney at law. Master came to deponent to make deceased's will, but deponent did not go.

Witnesses on 2d allegation for Master.

1. Henry Cradick. Deceased expressed great affection for Master, and used to say he would give him all at his death, and deceased used to damn his daughter and curse Amy Stone, and declare he would hang her if he could, and expressed great hatred to her ; Master did not take possession of deceased's cabin till after he was dead.

2. Peter Marriage. Deponent never spoke to deceased but about the will ; Poole and her sister Board went out of deceased's room of their own accord when he was going to give instructions for his will.

3. Elizabeth Hill, widow. Deponent well knew deceased ; there was great intimacy between him and Master ; deponent has heard deceased say he would leave all to Master and make him executor, and said he was afraid he should not leave him enough ; deceased expressed great dislike to Amy Stone, and said he would leave her nothing ; on Sunday, 5th January, deceased told deponent he hoped Master would come to him the next day.

4. John Heath. Deceased and Master were much together ; deceased frequently expressed great affection for him, and did so express him-[344]-self a short time before his death, he expressed great dislike to Amy Stone.

Judgment—*Sir George Lee*. Upon this evidence I was of opinion deceased's capacity and his free and voluntary making of the will was sufficiently proved, and that its being made to secure a debt was not sufficiently proved ; but supposing one view in making the will had been to secure a debt the deceased owed to Master, I thought that would not bring this case either within the letter or the meaning of the statute of King William, for Master appeared to be the deceased's intimate friend, to whom the deceased frequently declared he would leave what he had, and was not his landlord, and besides the deceased was an officer of the "Rose" man of war, and not a

common mariner. I therefore pronounced for the will, and decreed probate to Thomas Master.

PHILIPSON AND D'ESCHERNEY *against* HARVEY. Prerogative Court, Caveat Day, January 8th, 1757.—The Prerogative Court cannot take notice of the statute of limitations.—In a case of bankruptcy, affidavit of the amount of a debt is properly made by one of the assignees.

Michael Harvey, Esq., died intestate; administration of his effects were granted to his sister and next of kin; Philipson and D'Escherney, assignees under a commission of bankruptcy against one Thomas Ranson who was a creditor of Michael Harvey's, took out a citation against Frances Harvey, administratrix of her brother, to exhibit an inventory and account of his effects. She appeared and prayed an affidavit of the debt. Christopher Philipson made affidavit to this effect, that deponent is one of the assignees of Thomas Ran-[345]-son, and that deceased was indebted to Ranson upwards of forty-five pounds, as appears by Ranson's the bankrupt's books, no part of which as he verily believes has been paid; objection was taken on behalf of Mrs. Harvey, that administration was granted to her in 1748, and therefore the statute of limitations runs against the debt, and that the affidavit ought to have been made by the bankrupt himself and not by his assignee.

Judgment—*Sir George Lee.* But I was of opinion, first, that I could not take cognizance of the statute of limitations, that would be properly pleadable in an action at common law for this debt; it was sufficient for this court to decree an inventory and account that there was an appearance of a debt; and, secondly, as all the bankrupt's effects and credits were vested in the assignees, I thought the affidavit of debt was properly made by one of the assignees, and assigned Mrs. Harvey to exhibit an inventory and account, and condemned her in 1l. 6s. 8d. costs.

PARTINGTON *against* THE RECTOR, CHURCHWARDENS, &c. OF BARNES IN SURRY.

Court of Peculiars, 2d Session, Hilary Term, January 27th, 1757.—When the Court grants a faculty to appropriate a seat in a church to an inhabitant, it should be matter of preliminary consideration: 1st, whether such a grant would be prejudicial to the parish; 2dly, whether it would be prejudicial to the persons opposing the grant; and, 3dly, whether the party applying for it is, from station and property in the parish, qualified to have such a grant. Faculty granted.

Dr. Hay for Mrs. Abigail Partington. 1st November, 1754, citation issued against the rector, &c. [346] of Barnes, with intimation to shew cause why a faculty should not be granted to Abigail Partington to appropriate a pew on the north side of the church four feet ten inches wide, and seven feet four inches long, adjoining to a seat of Jacob Tonson, Esq. 12th November, 1754, Mr. Skelton, proctor, appeared for William Hutchins, Richard Edwards, Charles Rix, John Shuter and William Shrigley, and alleged them to be parishioners and inhabitants of Barnes, and in their names opposed the grant of the faculty, suggesting that Mrs. Partington is a lodger only, and that the pew is an office pew in which the churchwardens sat, and that the pew will hold eight persons; 13th January, 1754, Mrs. Partington was seated in this pew by the churchwardens; a little before, the pewing of the church was altered and this pew was lengthened; we say it never was an office pew but was a common pew. Partington sat quietly therein from said 13th January to 22d September, 1754, and then Rix on said Sunday climbed over the pew and took off the lock and seated himself there, whereupon she applied for this faculty; she lives chiefly at Barnes, has a mother, brothers and sister that live with her, she has 100l. a year freehold estate in the parish, and has a mansion house therein which she sets out to Lady Millbank, and for which she is rated to the parish taxes; she constantly attends divine service, and gave a scarlet cloth for the communion table, and six guineas towards new pewing the church; the five opposers subscribed only five shillings towards the pewing; the principal parishioners have consented to the faculty.

Dr. Bettesworth for the opposers. Besides the five named, several others oppose this faculty [347] because it is an improper pew to be appropriated to any one, and because Mrs. Partington is not entitled to have any pew appropriated to her; the intimation is irregular, for it prays that the pew may be appropriated to her and her family and servants for their use, without the usual words of limitation, viz. so long as she and they shall continue to inhabit in the parish; she lodges at a gardener's

house, and is a spinster, and has 100l. a-year estate in the parish, part thereof is a house she lets out ready furnished; this pew is in a part of the church very proper for the churchwardens, and they have often sat there; she was placed by Taylor, her landlord, when he was churchwarden, and he gave her the whole pew and put a lock on it; the reason of opposition is the general inconvenience to the church, but some of the opposers are specially hurt.

Witnesses for the opposers.

1. John Blissard. Deponent has been clerk of the parish of Barnes thirty-three years; Mrs. Partington lodges at the house of Taylor; proves dimensions of the pew; says it used to be called the churchwardens' pew, and they have no other seat of office; Taylor and Courtney, churchwardens in 1753, altered the pewing of the church, the pew in question will hold eight persons.

5. Int. Before it was altered it was a common pew for any parishioners. 6. Int. Partington was seated by the churchwardens in said pew in 1754, and quietly sat there till Rix, 22d September, 1754, forcibly came into the pew; she gave a communion cloth and five guineas towards the pewing.

2. Matthew Preston. Deponent always lived [348] at Barnes. Partington is a lodger, and believes she has no family in the parish; gives dimensions of the pew; for sixty years past the churchwardens have commonly sat in said pew, unless they had pews of their own; they have no other office pew; it will hold eight persons.

5. Int. It was a pew for the churchwardens.

3. John Emmerton. Deponent has always lived at Barnes. Partington has an estate in the parish; for sixty years past the churchwardens sat in the pew in question. Forty-five years ago deponent was churchwarden and sat therein; it will hold eight persons.

Witnesses for Partington.

1. James Courtney. For six or seven years past, Partington has had an estate of upwards of 100l. a year in the parish. She rents Taylor's house, and has her mother, brothers, sister, and servants living with her. She is rated for her estate; the pew has never been appropriated to the churchwardens, or any others, to the deponent's knowledge for forty years; the officers of the parish have not usually sat there in virtue of office; deponent has served the offices, and never sat in said pew officially, and the officers now sit in the next pew. Partington has been a benefactress to the church, and gave a cloth of crimson for the communion table; the pews being old, the parishioners unanimously agreed that they should be altered, and there is now room for forty persons more to sit in the church than there was before the alteration; the pewing was done by subscription, towards which Partington gave deponent, who collected the money, six guineas, and William Shrigley gave five shillings, and the other parties [349] subscribed nothing. On the repairing of the pews, Partington having no pew, deponent and Taylor, who were then churchwardens, with consent of the principal parishioners, gave her that pew for her use, &c., and seated her therein, and put a lock on the pew; Partington, her mother, brothers, and sister, sat quietly there for some Sundays, till Charles Rix forced himself into that pew, though he had then a seat in the next pew; believes Rix has taken the key and placed two wands in the front of the pew to denote it to be the churchwardens' pew, though he was not at that time churchwarden; John Emmerton, the witness, was seated in that pew, but he receives two shillings a week alms from the parish; believes none of the parishioners are disturbed by Partington having the pew; Hutchins and Edwards sit in the gallery and have pews to themselves there; Rix, Shuter and Shrigley sit promiscuously in the body of the church; proves certificate No. 1, of consent of parishioners to the faculty, and says some who have signed it are the most considerable of the parishioners.

2. Samuel Taylor. Deponent has lived at Barnes seven years; Partington has a freehold estate of 100l. a year in the parish, and occupies a hop ground of five or six acres of her own; she rents a house of deponent at twenty pounds a year, and resides there with her mother, brothers and sister in the summer, and has always a servant resident in the parish to look after the hop ground; she is assessed for her estate; deponent lives in part of his house and pays the taxes for it; the pew in question was enlarged about a foot and half; churchwardens have occasionally sat there, but the pew was never appropriated to [350] them; Partington gave a communion cloth, and towards repairing the pews she gave six guineas; upon the alteration of the pews,

Partington having none, deponent and the other churchwarden enlarged this pew and placed her therein, in which she was disturbed while she was sitting there by Charles Rix; the pew will not conveniently hold above six persons; John Emmerton has sat in this seat, and he told deponent Rix gave him sixpence each Sunday for sitting there with Partington, none of the parishioners will be prejudiced by granting the faculty.

3. James Preston. Deponent has always lived at Barnes; proves that Partington has 100l. a-year in that parish; she resides at Barnes in the summer; the pew was never appropriated, but the churchwardens and others have sat there occasionally; the next pew is as convenient for the churchwardens; deponent never sat in the pew as an officer; proves the same as the other witnesses. Emmerton receives alms; does not know any person will be prejudiced by the faculty.

4. Matthew Courtney. The same as the other witnesses; the pew was never appropriated to any one before Partington; when Edwards and Hutchins were churchwardens they did not sit in said pew, but some churchwardens have sat there occasionally.

5. Richard Phillips, smith. In the summer of 1754 deponent put a lock by Partington's orders on said pew; Rix forced the door open, and took off the lock, and has put two wands in front of the pew; Emmerton has sat lately in said pew, and deponent heard him say he had sixpence each time for sitting there; he is an almsman; on the 13th October, 1754, Rix forced himself into this [351] pew, though the churchwardens offered to seat him elsewhere.

Four other witnesses to the same purpose.

Witnesses for opposers on the 2d allegation.

1. Matthew Creston. Partington lets her own house, and pays no taxes for the house she lives in; the churchwardens and overseers have sat in said pew when they thought proper, and some of them have continued to sit in their own pews; does not know that any parishioner is displaced by Partington; believes the alterations of the pews was convenient; Emmerton is now an almsman, but formerly was in good circumstances, he was churchwarden and sat in this pew then, and for several years after; many of the persons who have signed the certificate No. 1 of consent are in low circumstances, but they pay rates; William Hutchins pays more than all together that have signed it.

7. Int. Shrigley has left the parish since Michaelmas last.

2. John Blissard. Partington is not rated for the house where she resides; the churchwardens have usually sat in this pew, but not all of them. Robert Singer and William Clark are displaced, and before the alteration of the pews, Rix, Shrigley, and Shuter used to sit in the pew in question, and Rix being churchwarden now sits there; Shuter is displaced, and has not another place allotted him; believes the alteration was not made with the consent of the majority of the parishioners or by order of vestry; does not think the alteration was unnecessary; Emmerton was in good circumstances, he did not sit in this pew for some [352] years before the alteration; several who have signed the certificate No. 1 are poor.

2. Int. The pew was common; some churchwardens did, and some did not, sit in it; Shuter and Shrigley, before this suit, were placed by the churchwardens in the next seat, and they offered to place Rix, but he refused.

3. Robert Singer. In 1734 and 1735 deponent was overseer and churchwarden, and then sat in the pew in question; never sat there before or since; knows that several who had not seats sat in said pew when they were in office; does not know any person is disturbed or displaced by the alteration of the pews; Emmerton did not sit in this pew for many years before it was altered; Hutchins pays as much to the rates as all those who signed the certificate No. 1.

2. Int. Churchwardens sat in said pew by virtue of their offices.

4. John Emmerton. The churchwardens for many years sat in this pew, and deponent sat there when he was churchwarden 53 years ago; deponent had formerly an estate of 40l. a year in the parish.

8th Int. Rix placed deponent in this pew and gave deponent sixpence for sitting there, and he had two other Sundays sixpence each for sitting there; five or six years ago deponent left the pew, being reduced in his circumstances.

Witnesses for Partington.

1. Beamish Hill. Churchwardens did not sit in the pew by virtue of their offices;

Shuter and Shirgley, before this suit, were seated by the churchwardens in the next pew, but Rix refused to be [353] seated. Alterations of the pews were made by order of vestry.

1. Int. Deponent signed the certificate No. 1, several of the signers are poor, but pay rates. 2. Int. Partington has two maid servants.

2. Robert Mitchell. Many who were not churchwardens sat in this pew; the pews were very ruinous before they were repaired; Emmerton had left and did not sit in this pew till he was hired to do so by Rix.

3. Stephen Gomb. The same.

4. Mathew Courtney. 13th October, 1754, Rix refused to be seated by churchwardens, and said he would sit where he pleased same as the others.

5. Samuel Taylor. Rix sat in this pew before he was churchwarden; deponent offered to place him in next pew, but he refused to be placed.

1. Int. Deponent signed certificate No. 1, it was carried from house to house to procure hands, has often seen Rix and Shuter sit in this pew before it was altered.

Dr. Hay for Partington. The intimation is regular; such intimation issued in the case of one Streatfield in 1721; the faculty will limit it to the time of her and her family's inhabiting in the parish; the opposers of a faculty must shew good cause why it should not be granted; she being a lodger is not an objection, as she has an estate in the parish, and it is proved that she has a family. The questions are, whether the pew is fit to be appropriated, and whether she is a person fit to have an appropriation? No one has even a possessory right in this pew, for all who sat there formerly [354] have been placed elsewhere, except Rix, who refused to be placed.

Dr. Simpson, same side. Mrs. Partington was placed in this pew by order of the parishioners to the churchwardens; Rix does not claim a seat in this pew by any private right, but claims it as a churchwarden's pew.

Dr. Bettesworth for the opposers. Rix has the approbation of the parish in what he has done, for they have chosen him churchwarden. Rix used to sit in this pew, and has been turned out, and therefore has an interest to oppose a faculty.

Judgment—Sir George Lee. I was of opinion that the objection to the intimation was not material; it was sufficient that it was a citation to call all persons interested, and that due notice had been given, for opposers had appeared and had joined issue. The Court was not obliged to grant a faculty in the terms of the intimation, but would grant it in terms agreeable to law; however I directed the register to take care that all intimations for the future should run to shew cause why a faculty should not be granted to appropriate a certain pew to it, and his or her family, so long as he, she or they shall continue to inhabit in the parish.

With respect to the faculty, I observed that the considerations on the grant of faculty were, first, whether the appropriation was prejudicial to the church or the parish in general? in which case, though the minister and churchwardens were the properest persons to shew cause, yet any other parishioner might oppose and shew cause if he [355] thought fit, because he had a general interest. Secondly, whether it would affect the rights of any particular persons? in which case the persons that would be injured only, or at least the churchwardens, as guardians of the parochial rights of every parishioner, ought to oppose, and no other parishioner who would not be personally affected. The third consideration was, whether the person who sued for the faculty was fitly qualified to have such a grant? and to apply these considerations to the present case, I observed that it was clear from the evidence that the church or parishioners in general would not be hurt by granting this faculty; 2dly, that the particular persons who opposed it would not be prejudiced, for they had clearly no right whatever, not even a possessory right, in this pew, for no one had been seated there before Mrs. Partington, but it was an open common pew where any one sat that pleased, and all the opposers were properly and conveniently seated elsewhere, except Rix, who refused to be placed, and had acted in a very unbecoming manner in attempting to seize the pew by force and to appropriate it to the churchwardens pending the suit; 3dly, I was of opinion that Mrs. Partington was a fit person to have a faculty, for she had a good estate in the parish and inhabited there with her family, and though she did not live in her own house, yet as she had an estate in the parish, I thought that not material, and she had already a title to this pew, it having been allotted to her by the churchwardens by the order of the principal parishioners, who still desired she might have a faculty; I therefore decreed a faculty to Mrs. Partington

to appropriate this pew to the sole use of herself and [356] her family so long as she and they should continue to be inhabitants of Barnes, and I condemned the opposers in costs.

DAME JUDITH LEIGHTON *against* LEIGHTON AND OTHERS. Prerogative Court, 3d Session, Hilary Term, February 7th, 1757.—An inventory refused to the widow of a legatee, where a testator has no effects at the time of his death, he having during his life conveyed all his personal estate by a bill of sale in consideration of a debt.

Dr. Simpson for Lady Leighton. Lady Leighton is the widow of a legatee in the will of Sir Edward Leighton, Bart., deceased. 26th March, 1756, he made his will, and appointed his sister Lettice Leighton and his son and daughter, executors and residuary legatees. Lady Leighton cited them to prove the will or shew cause why administration should not be granted to her, and to exhibit an inventory. On 1st Sess. Michaelmas Term, Lettice Leighton took probate and gave in a declaration loco inventorii in which she declares that deceased, by bill of sale dated 5th April, 1756, granted to her, in consideration of a debt he owed her of 2500l., all the personal estate whatever that he should die possessed of. We object to this declaration as not full or sufficient; the intent of an inventory is that persons interested may have a clear constat of the estate; she does not exhibit the bill of sale, and upon her own shewing it is fraudulent, because the deceased continued in possession of all the effects to his death; it is a general conveyance of every thing he had, even of arrears of rent, and such generality is held at common law to be a mark of fraud.

[357] Dr. Hay for Lettice Leighton. Deceased was indebted to Lettice in the whole in 3200l., for security of which he made a bill of sale to her of all his personal estate, which she swears in the declaration is not near sufficient to pay his debt. Though she allowed deceased the use of the personal estate, and he was in possession of it, yet she expressly swears all the effects were hers and not his at the time of his death, and therefore she is not obliged to give a particular inventory of them; and so this Court held in the case of *Smith and Oram* (supra, p. 256), Michaelmas Term, 1755. The executrix is sworn to give a true account only of deceased's effects, and these are not his effects.

Judgment—Sir George Lee. I was of opinion that the declaration was sufficient, for she expressly swore the deceased had no effects at his death, for he had in his lifetime conveyed all his personal estate to her by bill of sale in consideration of his debt to her, and that the effects were not sufficient to pay that debt; and therefore if the bill of sale was good, there were no effects to inventurize, and it would be putting Lettice to a needless expence to particularize the effects the deceased died in possession of, for knowing the species of the effects would be no assistance to Lady Leighton in controverting the validity of the bill of sale in a proper court, and as to exhibiting the said bill, it was needless to do it here, where the validity of it could not be tried. I therefore rejected Lady Leighton's petition.

[358] BOWES *against* MALPAS. Prerogative Court, 4th Session, Hilary Term, February 17th, 1757.—Probate decreed of an unexecuted will.

Bridget Kettleby, widow, aged about 80, made her will dated the 15th December, 1755, appointed Thomas Malpas, her apothecary, executor and universal legatee; she died the 20th December, 1755; left two nieces; one of them, Elizabeth Bowes, opposed the will; it was not signed or executed by deceased, and the instructions for it were given by Malpas; but it appearing clearly from the evidence that the deceased was perfectly in her senses—that she had ordered a will to be drawn for her, and approved of the writer who brought the will ready wrote to her, and read it distinctly to her, and she approved of it, and said she would give all to Malpas, and would have signed it if she had not had such a weakness in her hands that she could not write, and declared she believed it would do without signing, as there were witnesses enough to prove her intention, and at the same time ordered her keys to be delivered to Malpas in affirmance of her will, and bid him take possession of her effects; I pronounced for the validity of the will.

RAYMOND *against* THE BARON DE WATTEVILLE. Prerogative Court, Hilary Term, February 17th, 1757.—When a copy of a will is produced instead of an original, the instrument must not only be clearly authenticated, but it must be satisfactorily shewn that the original could not have been exhibited.

[See on other points, pp. 495 and 551, post.]

Dinah de Larisch, alias Von Larisch, formerly Raymond, died a widow without children, at Hernhutt, in Upper Lusatia; she left Jones Raymond, Esq., her brother and next of kin; made her will on the 26th April, 1756, attested by several witnesses, and appointed the Baron de Watteville [359] executor. Jones Raymond opposed it; De Watteville would have propounded a copy of the will, of which he had taken probate in common form in the Prerogative; in his allegation he pleaded that the original was deposited in Count Linzendorf's Court at Hernhutt, and the copy was under a seal, and attested by two private persons.

Judgment—Sir George Lee. I was of opinion I could not receive the copy upon this plea as it stood, but that he ought to plead that he could not produce the original because it was deposited in a proper Court at Hernhutt that had jurisdiction of wills, and that the copy propounded had been duly examined and collated with the original by the proper officers, which facts must be proved by witnesses; for I could give no credit to a copy under an unknown seal of an unknown Court, and attested by unknown persons. I therefore directed the allegation to be reformed.

REEVES *against* GLOVER AND OTHERS. Prerogative Court, By-Day after Trinity Term, February 25th, 1757.—An incomplete will cannot operate as a revocation of a subsisting will.

Dr. Hay for Reeves. William Finch, Esq., died the 5th December, 1755; left eight testamentary papers, which were found wrapt up together, which were brought into Court with an affidavit of scripts and scrolls, Nos. 1 and 2, which had been executed wills, but were cancelled; No. 3, a draft of the will No. 4, dated the 10th June, 1743, on the back thereof was indorsed, "This to serve as a will till another is made in better form;" this paper was all of the deceased's handwriting, was executed by him, and attested by two witnesses; [360] No. 4, likewise wrote by deceased, dated the 20th June, 1743, executed and attested by three witnesses, in which Sarah Finch, Samuel and Robert Nicholls were appointed executors, but the residue was not devised. Sarah Finch and Samuel Nicholls died in 1749, and Robert Nicholls dis-obliged deceased, whereupon he expunged all their names, and inserted with his own hand the name of Lucy Bradshaw as his sole executrix, and made a memorandum thereof with his own hand at the bottom of said will No. 4. On the 26th August, 1751, Lucy Bradshaw also died, and then deceased struck out her name, and with his own hand inserted the name of Elizabeth Reeves as sole executrix in her stead. Codicil A, dated the 5th September, 1751, in which Reeves is also named executrix, wrote by deceased. Codicil B wrote by deceased subsequent to the 5th September, 1751, for it begins, "My other codicil," though there is a date at the top of it, viz. "London, 3d September, 1751," but that date is not deceased's writing, nor does it appear by whom it was wrote. Codicil C without date, but it appears to be deceased's writing, and to have been written by him in 1751; and, lastly, a will marked D, in which Reeves was likewise executrix, but the residue was not devised. This paper is likewise written by the deceased, but it is not attested or signed by him otherwise than his name being written in the beginning of it; there is no date to this will, but on the back there is an endorsement in deceased's own hand, "wrote July, 1752;" deceased died a widower, and left Robert Glover and Frances Puddiphat, widow, his cousins-german and only next of kin, but left a great number of more distant relations; on his death Glover entered caveat, [361] which was warned by Reeves the executrix, who confessed his interest; he opposed all the testamentary papers, and insisted that from the uncertainty of which paper should be taken for the last will, the deceased was dead intestate. Reeves propounded the complete executed will No. 4, and examined two of the subscribing witnesses, and proved the handwriting, death and good character of the third; and also propounded the codicils A, B, and C, and cited Frances Puddiphat and all the legatees in the unexecuted will D to see said will No. 4, and codicils A, B, and C proved. Mrs. Puddiphat appeared, and as a principal legatee therein propounded the unexecuted will marked D as a substantive will, and as a revocation of the will marked No. 4, and the three codicils, it being as suggested

wrote in July, 1752, subsequent to all the rest of the papers. Several legatees in the paper marked D and the other papers also appeared, and prayed that the executrix might take probate of the will marked No. 4, of the codicils A, B, and C, and also of the paper D as another codicil to said will No. 4; paper D had in it a devise of a small real estate; the three codicils were all unattested, and C related to copyhold estates surrendered to the use of his will.

Dr. Simpson, same side. No. 4 is a complete executed will. Codicil A, dated the 5th September, 1751, made soon after the death of Lucy Bradshaw; ratifications of said will by deceased in 1749 and 1751. Codicil B, the date not of deceased's writing; all the legacies in No. 4 are subsisting, though some of the trustees are dead. Codicil C contains copyhold estates. The will D is not supported by any declarations.

[362] Dr. Smalbroke for Puddiphat. My client is one of the next of kin, and a legatee in will D which was wholly written by deceased, and has an executor, date on the back of it July, 1752, wrote by deceased; it was found wrapt up with the other testamentary papers; it mentions a real estate, which is described as a small freehold; deceased left a large personal estate. D was a deliberate act; deceased declared he intended to leave the care of his affairs to Atkinson and Kidd if the last had not died before him. We admit affirmances of will No. 4 till September, 1751; after that time he declared to Atkinson he would divide his estate among his relations, for he would make no one the great man. In codicils A and B there are three legacies to the same persons, and the same sums, and a fourth legacy in both, with the difference only of guineas instead of pounds. I shall insist that D will operate as substantive will, and as a revocation of the former will, and that codicils A and B are inconsistent.

Dr. Collier for the legatees. All the testamentary papers are propounded. We pray that will No. 4, codicils A, B, and C, and also will D, may all be pronounced for as one testamentary act; residue not disposed of in any of the papers. We insist that D is a codicil, and may be pronounced for as such, though propounded as a will.

Dr. Bettesworth for Glover. Glover, as one of the next of kin, insists on intestacy, from the uncertainty arising from the variety of testamentary papers; but if the Court should be of opinion that deceased is dead testate, then we pray that D may be pronounced for as the only last will, revoking all the former testamentary papers.

[363] Witnesses for Reeves.

1. John Wake. Deponent knew deceased 19 years; on 20th June, 1743, deponent in deceased's warehouse saw him execute the will marked No. 4, and deponent and John Gilbert and Henry Wade attested it as witnesses; deceased was in perfect senses, proves No. 4 to be deceased's handwriting; Lucy Bradshaw is dead, but cannot say when she died; proves the memorandum at the bottom of No. 4, and words "Lucy Bradshaw" are deceased's writing; John Gilbert is dead; proves Gilbert's handwriting as a witness to will No. 4, and his good character; proves the codicils A, B, and C to be all of deceased's handwriting, except the date London, September 3, 1751, at the top of codicil B, and some indorsements on the back of C; knows not whose handwriting they are.

5. Int. Proves paper marked D to be deceased's handwriting, except some indorsements on the back of it.

2. William Finch, innkeeper. Deponent was a relation to deceased; proves the name Lucy Bradshaw inserted in No. 4, and the note at the bottom thereof, and the name Elizabeth Reeves inserted in said will, to be all of deceased's handwriting; Lucy Bradshaw died in 1751, and Sarah Finch in 1749; John Gilbert is dead, he died in 1746; proves his handwriting and good character; 19th February, 1752, deceased was admitted tenant to a copyhold estate called Loudwater, mentioned in codicil C; the said codicil is deceased's handwriting; deceased died in December, 1755, and on that day the several testamentary papers now before the Court were all found wrapt together and laid up in his bureau, where he kept papers of moment.

[364] 4. Int. Deponent well knew deceased's handwriting; No. 3 is indorsed by deceased in these words, "This to serve as a will till another is made in better form."

Witnesses for Puddiphat.

1. John Atkinson. Knew deceased above thirty years; in June or July, 1752.

deceased asked deponent about William Kidd, who had been ill; deponent told him he was dead; deceased said he was very sorry for it, for he intended to leave his affairs to said Kidd, and deponent replied he alone would take care of them; deceased said he would expect too great a reward, and then said he would divide his estate and not make one great man.

2. Int. Deceased then said he intended to make a will soon.

2. Mary Kent. Deponent was a relation to deceased; Sarah French, Lucy Bradshaw, and Samuel Nichols are dead; deceased had upwards of sixty relations; deponent has seen deceased write; proves D to be deceased's handwriting.

Affidavit of scripts and scrolls made by Mrs. Reeves read by the counsel for the legatees; swears all the testamentary papers were found together.

All the propounded papers read.

Dr. Hay for Reeves. Reeves is named executrix in will No. 4, in codicil A and in paper D. The first question is whether deceased is dead testate? Suppose D was written subsequent to the other papers, it will not revoke them, unless it operates as a will; either that or No. 4 must be a good will, and consequently deceased cannot be dead intestate: the next question is whether all the [365] papers can be pronounced for together as a will? D cannot be deemed a codicil, for it was intended to be a will, but it is incomplete, contains real estate, was written long before the testator's death, and therefore cannot be a valid will; No. 4 is duly executed, was carried about by deceased, and affirmed by subsequent acts in 1749 and 1751; B begins "My other codicil," implies that it was subsequent to former codicil A. An executed will shall for ever remain till it is revoked. Delegates, *Hyde and Mason against Calamy and Limbrey* (1 Lee, 423, n.), an incomplete will that cannot operate for the whole estate, shall not, without special circumstances, operate to revoke an executed one. Prerogative, 3d December, 1750, *Barrow against Cox*, a will for real and personal estate wrote by deceased, his name inserted in the beginning, and it was confirmed by a codicil, but court held it could not revoke an executed will. Paper D not of a certain date, but if it was wrote in 1752 it was three years before his death. The two cancelled wills were executed ones. Paper No. 3, dated 10th June, 1743, which was only a draft for another will, was executed and attested, therefore deceased always intended to have an executed will. Prerogative, *Jekyll against Lady Ann Jekyll* (1 Lee, 419), A refers to the will, B refers to both the will and a former codicil; C also relates to a will; if D should be established, the greater part of his estate would fall under an intestacy, the residue not being devised.

Dr. Simpson, same side. Some of the same legacies are given in both A and B, but there are some different legacies; C devises copyhold es-[366]-tates which are subject to this Court, for they pass by surrender, and a will is only a declaration thereof.

Dr. Meacham, same side. Deceased had a settled intention to die testate from the year 1699; paper D is not propounded as written in 1752.

Dr. Smalbroke for Puddiphat. D can never be considered as a codicil; deceased calls it his will, it is perfect as to intention, it is diffusive, for it provides for twenty-three relations; it was clearly written after all the other papers; deceased was not in possession of the Loudwater estate till Christmas, 1751, and therefore D, which devises that estate, must be subsequent to all papers in 1751. Delegates, *Beaumont and Sharpe*, 1753, judges held that an inconsiderable real estate would not affect a will which conveys a great personal estate; 3 Mod. 218, *Hoyle against Clark*, Swinb. fo. 502. D cannot be reconciled with the other papers, and therefore cannot be a codicil.

Dr. Clarke, same side. Deceased made variety of dispositions upon death of several relations; several circumstances shew will D is the last wrote paper. An executed will may be revoked by one unexecuted, Crok. Eliz. 206, *Burton and Estoff*. Before the Statute of Frauds a will might be revoked by parol; a paper may be sufficient to revoke though it does not operate as a will, Prerogative, *Hellyar against Hellyar* (1 Lee, 492).

[367] Dr. Collier for the legatees. Deceased left above forty thousand pounds residue, not given in No. 4, because he intended from time to time to devise by codicil; D gives only about five thousand pounds; if that should operate alone, great part of his estate would go to the next of kin, and therefore he would make one great man contrary to his declaration.

Dr. Bettesworth for Glover. We contend for an intestacy. Prerogative, *Hunt*

against *Green*, A. made his will duly executed, and gave all to his wife but two legacies, and devised therein real estate, wrote another will subsequent, attested by two witnesses; the last was held to revoke the former will, though it could not carry the real estate.

Dr. Harris, same side. 2 Inst. tit. 17, sect. 7, Vinn. Cod. testament revoked by a solemn will, or by a military one, where the usage is so. *Onyons and Tyrer*, Chanc., a paper which could not enure as a will, was held to be a revocation of a complete will. Prerogative, *Martin against Wotton*, Millechamps made her will which was revoked by instructions only.

N.B.—She died before she could execute the new will, Cases in 1 Eq. Ab. 409, *Hyde and Hyde*. Comyns, fo. 476, same case. Moore, 710, *Ryder's case*.

Judgment—Sir George Lee. I was of opinion, first, that the deceased was not dead intestate; either No. 4 or D must be good and valid. Secondly, that D could not be taken as a codicil, for it was inconsistent with the other [368] papers, was designed for a will and not a codicil, and was propounded as a will: thirdly, if D could operate at all it must be as a latter will, thereby revoking the former, for it could not operate as a revocation merely, and was not pleaded as such; so held in Delegates in the cases of *Duke of Somerset* and *Sir John Jacobs*, and of *De Smith and Poyart* (1 Lee, 425, notes): fourthly, that D containing real estate which it could not convey for want of execution, and having been written so long before his death, and it also appearing from all the former wills that deceased intended to leave an executed will, and that he cancelled all the wills he had entirely departed from—that D could not be established as a will to revoke the former complete executed will No. 4, and the codicils referring to it; I therefore pronounced for the will No. 4 and the three codicils A, B, and C; but it appearing that the date at the top of B, viz. "London, 3d September, 1751," was not deceased's handwriting, and it not appearing by whom it was written, I ordered that date to be struck out.

BREEWOOD, Administration of Hibbin against CALEMBERG. Prerogative Court, March 2nd, 1757.—5l. only decreed on account of the poverty of the party nomine expensarum by way of stigmatizing an unjust and vexatious suit.

General Frampton died in October, 1749; after his death Mary Grace set up a paper as his will, in which she was executrix. The Countess Calemberg as first cousin once removed, and one of the general's next of kin, opposed the will; Grace [369] admitted her interest as cousin once removed, and one of the next of kin. After a long litigation I pronounced against the will as forged, and decreed administration to Calemberg. Grace appealed to the Delegates, where the sentence was affirmed in all respects, and the cause remitted to me. Elizabeth Hibbin, widow, entered a caveat, and then for the first time alleged that she was sister by the half-blood, viz. on the father's side, to General Frampton, and prayed administration. Calemberg denied her interest, and she would have denied Calemberg's interest, but as her interest had been admitted in this cause upon the contest concerning the will, and Hibbin had not intervened to oppose her interest, and this Court had pronounced for her interest upon Grace's admission, and that sentence had been affirmed in the Delegates, and thereby her interest had been established in a superior court, whose decree I could not vary from, I was of opinion that it was a res judicata, that Calemberg was cousin-german once removed to the deceased and next of kin, unless it could be clearly shewn that the deceased had left a nearer relation, which at the time of the sentences was unknown to the Courts; and consequently that Calemberg ought not now to be put to prove that she was cousin-german once removed to the deceased. Hibbin propounded her interest as sister of the half-blood to the deceased. Pleas were given in on both sides and many witnesses examined, then Hibbin died when the cause was almost ready for hearing, and her daughter Elizabeth Breewood, who was her administratrix, intervened and carried on the cause, and this day it came on to be heard, when it appeared that there was not the least colour of evidence to prove that Hibbin was any relation whatever to the [370] deceased General Frampton, or that she had ever been acquainted with the deceased or his father Charles Frampton, who she asserted was also her father, and who, in his will, dated April, 1723, gave no intimation of his having any other child but the deceased.

Judgment—Sir George Lee. I therefore pronounced against Hibbin's interest, and ordered letters of administration (pursuant to the former decree confirmed by the

Delegates) to pass to Calemberg, and condemned Elizabeth Breewood, Hibbin's administratrix, in 5l. nomine expensarum, to be paid out of Hibbin's assets (if any), and declared that as it appeared in the cause that Hibbin was very poor, I gave that sum only by way of stigmatizing such unjust and vexatious suits, and that if Hibbin had left sufficient assets to have paid them, I would have condemned her administratrix in full costs to the time of Hibbin's death; but I was of opinion her administratrix was not liable to pay costs out of her own pocket, as the witnesses had been examined and the cause was almost ready for hearing before Hibbin died.

On 21 June, 1757, an appearance was given for the Marchioness Paschall, who alleged herself to be first cousin to the deceased General Frampton; and Calemberg's proctor, Mr. Tyndal, who had been concerned throughout the cause, exhibiting a special proxy, whereby Lady Calemberg confessed Lady Paschall to be first cousin and next of kin to deceased, whereas she was only first cousin once removed; I decreed administration to Lady Paschall.

[371] *BOND against FAIKNEY.* Prerogative Court, 1st Session, Easter Term, April 28th, 1757.—Where a widow is left executrix with a stipulation that in the event of her second marriage, she is to concur in the appointment of trustees for the management of the property, and she does marry again, but dies without the appointment of trustees, holden, that her executorship expired on her second marriage.

Robert Fotherby, Esq., deceased, made his will and two codicils; the will was dated 14th August, 1749, the first codicil the 18th, and second codicil the 19th August, 1749; he appointed his wife Dorcas executrix and residuary legatee for life, and after her death gave the residue to his sister Mary Faikney for life, remainder to his nieces, Mary and Elizabeth Faikney. In the first codicil were these words, explanatory of the will, viz. "In case my wife shall think proper to marry, then my will is, that she and the persons who shall be entitled by my will to enjoy my estate as therein mentioned after her decease, do agree upon proper, able and honest persons to be trustees, and I do hereby direct my said wife my executrix to convey, assign and transfer and make over to the said trustees, all and every thing of my personal and real estate of what kind and nature whatsoever and wheresoever, which I have given to my said wife for her life, in trust for the uses of my said will, and my will is that a deed of trust shall be drawn and agreed on by counsel learned in the law to settle my said estate real and personal in the said trustees, in such manner as not to be subject to any debt or debts contracted by any husband before or after her marriage, and that they may receive the rents, profits and dividends arising as they become due, and pay the same over to her my said wife, or enable my said wife to receive the same, as she shall best like, and her receipt to be a sufficient discharge for every thing I have given her by my said will notwithstanding her coverture; and my will is that my said trustees do likewise take care of my plate, jewels, and household furniture of all [372] kinds, allowing my wife the use of them for her life, but not to be subject as aforesaid to the power of an husband."

Dorcas, the wife, took probate of the will and codicils on the 2nd January, 1749-50, and afterwards married Richard Bond; but, by settlement before marriage, she was empowered to make a will in writing. In June, 1753, she accordingly made such a will, and appointed her husband, Richard Bond, executor, who proved her will on 29th January, 1757. Mary Faikney, the sister of Robert Fotherby the first testator, died in the lifetime of Dorcas Bond, whereupon the residue, by the death of Dorcas, came to Mary and Elizabeth Faikney, nieces of Robert Fotherby. On the 5th January, 1757, Mary Faikney the niece, without alleging that Dorcas was dead intestate, prayed and obtained administration with the will and codicils of the goods of Robert Fotherby left unadministered by Dorcas Fotherby, but took no notice that Dorcas had died a feme covert and testate. Richard Bond, as executor of Dorcas, called Mary Faikney to bring in the administration, and shew cause why it should not be revoked as surreptitiously obtained, and why administration should not be granted to him as executor to Dorcas, through whom the privity between Bond and the first testator was continued. Dorcas and the reversionary residuary legatees did not, upon her marriage to Bond, agree upon trustees pursuant to the first codicil, so that she was at her death in possession of all the estate. Mary Faikney brought in the administration, and the question now was, whether the administration was improperly granted to her

and ought to be revoked, and administration to be granted with the will [373] and codicils to Bond, as executor of the executor of Robert Fotherby or not.

Judgment—Sir George Lee. I was of opinion that though trustees had not been appointed pursuant to the first codicil, yet that Dorcas's executorship, by the words and meaning of said codicil, expired on her marriage to Bond, and consequently that no privity was continued to him from the first testator, and therefore that the administration cum testamento was rightly granted to Mary Faikney, one of the now residuary legatees, and I confirmed the grant thereof to her.

COX *against* RICAFT. Arches Court, 2d Session, Easter Term, May 2nd, 1757.—The herbage of a chapel-yard and the loppings of trees in it, by law belong to the incumbent. If a parson is proceeded against for cutting down timber, under 35 Ed. 1 it must be by indictment at common law.

Appeal from Peterborough.

Griffin Ricraft, warden of the parochial chapel of Eye, in the county of Northampton, promoted articles against Thomas Cox, for that he had, contrary to the laws, canons and constitutions ecclesiastical, cut off the head, or two great branches that form the heads of a large timber tree that stands in the chapel-yard of Rye, and made it a pollard, whereby it was in danger of decaying and becoming useless for defending the chapel against the south-west wind, and for that [374] he had carried it away and applied it to his own use, and not for repairing the chapel; and for that he had pulled down six or seven feet of the wall of the chapel-yard for the more convenient carrying it away: the fact was fully proved that he did lop the tree, carried the branches away for his own use, and did pull down part of the chapel-yard wall to carry the loppings away; but it appeared that the rectory of this parish was appropriated to the see of Peterborough; that the bishop was lord of the manor as well as incumbent and ordinary, and nominated the curate; and that he had granted a lease of the tithes and appurtenances of this parish to the said Thomas Cox, and had, as rector, consented that said Thomas Cox might lop the tree in question, which consent the bishop certified under his hand, and the certificate was exhibited in the cause and proved; and it was also proved that Cox did immediately, and long before the prosecution was commenced, build up the chapel-yard wall again, and had put it into as good or a better condition than it was in when he pulled it down, and that several of the principal parishioners were averse to the prosecution.

On the 9th June, 1756, the Chancellor of Peterborough pronounced that Cox did unadvisedly and illegally cut timber from a tree in the chapel-yard of Eye, and did illegally pull down part of the yard wall, for which offences he ought to be censured and admonished, and condemned him in costs, and admonished him to pay them, but did not admonish him for the facts of lopping the tree and pulling down part of the yard wall.

From this decree Cox appealed to the Arches.

[375] *Judgment—Sir George Lee.* I was of opinion that the herbage of the chapel-yard and the loppings of the trees did by law belong to the incumbent; that Cox being the lessee of the incumbent, stood in his place, and having also his express consent for lopping this tree, was guilty of no offence against the ecclesiastical laws, for the Constitution in Linwood of Archbishop Stratford's declares the trees in a church-yard are the property of the parson, and does not subject him to punishment even for cutting them down, but only punishes the parishioners in case they cut down trees in the church-yard without the parson's consent; that if the constitution had prohibited cutting down trees except for repairing the church, as penal laws are not to be extended beyond the letter, it would not include this case of lopping only. The statute 35 Edw. 1, ne Rector prosternat arbores in cæmeterio, does not prohibit the parson from lopping trees in the church-yard, but prohibits him from cutting them down except for the repairs of the church; and if a parson is prosecuted upon that statute, it must be at common law by indictment. I was therefore of opinion that Cox, by lopping the tree, had not offended against any ecclesiastical law, and that the Spiritual Court had not jurisdiction over him in this case; that he had done wrong in pulling down the wall of the chapel-yard, but as he had immediately and voluntarily built it up again before any prosecution was begun, I thought this prosecution trifling and malicious. I pronounced for the appeal, and reversed the decree of the judge below with costs.

[376] *WHEATLEY against FOWLER.* Arches Court, Easter Term, May 20th, 1757.—A methodist preacher articted for against incontinence.—The incontinence proved ; penance enjoined.

(Appeal from Norwich.)

John Fowler promoted articles against James Wheatley, a Methodist preacher, who had a congregation at Norwich ; the citation was returned on 24th September, 1754 ; appearance for Wheatley in October following. The articles charged him with incontinence in several months in the years 1753 and 1754, with Mary Mason, formerly Fowler, daughter of the promoter, and with ——— Martin, Rebecca Payne, and Frances Bryant, and others. On the 17th December, 1754, Fowler's proctor alleged that he had cited Mary Mason to answer to articles for fornication or adultery with Wheatley, who was then a married man, and that she had appeared and been enjoined penance, which she had performed, and prayed an answer. Wheatley's proctor confessed his allegation to be true, and then she was produced, sworn and examined a witness against Wheatley.

Mary Mason swore that some time in March, April, May, or June, 1753, at which times she was a spinster, Wheatley, who was then married, and lodged at Mr. Jermy's house in Norwich, did several times attempt to debauch her, and did in Jermy's garden, in some of said months, first begin to corrupt her virtue ; deponent being averse, he used arguments to persuade her, and prevailed on her to consent in some of said months ; and on a Sunday in some of said months, after she had been at his preaching, in an arbor in Jermy's garden, he first had carnal knowledge of her ; he tempted and prevailed on her to repeat the said conversation several times in said arbor, in the parlor, and in [377] other places in his said house or lodgings ; next day after he had first lain with her, she expressed her uneasiness at what she had done, and he advised her to say nothing of it to any body ; he had a bible with him, and if any body came in, he talked to her of religion ; he often shewed her his privities, and treated her with indecency ; deponent was so uneasy that she told Mr. Paul and Mr. Keymer what had passed.

2nd Int. Respondent is daughter to the promoter, and is a clear-starcher by trade ; she is married to one Mason ; she wrote many friendly letters to Wheatley ; admits writing several letters to him as interrogate, in which she speaks of him as a good man, and a good christian, and says she is a great sinner ; the letters were written about Michaelmas, 1753 ; Wheatley had then secured her affection. 9th Int. A report was raised that Wheatley persuaded her to take physick to destroy a child she was supposed to be big with, and respondent denied that fact. 11th Int. Never declared that Wheatley was innocent with respect to her, but did say the report of her being with child by Wheatley was false. 15th Int. At Wheatley's request she sent a letter to the Dean of Norwich, complaining of his believing false stories of guilt between Wheatley and her. 17th Int. Respondent wrote letters to Mr. Watts from a draft drawn by Wheatley, and brought to her by Keymer, and she sent them to stifle the reports of guilt between her and Wheatley, and called it a malicious ill-grounded report. 18th Int. Respondent wrote a note from his draft to Wheatley to ask pardon for the false assertion she had made of his guilt. 19th Int. Respondent never made any fond applications to Wheatley ; he never gave her good advice but when she was going to receive the sacrament.

[378] Timothy Keymer and Thomas Paul swore they talked to Wheatley about his having debauched Mason, and he prevaricated, but confessed he had been guilty of indecencies with her and expressions which they thought amounted to a confession of guilt.

Lydia Bridgham swore that about Michaelmas, 1753, Mary Mason expressed great concern to deponent at her correspondence with Wheatley, and deponent heard her charge him with it to his face, and he did not deny it, and deponent expressing sorrow for his behaviour, he replied, "I told Polly it would be ruin to both in soul and body if we went on," and used other expressions admitting guilt.

Francis Bryant swore she came to live with Wheatley as his servant on 30th January, 1754, and on that very day he kissed her lewdly, and shewed her his privities, and put his hand up her coats ; but deponent resisted him, and afterwards he called her up stairs, and he again attempted to put his hands up her coats, and attempted to lie with her, and said he supposed she was afraid of being got with child, but he . . .

and then she could not be got with child ; deponent would not consent to him, and another day, when he was in bed, he attempted to get her to come to him.

6th Int. Admits she declared she never had spoken slightly of Wheatley. 8th Int. Says she told one Olave she was glad she had cleared Wheatley of what was reported against him.

Ann Ebbs swore that there is a door in her wash-house, which goes into Rebecca Payne's bed-chamber, and that on the 22nd August, 1753, through a crevice in said door, she saw Wheatley sitting at the feet of Payne's bed, and she lying on the bed by him, and deponent saw him put his hands up her coats.

[379] Peter Wetterick swore that on 22nd August, 1753, Ann Ebbs informed deponent that she had seen Wheatley and Mrs. Payne in very indecent postures together ; and deponent being at Ebbs's house on 24th August, 1753, through a crevice in Ebbs's wash-house door, which went into Payne's bed-chamber, saw Wheatley in said chamber with Mrs. Payne, and saw him put his hand up her coats and he then behaved very lewdly with her.

James Chapman and Sarah his wife swore, that in August, 1753, they saw Wheatley and Mrs. Martin go into the arbor in Jermy's garden together ; and he there set her upon his knee and put one hand up her coats, so high that they saw her thighs.

Wheatley in his defence examined several witnesses, who swore they believed him to be a virtuous good man ; but on interrogatories, admitted they had heard strong reports of his lewdness with Mason and others, and his witnesses proved that both Mason and Bryant had often declared they knew no harm of Wheatley, and that the reports against him were malicious ; and he pleaded many letters of Mason's to him in which she highly spoke of his goodness ; most of the letters were in a very enthusiastic style, and in several of them there were strong expressions of love and tenderness for him.

N.B.—Mason's character was not impeached, except as to her conversation with Wheatley.

On this evidence the chancellor of Norwich, on the 3rd February, 1756, gave sentence against Wheatley, and decreed him to do public penance.

Wheatley appealed to the Arches, where the cause was heard upon the same evidence as before, and I approved the sentence with 50l. costs, and remitted the cause.

[380] *ARNOLD against EARL AND NEWBEE*. Prerogative Court, 4th Session, Easter Term, May 23rd, 1757.—A next of kin who had been cited to see a will propounded, having appeared and declared that he did not oppose the will, is allowed to be dismissed for the purpose of being examined as a witness in the cause.

Thomas Newbee died a bachelor, having made his will, and appointed George Earl his sole executor ; he left Benjamin Newbee, his uncle of the whole-blood, and William and Richard Arnold, his uncles of the half-blood, his only next of kin. Earl took probate. On first session, Hilary Term, 1756, William Arnold cited him to prove the will by witnesses ; Earl appeared, and on 8th April, 1756, prayed a decree against Benjamin Newbee and Richard Arnold, to see the will propounded, which was personally served on them ; but they did not appear. Earl propounded the will against William Arnold personally, and against the others in pœnam ; William Arnold gave in an allegation opposing the will. Earl gave in a plea in reply. Benjamin Newbee was a material witness to prove some part thereof. On first session of Easter Term, 1757, Benjamin Newbee appeared, and by special proxy declared he would not oppose the will, and prayed to be dismissed from the cause ; William Arnold opposed his dismission. The question was whether, under the above circumstances, Newbee ought at his petition to be dismissed from being a party or not. The counsel for Newbee relied on the case of *Beaumont and Sharpe*, (a)¹ 14th February, [381] 1752, in the Delegates. The counsel on the other side cited 1 Vernon, 230, (a)² and Bacon's

(a)¹ The Delegates present at the decision of this point on 14th Feb., 1752, were—Mr. Justice Denison, Mr. Justice Birch, Drs. Collier, Ducarel, and Smalbroke ; the final sentence in the cause was on 31 May, 1753, when the Delegates present were—Mr. Justice Denison, Mr. Baron Legge, Drs. Collier, Ducarel, Smalbroke, and Clarke.

(a)² *Phillips v. The Duke of Buckingham* in which it was ruled that a co-plaintiff, though not a trustee, could not be examined as witness for the other plaintiff in the cause.

Abridgement, 235, the case of *Casey and Beachfield*, (b) to shew that in Chancery, though a defendant may, a plaintiff cannot be dismissed to become a witness; and he also cited the cases of *Gilley and Gilley*, (c) Delegates, Doctors' Commons, 1st July, 1738; and *Yardley against South and Wise*, Prerogative, 1744.

Judgment—*Sir George Lee*. Under the circumstances of this case, I was clearly of opinion that Benjamin Newbee ought to be dismissed; he had not voluntarily made himself a party, but was called in and had not intermeddled at all; that he had now appeared, and declared he would not oppose the will, and therefore had fully answered the purpose for which he [382] was cited; that to detain him would be a manifest hindrance to justice by depriving Earl of his testimony, for his answers could be of no use, they not being evidence against William Arnold, and no evidence was wanting against himself, as he declared he would not oppose the will, and had thereby judicially bound himself. In the cases where this court had refused to dismiss parties they had materially acted in the cause, and injustice would have been done the adversary by dismissing them; but in this case, great injustice would be done to Earl by detaining Newbee, who prayed to be dismissed, and I thought had a right so to be: I therefore dismissed him from the cause as a party, and he was immediately produced and sworn a witness.

PARKER against PARKER AND OTHERS. Prerogative Court, 1st Session, Trinity Term, June 8th, 1757.—The claim of a widow to the administration of her husband's effects opposed on the ground of his being a lunatic at the time of the marriage: objection overruled.

Virgil Parker died 24th May, 1753, intestate, without issue. On 23d June, 1752, he married Mary Mills, now Parker, who was his servant, by licence at the parish church of Minty in Wiltshire, in presence of above forty persons; besides the said Mary, who claims as widow, he left Walter and James Parker, his brothers, and Catherine Jenner, his sister. Walter Parker entered caveat, the widow warned it, and prayed citation against James Parker and Catherine Jenner; they all appeared and denied her interest; she propounded it; previous courtship, application to her relations, and declarations to them that he would have her, his applying for a licence, and laying a wager that he would be [383] married within a fortnight, which wager he won, and the fact of his being publicly married and behaving with the utmost decency at the marriage, and consummation and cohabitation with her as his wife till the 3rd August, 1752, when his brothers put him into a madhouse, where he remained to his death, were fully proved. The relations objected that though it was a marriage de facto, yet it was not de jure, for that he was a lunatic and incapable of consenting to marriage. It did appear that he had a very weak understanding from his infancy, and by hard drinking was at times lunatic, and did many mad and frantic acts, but no commission of lunacy was taken out, nor was he constantly mad, but only by fits; and as it appeared that he married with previous deliberation and intention, went by himself to Minty on the Sunday, 21st June, in order to be married the Tuesday following there, where the woman was to meet him at twelve miles distance from his habitation, sent for and paid for a licence himself, declared he was going to be married,

(b) The case of *Casey v. Beachfield* is thus reported in Gilbert's Cases in Equity, p. 98. In this case it was said by Mr. Vernon that the reason you cannot examine any of the plaintiffs as witnesses in the cause is, because if the case miscarries the plaintiffs will be liable to costs, and therefore their swearing is to exempt themselves; and it is their own choice that they are made plaintiffs, for without their consent they could not have been made so; but the defendants are forced into the cause, and if their being made parties should absolutely invalidate their testimonies it would be in the power of any one who had a mind to oppress another, and deprive him of his defence, to make the most material witnesses defendants in the cause; and therefore any of the defendants to a suit may be examined as a witness, saving just exceptions to their credit, capacity, &c.

The report of this case is to be found almost totidem verbis, in Pre. Cha. 411.

(c) *Gilley v. Gilley*, an appeal from the Exchequer Court at York; sentence was given in the cause on 20th June, 1740. The Delegates present being—Mr. Justice Page, Mr. Baron Carter, Drs. Bettesworth, Strahan and Kinaston. The point alluded to was probably argued before the Condelegates at Doctors' Commons.

and was married by the curate of the parish, who swore that he went through the ceremony with as much propriety as any man could do, and there being no evidence of his doing any mad acts about the time of the marriage, I was of opinion he had a sufficient capacity to contract a legal marriage,^(a) and pronounced for the widow's interest, but did not give costs.

[384] GOODALL *against* GOODALL. Arches Court, 2nd Session, Trinity Term, June 13th, 1757.—Plea of adultery against a husband in bar to a divorce by reason of the adultery of the wife not sustained by proof.

By letters of request from Chancellor of Lichfield.

Francis Goodall, a tradesman at Birmingham in Warwickshire, brought a suit for divorce by reason of adultery against Rebecca his wife; they were married the 20th July, 1741, and had three children, of whom a son and daughter are now living. They cohabited together at Birmingham very affectionately till 1744, and then she commenced a criminal conversation with one Mr. Turner, an intimate friend of Mr. Goodall's. In March, 1745, she, under pretence of ill usage, left her husband and came to London, and soon after Turner also came to London, and they lived privately in lodgings together as husband and wife, and had several children. In 1751 Mr. Goodall had intelligence that they lived together in Coleman's Buildings. In December, 1755, he had a verdict against Turner for 2500l. damages for criminal conversation with his wife. On 4th Session, Hilary Term, 1756, he gave in his libel in this court, charging her with the above criminal conversation, and that she had eloped with Turner; she, on the contrary, pleaded that she left her husband on account of his cruel usage of her, and that Turner did not come to town till a month after her. She likewise recriminated, and [385] pleaded that he was guilty of adultery with different women in the year 1750, and examined three witnesses to prove adultery on him. The adultery was so fully proved upon the wife, that her counsel admitted it, and would not argue that point; and as to the cruelty, it was admitted that there was not sufficient proof of cruelty to justify her leaving her husband, but insisted that there was sufficient proof of his having committed adultery, and therefore that he was not entitled to have a sentence of separation, but that Mrs. Goodall ought to be dismissed. The witnesses to prove adultery against him deposed as follows:—

1. Rachael Everett, formerly Stanmer, milliner. Deponent always lived at Birmingham, and followed the trade of a milliner there till 1750; at Christmas, 1749, deponent hired a house of Goodall, which had a door that opened into his yard; he frequently came to deponent and attempted to lie with her, and offered deponent forty pounds a-year to be his mistress; in May, 1750, deponent consented to let him come into bed to and lie with her, and afterwards he very frequently had carnal knowledge of deponent, but deponent never let him lie with her after Michaelmas, 1750, for deponent then broke off her conversation with him, on account of a young man with whom deponent then kept company being very uneasy thereat.

2. Sarah Nash. Believes producent was forced to leave her husband on account of his cruel usage of her, and that her friends advised her to leave him; deponent knew Rachael Stanmer, alias Everett, and heard her say Goodall offered her 50l. a-year to be his mistress; deponent well knew Ann Boweter; about six years ago deponent, [386] at said Ann's desire, went with her to Goodall's house at least six different nights, and said Ann knocked gently at the door, and it was opened, but deponent knows not by whom, and said Ann used to go in, and then deponent went away, and said Ann used to tell deponent she was going to lie with Mr. Goodall, and on the next mornings she has told deponent that she had lain with him those nights.

3d Int. Gives Mr. Goodall a very good character, and says that if she had a daughter she would willingly marry her to him. 9th Int. Never saw him commit adultery with Boweter.

3. Mary Pinkstone. Deponent knows producent and her husband, and well knows Ann Boweter; Francis Goodall often came to said Ann Boweter's mother's house, and shewed great fondness for said Ann, and deponent has heard the said Ann at nights tell her mother that she was going to Mr. Goodall's; in 1750 deponent was one night at said Ann's mother's house, and said Ann and Mr. Goodall then went

(a) See the same point raised with a different result in *Browning v. Reane*, 2 Phill. 69.

together into a parlour where there was a bed and shut the door; deponent looked through the keyhole and saw said Ann unpin her gown, and unlace her stays, and as deponent best remembers, take them off and then she put out the candle.

5th Int. Respondent has lived all her life at Birmingham, has never heard it reported there that the producent and Turner had criminal conversation together.

N.B.—Mr. Goodall's witnesses on interrogatories give him a very good character, say he is a virtuous sober, modest, industrious man, a very tender father, and believe he would have made her a very good husband if she had proved a good wife; [387] and many of the said witnesses likewise say that Rachael Everett, and Sarah Nash are persons of most infamous characters, common prostitutes, notorious liars, and persons to whom, in their opinion, no credit ought to be given; but there is no objection in evidence to the character of Mary Pinkstone.

Judgment—*Sir George Lee*. Upon consideration of the circumstances of this case, I did not think there was sufficient evidence from the testimony of these witnesses to pronounce that Mrs. Goodall had made good her plea of recrimination, and as Mr. Goodall had fully proved her guilty of adultery with Turner, I gave sentence for a separation à mensâ et thoro by reason of adultery committed by the wife.

JOHNSON *against* ARMOND. Prerogative Court, 2d Session, Trinity Term, June 16th, 1757.—Time extended for the return of a proxy from Philadelphia.

Susanna Potter, deceased, made her will, and appointed Philip Haste and William Townsend executors, who renounced and gave the residue of her estate to Susanna Johnson, who was her servant. Caveat entered by Mr. Altham, proctor, by order of John Armond in behalf of his son, who was nephew and next of kin to the deceased, and who is resident at Philadelphia. On the 24th March, [388] 1757, Altham was assigned to exhibit a proxy from John Armond, jun. Johnson therefore prayed that administration cum testamento might now be granted to her. John Armond, sen. made affidavit that his son was at Philadelphia, and that on 8th January last he sent a proxy to him to be signed, which was not and could not be returned, and prayed that to the caveat-day in September next to exhibit such proxy, which I decreed accordingly.

COOK *against* COWPER. Prerogative Court, Trinity Term, June 13th, 1757.—An administratrix, cited to exhibit an inventory and account, and to see portions allotted, calls for a proxy from the next of kin; question raised whether the proxy being only signed by the husband of the next of kin, is sufficient.

[See pp. 487 and 504, post.]

Henry Cook died intestate, left Mary Cowper his widow, and Susanna, wife of John Cook, his only child. A citation was taken out in the name of Susanna Cook against Mary Cowper to exhibit an inventory and account, and to see portions allotted; she having taken administration to deceased: Cowper appeared and prayed that Cook's proctor might exhibit a proxy, which he was assigned to do; Susanna Cook lives separate from her husband, he having commenced a suit against her, which is now depending in the Consistory Court of London, for a divorce for adultery, the proctor therefore exhibited a proxy from the husband only; the counsel for Cowper insisted that the proxy was not sufficient that the wife was the proper party, and that by statute 1 Jac. 2, chap. 17, sect. 6, (a) no person could be cited to an [389] account but at the instance of the next of kin, or a creditor &c., and that the husband did not come under those descriptions, and could not commence this suit but in the name of his wife, and therefore that Cowper ought to be dismissed. On the contrary it was said that the real interest vested in the husband, which the wife could not by her

(a) "Provided always, and it is hereby further enacted, that no administrator shall from the four and twentieth day of July next be cited to any of the Courts in the said last act mentioned, to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof), unless it be at the instance or prosecution of some person or persons in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin; nor be compellable to account before any of the ordinaries or judges by the said last act empowered or appointed to take the same, otherwise than as aforesaid; any thing in the said last act contained to the contrary notwithstanding." 1 Jac. 2, c. 17, s. 6.

refusal to join with him, deprive him of ; that the citation might have been in name of husband and wife, and if she had carried on the suit he ought to have joined in the proxy. Delegates, *Von Thienen's case*, administration granted to the husband in right of his wife, when she, who lived separate from him, refused to take it, in order to prejudice her husband.

Judgment—Sir George Lee. As there was no evidence in this case that the wife had been applied to and had refused to sign the proxy, in order to justify the Court in departing from the common course of proceeding, I directed that she should be applied to, to sign the proxy, and if she refused, upon affidavit made of the fact, I should have no difficulty in accepting the proxy from the husband only, and allowing him to proceed alone in the suit, as the real interest was vested in him as husband ; for otherwise there would be a failure of justice, and the husband's right would be dependent on the pleasure of the wife. Delegates, 22nd May, 1732, *Lopes da Rosa and Others against Lusitano de Pinna and Others*, De Pinna prayed administration to her mother and sister, was opposed by Da Rosa, another sister, who lived at the Brazils. The Judge of the Prerogative decreed administration to pass under seal to De Pinna, who was sworn administratrix. Da Rosa's proctor appealed, and in the Delegates Mrs. De Pinna gave a proxy to renounce her right to the administration, in order to prejudice her husband, the husband intervened, and prayed that her proxy might be rejected. The Court was of opinion that on decreeing the administration to the wife, an interest was vested in her husband which she could not by any subsequent act deprive him of, and therefore rejected her proxy of renunciation. Vide my second Case Book, p. 180.(a)

[391] LADY VISCOUNTESS MAYO *against* BROWN. Prerogative Court, 3rd Session, Trinity Term, June 21st, 1757.—Legitimacy so far presumptively established as to throw on the opposing party the burthen of disproving it.

[See 1 Lee, 271, 570.]

Gertrude Aylmer, alias Brown, died 28th December, 1729, intestate ; left Stephen Brown, Esq., her reputed husband, and Catherine Aylmer, now Lady Mayo, her reputed lawful daughter by Whitgift Aylmer, Esq., her first husband ; deceased died at Bordeaux in France, but left considerable effects in Jamaica. Lord Mayo took administration to deceased at Jamaica (it being the course there to grant it to the husband), in right of his wife, as deceased's lawful daughter. Brown likewise took administration to deceased as his lawful wife here in the Prerogative Court, in October, 1732. After long litigation in Chancery between Brown and Lady Mayo concerning her father and mother's estate, she alleged in the Prerogative Court that Brown was

(a) The valuable note referred to is as follows :—

Delegates (Doctors' Commons), May 22, 1732, 4tæ Sessione Paschæ.

Lopes da Rosa et Al' versus Lusitano de Pinna et Al'.

Judges—Drs. Pinfold, Strahan, Audley and Isham.

Mary Agnes de Pinna, in the Prerogative, prayed administration to her mother and brother ; she was opposed by Lopes da Rosa and another sister, both which lived at Bahia in the Brazils. Administration was decreed to Mary de Pinna, who was a feme coverte, she was sworn administratrix, and the administration decreed under seal ; Mr. Lanes, proctor for Lopez da Rosa &c., appealed, and now in the Delegates Mr. Holnar appeared for De Pinna, the husband, and would have appeared for Mary de Pinna the wife also, but she having altered her mind, gave a special proxy to Mr. Cheslyn to renounce her right to the said administration, and give an affirmative issue to the libel of appeal.

The question was whether this proxy could now be admitted ; it was insisted that it could not, for the administration having been decreed, there was a jus acquisitum to the husband, and the wife could not now renounce in prejudice to her husband ; and to shew that a wife who has the interest immediately in her shall not by her act prejudice her husband, Dr. Andrew cited the cases of *Jacobs v. Flutter* in the Arches, 1719, of *Lilley v. Bevoir*, Prerog. 1719, and also of *Gibbs v. Davis*, and of *Silvester v. Gee*, both in the Prerogative.

In the present case the Court was of opinion the wife could not renounce and give an affirmative issue in opposition to her husband, and therefore would not admit her proxy for that purpose. MSS. Note Books of Sir George Lee.

not lawful husband of Gertrude, the deceased, and took out citation against him to bring in his administration and shew cause why it should not be revoked and administration granted to her, as daughter to deceased. Brown appeared and denied Lady Mayo to be deceased's legiti-[392]-mate daughter. She propounded her interest, and alleged that Gertrude Brown many years since married Whitgift Aylmer, and had issue of that marriage Catherine, now Lady Mayo, the party, but did not fix the factum of their marriage, nor the year in which it took place, nor the year in which she herself was born, but pleaded her father's will, dated 13th June, 1719, in which he gives the residue of his estate to Catherine Aylmer, his only daughter, and appoints her mother guardian, and his codicil dated in August, 1720, when he again mentions her as his daughter, a deed dated 16th November, 1720, wherein Gertrude, the deceased, after she became a widow, made a settlement on her daughter Catherine; and also pleaded letters and other papers signed by Brown, wherein he had mentioned Lady Mayo as legitimate, and called her his daughter-in-law. Lady Mayo in her minority married Mark Hamilton, in the warrant for the licence she was described as the lawful and natural daughter of Gertrude Brown, formerly Aylmer, and her mother signed and swore to that warrant, and Mr. Brown joined in the bond on obtaining the licence. Lady Mayo further proved by witnesses that Whitgift and Gertrude Aylmer had constantly and uninterruptedly owned her from 1714 to their respective deaths as their lawful child, and that she had always been reputed legitimate; this was the substance of her evidence. On the other hand Brown admitted that Whitgift and Gertrude were lawful husband and wife, but alleged that Lady Mayo was born in 1711, and that her father and mother were not married together till 1712. The only proof he attempted to make of these facts was as follows:—One witness swore that in 1711, 1712, [393] and 1713 Gertrude lived with Whitgift, as his servant and owned herself to be so; and another witness swore that he dined with Whitgift the beginning of 1712, when Gertrude sitting at the head of Whitgift's table, he took her for his wife but Whitgift told him she was a lady he had a great regard for, but that she was not his wife, and that he had no wife; other witnesses swore that her mother always declared her to be of such an age as would bring her birth to the year 1711, particularly in the marriage licence in 1727, she was described as upwards of sixteen; but most of his witnesses said they always esteemed her to be legitimate, and there was no sort of proof that Gertrude was reputed to be Whitgift's mistress, or any imputation whatever upon her character, save what arose from the supposition that this daughter was born before marriage. He further pleaded an answer of Lady Mayo in Chancery, in which she said she was nine years old in 1720, when her father died; he likewise pleaded an entry on a loose piece of paper of the birth of Catherine, said to be written by her mother and to be found in her trunk by Brown after her death; the only proof of this paper was by a maid-servant, who had lived with Gertrude only three months, who swore she believed it to be her handwriting but no proof of the finding it or of its ever having been shewn to any body by Brown, or spoken of. This entry said that Catherine was born on 13th August, 1711; but there was good reason to suspect this paper, and there was not a syllable of proof that Whitgift and Gertrude were married in 1712 and not before, and consequently, if it had been clearly proved that Lady Mayo was born in 1711, it would not have followed that she was illegitimate; and therefore, upon the admission [394] that her father and mother were lawfully married together, and the full proof that they constantly owned her for their legitimate child, and from the general reputation of her legitimacy from her infancy to the commencement of this cause, I pronounced for Lady Mayo's interest, notwithstanding there was no actual proof of the marriage of her father and mother, or of the time of her birth, and condemned Brown in costs. His proctor appealed ad statim.

N.B.—I was of opinion that the full proof Lady Mayo had made of her being reputed to be legitimate, and of the constant owning of her as such by her father and mother, threw the proof on Brown that she was not legitimate, and obliged him to shew she was born before her parents' marriage, by shewing the precise time of her birth, and of their marriage subsequent to it.

STOTE against THOMAS TYNDALL, ESQ., the King's Proctor. Prerogative Court, 4th Session, Trinity Term, June 30th, 1757.—If a person dies intestate, and without leaving any sort of relations in blood, administration is granted to the nominee of the crown, but the most remote relation defeats the king's title.

(Upon admission of an allegation.)

Dr. Simpson for Stote. The Honorable Dorothy Windsor, widow, died in January, 1757, aged 84, intestate; left Richard Stote, Esq., her cousin and next of kin; he applied as such for administration, and was sworn administrator; but the King's proctor entered caveat and denied our interest. The deceased was daughter of Sir Richard Stote, of Stote Hale in Northumberland, serjeant at law, [395] who left a son, Bertram, and three daughters, Margaret, Frances, and Dorothy, the deceased in this cause. Bertram died a bachelor at Newcastle in 1707, Margaret married the Rev. Mr. Tonge, and Frances married Mr. Shipper, and both died many years ago without issue. Dorothy married the Honourable Dixey Windsor, Esq., and she also died without issue; she lived, for many years before and to her death, in and about London. Richard Stote, the party, is son of Robert and Ann Stote, of Northumberland; Robert died in 1705, but in his life-time was very intimate with Bertram Stote and his sisters, and they always owned him as their cousin and nearest relation. We have not set forth a common ancestor in our allegation, nor have pleaded in what degree of cousin we stood related to deceased, but rest our case in this plea solely upon mutual ownings; for against the crown we have nothing to do but to shew a general relationship, because the crown has no colour of interest if the deceased left any relation, however remote; and indeed the crown has not a legal interest to claim the personal estate even if the deceased had left no relation, for then the personal estate would be in the ordinary; for before statute 13 Edw. 1, c. 19 (vide 1 Phill. p. 12, notes) the ordinary took the personal estate to dispose of it to pious uses, and that statute only subjected it to the deceased's creditors. 31 Edw. 3, chap. 11, directs administration to be granted to the next friend to deceased. 21 H. 8, ch. 5, gives administration to the widow or next of kin to deceased; but if there is no widow or next of kin, the statute of distribution, 22 & 23 Car. 2, ch. 10, cannot take place, and then the personal estate remains in the ordi-[396]-nary, as it did before any of those statutes. Judges of late have chosen to grant administration to a nominee of the crown, rather than keep the personal estate in their own hands, to subject themselves to actions. No office has been found, nor can be of personal estate, to vest a right in the crown. Where a dispute has been between a nominee of the crown and a creditor, (neither of which has a legal title to administration) it has been granted to the king's nominee, as being generally the more worthy and responsible person. The nomination by the crown is only a recommendation. Salk. 37, *Manning and Knapp*, A. B. nominee of the crown prayed administration, C. entered caveat and gave him a vexatious opposition, for which A. B. brought an action for damages against C. Lord C. J. Holt held the action would not lie, for the granting of administration to the nominee of the crown was rather a matter of favour than of right.

Dr. Hay for the crown, opposed the allegation, as being so general that it set forth no relationship or pedigree at all, and therefore concluded nothing.

Judgment—*Sir George Lee*. I mentioned the case of *Sir Thomas Colby* in the Prerogative, who was supposed to have been a bastard, and consequently as he died a bachelor, could have no relations: there the crown interposed, but it appeared that he was legitimate and had relations; and I took it now to be a settled point, that if a man died without having any sort of relations in blood, administration should be granted to the king's nominee; but as the most [397] remote relation would defeat the king's title, I was of opinion this allegation ought to be admitted as against the king's nominee, though it did not set forth any pedigree, but rested only on mutual ownings and general reputation of relationship.

N.B.—Mr. Stote not having pleaded a pedigree, but having rested his title upon reputation and owning of a relationship between his family and the deceased's, I, on the 1st Session, Trinity Term, 24th May, 1758, admitted an allegation on behalf of the crown, pleading in contradiction that the deceased's and the claimant's families never did visit, or own each other as relations, and also pleading that both the deceased and the claimant had declared they knew of no relationship between them.

MARTIN against ROLINSON. Prerogative Court, Trinity Term, June 30th, 1757.—

A cause delayed till the return of a material witness from beyond seas.

Dr. Bettesworth for Rolinson. John Peterson, alias Pitts, mariner in the "St. George" Indiaman, made his will 5th September, 1747, and appointed Mary and Erasmus Rolinson his executors; it is said he made another will dated 10th January, 1749, and appointed Swain Martin sole executor. In June, 1751, Mary Rolinson,

with consent of Martin, proved the first will, and with his privity and in his presence received deceased's wages, viz. twenty-four pounds, at the India House; and first deducting what deceased owed her, paid the surplus to Martin and took his receipt for the same; afterwards he cited her to bring in her [398] probate, &c. and shew cause why probate should not be granted to him of the latter will. Cheslyn, his proctor, propounded the last will; in February, 1756, we pleaded the above facts; on 12th May, 1756, Cheslyn was assigned to give answers to our plea, which assignation was continued from court-day to court-day to the 1st March, 1757. On the 4th May, 1757, Smith, her proctor, was assigned to prove. Herbert Hanson, who attested the receipt, and is a very material witness for us, is gone on a voyage to North America, of which fact we have an affidavit, and therefore pray the term probatory may be continued till he returns home.

Affidavit read.

Judgment—Sir George Lee. I said it was a common case in the Admiralty Court to delay a cause till a material witness came home, and had often been done in this court, —that the delay in this cause had arisen from Cheslyn's client, who had not given in his answers till last term—and as this was a trifling cause, carried on only with respect to costs, which originally could be but very little, but would become large by this suit, I would give time, if there was no other reason for it but to allow opportunity to the parties to agree; I therefore continued Smith's term probatory to the 1st session of next Michaelmas Term.

[399] *ROBERTS against ROBERTS.* Prerogative Court, Trinity Term, June 30th, 1757. —A contingent interest in the residue entitles a party to call for an inventory and to have notice of the sureties.—In the case of minors the Court orders an inventory *ex officio*.

Dr. Bettesworth for Thomas Roberts. Thomas Roberts, uncle to my client, died 13th March, 1755; by his will he gave to my client a legacy of 100l. to be paid when he arrived at the age of 25 years; all the residue of his estates he bequeathed to William Johnson and William Newell, or the survivor of them and the executors or administrators of such survivors, upon trust to sell his effects and lay out the money on securities and pay the interest to his daughter, Sarah Roberts, in case she married with consent of her trustees, and her receipts, notwithstanding her coverture, to be a sufficient discharge, and in case she should die leaving a husband, then to pay the interest to the husband and her children by him in such shares as the surviving trustee shall think fit, and after such husband's death to pay the interest for maintenance of the children, and the principal to be paid them share and share alike at their respective ages of 21 years; but in case his daughter should marry with consent and have children who should die minors without issue, then the said trustees or the survivor of them to pay one moiety of the residue to Catherine Roberts, his the testator's sister, and the other moiety to his nephew Thomas Roberts; and he made Johnson and Newell executors, who have renounced probate as executors and administration cum testamento as residuary trustees. Sarah Roberts, the daughter and residuary legatee for life, being under 21 years of age, chose the said William Johnson for her guardian [400] in June, 1755, and he then took administration cum testamento as guardian for her use till she should arrive at the age of 21. On the 22nd February, 1757, caveat was entered for Thomas Roberts, who is arrived at the age of 22. Sarah soon after came of age, and the administration to Johnson expired; the said caveat was warned for 24th March, 1757. Cheslyn appeared for Sarah Roberts, who is now married, and prayed administration cum testamento. Fanshaw appeared for Thomas Roberts and prayed an inventory or commission of appraisement, and notice of the security, before administration should be granted to the daughter. Cheslyn confessed Thomas to be a nephew to the deceased and a legatee in his will, and also one of the substituted residuary legatees, and offered to bring the legacy of 100l. into court to be lodged in the name of the register and the said Thomas, in the funds, till said Thomas should arrive at the age of 25 years and be capable of receiving it, but denied he had any interest to pray an inventory or commission of appraisement and notice of the security before administration should pass the seal. The question is whether he has sufficient interest for the purposes aforesaid.

Judgment—Sir George Lee. I was of opinion his interest in the residue, though it was contingent, was sufficient to entitle him to an inventory and to notice of the

security; as the estate was now come into the hands of the daughter (contrary to the intention of the testator) who had only an interest in it for life, the Court of Chancery would decree a full discovery, and would oblige her to give security, and this Court has usually ordered inventories [401] ex officio in the case of minors; therefore ordered an inventory and notice of the sureties for the benefit of those who might have interest in the estate after the daughter, but refused a commission of appraisement.

PICKERING AND TOWERS *against* TOWERS. Prerogative Court, By-Day after Trinity Term, July 6th, 1757.—Executors appointed according to the tenor of a will.—Whoever gives a power must be presumed to intend to give every thing to make that power complete.

[Applied, *In the Goods of Fraser*, 1870, L. R. 2 P. & D. 186; *In the Goods of Bluet*, 1885, 15 L. R. Ir. 143; *In the Goods of Hamilton*, 1886, 17 L. R. Ir. 279. Distinguished, *In the Goods of M'Kane*, 1887, 21 L. R. Ir. 4. Not applied, *In the Goods of Way*, [1901] P. 345.]

Dr. Hay for William Pickering and James Towers. Samuel Towers, Esq. deceased, made his will wrote with his own hand, dated 16th September, 1752 attested by three witnesses; gave his estate at Paddington to his son James, and his estate at the Seven Dials to his sons-in-law William and John Pickering who married his daughters, and 3000l. to each of them; to his eldest son George 2000l., and 3000l. to his children, and to his daughter, William Pickering's wife, 1000l.; and left diverse other legacies to his children, grandchildren, and friends, some of which were given over in case the legatees died without issue and minors; left George and James Towers his sons, and Elizabeth the wife of William Pickering his daughter, and grandchildren by his daughter Mary, deceased, who was the wife of John Pickering he did not bequeath the residue or expressly name executors, but we say he made William Pickering, James Towers, and John Pickering executors by the tenor of the will in these words: "I appoint William Pickering, James Towers, and John Pickering to [402] receive and pay the contents abovementioned." He says nothing of his debts, &c., but his will contains only devises of real and personal legacies, which he directs shall be paid within two months after his death. John Pickering is dead, but made his will and appointed his said brother William Pickering testamentary guardian of his children; many testamentary papers were brought into court upon affidavits of scripts and scrolls, in some of which William Pickering and James Towers were named executors; George Towers, the eldest son, prays that administration cum testamento may be granted to him solely, or to him, William Pickering, and James Towers jointly. We pray probate to William Pickering and James Towers; but if the court should be of opinion they are not constituted executors by the tenor of the will, then we pray that administration cum testamento may be granted to James Towers and Elizabeth the wife of William Pickering, to which William, as guardian to John's children (who are entitled to distribution of the undivided residue), consents and who therefore have three interests against one. The first question is, whether William Pickering and James Towers are not executors by the tenor of the will under the words abovementioned? Testator says nothing of paying his debts, but they must receive the whole and pay the debts before they can pay the legacies. Godolphin Orp. Leg. part 2, c. 5, p. 82, nu. 3. Although no executor, by the word executor, is expressly in the will nominated or appointed, yet if any other words or circumlocutions equivalent to the function of an executor, or to the charge and office which in any part pertains to an executor, be recommended or committed to [403] any one or more, it shall amount to as much as the ordaining or constituting him or them executors by the very word executor.

Dr. Bettesworth, same side. They must collect in the effects to pay the legacies which is the act of an executor. The words of appointment which are in question at the last words of the will, and added after the date, and must be presumed to have been inserted by the testator upon reading over the will and finding he had omitted to appoint any person to administer his estate.

Dr. Simpson for George Towers. We have offered immediate distribution at undoubted security. The legacies to the children are given over if they die minors and therefore the appointment was only intended to secure the legacies in trust. The same persons ought not to be administrators and trustees; administrators are mo

favourable than executors in consideration of law because the first give security. George is the eldest son, and his legacy is not contingent as the others are, but is absolute, and therefore he has a more beneficial interest than they.

Dr. Smalbroke, same side. The words of the appointment create a trust for a special purpose, not a general executorship. The undivided residue amounts to 10,000*l.* and no power is given to them over that.

Judgment—Sir George Lee. I was of opinion that William Pickering and James Towers, under the words above stated, were executors according to the tenor of the will; for [404] they could not receive and pay the legacies without collecting in the effects. No one can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who has the management of the estate knows whether the assets are sufficient. If the legatees were to sue in the Arches for their legacies they must sue the testator's representative, and I must decree him to pay the legacy to the legatee, which would totally defeat the supposed trust. Whoever gives a power must be presumed to intend to give everything necessary to make that power effectual; but upon supposition that these gentlemen are only trustees, they can do nothing pursuant to any power conveyed to them by the will till they have had a decree in Chancery against the representative of the testator to pay the several legacies to them; now it cannot be supposed that any testator in his senses would impose a burthensome trust upon his friends, and at the same time intend they should first go through a Chancery suit to put them in a condition to execute that trust: to avoid such an absurdity, I must suppose he intended by the words abovementioned to give them the general management of his personal estate, and therefore I decreed probate to William Pickering and James Towers, as executors, according to the tenor of the will; and if I had not thought the words sufficient to amount to a constitution of executors, I should have granted the administration cum testamento to James Towers and Elizabeth Pickering, not only because they had a majority of interests, but also because that would the most effectually have carried the intention of the testator into execution.

[405] STOTE *against* THOMAS TYNDALL, ESQ., the King's Proctor. Prerogative Court, Caveat Day after Trinity Term, July 28th, 1757.—In an interest cause, a party who has given in an admissible allegation has a right to a constat of the effects.—A commission of appraisement decreed in preference to an inventory.

Mrs. Windsor died intestate, leaving no near relations; the crown insisting she left no relations at all, claimed her estate. Mr. Stote appeared and alleged he was her cousin, and prayed administration; Mr. Tyndall denied his interest; he gave an allegation pleading ownings between his family and deceased's of relationship, but set forth no common ancestor. I admitted the allegation for reasons stated before, and now this day Stote prayed a commission of inspection and appraisement, which Tyndall opposed.

Judgment—Sir George Lee. I was of opinion, as his allegation was admitted, Stote had a right to a constat of the estate; that it would be for the benefit of whoever should hereafter have a title to the estate; that I could not decree an inventory, because the king's proctor not being in possession of the effects could not give one, but a commission of appraisement might be executed whoever was possessed of the effects; and therefore I decreed a commission of appraisement to be executed in the common course, but did not decree a particular commission of inspection.

[406] MACHIN AND TYNDALL *against* GRINDON AND OTHERS. Prerogative Court, Caveat Day, July 28th, 1757.—Where a person declares that a will has not been executed according to his intentions, no part of the will can be entitled to probate.—The Court will not establish a testamentary paper not found in the custody of the deceased, or supported by extrinsic evidence, upon controverted evidence of hand-writing.

John Pickering died suddenly on the 7th August, 1755, made a will dated 17th December, 1754, appointed Ann Machin, Thomas Tyndall, and ——— Emily, executors, left a legacy of ten pounds to John Grindon; the will is not controverted, it is duly executed and witnessed, but deceased having an intention to alter his will, sent for Emily, one of his executors, and desired him to draw a codicil; one was drawn and carried to deceased, he read it, disapproved several clauses in it, said it was not agree-

able to his instructions, and declared then and the next day that he would not sign it, but as he was going to St. Alban's he would carry that and his will with him, and would have it altered when he came back; but he never did anything towards finishing it: in this codicil he gave a legacy of ninety pounds to John Grindon in addition to the ten pounds left him by the will; this unexecuted paper John Grindon propounded, and also another paper in these words:—

"July 23, 1755.—Over and above the money I shall lend Mrs. Cole that I have given my kinsman John Grindon, I do hereby give him six hundred pounds now in the hands of my lawyer; I intend to make it a thousand to put out at Noman's Land.

"JOHN PICKERING."

On 25th June, 1755, deceased went to St. Alban's, and lodged at Grindon's house, where he staid till 29th July following, and carried with him his will and the draft of the codicil, dated 24th June, 1755, which he brought back with him.

[407] Grindon pleaded that he found the codicil dated 23rd July, 1755, in a drawer in the well of a bureau which stood in the room in his house; wherein deceased lay while he lodged with him at St. Alban's, the key of which bureau deceased delivered to him when he went to London on 29th July; that he found it in said bureau on 28th August, 1755, when he was alone, and that the whole body thereof and the signing was deceased's hand-writing; he further pleaded that deceased had great affection for him, and had declared about that time that he would do well for him. As to the finding, no proof thereof was attempted, but there was some evidence that the deceased had a regard for him. One William Smith swore that in discourse with deceased on the 17th July, 1755, he said to deceased, "I hope you will do something for Mr. Grindon;" deceased replied, "I have done something, and will do more, for I am fitting up a room in his house and intend to come here when I have settled my affairs;" and Joseph Hanley swore that on 24th July, 1755, deceased said to him, "I have done something for John Grindon, and if he behaves well I will do more for him, I am going to London and shall alter my will, there is something in it that is not quite to my liking, it will be to his advantage I assure you." To prove deceased's hand-writing he exhibited several letters and receipts, which were allowed to have been wrote by him, and examined four witnesses: George Richards, who believed the whole was wrote by deceased, but confessed he had never seen him write anything but his name; Thomas Rogers also believed it was wholly wrote by deceased, but said that he had [408] once seen deceased write a receipt, and he was acquainted in some manner with deceased's hand-writing; Maximilian Grindon, brother to the party, said he was well acquainted with deceased's hand-writing, and believed the whole codicil was wrote by him; and Phineas Coates, the fourth witness, who was a relation of the deceased's, said he was very well acquainted with deceased's manner of writing, and did verily believe it was not wrote by deceased, gave several reasons for his believing it was not, both with respect to the turn of the letters and the false spellings and mistakes. On the contrary, the same Coates was examined by the executors, who deposed the same upon his second examination, and was supported by another witness, who said he was well acquainted with deceased's manner of writing, and verily believed this codicil was not wrote by him.

N.B.—It appeared in evidence that Grindon, soon after deceased's death, wrote to his brother to send him all the letters he had from deceased, and to get as many from other people as he could, and that his brother accordingly sent him several, which were exhibited, and there was a great similitude between those letters and the codicil propounded.

Judgment—*Sir George Lee*. Upon this evidence I pronounced against both the codicils; against the first, dated 24th June, 1755, because the deceased had expressly declared it was not agreeable to his mind, and had expressly said he would not execute it; and I was clearly of opinion I could not in this case pro-[409]-nounce for part of the legacies contained in it (as the counsel argued I might), and reject those clauses which the witness said deceased objected to; for as he declared it was not drawn agreeable to his instructions, and that he would never sign it, there might be other parts he disliked besides those he particularly mentioned.

Against the second codicil, dated 23rd July, 1755, because it was not supported by any circumstance whatever; on the contrary the circumstances gave suspicion of forgery: his declarations that he would do well for Grindon referred to a future settlement he intended to make of his affairs when he came to town, particularly the

declaration deposed to by Hanley on 24th July, the day after the date of this paper, could not possibly refer to it, but on the contrary referred to a future act to be done by him, which shews he knew nothing of this paper; he left his lodgings at Grindon's on 29th July without intention of returning thither again, he carried his things away with him, and particularly his will and the other codicil. Now it is incredible that he should leave this paper behind him in a bureau, the key of which he gave up to Grindon; and if deceased had wrote it he could not have forgot it, because it bears date but six days before he left Grindon's. Grindon's solicitude to get as many papers of the deceased's hand-writing into his custody as he could presently after the deceased's death, gives a degree of suspicion, and also his saying nothing of it at the time it is pretended he first found it; but supposing there were no suspicions at all of any indirect practice, I was of opinion there was not evidence enough before the court to establish this [410] paper, for it stood solely upon a doubtful proof of hand-writing, the most uncertain species of proof. The court had never established a paper not found in the deceased person's custody, nor supported by any circumstance, upon a controverted evidence of hand-writing; and in this case the evidence that it was not Mr. Pickering's hand-writing is as strong as the evidence that it was: I therefore decreed probate to the executors of the will alone, but did not give costs.

WORTLEY against MACKENZIE. Prerogative Court, Caveat Day, September 8th, 1757.—The will of a lunatic not brought forward for probate.

Elizabeth Morgan, deceased, made her will 30th April, 1734, appointed Bartholomew Wortley, clerk, her executor and residuary legatee; on 13th December, 1734, she made a codicil, gave divers legacies therein to Caius College in Cambridge. In 1742 she lost her memory and became insane, and was put under the care and direction of Mr. Thomas Ewens of Cambridge, who procured her to sign a will. On 4th November, 1742, George Mackenzie and his wife, who was the deceased's niece and next of kin, took out a commission of lunacy against her, and in December, 1742, the inquisition found her a lunatic for eleven months preceding, which extended beyond the time of the date of Ewens' will, and therefore the Lord Chancellor ordered that will to be lodged in the hands of Master Edwards. Deceased died in the end of 1748; caveats were entered by Wortley the executor, and Mackenzie the niece; affidavits of scripts [411] given in by both parties. Mackenzie annexed to her affidavit the will of 30th April, 1734, and Wortley annexed to his affidavit the codicil of 13th December, 1734. Nothing farther was done. Wortley, executor of Morgan, made his will and died, having appointed Sir Thomas Gooch, Bishop of Ely, and Dr. Barber his executors, and also made a codicil, whereby he gave the residue of his effects to the master and fellows of Caius College. His executors proved his will and codicil, and the bishop is since dead; the college has now appointed a syndick with power to pray that administration with Morgan's will and codicil, made in 1734, may be granted to Dr. Barber as surviving executor of Wortley, or if he refuses to accept it, that it may be granted to their syndick, who now prayed, and I decreed accordingly, citations against Mrs. Mackenzie as niece and next of kin to Mrs. Morgan, and against Dr. Barber as surviving executor of Wortley, to accept or refuse administration cum testamento to Morgan, and also against Sir Robert Ladbroke, who is executor of Thomas Ewens, to bring in and prove if he thinks proper the last will obtained by said Ewens, who is since dead.

SNAPE against WEBB AND OTHERS. Prerogative Court, Caveat Day, September 8th, 1757.—Administration cum testamento annexo contested by a creditor and by a person who had been joint assignee with the deceased in a bankrupt estate, granted to the creditors.

The Hon. William Montague, Esq., deceased, made a will and appointed executors in trust for his wife; they renounced, as did also the wife and the principal specific legatee. James Snape, the deceased's [412] gentleman, prayed administration cum testamento as a creditor, and made oath that the deceased was indebted to him the sum of 151l. 12s. 3½d. for wages, board-wages, and money laid out for his use. Several other creditors were before the Court, who did not oppose Snape's having the administration, he agreeing to sign articles to pay pro rata, and Mr. Triggs, a creditor by bond in 200l., consented by his proctor that Snape should have the administration, but no proxy for that purpose was exhibited. George Williams, Esq., appeared by

his proctor, and alleged that he was a joint assignee with deceased of the estate of Thomas Landy, a bankrupt, and that deceased had received five hundred pounds of Landy's effects, which he had applied to his own use, and had not accounted with him or any of Landy's creditors for the same, of which Williams made affidavit, and prayed administration cum testamento to deceased as a creditor upon the footing above stated.

Judgment—Sir George Lee. But I was of opinion that Williams, as a joint assignee with deceased, was only a trustee for Landy's creditors, and would have his remedy against the deceased's representative in equity, but was not a creditor himself to the deceased's estate, and therefore since no creditor of a superior nature to Snape appeared to pray the administration cum testamento, I decreed it to him, giving security in 1200l. (which was agreed to be double the value of deceased's effects) by sureties residing in England, and give notice of those securities to the other parties, and a bond to pay pro ratâ as he had offered to do.

[413] PICKERING AND TOWERS *against* TOWERS. Prerogative Court, Caveat Day, October 6th, 1757.—The expenses of a commission of appraisement decreed to be paid out of the estate of a testator.

Samuel Towers, Esq., made his will, and William Pickering, who married his daughter, and James Towers, his younger son, executors, according to the tenor of his will, and gave his eldest son George Towers a legacy of two thousand pounds, but did not bequeath the residue. George Towers prayed a commission of appraisement, which the executors did not oppose, but joined in the commission. They afterwards paid George his legacy, and now George prayed that the expenses of the commission of appraisement might be decreed to be paid out of the estate; the executors opposed it, insisted that George having received his legacy, had no interest in the estate, for that the undivided residue vested in the executors notwithstanding they had legacies, because they were near relations to deceased, and that an appraisement was unnecessary, most of the personal estate being in the funds.

Judgment—Sir George Lee. The question concerning the distribution of the residue not being before me, I said I would give no opinion upon that, further than that George had a semblance of an interest with respect to the residue, that at the time the commission was decreed he had an interest as a specific legatee, the effect of which could not be taken away after the expenses of the commission had accrued, and as the executors had not objected to granting a commission, but had joined in it, I was clearly of opinion the expenses thereof ought to go out of the estate, I decreed accordingly.

[414] LINTHWAITE *against* GALLOWAY. Prerogative Court, Caveat Day, 6th October, 1757.—Where an executor renounces it is the practice to grant administration cum testamento annexo to the residuary legatee in preference to the next of kin; but the court cannot refuse an administration of this description to a person who is both next of kin and residuary legatee.

John Cook made his will, appointed executors who renounced, left legacies to his wife, and real estate to any child or children he should have, bequeathed the residue to his wife's sister, Mrs. Linthwaite, and to his own sister, Mrs. Galloway; deceased left no issue, and his wife died after him, but without taking administration. Mrs. Linthwaite prayed administration cum testamento to be granted to her solely. Mrs. Galloway prayed that it might be granted to them two jointly, as being joint residuary legatees.

Judgment—Sir George Lee. I was of opinion I could not in this case refuse to grant administration to Mrs. Galloway. By statute 21 Hen. 8, c. 5, when executors renounce, administration cum testamento is to be granted to the widow or next of kin, though by constant practice ever since that statute, administration cum testamento has been granted to the residuary legatee preferably to the next of kin, because the next of kin was deprived of all real interest in that case by the will, and such practice was confirmed by statute 22 & 23 Car. 2, c. 10, but when the same person is both next of kin and residuary legatee, neither law nor practice would warrant a refusal to grant administration cum testamento to such person; I therefore granted it to Linthwaite and Galloway as joint residuary legatees.

[415] *SMITH against SMITHSON.* Prerogative Court, 1st Session, Michaelmas Term, November 7th, 1757.—The conclusion of a clause rescinded to allow the party to plead the identity of the testatrix on the party praying for the indulgence paying the expense retardati processûs.

Frances Smithson, deceased, made her will 1st January, 1757, and appointed John Smith executor. Richard Smithson, her nephew and next of kin, and also executor of a former will dated 20th January, 1754, entered caveat. Both parties propounded their respective wills as executors of the deceased Frances Smithson. Smith examined two witnesses who (as suggested) had fully proved capacity, execution, &c., but the proof of the identity of the testatrix was deficient, and therefore, when the cause stood ex 2do Dr. Simpson for Smith, moved that the court would rescind the conclusion, and allow them to plead the identity, which was opposed by Dr. Smalbroke on behalf of Smithson; but I rescinded the conclusion, and admitted an allegation pleading the identity of the testatrix, and condemned Smith to pay 1l. 6s. 8d. pro expensis retardati processus.

SHEAFE against ROWE AND MUNCKLEY. Prerogative Court, Michaelmas Term, November 7th, 1757.—It is usual to plead affection to the family of a legatee as well as to the legatee himself. It was the ancient practice in cases of insanity that the witnesses should speak to particular acts under the general plea. Very desirable to revert to this practice.

John Rowe died of a fever, 2d April, 1757, a minor aged near 20 years, made (as alleged) a will dated on 1st April, 1757, wherein he appointed Alexander Sheafe, Esq. his uncle on the mo-[416]-ther's side, and Philip Lindy his executors, gave a legacy of fifteen hundred pounds to his aunt Susanna Sheafe, sister of the executor, and other legacies, and devised the residue to two other persons, and left nothing to Theophilus Rowe and Sarah Munckley who were his uncle and aunt and next of kin of the father's side. Theophilus Rowe entered caveat. Philip Lindy renounced the executorship, and was dismissed out of the cause. Mr. Sheafe cited and made Sarah Munckley a party, and then propounded the will against her and Rowe, who opposed it, and examined four witnesses. Rowe now gave in an allegation, pleading that deceased had great affection for Theophilus Rowe and Sarah Munckley, and for her son Nicholas Munckley, who deceased chose to be his guardian to take administration to his use to deceased's father, who died intestate in 1756, and was his guardian and administrator for him at the time deceased died; that deceased had a violent fever, which rendered him incapable of making a will on 1st April, 1757, and in general a total incapacity, but did not plead any particular acts or expressions to shew insanity, and pleaded that his physician and apothecary saw him several times on 1st April, and were of opinion he was wholly incapable of making a will; that they were importuned by Sheafe or his sister or their agents to persuade deceased to make a will, but they refused so to do; and pleaded further that deceased did not send for the writer of the will or give him any instructions, but that he was sent for by and received his instructions from Mr. Sheafe or his sister or their agent; and that when deceased was well he wrote a plain legible hand, but the subscription [417] to the will was wrote in such an hand as shewed the utmost weakness; this allegation was opposed in every part, because it was improper to plead affection to Nicholas Munckley, who was not a party in the suit; that incapacity was pleaded too generally; that they ought to specify some acts and expressions to denote insanity; that the opinions of the doctor and apothecary could not be received, and that his not giving instructions to the writer himself was a negative that could not be proved.

Judgment—Sir George Lee. But I was of opinion it was usual and proper to plead affection to the family of a party as well as to the party himself; that the opinions of doctors and apothecaries concerning a man's capacity from the nature of his disorder were good evidence; that the writer could prove whether he had the instructions from deceased himself or from any other person, and possibly other persons might be present when the instructions were given, who could prove the same; that as to the incapacity being pleaded too generally, I was glad to find we were returning to the ancient practice, that under the general pleading the witnesses must set forth particular facts and expressions to shew insanity, otherwise their evidence would have no weight, which I thought much more conducive to a discovery of the truth, than leading witnesses by laying specials or expressions for them to swear to; and the times and

dates are often very material to be specially pleaded, yet in this case the particular hours on the first of April when the doctor and apothecary [418] were with deceased would come more properly from them than if they were specially pleaded, and the court would have more satisfaction in collecting from the evidence whether they were with the deceased near the time when the will was made.

I admitted the whole allegation as laid, and declared I hoped it would be a precedent for pleading in the same general manner in the like cases.

BROWN AND FARRANT against HALLETT. Prerogative Court, 3rd Session, Michaelmas Term, November 23rd 1757.—An unfinished and unexecuted paper established as a codicil.

Captain Thomas Brown, deceased, made a will dated 3d December, 1754, completely executed, appointed his wife Margaret Browne, Stephen Law, Esq., and Mr. Henry Farrant, proctor, his executors and testamentary guardians for his children, and in case Mr. Law should refuse to be his executor &c., he appointed Mr. Arthur Pond to be executor in his stead. Both Law and Pond have refused to act. The deceased gave his wife for her life the interest of 3000l. and the lease of the house where he lived, and all his household goods, plate and linen, and 200l. to maintain her and the children till the 3000l. should be invested in securities and produce interest; gave the residue to his four children, all minors; his sister Catherine Hatfield 100l., his sister Mary North 50l. for mourning, and the same to his mother. In May, 1757, deceased went to Ireland to visit his said mother and sisters, and re-[419]-turned home in August, after which he frequently declared that they (his said relations) had used him and his wife ill in Ireland, and he would alter his will. Deceased was taken ill on the 19th August, and died on the 30th. On 25th August, in the evening, deceased being in bed, and his wife, niece, and maid-servant being in the room, he bid his wife fetch his will, and his niece bring pen, ink and paper; deceased read over the will, and then wrote himself the paper now pleaded as a codicil, wherein he appointed John Hallett, Esq. executor, and altered the legacy of 100l. to his sister Hatfield to 20l., reduced his sister Mary North's and his mother's legacies to 10l. each and gave to Mr. Hallett and Mr. Farrant two thousand pounds and two hundred pounds, in trust to be laid out and to pay the dividends to his wife for life; he wrote a few more words which shew he was going on to explain that devise, but left off abruptly, saying (as the witnesses deposed) that he was very much tired with writing. From that time he daily grew worse and worse, and did nothing more towards completing the paper; but when he left off writing, bid his wife take care of that paper and lay it up with his will. Hallett cited the widow and Farrant to see this paper propounded and proved as a codicil; they appeared, declared they did not oppose the codicil, confessed the allegation *modo et formâ*, wherein the above facts were pleaded, and waved all assignations; but Hallett examined three witnesses, who proved all the facts above stated, and that deceased was fully in his senses when he wrote said paper.

Judgment—*Sir George Lee.* As the deceased had declared he would alter his [420] will agreeably to this paper, and as it appeared he was in his senses—had wrote it but four days before his death, and was not in a condition to complete it; and as the guardians for the children did not oppose it, I pronounced this paper to be a codicil to the deceased's said executed will.

LOCK, BY HER GUARDIAN against SIR ATWELL LAKE. Prerogative Court, Michaelmas Term, November 23rd, 1757.—In cases of distribution and succession to personal estate, the degrees of relationship are to be computed according to the civil, not according to the canon law.

Mary Buckham died a spinster, intestate, in 1756; Elizabeth Lock, a minor, appeared by her guardian, who alleged her to be cousin-german twice removed and sole next of kin to deceased, and on her behalf prayed administration. Sir Atwell Lake appeared, opposed, and alleged himself to be second cousin once removed and one of the next of kin to deceased; both interests being denied, they were pleaded. Lock examined several witnesses, and fully proved her relationship as alleged, and Sir Atwell in his answers confessed her to be cousin-german twice removed to deceased, but denied her to be sole next of kin, and insisted that he was in equal degree with her; he gave in two or three allegations, but did not examine one witness, and afterwards his proctor declared he would not proceed any further in the cause, whereupon the cause was regularly called on and assigned for hearing.

Judgment—Sir George Lee. In this case I said there was no doubt but that I must grant administration to the guardian for the [421] use of Lock, for she had proved her relationship, but Sir Atwell had made no proof at all of his; but farther, upon his own stating, she was clearly nearer of kin to the deceased than he, for in matters of distribution and succession to personal estates the degrees of relationship were to be computed according to the civil law, and not according to the canon law, and by the civil law a cousin-german twice removed was in the sixth degree of consanguinity to the intestate, whereas a second cousin once removed was by that law in the seventh degree.

Sir Atwell's counsel contended that he ought not to be condemned in costs; but as he had put Lock to considerable expence (her proctor's bill amounting to 109l.), though he knew and owned her decree of relationship, I condemned him in costs, and taxed the bill according to the registrar's report at 70l. (vid. Vinn. Com. in Inst. de Nupt. 11, 4, and de Grad. Cogn. in paragraph).

ROBINS against SIR WILLIAM WOLSELEY, BART. Arches Court, 4th Session, Michaelmas Term, December 1st, 1757.—Witnesses to whose general character there is no exception are not to be rejected on conjectures and suspicions.—Alibi not proved. Where a witness is grossly perjured, no credit in law can be given to his testimony. The declaration of a dead person is good adminicular proof in support of other witnesses, but not of itself sufficient to support facts contrary to his own acts. In a suit for divorce by reason of adultery, a previous marriage which had been pleaded in bar, substantiated.

[See on other points, pp. 34 and 149, ante.]

Dr. Hay for Robins. This cause was appealed from Litchfield in October, 1753. Sir William brought a suit against Ann Whitby, alias Robins, alias Dame Ann Wolseley, for divorce for adultery, [422] pleaded his own courtship and marriage to Ann on 23d September, 1752, in their parish church of Colwich in Staffordshire, and that she in October, 1752, left him, and lived in adultery with John Robins, Esq. She pleaded in bar to his suit that she was the wife of John Robins, Esq.; pleaded that he courted her from April, 1751, to June, 1752, and that she was married by Mr. Corne to Robins on 16th June, 1752, at Castle church in Staffordshire; and prayed that she might be pronounced to be the wife of Robins and might be dismissed from Sir William's suit. Sir William denied her marriage with Robins, and insisted that she was his wife in order to obtain a divorce from her. The Judge below admitted the libel and her allegation and refused a witness *de bene esse* on the libel, from which she appealed. This Court pronounced for the appeal, and retained the cause, since which we have pleaded a contract between her and Robins in *verba de præsenti* in writing, dated 1st April, 1752, which is signed by the parties, and attested by Richard Derry and Mary Nutt; the actual marriage on 16th June, 1752, is proved by Derry, who was present; he is a servant to Mrs. Robins; he says that on 15th June, 1752, Robins came and dined with his mistress at Whitby Wood, in the parish of Colwich, and that soon after he went away, he by his order followed him to Stafford, and there witnessed for him the licence bond; swears she rode behind him to be married; Mary Nutt swears that her mistress, said Mrs. Robins, on 15th June, told her she was to be married to Robins the next day; that the said Mrs. Robins went out at five in the morning on the 16th June, and said when she came home she was married. John Bailly confirms these witnesses, [423] and says he saw Mr. Robins go into Castle church early in the morning of 16th June, and a woman. Dickenson, the parish clerk of Castle church, speaks to a declaration of Corne's that he had married them. The licence bond and warrant is dated 9th June; there is an entry in the register of Castle church, on which said marriage on 16th June is entered. Mr. Brookes, a witness, swears he saw the entry fair and without a rasure in January, 1753. She went on 12th October, 1752, and lived publicly with Robins. She at first kept her marriage secret to avoid losing the guardianship of her children. John Dunn, Sir William's witness, says, in October, 1752, he saw the said register, and the entry appeared to him to be fair. Sir William has pleaded that Corne married Robins and Ann on 9th October, 1752, subsequent to his marriage with her, William Thompson has sworn to this fact, who was servant to Mr. Robins, but has since lived with Sir William, and he has likewise pleaded affidavits and declarations of Corne, which we shall oppose reading; we shall shew that Thompson is perjured, and that

Corne was guilty of forgery. Sir William has also pleaded that she signed marriage articles with him by the name of Whitby on 23d September, 1752, the purport of which were that she should have nothing out of his estate, but he should have 300l. a year out of her jointure. She says the said articles were signed on 26th August, 1752, and that she was compelled to sign them when she was intoxicated by some thing given her by Mrs. Clements, whose husband is said to have married Sir William and her; Clements demanded and received a marriage fee from Mr. Robins on account of his marriage to said Ann. Objections have been made to Derry's and [424] Nutt's depositions; viz. that Mr. Robins was sick on 16th June and not able to go to Castle church. Sir William has pleaded a letter from Ann to him, which he says she wrote on 29th August, 1752. The single question is, whether Ann has proved her marriage to Mr. Robins on 16th June, 1752?

Dr. Smalbroke for Sir William. Mrs. Whitby, alias Robins, brought in the written contract in November, 1755; it is in proper words of the present tense, wherein they agreed to solemnize marriage on or before the 31st August, 1752. The morning of 16th June was excessively wet; Mr. Robins was then very ill. Corne, as a surrogate, passed the licence in June, 1753; Corne declared to the Bishop of Litchfield that he did not marry them on 16th June, but did on 9th October, 1752; he made an affidavit in order to be exhibited in the King's Bench. Corne died 22nd November, 1753, he is supposed to have died of concern for this transaction. Substance of his affidavit, that on 7th October, 1752, Mr. Robins desired him to marry him and Ann in a private manner; he at first refused, but on 9th October he married them at Robins' house between 11 and 12 at night, and antedated the marriage to 16th June because, as Robins said, she was with child. The marriage bond and warrant were dated 9th June. The first entry in the register was on 9th June, and to make the entry tally to the proper time, he erased the entry of the burial of one Elizabeth Ward. Mr. Nicholls, attorney at Stafford, asked him why he made the entry on 9th June, when it was known Robins was then at Lord Uxbridge's. Corne thereupon consulted Mr. and Mrs. Robins, and an attorney at Stafford, one Hicken, and they agreed [425] he should alter the entry from the 9th to the 16th June. Corne returned the licence bond and warrant to the office on 18th December, 1752. He made three returns from 9th June to Christmas; the first on 19th June, the second on 30th September, and the last on 18th December, 1752. The marriage between Robins and Whitby was declared on 12th October. The bishop hearing complaint of Corne, sent for him in December, 1752, Corne consulted Robins and Hicken; they advised him to stick to the marriage of 16th June, and promised him that a note of indemnity which had been given him for this marriage should be exchanged for a bond; accordingly Corne told the bishop the marriage was on 16th June, and that they at first intended the marriage should have been had on 9th June. When he returned from the bishop, he received on 23rd December a bond of indemnity signed by Mr. Robins and witnessed by Hicken. In March, 1753, Corne first discovered to Michael Peak that what he had told the bishop was false, and said he was very uneasy to discover the truth. Peak gave hints of this to Master Elde. The bishop being told thereof, in June, 1753, called on Corne, who confessed he had before imposed on the bishop and then related to him some of the above facts; six weeks after he went again to the bishop in company with Mr. Boothby, and told him further particulars, and Boothby going out of the room, Corne owned that he had erased the register. There is in the register a note pinned to the leaf stating the rasure. Sir William has pleaded marriage articles executed on 23rd September, which at Ann's request were executed in Colwich church; two separate agreements were executed at that time, [426] signed by each respective party; that signed by Sir William is in her hands; he has produced that signed by her; it is dated on 22nd September, though executed on the 23rd, and the word September is on a rasure. Mr. Victor, who drew them, says he was with Sir William on a visit in July, 1752, when Sir William told him he was going to marry Mrs. Whitby, that she desired it might be secret, and that Victor might give her away. Victor desired thereupon to talk with her; on the 18th or 19th August, she sent for Victor, he went to her, and told her he was going to Ireland soon, and as he was to give her away, desired she would fix a day for the marriage. She named the 25th August, and he told her the necessity of her renouncing her right of dower on the Wolseley estate. She objected at first, but on the whole thinking she consented, Victor settled the

articles with Sir William, and dated them 22nd August. On Sunday 23rd August she sent for Sir William, who carried with him the articles. Sir William told Victor she objected to them. On the 29th August Victor wrote to her to persuade her to renounce dower; same day she wrote to Sir William, referring to Victor's letter. On the 23rd September the articles were produced in Colwich church, and August was erased and September written instead thereof, but the figures remained; the subscribing witnesses Mr. Wolseley and Parson Clements, and Mrs. Clements was present; the witnesses have said they were executed in a window on the right hand of the church going from the road, which window was in Sir William's seat; objected that there was no such window in Sir William's seat, or at least none that could be written upon. Ann has pleaded that she was at [427] Clements' house on the 26th August, and that Mrs. Clements gave her a glass of something that deprived her of her senses; when she was a little recovered she saw Mr. Clements standing near her with a book in his hand reading; she was then forced to sign a paper she did not know the contents of; there are witnesses to her declarations that she remained intoxicated till 11 at night, and that she did not go out of Clements' house except into the garden. Sir William and Clements on 27th August came to her house and talked to her to this effect; that he (Sir William) hoped she remembered that she was married to him the night before; she said it was an imposition on her; that the paper she had signed was by force, and desired he would restore it to her; he replied that if he had taken advantage of her it was because he loved her. Strange fact sworn to by Mary Nutt; she finished and signed her deposition 13th June, 1755: she came again on the 18th June to be further examined without notice to the adverse proctor. On the 28th June Derry was examined; both swear that Clements forced himself into Mrs. Whitby's bed chamber, took her by her arms, and pulled her out of bed; this was said to be done between the 23rd September and the 1st October, 1752. On the contrary we have proved she played at cards and supped at Clements' the night of 16th August, and that she wrote a letter to Sir William on 29th August, and that she met him at Clements' on 23rd September.

Dr. Bettesworth, same side. A declaration of her's in July, that she had refused Robins, and [428] Mr. Robins executed a deed renouncing to Sir William all right to his jointure.

Evidence for Robins.

1st article of her first allegation pleads Robins' courtship to her, and that they contracted themselves; prayer of that allegation, that Sir William may not proceed, and that it may be pronounced that John Robins and she were contracted and afterwards married.

Witnesses.

1. Richard Derry, examined 15th December, 1755. Deponent has often seen Mr. and Mrs. Robins write, and knows their hands; the contract H, dated 1st April, 1752, is Mr. Robins's hand, and is signed by him and Ann Whitby; deponent saw them sign it, and deponent and Mary Nutt, who was also present, witnessed it at Mr. Wilson's at Islington.

1. Int. It was signed in a ground room.

2. Mary Nutt examined on 20th December, 1755. The same; proves handwriting and signing the contract by both.

1. Int. Same as last witness. 4. Int. Ann told deponent she and Derry were to be witnesses to the contract. Derry to said interrogatory says the same.

N.B.—To all the interrogatories she and Derry swear in the same words. Derry to the 10th Int. The int. itself—Did he not make affidavit in the K. B.? answer—Respondent did make affidavit; does not remember he did particularly swear to the marriage or contract.

Mary Nutt to 1. Int. 5to loco. Did not make affidavit as to the contract of marriage.

[429] On another allegation.

1. Richard Derry, examined 20th June, 1755. Twenty years ago deponent went to live as a servant with producent. On the 26th August, 1752, producent went to Mr. Clements' and dined there and came home about 11 at night; Sir William came home in the coach with her; she then staggered and seemed very much intoxicated; she got upstairs with great difficulty; Nutt said she was so ill, she sat up with her, and she remained very ill some days; next morning Sir William came; producent

went down to him ; Mr. Clements came several times ; deponent heard him persuade her to marry Sir William ; she refused ; Clements replied, then she must take what followed, for by God Sir William had given him 1000*l.* to indemnify him, and he would swear any thing to serve Sir William, and asked her how she would help herself, and whether she had not better make it her own act in marrying Sir William, than run the risk of being exposed ; she replied, let the consequence be what it would she would never marry Sir William ; deponent listened at the door at another time between the 23rd September and the first of October, 1752 ; Clements went into producent's bed chamber when she was ill, and deponent and Nutt standing at the door, heard him say that she was not ill, but must and should get up and go to Colwich church to be married to Sir William, and then all would be well ; she bid him begone for a vile scoundrel, and then she screamed out, and Nutt went into the room ; at the beginning of October, 1752, Sir William and Clements being with the producent, deponent and Nutt stood at the door and heard producent ask them for the paper she had signed ; [430] they answered that the paper was a marriage agreement between her and Sir William, and since she was so damned obstinate that she would not marry him, they would keep it ; 15th June, 1752, Mr. Robins and Mr. Nicholls dined at producent's house, and after they were gone, producent sent deponent after Robins, and bid him privately tell him she desired an answer to what he knew of ; deponent went to him at Stafford, and delivered the message ; he bid deponent stay ; soon after Robins called deponent in, and signed a bond for a licence as he said, in presence of deponent and William Thompson, Robins' servant, who attested it, and then Robins gave deponent a letter for producent, and bid deponent tell her every thing was ready, and he expected to meet her the next morning ; deponent delivered the letter and message to producent, and after she had read the letter, she ordered deponent to be ready to go out with her on horseback the next morning at four o'clock, and not to put on his livery ; between four and five o'clock next morning, being the 16th June, 1752, she went behind deponent on horseback to Castle church, where she said she was going to be married to Mr. Robins ; they went and found him, his man William Thompson, and Parson Corne ; and deponent there saw the said Mr. Robins and producent married together by Corne in presence of deponent and said William Thompson, and then deponent carried producent home again, and they got home about eight in the morning ; about a week after Robins came and lay at producent's house, and, deponent believes with her.

2. Int. The licence bond was executed by candle-light, he believes about ten at night. 3. Int. [431] Never as he best remembers had any discourse with any one about Sir William's courtship of producent, but in the morning of 26th August deponent was compelled to sign a paper by Sir William, declaring he had said what was contained in said paper. 4. Int. Never declared he had talked to producent against marrying Sir William. 5. Int. Respondent lodges at Leicester and lives on what he has got.

2. Mary Nutt, examined 13th June, 1755. . On the 26th August producent dined at Clements', came home at eleven at night, was then quite intoxicated and staggered very much ; producent was very ill ; when she came to her senses producent said she was made so ill by what Mrs. Clements had given her, and that she had been ill used there ; she continued very ill for three or four days ; on the 27th August Sir William came to her ; deponent told her he was there, she exclaimed much against him, and said she would not go to him, but at last she went to him ; she left the door open, and deponent listened at the door, heard her tell him the glass of wine Clements gave her had almost killed her ; he said he hoped she remembered he was married to her last night ; she said it was false, he replied, surely the fit she fell into had not made her forget all that had passed ; producent was in a great passion, said she never was married to him in her senses, and never would be ; heard producent ask him for the paper they had made her sign the night before, and what were the contents of it ; he replied, " You was married to me last night, and Mr. and Mrs. Clements will swear it, and if any advantage was taken it was owing to my love for you, and if you will go publicly to the church and be married to me, I will do everything to make you happy, but if you remain obstinate I [432] will bring my coach and take you to my own house by force ; and as to the paper writing, you shall never have it, I will keep it." She replied, " All your threats shall never make me marry you, and she believed there never was so base a plot ;" producent soon after came up stairs and flew into a

great passion of crying, and told deponent that Clements pressed her to stay to dinner, and afterwards Mrs. Clements brought her a glass of wine, which made her soon sick and vomit, and afterwards she was quite stupid, and when she came to her senses she saw Sir William and Clements and his wife standing by her, and Clements had a book in his hand; she told deponent she was so ill that she had vomited in the coach, and deponent went and looked and saw somebody had vomited in the coach; well remembers that on the 21st September Sir William came to producent, and the door being left open, deponent listened and heard Sir William tell her that he heartily begged pardon for what he had done, that he had used her ill, but it arose from his love; but since she was so averse to him he would trouble her no more; she replied she was glad he had some remorse; he said he would leave the country and she should never see him again; she answered that before she forgave him, she insisted to have the paper she signed on 26th August delivered up to her; he replied it was in Clements' custody, and he would make him give it up; 22nd September Clements came, producent told him what had passed the day before, and insisted on having the paper; he said, upon his soul she should have it the next day if she would call at his house; 23d September producent went, as she said, to Clements', and staid till eleven at night; producent afterwards told deponent she could not get [433] the paper from him, and that Sir William came there, and producent told deponent she was never out of Clements' house but in his garden whilst she was abroad that day; in the beginning of October, 1752, Sir William and Clement came to producent's, the deponent and Derry listened at the door, heard her ask them for the paper signed 26th August; they both said that the said paper writing was a marriage agreement between Sir William and her, and said since she was so damned obstinate and would not marry Sir William, they would keep it and make what use they pleased of it; deponent was not present at producent's marriage to Robins; believes they were married on 16th June, 1752, as she well remembers that on the 15th of said June at night, producent bid deponent call her up at four o'clock in the morning, and desired deponent to lend her deponent's green joeseph and hat, for she was to go out between four and five o'clock in the morning, and she then told deponent as a secret, that she designed to be married the next morning to Mr. Robins, and that they were to meet at Castle church, near Stafford, and Mr. Corne was to marry them; producent went out the next morning between four and five, and came back about eight of the clock, and then told deponent she had been married to Mr. Robins, and they several times after said 16th June lay together at producent's house, and deponent saw them in bed, and the first time was in said June.

On the 18th June, 1755, this witness came again to the examiner, and told him she had forgot some things which she desired she might add to her examination.

17th art. Since her examination she recollects from notes she had made, that John Clements was [434] twice at producent's house between 23d of September and 1st October, 1752; and the first time deponent heard him tell producent she had better be publickly married, for he was ready to swear he had married them privately on 23d September; and the second time he came, deponent heard him tell her she was not ill, and she should get up and go to church and be married to Sir William; she called him a vile scoundrel and cried out; deponent went into her room and found him pulling her out of bed; Sir William was once during said time with producent, and he heard him threaten to carry her to his house by force.

3. John Bailey, husbandman, exd. 10th July, 1755. Deponent was servant to William Corne, clerk, for two years ending at Michaelmas, 1752; on 16th June, 1752, Corne ordered deponent to attend him about five in the morning to Castle church; deponent did, and saw Mr. Robins and his man in the church-yard, and soon after a man and woman on horseback came to the church-yard and alighted, and they all five went into Castle church, and after staying about half an hour the man and woman and the rest of the company came out and went away; Corne bid deponent not speak of what he had seen.

12. Int. Respondent was present at a marriage in July last but cannot tell the day.

N.B.—All the witnesses deny corruption or combination.

4. William Brookes, Esq. On the 15th January, 1753, deponent was applied to by Mr. Robins to take a copy of the entry of his marriage with producent; Corne produced to deponent and John Hickin the entry of said marriage in the register of

Castle church; deponent took [435] a copy thereof, it was then a fair entry, and deponent is certain no part of said entry was then wrote on a rasure, nor was there any interlineation or obliteration or any paper pinned thereto.

5. John Blakemore. Deponent was coachman to producent; deponent went with the coach on 26th August, 1752, to fetch producent home from Clements'; and Clements' son James, then about nine years old, told deponent producent had been in a fit, and his father had with a book been preaching over her, and that his mamma and Sir William were in the room, and his mamma said to Sir William, "I told you it would lay her asleep, and then you might be as happy as you could wish;" producent and Sir William came home together in her coach; she staggered very much and vomited in the coach; deponent stopped and asked her how she did; she said, "Very ill;" Sir William was in the coach with her and said nothing; deponent afterwards carried him home.

6. Thomas Wood, writer. Exhibit D is deponent's handwriting; on the 9th May, 1754, William Thompson freely set his name to it; Margaret Hales was then present; by deponent's desire Sir William read it all over, and declared that he signed it to satisfy the world of the truth of the fact of Mr. Robins's marriage with Mrs. Whitby and said it (meaning the paper) was true, as he had a soul to be saved, and clasping his hands together, wished he might never enter into heaven if it was not true; and deponent and Margaret Hales attested it.

7. Wyldé Buckeridge, gent., exd. 25th August, 1755.—Deponent is deputy register of Litch-[436]-field; proves copies of bond and warrant for licence of marriage between Robins and producent; the bond is attested by Richard Derry and William Thompson, and the warrant is signed by William Corne as surrogate.

1. Int. Between May and Christmas, 1752, Corne made three returns of licences to the office; the first on the 19th June, the second on 30th of September, and the third on 18th December, at which last time the bond and warrant for the licence for the marriage of Robins and producent were returned; Corne was very punctual in his returns. 4. Int. Believes he would have returned them sooner if the licence had been executed.

Contract read, dated 1st April, 1752, recites intention to marry, and then in words of the present time, they take each other mutually for husband and wife, signed by Richard Derry and Mary Nutt, as witnesses, and signed by Robins and producent as parties.

Exhibit D read, dated May 9, 1754: William Thompson promises to declare on oath that he was present on 16th June, 1752, with Richard Derry, and saw Mr. John Robins and Mrs. Ann Whitby married together, and deponent was a witness to the bond relating to said marriage.

Read for Sir William, part of his allegation.

21st article alleges that Corne made an erasement in the register.

23d article alleges declaration of Corne concerning his having married them on the 16th June, 1752.

24th article. Mr. Robins on 9th June took out a licence.

[437] For Robins.

8. Thomas Ward, farmer, exd. 9th July, 1755. At the end of September or beginning of October, 1753, Philip Seekerson, clerk of Castle church, asked deponent what his child's name was, which was buried at Castle church, and what was his and his wife's name, and when the child was buried; deponent told him his name was Thomas, his wife's Mary, and the child's Elizabeth, and that she was buried 2d July, 1752; Seekerson then said Mr. Corne had forgot to register said burial, and bid him ask deponent about it; Corne being over the way, Seekerson called him and told him what deponent had said; Corne thanked deponent, and said he would go and register it immediately.

9. Philip Seekerson, clerk of Castle church. Deponent well knew William Corne; on the 2d July, 1752, Elizabeth Ward was buried by Corne at Castle church; believes Corne did not make any entry of such burial, because in September, 1753, he asked deponent if he knew the name of Ward's child, and where it was buried, &c., and desired deponent to enquire of Ward, the father, and said he had forgot to register it, and seemed to be very uneasy at it; gives the same account as Ward does of what passed between deponent and Ward; deponent made an entry of it in his pocket-book; in June, 1752, Corne told deponent he had married a couple of fortune that month,

and he should have his fee, but it was to be kept a secret as yet ; on the 12th or 13th October, 1752, Corne told deponent that he had married Mr. Robins and producent on 16th June, which were the couple he had before told him of.

6. Int. In June, 1752, and to his death Corne [438] was often with deponent and seemed very uneasy.

Witnesses for Sir William Wolseley.

1. Bishop of Litchfield and Coventry. In 1750 deponent first knew Sir William ; in the summer of 1752 deponent dined with him at his house in the country ; Mrs. Whitby was there, and it was currently reported Sir William courted her, and that they were soon to be married ; deponent afterwards heard they were married on 23d September, 1752, and soon after deponent heard Mr. Robins was married to Mrs. Whitby by Corne, and also heard that Corne sometimes said he married them on the 9th, and sometimes on the 16th June, 1752 ; Sir William having complained to deponent about said affair, in the beginning of December, 1752, deponent sent for Corne, and required him on his canonical obedience to tell him the truth of that affair, and then Corne assured deponent gravely that he married Robins and Whitby between the hours of eleven and twelve on 16th June, 1752, and said that none but they and their servants were present ; they at first intended to be married on 9th June, but were hindered, which caused the report of their being married sometimes on one and sometimes on the other of said days : deponent came to town, where he heard that Corne had imposed upon him, and that he had told deponent a lie, and that he was ill thereupon from uneasiness of mind ; on 9th June, 1753, deponent called on Corne at his house at Stafford ; he then was very ill and emaciated from being a lusty, healthful man ; believes his illness arose from his uneasiness of mind ; Corne fell on his knees and with tears begged deponent's forgiveness, and confessed he [439] had imposed on deponent, and that all he had told him relating to said marriage was false, but if deponent would forgive him he would tell him the whole truth ; deponent told him he had done a very wicked thing, and must beg forgiveness of God and tell the whole truth, and he would forgive him ; he then declared that he did not marry Mr. Robins and Mrs. Whitby till the 9th day of October, 1752 ; about six weeks or two months afterwards, said Corne and Mr. Boothby, a justice of peace, came to deponent's house together, and Corne again assured deponent that he did not marry them till 9th of October, and that he married them between ten and twelve at night at Robins' house in Stafford, at the particular entreaty of Mr. Robins, who told him the lady was with child and begged he would enter the marriage as on 9th June, 1752, to save her reputation, and he, being ignorant of her marriage with Sir William, entered said marriage with Robins on 9th June ; and he not seeming willing to own one circumstance, deponent pressed him thereon, whereupon Mr. Boothby going out of the room, said Corne confessed to deponent that he had erased the register-book in order to make an entry as on 9th June, 1752 ; deponent cannot set forth the particular entry erased. Corne further confessed that soon after the 9th June, 1752, he heard Mrs. Robins say she supposed Clements would swear he had married her to Sir William Wolseley ; and Corne said that soon after Mr. Nicholls, an attorney, came to him and asked him how he came to make the entry on 9th June when it was well known that Mr. Robins was on that day at Lord Uxbridge's, and also that Nicholls told him Sir William was [440] actually married to her, and that he, Corne, informed Mr. and Mrs. Robins and Hickin, their agent, of what Nicholls had said, and thereupon they all ordered him to alter the entry of said marriage from the 9th to the 16th June, 1752, and that he accordingly altered it upon Mr. Robins giving him a note for one thousand pounds to indemnify him. Corne further confessed that on deponent sending first for him, Hickin advised him to tell deponent he married them on 16th June, and by said Hickin's persuasion he had falsely declared to deponent ; and soon after the note was exchanged for a bond, and Corne then shewed deponent said bond signed by Robins and witnessed by John Hickin. Corne further confessed that on a report that Ann was to be indicted at Lent assizes, 1753, for bigamy, Hickin applied to him to go out of the way during the assizes, that he might not be a witness, and offered to give him money to bear his charges, but he refused ; the latter end of October, 1753, deponent met Corne in Stafford, and asked him how he did, and told him he hoped he was better now he had eased his mind, he replied, " I feel it here ; and I fear it will kill me ; " two or three months after, deponent heard he was dead, and believes said affair broke his heart ; Corne told deponent he made an affidavit on 2nd October, 1753, concerning said affair to be exhibited in the King's Bench.

2. Robert Pardo. Deponent has known Sir William many years; well knew William Corne, he was a very healthy man till lately; before his death he seemed very melancholy, and Corne owned to deponent that he did not marry Robins till late at night of 9th October, 1752, and at their request he entered the marriage on 9th June, 1752; [441] and Corne shewed deponent said entry, and it then appeared to be wrote on a rasure, and he owned he had erased an entry of a burial. Corne said he heard Mrs. Robins say she believed Clements would swear he had married her to Sir William, and Nicholls had asked him how he entered the marriage; deponent told him, and he said Robins was at Lord Uxbridge's on 9th June, and thereupon he altered the date to 16th June; deposes to all Corne's declarations which he made to deponent at the Summer assizes, 1753, the same as the Bishop does; Corne said Hickin would not let him tell him the true account of the transactions, because he said that would hinder him from being a witness; deponent drew an affidavit for Corne to swear to in the King's Bench; believes this affair broke Corne's heart; deponent is solicitor for Sir William.

3. John Bird, Esq. Deponent knows the parties well; knew Corne, who told deponent the facts in the affidavit, and swore said affidavit before deponent; proves said affidavit; Corne seemed very uneasy, and believes his heart was broke.

Opposition to reading Corne's affidavit.

Dr. Hay for Robins. The rule of law is that no evidence shall be admitted but what shall be under the examination of both parties. Style, 446, the voluntary affidavit of a stranger cannot be given in evidence.

N.B.—That was a dictum only, not a determination. 5 Mod. 163, 164, 165. 1 Lord Raym. 729. Carthew, 405. 1 Salk. 281. 2 Lord Raym. 729. Information against Payne for a libel. Affidavit [442] of a witness who died, not received, for it is not evidence on misdemeanors or civil actions, &c.

Dr. Simpson, same side. Corne was guilty of a clandestine marriage, and therefore excommunicated, and could not have been a witness. The substance of the affidavit is to exculpate himself. A voluntary affidavit is not evidence; no affidavit made in or out of a Court can be read. Gilbert's Law of Evidence, Raym. 63, depositions taken before answer given in Chancery and issue joined are only as affidavits, and cannot be read unless the defendant has been in contempt. Same book, 65, a witness examined *de bene esse* before coming in of answer, dies, the deposition cannot be read. Law of Evidence, 69, the same doctrine.

Dr. Smalbroke *contrà*. They might have cross-examined as to his affidavit, &c.

Dr. Bettesworth, same side. Robins's allegation read, in which she controverts the purport of said affidavit.

Delegates, 6th March, 1716, the affidavit of an intestate allowed to establish his marriage, *Sacheverell* against *Sacheverell*.

Per Curiam. I was of opinion that the judgments upon this point had been various at common law; all the judges resolved that depositions taken *ex parte* by a coroner, (a) the witnesses being dead, should be re-[443]-ceived as evidence in a criminal case, Kelynge, 55, 1 Levinz, 80, *Brunswick's case*. Law of Evidence, 121, c. 83, *ibid*. 124. 1 Salk. 278. 1 Show. 365, 3 Mod. 36. *Goodier* against *Smith*, Law of Evidence, 127, c. 92. In the Spiritual Court affidavits of dead persons had been received. Prerogative, 7th March, 1727, *Richardson v. Wagstaff*, and other cases. How far this affidavit would be evidence, or what weight ought to be given to it, would properly be considered hereafter, on the arguments upon the merits of the case; but I was of opinion it ought now to be read, and overruled the objection.

Affidavit of William Corne, clerk, dated 2nd October, 1753. On 7th October, 1752, and not before, Mr. Robins applied to deponent to marry him and Mrs. Whitby, and on 9th October, 1752, between ten and twelve at night, deponent married them at Mr. Robins' house; Richard Derry, her servant, gave her away; Robins desired deponent to enter said marriage on 9th June; deponent did enter it accordingly on a rasure, and for the same reason deponent dated the licence 9th June; soon after deponent heard Mrs. Robins say she supposed Clements would swear she was married to Sir William Wolseley, at which deponent was much surprised, and desired Mr.

(a) Founded on St. 1 & 2 Ph. & M. c. 13, s. 15. The authorities on this point are now concentrated in the excellent work of Mr. Phillipps (Law of Evidence, vol. i. 373). See also Buller's N. P. 242.

Nicholls, an attorney at Stafford, might be consulted, but they disapproved of him and named Mr. Hickin; deponent did not see Hickin till the 11th of October, when Robins told him they were married on 9th June, and desired Hickin to search the register of Colwich for Sir William's marriage; he did, and said he could find none; Nicholls told deponent Sir William was married to Whitby; Robins afterwards order-[444]-ed deponent to alter the register to the 16th June, which deponent did, and he gave deponent a bond of indemnity for one thousand pounds; deponent pressed Robins to accommodate the affair with Sir William; Hickin would not let deponent tell him the truth of the transaction, but Hickin desired deponent to make affidavit that he married them in June, but deponent refused; Robins made affidavit that he was married in June, and deponent spoke to him of it with surprize; Hickin pressed deponent to absent himself that he might not be a witness upon an indictment against Whitby for bigamy.

4. Joseph Dickenson, clerk. Deponent well knew William Corne; proves entry in register of Castle church, marked D.

5. Lewis Dickenson. Proves exhibit D; knew William Corne, who several times told deponent said entry was false, and that he first wrote it 9th June; declared he did not marry Robins and Whitby till 9th October, 1752, but entered it 9th June to save her reputation; deposes to Corne's declarations as the other witnesses did; Corne died 22nd November, 1753, and was buried at Stafford; believes his heart was broke; proves Corne's affidavit.

6. Phoebe Boothby. Well knew Corne; he often said he believed that unfortunate affair, meaning Robins's marriage, would cause his death; heard him ask Sir William's pardon, and said he had grievously injured him; heard him say he had imposed on the Bishop.

7. Brooke Boothby, Esq. Deponent knows the parties; deponent received a message from Corne, desiring him to acquaint Sir William that if he would forgive him he would tell him the whole truth as to the said marriage; Corne desired [445] deponent to go with him to the Bishop, and Corne then told the Bishop that Hickin advised him to insist he married them on 16th June. Corne said Robins desired him to make affidavit that he married them on 16th June, but he refused; confessed to the Bishop he had made a false entry. Corne said to deponent, that as he expected to die very soon, deponent might depend upon it that all he had said in his affidavit was true.

8. John Dunn. Knows parties, and knew Corne. Deponent went to search the register of Castle church for the entry of Robins's marriage; the first time deponent went, Corne said he married them on 9th June, but when deponent saw the register it was entered 16th June.

3. Int. Never saw said register but when Corne shewed it to him; when respondent inspected it, it did appear to him to be a fair entry, and deponent did not observe any rasure, and there was no paper then pinned to it. Respondent did not carefully examine it as to the rasure.

9. Michael Peake, farmer. Knew Corne; deponent married his sister; the entry in register of Castle church and the paper pinned to it deponent believes are Corne's handwriting; in March, 1753, Corne told deponent that all he had said about said marriage was false, and that the entry was false, and that he did not marry them till the 9th October, 1752, and that he had imposed on the Bishop; Corne told deponent Robins wanted him to swear to the marriage in June, but he would not; deposes the same as the other witnesses to Corne's declarations and that he told deponent he had made a full and true confession to [446] the Bishop. He was very uneasy in mind and apprehensive of being set in the pillory for the false entry.

2. Int. Has several times heard Corne say he married Robins in June, 1752.

10. William Scott, gent. Deponent is bailiff to Lord Uxbridge; swears that Mr. Robins came to his lord's house on 29th May, 1752, and on 9th June, 1752, he was very lame, and not able to stir without assistance, and deponent was with him almost the whole day of 9th June, and Robins was not out that whole day from Lord Uxbridge's house.

2. Int. Deponent had a child baptized 16th June, 1752, as he believes the day to have been, and Robins was godfather, and present at said christening, and slept at respondent's house that night. 3. Int. Respondent has frequently heard Corne say he married Robins on 16th June.

11. Benjamin Victor, Esq. Deponent first knew Sir William in 1729; on 16th or 17th July, 1752, first knew Ann Whitby. Deponent left Wolseley Hall on 29th August, 1752, and while deponent was at Sir William's, Ann often declared herself to be a widow. Sir William told deponent she had agreed to marry him, and that she desired the wedding might be speedy, and that nobody but Clements and his wife and deponent might be there, and that deponent might give her away. Deponent desired he might have some talk with her alone; on 18th or 19th August she sent for deponent, and deponent told her he was going out of England soon, and she must fix a short day if he was to give her away, she named the 25th August; deponent having mentioned the necessity of her re-[447]-nouncing all claim on Sir William's estate if she survived him; she replied, "I will do all I can to shew myself a friend to Sir William's family." Deponent looking on what she said as a consent, he and Sir William settled the articles C, and dated them 22nd August, to be signed the next day, but she then refused to execute such articles; does not know when they were executed, believes the word September in the date is Sir William's writing and the rest is deponent's.

Int. read. Do you know of a pamphlet called the Widow in the Wood; did not you write or cause it to be wrote, and by whose order? Ans. That he knows of such pamphlet, and further he is not bound to answer.

12. Richard Wolseley, Esq. Deponent is nephew to Sir William; has known Ann Whitby about four years, on 23d September, 1752, deponent was at Colwich church, and there saw her execute the articles dated 22nd September, 1752; and deponent and Mr. Clements were witnesses to said articles, and to a counter-part then executed by Sir William; does not know the contents of said articles; those marked C were originally dated 22nd August.

13. William Thompson. Deponent was servant to Mr. Robins to his death. On the 9th October, 1752, deponent was present about eight or nine at night, and saw and heard William Corne, clerk, marry said John Robins and Ann Whitby, and about a week before deponent heard Robins ask Corne to marry them; has heard her say she supposed that rogue Clements would swear he had married her to Sir William. During the whole month of June, 1752, as he best remembers, Mr. [448] Robins was at Lord Uxbridge's, and was ill all that time. Mr. Robins, on discovery of the truth of the marriage, went to France.

2. Int. Respondent lives at Sir William's, but is not in his service. 3. Int. Has known Thomas Wood some years; in May, 1754, deponent, to oblige Mr. Robins, did declare to said Wood in presence of Margaret Pidgeon that Robins and Whitby were married 16th June, 1752, and that he and Richard Derry were present on said 16th June, and saw said marriage performed by Corne, but he never intended to swear thereto; respondent was a witness to a bond relating to said marriage. 4. Int. In May, 1754, deponent did sign a writing that it was the 16th June, 1752, when he was present at such marriage, and such writing was witnessed by Thomas Wood and Margaret Pidgeon; but deponent did not at any time clasp his hands together, and wish he might never enter into heaven if it was not true.

14. John Clements, clerk. Knows the parties by being vicar of Colwich; on 23d September, 1752, Ann Whitby executed the articles marked C in Colwich church in presence of deponent and Richard Wolseley who attested them, and a counterpart was signed by Sir William; they intended to have been married on 25th August, and the articles were to have been executed on 22nd August, but deponent advised her to consult her brother Mr. Northey, which put off the marriage; sets forth the purport of those articles Sir William signed, which were delivered to her; substance thereof—Sir William to have 300l. a-year of her jointure, and he to make such provision for [449] children by her as he had settled on his younger children by his first wife.

4. Int. 13th November, 1752, deponent sent Walter Cartwright to Mrs. Robins, for two modus's due to him as vicar of Colwich, out of her estate, and bid him tell her that if she was married to Mr. Robins on 16th June, 1752, there was a fee due to him for such marriage, but did not otherwise demand any fee; Mr. Robins paid to Cartwright a fee of five shillings, for which he gave him a receipt, and Robins also paid him the moduses.

15. Mary Clements. The end of August, 1752, Mrs. Whitby said to deponent, "Mrs. Clements, they are always raising stories of me, they said I was going to be

married to Mr. Robins before my husband was cold, but I must do Mr. Robins the justice to say he never asked me the question, and I will swear it;" on 23d September, 1752, deponent was present in Colwich church, and saw said Ann execute her part of articles with Sir William.

14. Int. They were executed in one of the windows of said church; Ann desired they might be executed there for privacy, and said Ann delivered the part signed by Sir William to deponent's husband to keep for her.

16. Edward Whitby, Esq. Deponent was brother to Ann's first husband; 15th July, 1752, deponent dined with her at Whitby Wood, she asked deponent if he had seen Mr. Robins, and said he had proposed himself to her, but she had refused him.

Marriage articles marked C read.

Ann agrees to claim nothing out of Sir William's [450] estate, if she survives him, but agrees to pay him 300l. a year out of her jointure.

On Sir William's allegation, dated 16th June, 1755.

1. John Clements, clerk. On or about 26th August, 1752, Ann dined with deponent, and in the afternoon Sir William was sent for at her desire, and she then seemed uneasy at Sir William's having examined her servant, and she cried and seemed to faint away; Sir William called for hartshorn, which she drank, and soon after fell into an hysterick fit, and during the fit often cried out, "That damned rascal Victor has done this to break the match," and cried out, "I love Sir William, where is he?" Sir William asked deponent's wife if she ever heard any body talk so rationally in a fit; deponent had not any book in his hand; after the fit she was very merry, played at cards, and supped at deponent's that night; 23rd September, 1752, she again came and dined at deponent's house, and after dinner, at her earnest request, deponent fetched Sir William and his nephew, and she signed the articles that afternoon in Colwich church.

2. Int. On Sunday, 23rd August, deponent was present when Sir William gave her a paper to sign, and she said she would consider of it. 3. Int. On 26th August Ann went upstairs after dinner to dress herself, and then drank a glass of the same wine they had drank at dinner, and she afterwards fell into a fit. 4. Int. On 21st September, 1752, she dictated to respondent at his house certain articles of agreement, and by her direction, after deponent had written them, he delivered them to Sir William; deponent wrote them by her direction, but can not say how she became skilful [451] enough to dictate marriage articles; they were dated 21st September, and afterwards some alterations were made, and respondent wrote said articles over again on stamp paper by her desire; cannot set forth where he bought the stamps; he engrossed them on stamps on 23d September, and had them in his custody till 8th or 9th October following, and they are the same articles Sir William executed. 5. Int. Before they were executed, the articles signed by Ann were in Sir William's custody, and believes Sir William brought them with him on 23d September, and they were executed in the window in Sir William's seat in Colwich church; the two parts were not duplicates, one signed one set of articles, and the other party signed the other set. 6. Int. Ann delivered the articles signed by Sir William to keep for her, and she so delivered them in the church, and deponent kept them till 8th or 9th October, when Ann sent for them, and deponent delivered them into her own hand.

2. Mary Clements. Deposes the same as to her fit on 26th August, and as to what Ann said when she was in the fit. She afterwards played at cards, supped, and was very merry at deponent's house that night; contradicts, as does her husband, the depositions of Blakemore, the coachman. She again dined at deponent's on 23d September, and by Ann's desire Sir William was sent for, and she that afternoon signed the articles in the church.

3. James Clements, aged 16, examined in 1755. Swears precisely to 26th August, and gives his reasons for remembering the day when Ann and Sir William were at his father's house; says she supped there, and was very merry. Swears [452] he never told Blakemore what he said Blakemore has deposed to.

4. Elizabeth Clements, aged 18. Swears Ann supped and played at cards the evening of 26th August at Clements' house. Deponent heard nothing of what is deposed by Blakemore; 23d September Ann again dined at Clements', and Sir William was sent for.

5. John Aston. Deponent was servant to Clements; in August, 1752, Ann dined at Clements', and had a fit, but afterwards was very merry, played at cards, and

supped there, and about a fortnight afterwards again dined there, and she was at six in the evening in Colwich church, and she did not go home till about ten o'clock.

6. Mary Boreham. Deponent was servant to Clements in August, 1752, when Ann dined there; believes Ann had a fit there, but afterwards she played at cards and supped there, and about three weeks afterwards Ann dined there again, and that afternoon deponent saw her and Mrs. Clements in the church-yard.

7. Mary Goodwin. On 23d September, 1752, about five or six in the evening, deponent saw Ann and Mrs. Clements in the church-yard.

2. Int. Believes she may have said she did not see Sir William and Ann come out of the church together.

8. William Thompson. Some time about 9th October, 1752, but cannot be certain as to the day deponent and Richard Derry witnessed a marriage bond executed by Mr. Robins, is certain it was not before October.

1. Int. In May, 1754, deponent, by the direction of Mr. Robins, went to the house of John Dearle, [453] but did not see him, nor did respondent then, or at any other time, go to Dearle's house with intent to swear to the marriage of Mr. Robins with Ann Whitby on 16th June, 1752, or ever request Dearle, or any other person, to swear him to an affidavit that they were married on 16th June, 1752; neither had respondent at any time any discourse with Dearle about making such affidavit, nor did he ever apply to Thomas Wood or any other person, to put down in writing what he was willing to swear; but Wood came one day to Mr. Robins, and put down a declaration in writing, purporting to testify that deponent was present and saw them married on 16th June, 1752, and that he was a witness to the bond relating to such marriage, and was ready to testify the same on oath when required; but deponent did not request Wood to put down such memorandum, nor did deponent ever sign such memorandum or declaration, and there was not any one present when Wood made such memorandum, but deponent and Mrs. Pidgeon.

N.B.—This witness has flatly perjured himself in his answer to this interrogatory.

9. Benjamin Victor, Esq. On 26th August, 1752, deponent was at Sir William's house, when Mr. Clements came and told Sir William Ann desired to see him.

10. William Scott. Deponent is sure Robins did not sign any marriage warrant before Corne on 9th June, for he was then at Lord Uxbridge's.

11. Richard Wolseley, Esq. Deponent was not in Staffordshire on 26th August, 1752; never witnessed any paper signed by Ann on said day; swears Ann was in Colwich church on the evening of 23d September, 1752.

3. Int. The articles were executed in a window [454] on the right hand of Colwich church, going into it from the road; does not remember they were read over when they were executed. Deponent was a witness to them; thinks he signed his name at Clements' house, and Clements as he best remembers first produced the articles. Two parts were then executed, one by Sir William and the other by Ann.

Witnesses for Sir William on another allegation in 1756.

1. Benjamin Victor, Esq. To declaration of Derry, dated 21st August, 1752; deposes that Derry acknowledged the contents to be true, and voluntarily signed it, and did not then say his mistress was married to Robins. Deponent wrote to Ann on Saturday 29th August, 1752, relating to her marriage with Sir William, which was the only letter he ever wrote to her, does not know her handwriting.

3. Int. Derry signed a paper drawn up by respondent to confess his crime in having reflected on his mistress. The paper was wrote on 21st August; deponent drew it up; upon being told what Derry had said to Sir William's servants on 18th August, Derry was sent for on 21st, but he could not come till the 25th, and then the paper being read to him, and being told that if he would not sign it, his mistress would be informed of the scandalous expressions he had used of her, and that she would prosecute him for the same; he thereupon did sign it in presence of respondent, Sir William, and Mr. Clements, and respondent and Clements witnessed it. 4. Int. 29th August respondent wrote to Ann, to induce her to sign the deed, to renounce all claims to the Wolseley [455] estate; deponent delivered the letter to Sir William's butler, and gave a copy of it to Sir William.

2. Sarah Nicholls, widow. Deponent's husband on 15th June, 1752, met Mr. Robins at dinner at Mrs. Whitby's, and at nine or ten at night they came to Nicholls' house, at Stafford, in a one-horse chaise, and there with assistance Robins alighted and spent the evening at Nicholls', and did not stir from thence till twelve or one that

morning, and then went home to his own house on the opposite side of the way. About eight o'clock next morning, William Thompson informed deponent that his master, Mr. Robins, was ill in bed, and wanted some strong wine. Deponent gave him some, and on said 16th June Robins dined with deponent's husband. Deponent thinks he was not well enough to ride that day to Castle church; proves letters from Ann to Sir William to be Ann's writing.

2. Int. Elizabeth Toukes, who was a servant to Robins, told deponent she would not remember any thing about this affair. 3. Int. Respondent has asked persons what they knew about Robins having been at her house on 15th June. 4. Int. Believes Robins dined with Ann on 15th June, and came from thence to Stafford, from whence to Castle church is one mile. Believes he was godfather to Mr. Scott's child in June, 1752.

Ann's letter to Sir William. Invites Sir William to come to her at eight that evening; says she was engaged to go out and should not be back till the evening; mentions that she had received a letter that morning from Mr. Victor; expresses regard for Sir William and his family; dated Saturday.

3. Elizabeth Toukes. Says she cannot depose [456] to any part of the allegation. (N.B.—She was servant to Mr. Robins in June, 1752.)

1. Int. Respondent was servant to Mr. Robins on 16th June, 1752; he might go out early in the morning of that day and return home without her knowledge.

2. Int. Knows Mr. Hickin.

4. Ann Vaughan. Deponent servant to Nicholls; about ten at night on 15th June, 1752, Robins came to Nicholls' house and staid there till between twelve and one in the morning, and the next day he dined at Nicholls'; he was then in a weak condition.

4. Int. Castle church is a mile from Stafford.

5. John Clements, clerk. Derry read his recantation and signed it, and deponent and Victor attested it; it was signed on 25th August voluntarily.

3. Int. Confirms deposition; says Derry was not present when the recantation was drawn up; 29th August, 1752, was a Saturday.

Recantation read.

6. Abraham Lukin. In August, 1752, Derry said at Sir William's house, "The affair is quite indifferent to me whether my mistress marries Sir William or not, for she has promised to take care of me, for I can bring her on her knees for her former sins;" deponent was present when the recantation was read to Derry.

Sixth article of allegation charges a particular discourse between Derry and three of Sir William's servants. Answer. He knows nothing of the contents thereof.

3. Int. Respondent heard Derry acknowledge the contents of the recantation to be true.

7. Thomas Greatholder. Deposes to Derry's [457] declaration the same as Lukin, and proves the recantation.

7. Int. Deponent is coachman to Sir William; deponent has often said Ann was a wicked woman.

8. Mary Flint. Derry declared to deponent after the 22nd of June, 1752, that the match between his mistress and Robins was off, and said "They have quite broke off."

9. Joseph Dickenson, clerk. 16th June, 1752, was the archdeacon's visitation at Stafford; it did not cease raining that day from seven in the morning till three in the afternoon; deponent saw Corne at Stafford at ten that morning.

10. Charles Howard, proctor. On the 16th June, 1752, deponent was up at five in the morning, when it rained violently and the roads were very wet, and it continued to rain violently till noon; deponent was with the archdeacon on his visitation that day.

11. Brooke Crutchley, gent. On 15th June, 1752, about ten at night deponent saw Robins come with Nicholls to Stafford, and he was helped into Nicholls' house about nine in the morning of 16th said June; deponent was with Robins; found him in bed, and he complained he was very ill; middle of July, 1752, deponent went to see Mrs. Whitby, and she then said to deponent, "The affair is quite over between Mr. Robins and I, and I shall never have any thing more to say to him on that head, but I shall always be glad to see him as a relation;" and the beginning of said July Robins told deponent the affair between him and Mrs. Whitby was over, and William Thompson told deponent the same.

12. Catherine Crutchley. Swears she went to [458] see Mr. Robins, who was her brother, about ten in the morning of 16th June, and he was very ill, and said he could not get off his chair.

13. Richard Wilks, M.D. The morning of 16th June, 1752, was very wet; about ten that morning deponent went to visit Mr. Robins, who was undrest, and he then said he was so very weak that he had great difficulty in rising from his chair, and more in walking across the room, and said he was not able to ride on horseback.

3. Int. Robins was unfit to go to Castle church on 16th June.

Witnesses for Robins.

1. John Dearle, gent. Between Easter and Whitsuntide, viz. in May, 1754, William Thompson came to deponent's house in Stafford, deponent being a master extraordinary in chancery, and desired deponent to take his affidavit that he was present at the marriage of Mr. Robins and Mrs. Whitby, on 16th June, 1752; deponent told him he had no commission to take affidavits in the Arches, and was so ill he could not draw an affidavit; he then asked deponent what he had best do in that affair; deponent recommended him to go to Mr. Thomas Wood, a writer, and get him to put down in writing what he was willing to swear, and send it to Mrs. Robins.

1. Int. About Christmas, 1754, respondent received an affidavit from London concerning said marriage for Thompson to swear to, but he then said times were altered; deponent admonished him not to swear falsely; he replied that he did not deny but that the contents of said affidavit were true, but he should not swear to it.

[459] 3. Int. Believes Thompson was sent by Robins to deponent to take said affidavit.

2. Elizabeth Whitnall. Deponent was servant to Mr. Dearle, and was present when William Thompson came to Mr. Dearle and desired him to draw an affidavit that he was present on 16th June, 1752, when Robins and Whitby were married, and to swear him thereto; Dearle said he was ill, and recommended him to go to Thomas Wood, and get him to draw an affidavit; this passed in May, 1754.

3. Walker Cartwright, barber. Sunday 12th November, 1752, Mr. Clements sent for deponent and bid him go the next day to Stafford to demand of Mr. John Robins two moduses for Mrs. Ann Whitby's estate, and also a marriage fee, which he said was due to him for her marriage to Robins, and said as they had been married some time he ought to be paid, and Clements then gave deponent two receipts signed by him, and the whole was of his handwriting, and bid deponent deliver the same to Mr. Robins if he paid said two moduses, but did not give him a receipt for the marriage fee, but bid deponent give one if it was paid to him, and at same time said he expected Robins would give him more than his fee; Ann had then lived publicly with Robins as her husband, about a month; deponent went the next day; Robins paid him said two moduses and five shillings for a marriage fee, for which deponent gave him a receipt, which was written by Mr. Robins's footman and deponent signed it; same day deponent paid said money for the moduses and fee to Clements; the end of December or January, 1752, Clements applied to deponent to make affidavit that deponent did not receive said [460] moduses and fee for him by his order, and produced a draft of an affidavit setting forth that deponent had received said money of his own head, without the order or privity of said Clements; such draft also contained several transactions to which deponent was an entire stranger; deponent told Clements he was a very wicked man, and that deponent would not make such affidavit; Clements still pressed deponent to swear to it, and told deponent he would give him some of the sacrament money, but deponent totally rejected his offer; in January, 1753, deponent made affidavit that he had received the moduses and fee by Clements' order, and he hearing of it applied to deponent to know whether he had done so; deponent told him he had; then Clements said he should have come to him, and he would have taught him what to have sworn; deponent knows Sir William's seat in Colwich church, there is no window in it.

8. Int. Respondent shaves for a penny. 16. Int. There is a window in the staircase going to Sir William's gallery.

4. Ellen Cartwright. In January, 1753, Mr. Clements came to deponent's husband, Walter Cartwright, and asked him if he had made an affidavit that he had received of Mr. Robins two moduses and a marriage-fee for him; deponent's husband said "Yes;" Clements replied he had done wrong, he should have come to him to have

been taught what to swear; there is no window in Sir William's seat in Colwich church.

4. Walter Cartwright, sen. There is no window in Sir William's seat in Colwich church.

2. Int. Sir William has two seats below, in which there is a window. 3. Int. Sir William [461] built a gallery over said seat, the stairs of which are near said window. 4. Int. The south seat is Sir William's.

6. William Draper. There is no window in Sir William's seat.

7. Ann Nevill. The same.

8. Richard Bond. The same.

4. Int. A writing may be signed in the window by the staircase, if a person kneels or sits down to write.

9. Francis Spencer. The same.

10. Randolph Mottershaw. The same.

11. Charles Trubshaw. The same.

1. Int. As soon as one comes into Colwich church at the north door, there is a window where a person may sign a paper if he kneels or sits on the stairs.

Witnesses for Robins on another allegation.

1. William Lithgow. Knows the parties; deponent was at Mr. Robins' house at Stafford from four or five o'clock in the evening of 15th June, 1752, till one o'clock in the morning; deponent went there to welcome Mr. Robins to Stafford, who had not been there for some time, and to assist the servant in drawing ale for the burgesses who came there about ten or eleven of said night of 15th June, as he best remembers the hour; deponent saw Mr. Robins come into his house and he then appeared to be in good health and spirits, and Richard Derry was then there; deponent observed Robins whisper to Derry, and presently after saw Mr. Robins, Derry, and William Thompson go into the little parlour; they staid there about half an hour, and then Derry directly went out of the house, and soon after Mr. Robins [462] went out and did not return till near one in the morning; deponent was then there drinking; deponent saw Robins on 16th June, and he then appeared to be in very good health, and able to go to Castle church.

2. Mary Bradley. Deponent was at Mr. Robins' to serve as cook on 15th June, 1752, and staid there till half past eleven that night; between ten and eleven Robins came into his house, and he then appeared to be in good health and spirits; Derry was there; deponent saw Robins whisper him and then they two and William Thompson went into the little parlour together, and staid about half an hour, and then Derry went away, and soon after Mr. Robins went out; on the 16th June deponent dressed a supper at Mr. Scott's child's christening, and Robins and Nicholls came there together; believes they were godfathers to said child, and they supped at Scott's; Robins appeared to be in good health.

3. William Marston, carpenter. Deponent went to Mr. Robins's on 15th June, 1752, to welcome him home between ten and eleven at night; Robins came in, seemed in good health, and then he and Derry and Thompson went into the parlour together.

N.B.—On 3d interrogatory, this and most of the witnesses say Mrs. Hales spoke to them to be witnesses.

4. Ann Harvey. On 16th June, 1752, Robins supped at Scott's, and appeared to be in good health and able to have gone to Castle church.

5. Ann Marson. 16th June, 1752, deponent saw Mr. Robins going alone from his own house towards Scott's house, and saw him go into said house without any assistance.

[463] 6. John Saunders. 16th June, 1752, deponent saw Mr. Robins, and he appeared to be in very good health.

7. Mary Bolton. Deponent was servant to Mrs. Whitby at her husband's death; heard his will read; he devised the guardianship of his two sons to his said wife during her widowhood only; deponent was told by Derry and others that the marriage between her and Robins was to be a secret, because she would lose the guardianship of her children, and therefore the servants were directed to speak of her as a widow; deponent believes said marriage was kept secret on account of said guardianship of her children; on the 29th August, 1752, deponent was at said Ann Whitby's house, and said Ann was very ill all that day, and did not write any letter that day as deponent believes; for deponent saw her attempt to write, and she could not, her hand trembled so much.

8. Mary Nutt. On the 15th June, 1752, Robins dined with Ann at Whitby's, and he seemed to be then in very good health, and said he was come from Lord Uxbridge's, and he and Ann walked out for an hour before dinner, and he walked without assistance, and did not seem tired when he came in again; after the 16th June Ann often spoke to deponent of her marriage, but enjoined deponent to keep it secret; in said month Robins came to Ann's house, and he and she both charged deponent and Derry to keep their marriage secret; the reason they gave was because she would lose the care of her children; deponent has heard Mr. Whitby's will, by which the guardianship was given to her only during her widowhood, and therefore she was spoken of and treated as a widow; but Sir William's be-[464]-haviour to her obliged her to publish her marriage in October, 1752, and she thereby lost the care of her children; deponent was with Ann the whole day of 29th August, 1752, and is certain that Ann did not write any letter that day, but was very ill and unable to write; deponent saw her attempt to write that day upon business, but she was not able to write, her hand trembled so much (as she said), occasioned by the ill-treatment she had met with at Clements' on 26th August.

9. John Blakemore. On 15th June, 1752, Robins appeared to be in good health; deponent saw him and Ann walking both before and after dinner, and believes they walked together an hour each time, and he did not seem fatigued; he got into the chaise when he went away without any help, and Mr. Nicholls, since dead, was with him; Ann was above stairs all day of 29th August, 1752, and therefore deponent did not see her that day.

10. Hannah Wright. Deponent went to live with Ann as housekeeper on 3d April, 1752, and staid with her about two years and a half; on the 29th August, 1752, Ann was very ill; deponent does not believe she wrote any letter that day, for she did not seem capable of writing one; believes her illness arose from ill-treatment at Clements' on 26th August.

11. Ann Locksdale. In the middle of June, 1752, Robins was at Scott's, and appeared to be in a weak condition.

8. Int. Believes Scott's child was baptized at home on Robins' account, who could not well walk to the church.

12. John Buchanan, M.D. Deponent was [465] with Robins at Nicholls's on 16th June, and he then seemed to be an invalid.

2. Int. Robins was reputed to drink hard, and he seemed to be impaired and in a feeble state; in a morning he was very weak and scarce able to hold a dish of tea.

4. Int. Dr. Wilks is a physician of great eminence. 6. Int. Believes Dr. Wilks, by talking with Robins on 16th June, might judge of his health.

13. Randolph Mottershaw. There is no window on the right hand of the church of Colwich; on the south side there is a window in which a person sitting on the stairs might write.

14. Charles Trubshaw. No window in Sir William's gallery.

1. Int. Same as the rest.

15. Thomas Nevill. The same.

Read paper D dated 9th May, 1754. "I, William Thompson, promise to declare on oath that I was present on 16th June, 1752, and saw Mr. Robins and Mrs. Whitby married."

Witnesses for Sir William.

1. John Dunn. In Sir William's old seat there was a window about four feet seven inches and upwards from the ground, and though it is not in the gallery, it is commonly called the window in Sir William's seat.

Three more witnesses to the same purpose not read.

Dr. Hay's argument for Mrs. Robins, alias Whitby. Sir William's courtship was from June to September, 1752; to his suit she pleaded in bar that she was the wife of Robins, and therefore not liable to [466] answer to Sir William on a charge of adultery, but Sir William insists on his marriage with her in order to be divorced from her. That Robins was living on 23d September, 1752, appears from Clements' receipts to him in November, 1752. She has alleged that she was married to Robins on 16th June, 1752; I shall not lay great stress on the contract, because the same witnesses prove the contract and the marriage; if there had not been a real marriage she would have rested on the contract. Mr. Robins died in 1754, the contract is of his handwriting, the marriage is a fact, and must be proved by positive evidence, and

is not to be set aside by conjectures. Richard Derry's character is unimpeached; he is supported by Nutt and Bailey; they are also supported by a marriage bond and a warrant, and an entry in the parish register; their objection is that no regard is to be paid to the register or to the witnesses; first, as to the entry—it is to be contradicted by declarations, and an affidavit of Corne to set aside his own act, his declarations also are contradictory to one another. I object even to the competency of Corne, he speaks to repeated conversations with Hickin, who is proved to be living, and yet he is not examined, and therefore Corne's affidavit &c. is not the best evidence that could have been had; it does not appear to me that the entry is on a rasure; Brooker is certain there was no rasure in the entry on 15th June, 1753, and Dunn, their witness, says the same, so Corne is contradicted by two witnesses. Seckerson says Corne told him in September, 1753, that he had forgot to register Ward's child. Corne died in November, 1753; in December, 1752, he on his canonical obedience declared to the Bishop that he had married Mrs. Whitby and Robins on 16th June; [467] they have admitted that Corne deserves no credit by himself, and he is supported only by William Thompson, who is clearly perjured. Thompson, upon his first examination, owns he signed the declaration marked D; upon his second examination he denies it, and Dearnley expressly contradicts him; their great point was to shew a marriage on 9th October, 1752, between Mr. Robins and Mrs. Whitby, and this is to be proved by Corne, who was guilty of forgery, and by Thompson, who is perjured; the declarations made by Ann and Robins that the marriage was off shews there was a rumour of the marriage in the country; they have not proved that Robins was not at Castle church on 16th June. Vaughan and Nicholls swear Robins did not go out of Nicholls' house on 15th June at night till between twelve and one, this is contradicted by three witnesses, who saw him at his own house with Derry about ten that night; he dined and supped abroad on 16th June, which proves he was not very ill; it has been attempted to impeach Derry by the evidence of Lukin and Greatholder, but they do not contradict him; another objection is made to him that he swears he signed the declaration of 21st August by force, having been compelled to sign it by threats, whereas they say he did it voluntarily—Victor proves he was threatened. No particular impeachment of Nutt and Bailey, they rely on two grand particulars—her letter said to be written to Sir William on 29th August, 1752, and the marriage articles of 22nd September, 1752. Victor to 4th interrogatory says he gave a copy of his letter to Ann, to Sir William: why was it not introduced to shew the date, and why was not Sir William's butler examined, with whom Victor left his letter to be carried to Ann? All her family [468] swear that Ann was not abroad on 29th August, 1752, and yet the letter supposed to be written to Sir William on that day speaks of her going abroad that day. As to the articles, every part of them is improbable; the witnesses are contradicted as to the window where they were signed; if Cartwright and his wife can be believed, Clements is a most infamous man; the articles import fraud, she bars herself of dower, and gives Sir William 300l. a-year of her jointure. Clements to 6th interrogatory, on his 2nd examination, says Ann sent him a card sealed up, to desire him to bring her the articles; that card is not exhibited; if she had signed articles on 23d September, that fact would not disprove positive evidence of a marriage on 16th June.

Dr. Simpson, same side. They have not disputed the contract being in the handwriting of Robins; Dunn swears positively that the entry in the register appeared to him fair when he inspected it soon after 12th October, 1752, and there was then no paper pinned to the register; Corne applied to know where Ward's child was buried in September, 1753, ten months after the entry had been seen fair by Brookes and Dunn, and, therefore, Corne's account of his erasing the burial of Ward's child must be false. Affidavits have been received where the witness has been indifferent as to the facts; in civil actions one affidavit cannot be received as evidence. The bond from Robins to Corne, dated in December, 1752, was to induce him (as he says) to alter the register—it is a general bond to indemnify him from a clandestine marriage; it is most likely Corne's illness arose from his affidavit; no witness speaks to a marriage on 9th October, 1752, but Thompson; Clements and Wolseley both say the articles were signed on 23d September, 1752, immediately before the ceremony; Blakemore and all her servants swear she was ill on 29th August, 1752; notwithstanding the affection they pretend Ann had for Sir William, she, according to their suggestion, married Robins a fortnight after they pretend she married

Sir William. Nutt and Derry both say Sir William, on 27th August, insisted that he was married to her the night before, and she then insisted on having back the paper she had signed the night before; they have not attempted to contradict any part of these facts; the paper signed by her on 26th August was not witnessed then, and probably it was attested afterwards, and the date altered to September. Mr. Wolseley swears the articles were executed in a window on the right hand going into Colwich church from the road—Mrs. Clements does not know what window was done in—Mr. Wolseley says that he attested them afterwards at Clements' house, but yet Wolseley's name stands first in the attestation—Mr. Wolseley varies in his account on his second examination; the demand of moduses and a fee from Robins is strong evidence against Clements; the witnesses to Robins' being with Derry and Thompson in his parlour on 15th June at night, are not contradicted. Derry, to interrogatories, denies that he ever had any conversation, to the best of his remembrance, with Sir William's servants about Ann's marriage with Sir William, except that he said, if such a thing could be as her marrying Sir William, she would knock him up in a twelvemonth. Lukin knows nothing of the conversation with [470] Derry, and, therefore, the case stands upon Greatholder's evidence alone.

Dr. Smalbroke contrâ, for Sir William Wolseley. I shall shew she has totally failed in her plea of marriage. She pleaded courtship by Robins from April, 1751, but has not attempted to prove it, no letter has been produced from him to her; if the contract had been proved, it would have been clear evidence of prior intention to marry; the contract was not executed at the time it bears date, as is clear from circumstances. She could not have been afraid of being forced to marry Sir William, if she had been contracted to Robins; when the double marriage was discovered in October, the contract was not spoken of; Derry and Nutt, in their affidavits in the King's Bench, did not mention a contract, it was not produced till November, 1755; by it they agreed to solemnize marriage in facie ecclesiæ on or before 31st August, 1752—the limiting it to that time is suspicious; Nicholls swears Robins did not stir out of her house on 15th June till one in the morning, and she is supported by Vaughan; as Robins was with Ann on 15th June, they would certainly have settled the bond of the marriage then, if they had intended to marry the next day; the date of the marriage bond is plainly false; from his weakness and the badness of the weather, it is highly improbable that Robins should have been at Castle church on 16th June, 1752; they have not specified how Robins went to Castle church, whether on foot, on horseback, or in a carriage; he could not go on foot—he declared he had not rode on horseback for many months—if in a carriage somebody must have seen it; no proof that he or Corne were abroad that morning. Nutt says Ann told [471] her of her marriage on 16th June; her declarations to Mr. Whitby, to Mr. Crutchley, and to Mary Flint were voluntary. Robins disavowed this marriage, for he went to France as soon as the subsequent marriages were discovered; they did not intend a secret marriage, as appears from what is said to be their own act, for by the contract they agreed to be married in facie ecclesiæ. The entry in the register—the licence for the marriage—all made it public; the contract was ipsum matrimonium, an actual subsequent marriage was therefore unnecessary. Corne was ten years surrogate at Litchfield; no impeachment on his general character; his affidavit was his solemn dying declaration; perfect agreement between his declarations and the proofs in the cause; Corne did not return the bond and warrant till 18th December, his first return after 9th October. Ann has pleaded, and therefore cannot deny, a rasure in the register. The fright Corne expressed to Seckerson shews he had something of more consequence on his mind than barely the entry of the burial of Ward's child. Nicholls knew Robins was at Lord Uxbridge's on 9th October, for he dined with him there that day. The bond of indemnity is dated 23d December, 1752. Michael Peak confirms Corne as to his going to Hickin; Hickin was much interested to have cleared up the charges against him. Corne never varied in his account after March, 1753. Pardo was told by Corne that he had entered the marriage on 9th June, and he shewed Pardo the register—the entry was on 16th June, and was then on a rasure. Bailey proves a couple were married in July, but does not prove the day or the parties. The Bishop of Litchfield and Mrs. Nicholls prove there was a report of a marriage between Ann and Sir William; there was [472] no inconsistency in Clements' asking for the moduses and fee in case Robins was married to Ann. Cartwright and his wife cannot be believed; six witnesses proved Ann played at cards on

26th August; the conversation between Sir William and Ann after 26th August, deposed to by Nutt and Derry, is absolutely incredible; the allegation as originally drawn, only alleged that Ann did not write any letter on 29th August, 1752—the Court intimated that this would not be a sufficient plea—that she ought to allege that she was so ill, that though she attempted to write on that day she was not able to do it, and so the witnesses swore up to what they understood was necessary. There are objections to Derry and Nutt, Derry has attested a bond, which he says was executed on 15th June, but is dated 9th June; Derry says he signed his declaration by force, whereas no force was offered him. Mr. Robins has given in false and dilatory pleas.

Dr. Bettesworth, same side. The contract is quite out of the question; the transaction with Sir William was known in the country; they pleaded that the bond was executed on 9th June, in the allegation which Ann gave in in March, 1754. Derry's account of what passed on the 15th June is improbable. Robins alighted that night at Nicholls' and did not go home till one in the morning; they have not produced Robins' letter of 15th June to Ann; there is no evidence of notice given to Corne to marry them on 16th June, impossible Robins should go in a carriage to Castle church without its being known; he was in a very bad state of health, and it was a very wet morning; grossly improbable that Bailey should be warned by Corne only to know nothing of the matter. Mrs. Nicholls swears Thompson said Robins was [473] in bed at eight in the morning of 16th June; I am little concerned for Thompson's evidence, it is not to be much credited, but must observe he could have no view in swearing that he did not sign the paper D. Corne's first declaration could not be true, for he told the bishop he had married them between eleven and twelve in the morning, and at first said he had married them on 9th June. Dunn upon first view did not see the rasure, but he afterwards saw it. Seekerson deposes to the end of September, 1753, when Corne applied to him to learn the day when Ward's child was buried; to the second interrogatory Clements says, Ann requested him not to enter her marriage with Sir William. They have pleaded that the entry of her marriage with Robins was written on a rasure, and therefore cannot now deny that fact. Corne returned the bond and warrant into the bishop's office on 18th December, 1752, the first return he made after 9th October. Derry and Nutt say Robins and Ann called them into the parlour in June, and told them they were married, and bid them keep it secret; the articles are a disavowal under her hand of her marriage with Robins; Ann only dictated to Clements the alterations she would have made in the articles: the letter of 29th August, 1752, from Ann to Sir William, shews her great liking to him; Bolton is introduced to prove Ann could not write on 29th August; Derry, Nutt and Thompson (as she says) all told her the secret of Ann's marriage to Robins; we could not examine Hickin, because he is charged by us with subornation of perjury.

Dr. Hay's reply. Four witnesses must be adjudged to be perjured if sentence is given against Ann's marriage with Robins; if Robins was married [474] to Ann on 9th October, it would follow that he could not have been married to her on 16th June, 1752; but they have not proved a marriage on 9th October; Corne was guilty of forgery, and therefore cannot be received as a witness; Clements' character is strongly affected by Cartwright and his wife—the letter of 29th August is proved only by Victor. Why did not they interrogate Derry as to the manner in which Robins came to Castle church? if the fact of Mrs. Robins releasing her jointure to Sir William had been proved, it would have been an evidence that she was married to Robins.

Dr. Simpson's reply on same side. The fact which alone was material for them was to have proved that Robins and Ann were married on 9th October, 1752, which they have not proved; it is not likely Ann and Robins should desire Corne to alter the register which was fair. Corne told the bishop that the marriage was to have been on 9th June, but Robins sent him word it could not be that day, and therefore the bond and warrant were prepared and dated on 9th June; Mr. Robins made no declarations, relative to the marriage, till after 16th June.

Judgment—Sir George Lee. Though there were objections to the witnesses on both sides, I was of opinion that the weight of the evidence was in favour of the marriage on 16th June, 1752. Derry and Nutt had deposed to conversations between Ann and Sir William, which seemed improbable, but their general characters were unimpeached, and witnesses against whose general characters there was no exception were not to

be rejected upon conjectures, suspicions, and [475] supposed improbabilities only. Derry had sworn positively that he was present, and saw Mr. Robins and Mrs. Whitby married on 16th June, and his name appears as a witness to the marriage bond—Nutt has sworn positively that Mrs. Whitby told her on 15th June that she was to be married to Mr. Robins the next morning—that Whitby went out very early the next morning, and when she returned home, told her she was married to Robins, and they were supported by Bailey, against whom there is no exception whatsoever; and also by Seckerson, who swears Corne told him in June, 1752, that he had married a couple of fortune that month, and he should have his fee as clerk of the parish, but the marriage was not at that time owned—and that in October following Corne told him the couple he had mentioned to him to have been married in June as aforesaid, were Mr. Robins and Mrs. Whitby—an alibi of neither of the parties was proved, for though it had been attempted to prove that Mr. Robins was unable to go to Castle church on 16th June, yet the proof was deficient, for he had travelled several miles on the 15th June, supped abroad that night, and dined and supped abroad on 16th June, and there was no proof that he had not been out of his house the morning of 16th June; on the contrary, William Thompson, who was the principal witness for Sir William, was so grossly perjured in this cause, that no credit in law could be given to any thing he deposed, so that the fact that Robins and Whitby were married on 9th October, 1752, and not before, rested solely on the declarations and affidavit of Corne, which, as he was dead, I was of opinion would be good adminicular proof to support other witnesses, but was not of itself sufficient evidence to support facts contrary to his own acts, not [476] only as his evidence was ex parte, but also as he appeared to have acted very improperly, for if he had erased the register and made a false entry, he was guilty of a sort of forgery, and if he had not done so, he was guilty of perjury, and therefore I could not consider his affidavit and declarations, standing unsupported, as any evidence at all. As to the letter from Ann to Sir William, said to be written on 29th August, I did not think that point was proved, for though Victor swears he wrote to Ann on 29th August, and that he never wrote any other letter to her, and she, in her letter to Sir William, says she had that morning received a letter from Victor, yet it does not appear that Sir William's butler, with whom Victor left his letter, delivered it to Ann that day, and consequently the date of her letter is not fixed to be on 29th August; on the contrary I must believe she did not write it on 29th August, because three or four witnesses have positively sworn she was so ill on that day and her hand trembled so much, that though she attempted to write, she was utterly unable to do it, and that she was not abroad that day, though in the letter she mentions she was going abroad. As to her giving encouragement to Sir William, and signing marriage articles, it was not more extraordinary than the rest of her conduct, for it was not more improbable that she should marry Mr. Robins on 16th June, and afterwards marry Sir William on 23d September, than it was that she should marry Sir William on the 23d September, and marry Mr. Robins on the 9th October following, which Sir William had alleged, and attempted to prove she had done; and, therefore, upon the whole, I pronounced by interlocutory, that from the proofs in the cause, it appeared to me that Mrs. Ann Whitby was married to Mr. John Robins on 16th June, [477] 1752, who was living on the 23d September, 1752, and therefore I admitted her plea in bar, and dismissed her from Sir William Wolseley's suit, but without costs.

Sir William's proctor appealed.(a)

(a) The judges delegates named in this commission were—

Edward Earl of Warwick and Holland, John Lord Bishop of Salisbury, James Lord Bishop of Gloucester, John Lord Bishop of Bristol, Hugh Lord Willoughby of Parham, John Lord Berkeley of Stratton, Mr. Justice Denison, Mr. Justice Clive, Mr. Baron Legge, Sir Thomas Saulsbury, and Drs. Walker, Collier, Ducarel, and Clarke.

They accepted the commission on the 24th December, 1757, and the cause was proceeded in, under the title of *Sir William Wolseley of Wolseley, in the County of Stafford, Bart., the Lawful Husband of Dame Ann Wolseley, falsely calling herself Robins v. The said Dame Ann Wolseley, falsely calling herself Robins*, for a considerable time, but never came to a hearing, for on the 1st February, 1759, the proctor of Sir William Wolseley exhibited a special proxy under the hand and seal of his party, by which he renounced

HASELFOOT against HASELFOOT. Prerogative Court, 4th Session, Michaelmas Term, December 3rd, 1757.—An inventory decreed.

Vezey Haselfoot died intestate in November, 1756; left three children and three grandchildren; caveat was entered by Harvey, who married deceased's daughter, in behalf of his children by her. [478] Mr. Farrer, Harvey's proctor, prayed, and it not being opposed, the Court decreed a commission of appraisement, but afterwards Farrer subducted his prayer, and did not take out the commission; then administration was granted in February, 1757, to William, deceased's eldest son, and Thomas, another son, and all the rest of the relations entitled to distribution agreed in writing that the effects should be appraised by friends therein named, who accordingly appraised them, notwithstanding which, Thomas cited William to exhibit an inventory and account, and to give further security, and upon the return of the process prayed a commission of appraisement, which William opposed, but declared he was ready to exhibit an inventory.

I rejected Thomas's prayer, and decreed William to give in an inventory.

CUNNINGHAM against ROSS. Prerogative Court, Michaelmas Term, December 3rd, 1757.—A will not attested by witnesses holden to be entitled to probate.—Administration cum testamento annexo decreed to the universal legatee, she having first proved herself to have been the widow of the testator.

Dr. Bettesworth for Elizabeth Cooper, alias Smith, alias Cunningham. David Cunningham died in October, 1755; on 8th July, 1752, he made his will all in his own handwriting in these words:—

"I, Master David Cunningham, doctor in medicine, do hereby give, grant, bequeath to Mrs. Elizabeth Cooper, alias Smith, out of love and affection, all my bonds, bills, ready money and goods belonging to me, lying in the lodgings I possess in the house belonging to Mr. Smith the trunkmaker near Charing-Cross, and that none of my relations shall trouble or molest her in any manner of way, but after her decease to bestow on them according to her [479] pleasure; this I do in soundness of body and mind. Signed by me the 8th of July, 1752. I say by me,

"DAVID CUNNINGHAM. Amen.

"Witnesses—Andrew Nash, Margaret Smith."

The witnesses wrote their names by mistake on the will as persons who could prove his handwriting, for the will was not executed by deceased in presence of witnesses. Elizabeth Cooper lived with him as his housekeeper and companion, on the 9th February, 1754, he being a very old man, married her, who was not young; on deceased's death she applied, as widow and universal legatee, for administration cum testamento annexo. Caveat was entered by Cheslyn for Robert Ross, deceased's nephew and next of kin; Hughes, her proctor, denied Ross's interest, and Cheslyn denied her interest and opposed the will. First session Easter Term, 1756, Cheslyn propounded Ross's interest, she then confessed it, and paid costs. Second session Trinity Term, 1756, Smith, now proctor for her, pleaded her interest and the will in separate allegations. Cheslyn, in Hilary Term, 1757, gave in an allegation, and has examined witnesses; he afterwards offered another allegation, which was rejected. Two questions: 1st, whether she had proved her marriage; 2d, whether she has proved the will. Ross has pleaded nothing to affect the will, but we have fully proved it to be the deceased's handwriting. They were married at Keith's chapel, the parson proves that he married two persons of their names, Drummond, the clerk, proves their identity, the deceased confessed the marriage; they have attempted to prove she lived with him only as a servant, and had been mistress to, and had children by, one [480] James Smith, but have not proved she passed for Smith's wife; they have indeed exhibited an entry of the baptism of a child as the son of James and Elizabeth Smith.

Dr. Hay for Robert Ross. Deceased had no effects at Smith's house when he died, for he was removed from thence and lived in Cranbourn-Alley; the paper is imperfect; there is no declaration prior or subsequent; two witnesses to the marriage; we have proved her to be an infamous woman; courtship pleaded but not proved.

the appeal; whereupon the Condelegates assigned the cause for sentence before the whole commission, and on the 3d July, 1759, the Court, by its final decree, pronounced against the appeal, and remitted the cause to the Arches Court.

Witnesses for Cunningham on the will.

1. John Johnson, Esq., æt. 24. Deponent well knew deceased; has often seen him write; well knows his handwriting; the will is all of his writing.

1. Int. Never knew producent called by any names but Smith and Cunningham, and all the time deponent knew her she lived with deceased, but cannot say whether as a servant or not. 2. Int. Has heard she was married to or kept company with one Smith. 3. Int. Believes she went by name of Smith in deceased's lifetime cannot tell whether she claimed to be married to him till after his death or not. 4. Int. Deceased was about eighty-three years old at his death. 23. Int. Producent some time ago gave deponent's wife a handkerchief, which she said she would be paid for if she lost her cause.

2. Thomas Calloway, gent. Deposits to the handwriting of deceased; came to know him by knowing producent; never saw deceased write, but has received letters from him; believes the will is deceased's writing.

1. Int. Knows nothing of producent being a [481] loose woman. 2. Int. Producent had a child by Smith, and went by name of Smith, but she passed for deceased's wife some time before his death.

21 and 22. Int. Does not know that Smith and producent ever owned each other as husband and wife.

3. John Mackintosh, merchant. Knew deceased; has seen him write his name, but not often; believes the name subscribed to the will is his writing.

1. Int. Believes producent has gone by the names of Cooper, Smith, and Cunningham.

4. John Vaughan, upholsterer. Knew deceased well; knows his handwriting; believes the will is deceased's handwriting; believes deceased had no personal estate but what is contained in the will.

Int. Believes producent had children by Smith, which said Smith owned to deponent, and believes she went by his name, and was reputed his wife.

5. Andrew Nash. Fully proves the will to be deceased's handwriting; proves producent's identity; deponent and Margaret Smith subscribed their names to the will inadvertently after deceased's death, only thereby to signify they knew and could prove his handwriting.

Witnesses for Cunningham as to the marriage.

1. Brewer Kidman, clerk. Deponent is a priest of the church of England, and officiated at Keith's chapel; on the 9th February, 1754, a man who said his name was David Cunningham, and who deponent has seen, came to his fellow-witness James Drummond, and a woman who went by the name of Elizabeth Cooper, who deponent did not know, but believes was producent, came to said chapel to be married, and [482] described themselves of St. Martin's parish, and deponent then married them together according to the liturgy of the church of England.

6. Int. The man the respondent married was a tall, personable man, but respondent does not know his complexion or age.

2. James Drummond, gent. Deponent knew deceased thirteen or fourteen years before and to his death; deponent officiated ten years as clerk at May-fair chapel; deceased often called on deponent there; deponent first knew producent six or seven months before her marriage; on the 9th February, 1754, about eleven in the morning, deceased and producent came to May-fair chapel, and they were then and there married together by Mr. Kidman according to the liturgy of the church of England, in presence of deponent, who officiated as clerk and gave her in marriage to deceased; believes they from that time cohabited as husband and wife, and they owned each other as such, and were so reputed to be.

6. Int. Deceased was a fair, middle-sized man; respondent took him to be about seventy years old.

3. Gilbert Sheldon. Deponent knew deceased about two years before his death; deponent heard it reported that deceased was married to his housekeeper, who deponent knew, and deceased and producent came together to deponent's house; deponent told them he heard they were married together; deceased replied "I am," or "She is my wife," or to that effect; deponent wished them joy and saluted the producent; from that time deponent esteemed them to be man and wife.

Int. Never knew her go by any name but Smith, and Cunningham, which last name she was called by in deceased's lifetime.

[483] 4. Andrew Nash, tailor. Producent is an Anabaptist, and it being reported she was married to deceased, deponent and Thomas Sturgis were appointed by the assembly to go to her and inquire into the truth of her marriage; some time between Midsummer and Michaelmas, 1755, deponent and the said Sturgis went to the house of Mr. Smith at Charing-cross, where deceased and producent lodged, and went into the room where they were together, and Sturgis asked producent whether she was married to deceased; she bid him ask deceased, and thereupon deceased said she (meaning producent) is Mrs. Cunningham; Sturgis asked why they kept it secret; deceased answered they had reasons, and mentioned his age, and said they should be laughed at.

1. Int. Producent acted as deceased's servant to his death. 2. Int. Respondent subscribed his name to the will, but not at the request of any one. 4. Int. Respondent knew James Smith, who kept a school at Brentford; producent owned to the assembly she had lived with Smith, but was not his wife. 8 and 9. Int. Deceased removed to Cranbourn-Alley, where he died; believes he had no effects at Mr. Smith's at Charing-cross at his death; respondent owed deceased forty pounds, and respondent is a bankrupt. 14. Int. Respondent shall not gain or lose by this cause.

5. Thomas Sturgis, apothecary. Knew deceased and producent; deponent and Andrew Nash went to them to enquire into the truth of their marriage; upon Nash's enquiring, deceased told them they were married at May-fair chapel, and she produced a certificate of said marriage.

1. Int. Has heard producent at one time did [484] all deceased's work, but after their marriage they kept a servant girl.

Witnesses for Ross.

1. Ann Panton. Knew deceased; often visited him at Smith's house at Charing-cross; deceased was about eighty-five years old; deponent knew Elizabeth Smith, who acted as his servant and is aged about forty; never heard she went by any name but Smith, till after deceased's death.

2. Edward Smith. Deceased lodged at deponent's house; and Elizabeth Smith lived with deceased about three years at deponent's house as his servant, as deponent imagined; deceased was upwards of eighty and she about fifty; she, all the said time, went by the name of Smith, but deponent afterwards heard that deceased owned her for his wife.

3. Margaret Weems. Deponent knew deceased about thirty years; visited him at Charing-Cross; Elizabeth Cooper lived with him as a servant; believes he died a widower; Smith, alias Cooper, is a likely young woman.

4. William Montgomery, merchant. Believes deceased died a widower upwards of eighty; James Smith carried deponent to his lodgings to see what a fine boy he had got, and said Smith shewed deponent a child which he owned he had by the woman then in bed in the room they were in, which woman was Elizabeth Cooper, and she and said Smith lived together as man and wife, and deponent looked on them to be lawful husband and wife, but never heard them own each other as such, or knows that they were ever so [485] reputed to be; deponent always thought she lived as a servant with deceased, and she always in his lifetime was called Smith.

5. Susanna Atkinson. Deponent was related to and knew deceased; in January, 1754, deponent went to see deceased, and several times after and at all times Elizabeth Smith appeared as his servant, and went by the name of Smith, and deponent never heard she went by any other name till after deceased's death.

6. Mary Oxenham. Deponent knew deceased and Elizabeth Smith about two years before he died, by going to live as a servant with deceased; deponent lived with him about four months, during which time said Smith lived with deceased as his housekeeper, and he constantly called her by name of Smith.

7. Thomas Caigow. Deponent first knew deceased about fifteen years ago; knew Elizabeth Smith by seeing her at deceased's lodgings; about three weeks before his death, deceased being in deponent's shop and speaking of said Elizabeth Smith, called her his housekeeper, and did not mention her as his wife; deceased was about eighty-five years old; Smith passed for deceased's servant, and was commonly reputed to be the wife of one Smith; never heard she took deceased's name till after his death.

8. John Herring. Proves entry of the baptism of a child as the son of James and Elizabeth Smith.

Dr. Bettesworth for Cunningham. No proof of affection for Ross or any other

relation ; the will is imperfect for want of execution, but it was [486] once his intention ; no departure from it ; Ross has not pleaded any thing to impeach the will ; as to the marriage, no imputation on her but with respect to an affair with one man. She never cohabited with reputation with James Smith ; after deceased's marriage he kept another servant. Pray costs.

Dr. Harris, same side. She is not proved to be a woman of bad character. Swinb. part 4, ch. 18. The stile of the will shews it is genuine. Pray costs.

Dr. Hay for Ross. Not necessary for next of kin to prove affection ; the Court has in no case given costs unless the next of kin were privy to the will ; they must shew a permanency of intention where the paper is imperfect for want of execution.

Dr. Smalbroke, same side. Prerogative, *Barnesley* against *Powell*, a long will forged, therefore proof of handwriting alone is not sufficient proof to establish a will. Johnson is an interested witness. Prerogative, *Crellins* against *Jones*, a witness rejected because she had a legacy in a will of an old gown, which she had neither received nor renounced.

Judgment—*Sir George Lee*. I was of opinion the will was sufficiently proved, for it was fully proved to be all written and signed by the testator ; and as it was complete as to the disposition, and only contained personal estate, the law did not require execution before witnesses ; [487] and as to the marriage, it was fully proved by two witnesses, who were present, and by the mutual ownings of both the parties. I therefore pronounced for the will and the marriage, and decreed administration cum testamento to Elizabeth Cunningham, as widow of the deceased and universal legatee in his will, but did not give costs.

COOK *against* COWPER. Prerogative Court, Michaelmas Term, December 3rd, 1757.—

Where a party refuses to admit a proxy or to appear, the Court will proceed in the cause as if the party had appeared and raised no opposition.

[See p. 388, ante, and p. 504, post.]

The wife, Susanna Cook, would not give a proxy nor appear. I therefore admitted a proxy from her husband alone ; and he having confessed the allegation, inventory, and account modo et formâ, as exhibited by Mrs. Cowper, the administratrix, I decreed distribution accordingly to the husband without taking notice of the wife.

MILL, Executrix of Blandford *against* BLANDFORD. Prerogative Court, By-Day after Michaelmas Term, December 10th, 1757.—A will established upon adequate proof of instructions and capacity.

Thomas Blandford made his will dated 11th August, 1755 ; appointed his wife Elizabeth Blandford, executrix, and residuary legatee, and gave his mother, Mary Blandford, one hundred pounds, but that legacy is struck out, and made Mr. Toke and Mr. James Mill, his brother in law, trustees ; deceased being ill, went for air to said Mr. Mill's house at Salisbury, and there on [488] 25th of August, 1755, the day he died, he made another will, appointed Toke and Mill executors in trust, and gave them ten pounds each, then appointed his wife sole executrix and residuary legatee, and gave therein a legacy of seventy pounds to his mother ; she survived the testator, made her will, and appointed Beata Mill sole executrix. Mill cited Elizabeth Blandford, deceased's widow, to take probate of the last will, dated 25th August, 1755. She appeared, and upon an affidavit of scripts and scrolls brought in both wills, and declared she was ready to take probate of the will dated 11th August, 1755, but opposed the last will dated 25th August, 1755. Beata Mill, as executrix of Mary Blandford, the mother of deceased and a legatee in his will, propounded the will of 25th August, 1755 ; the widow did not propound the first will or give in any plea in opposition to the last, but cross-examined Mill's witnesses.

Witnesses for Mill.

1. Robert Stillingfleet, N. P. Deponent knew deceased by sight for twenty years ; on or about 25th August, 1755, deponent being sent for, went to deceased at the house of James Mill, his brother in law, in Salisbury, and then deceased himself gave deponent verbal instructions for making his will ; deponent wrote them down and carried them home, and directly wrote the will dated 25th August, 1755, and carried it to deceased, and read it twice over to him, and asked him if he was satisfied with it ; he answered he was well satisfied with it, and should not have been easy if he had not done it ; deceased then duly executed it in presence of deponent and James Hord ; [489] deceased was then very weak, but of sound mind.

2. Int. Deceased died the same day the will was executed; deponent heard the bell toll for him about four or five hours after. 3. Int. Deceased entirely gave the instructions for the will, and he gave them to respondent between nine and eleven in the morning. 5. Int. The will was executed between two and four in the afternoon. 6. Int. Does not remember that any one but James Mill was present at reading the will; while respondent was reading it deceased said, "Brother, raise me a little higher," speaking to Mill. 7. Int. When the will was executed, deceased was very weak and was assisted in writing his name by Mill, who respondent believes held his hand. 8. Int. Believes Mr. Toke was in the house at the time the will was executed, but deceased said he would not have him for a witness.

2. James Hord, victualler. Deponent knew deceased by sight; on 25th August, 1755, as deponent believes the day was, James Mill called deponent to his house and carried deponent to a bed chamber, where deceased was sitting up in his bed, and Robert Stillingfleet was then finishing the will; deceased asked Mill who deponent was; Mill told him deponent was a neighbour who was come to witness the will; Stillingfleet directed him, and deceased did execute it; deponent cannot say whether deceased was or was not in his senses as he was very near death; deponent signed the will as a witness.

5. Int. It was executed in the afternoon. 7. Int. Deceased was in a weak state, but was able to sit up and write his name without assistance; respondent heard he died soon after.

[490] *Judgment*—*Sir George Lee*. I was of opinion that the deceased's capacity, his giving instructions himself for his will, his approbation and execution of it, were sufficiently proved by these witnesses, and the more especially as Robert Stillingfleet was a sworn notary; and therefore I pronounced for the will dated 25th August, 1755, and decreed probate to the widow and executrix Elizabeth Blandford.

SEROCOLD AND HUNTER *against* HEMMING. Prerogative Court, 2nd Session, Hilary Term, January 31st, 1758.—A codicil may revive a first will by a direct reference to the instrument, and revoke by implication the will in existence of the latest date.—It is not the act of revival that revokes the last will, but the first will after it is revived.—Wills made in the West Indies are not within the statute of frauds.

[Referred to, *In re Smith*; *Bilke v. Roper*, 1890, 45 Ch. D. 637.]

Dr. Simpson for Serocold and Hunter. Richard Heming, Esq., made his will in London, dated 23d January, 1753, attested by three witnesses, and appointed Mr. Hunter, Mr. Serocold, Mr. Samuel Hemming his brother, Mr. Whitehorn, Mr. Tucker, Mr. Clark, and Mr. Samuel Hemming his eldest son, executors. On the 7th March, 1753, deceased made another will at Jamaica, which he left behind him there when he returned to England, where he died; the last will was attested by five witnesses, and therein he appointed Mr. Rose Fuller a new executor, and left out Mr. Whitehorn and his brother Samuel Hemming, but the rest of the executors were the same as in the first will. By the will of 23d January, 1753, deceased charged all his debts, legacies and annuities upon his real and personal estate, gave to his two younger sons four thousand pounds sterling each charged upon his real and personal estate, and to be paid [491] them at their ages of twenty-one years, and added, "It is my will and mind that if they or either of them should die under age, his share shall lapse to my estate for the benefit of my eldest son." This clause is omitted in the last will; he gave legacies to his daughters, with clauses of lapse in like manner; to Margaret Hawksworth five pounds a-year, which in the last will is made twenty pounds a-year; all his plantations in Jamaica and his real estate in Britain or elsewhere, and his personal estate, subject to his debts, legacies and annuities, to his eldest son. In the last will he manumitted two of his slaves, and give them fifteen pounds a-year each for life; these were the only, or at least the most material variations, between the two wills. At the bottom of the first will (which he kept uncanceled), immediately under his name and seal affixed to the last sheet, he wrote with his own hand thus:—

"London, 16th October, 1755; I likewise give to Mrs. Lucretia Luxford twenty-five pounds a-year for her life, and to my black servant, Peter Saville, ten pounds

a-year for his life, the said annuities to be paid out of my estate by my executors above named. Witness my hand,

"Witness—John Serocold, J. Straw."

"RICHARD HEMMING."

N.B.—The said Serocold the witness was one of the executors in both wills.

On the 3d November, 1755, probate was granted of this will with the said codicil at the bottom thereof, to Mr. Serocold in the Prerogative Office, and on the 10th of said month probate was granted thereof to Mr. Orby Hunter, another of the executors; Mr. Clark took probate of the last will [492] dated 7th March, 1753, at Jamaica, and sent over to the other executors an authentic copy; upon receipt thereof, Mr. Hunter and Mr. Serocold came to the Prerogative Office, and offered to bring in the probate of the first will and the codicil, and to take a new probate of the last will and said codicil of 16th October, 1755. Mr. Samuel Hemming, deceased's eldest son, and an executor in both wills, entered a caveat, and prayed that the probate of the first will, with the codicil of 16th October, 1755, might be confirmed, and insisted that the codicil of 16th October revived the will of 23d January, 1753, and, consequently, that the latter will of the 7th March, 1753, was revoked. The parties agreed the facts in an act, and the point was brought on to hearing upon an act of court only, which was read, and the two wills; and Dr. Hay, who was counsel for Hemming, admitted that Dr. Simpson had fairly stated all the facts in his opening.

Dr. Simpson's argument for Serocold and Hunter. The single question is, whether the first will is revived by the codicil of 16th October, 1755; a revival of the first will be a revocation of the second will; where a will is revoked by operation of law, a parol reviver will be sufficient; but where both the wills are in being, there must be an act done to revive or republish the first will. If a will is cancelled, it must be revived by an express act. *Lewis and Watts*, (u) Delegates, 1738. [493] *Cotton's case* (1 Lee, 513), in *Vernon*, was denied to be law. *Lewis and Bulkley*, Delegates. The memorandum of 16th October is not styled a codicil, does not confirm the will of 23d January, does not express an intention to revive that will; testator's intention is the grand rule; it does not appear that testator intended to revive the whole of the first will. There is a flat objection, viz. that both the wills dispose real as well as personal estate, and, therefore, the last will attested by five witnesses cannot be revoked by the memorandum, which is only attested by two witnesses, and one of them is an executor, who could not depose to it. Perhaps it will be said the statute of frauds does not extend to the plantations; but in these wills mention is made of lands in Great Britain.

Dr. Smalbroke, same side. If the testator has revived the first will, the second is revoked. Prerog. *Helyar and Helyar* (1 Lee, 472).

Dr. Hay contra, for Hemming. We pray that probate of the first will and the codicil may be confirmed to the executors; they pray that probate of the last will with the codicil may be granted to the executors, and that the probate which has been granted may be revoked. Swinburn says that parol alone will revoke a former will. Crok. Eliz. 493, *Beckford and Farnicott*. Deceased had the first will in view when he wrote the memorandum at the bottom of it; he left the last will in Jamaica; the memorandum begins "I likewise give," which are words of reference to the will written over them; the words [494] "my executors," above named, must mean the executors in the will written above. Prerog. *Friend and Burgoyne*. The statute of frauds does not extend to implied revocations; determined so at the Council Board.

Dr. Bettesworth, same side. Deceased could not intend that the memorandum of 16th October should operate as a codicil to the last will, to which it has no reference, and it does not appear to have been under his consideration. *Hoyle* against *Clark*, 3 Mod. 218. Roll's Abridgement, 213. *French's case*, 2 Vern. 116. *Strode* against *Russell*, Comyn, 381.

Judgment—*Sir George Lee*. I was of opinion that the first will was revived by the codicil, and consequently that the last will was thereby revoked. "The executors above named" could be only those appointed by the first will, and yet, unless the first will was established, as the executors were not recited by name in the codicil, such of them as were appointed only by the first will could not act even with respect to the codicil, for they were not executors if the first will continued revoked, and,

(a) *Lewis v. Watts*, Deleg. 9th Feb., 1738. The Judges Delegates present were—Mr. Justice Fortescue, Mr. Justice Thompson, Sir Henry Penrice, Sir Edward Isham, Dr. Walker and Dr. Foulkes.

therefore, this was such a reference to the first will as would revive it at least as to the personal estate, which alone was in question in this court; and if the first will was revived, that would revoke the last will; and as to personal estate, a proper act done under a man's hand only without three witnesses, would be sufficient to revive a will that had been revoked, and therefore, I had no occasion to consider the statute of frauds upon this point, it being a case that did not fall within that statute, and which besides had often [495] been held at the Council Board not to extend to the plantations; but supposing the wills had related to real estate only, it might well be made a question whether it was necessary that the act of revival should be attested by three witnesses, for revivals are not mentioned in the statute of frauds, and it is not the act of revival that revokes the last will, but it is the first will after it is revived that revokes it, and that first will being attested by three witnesses seems to satisfy the intention of the statute. Upon the whole, I pronounced that the first will was revived by the codicil of 16th October, 1755, and confirmed the probate of said first will and codicil heretofore granted to Mr. Serocold and Mr. Hunter, two of the executors named in the first will.

RAYMOND *against* THE BARON VON WATTEVILLE. Prerogative Court, 3rd Session, Hilary Term, February 7th, 1758.—When a certificate to a decree for answers has been discontinued, it is still competent to the proctor having discontinued it, to object to answers.—Answers directed to be reformed.—A new requisition allowed to issue to Germany.

[See on other points, p. 358, ante, and p. 551, post.]

Dr. Bettesworth for Von Watteville. Dinah de Laris, alias Von Larish, formerly Raymond, died a widow at Hernhutt in Germany, on 25th May, 1756; made her will on 26th April, 1756, and appointed Baron von Watteville her universal heir or executor. She resided at the time at Hernhutt, in Upper Lusatia. Pursuant to the laws of that country, in the court or before the magistrates of Hernhutt, she recognized her will the day of the date thereof, and deposited it in the said court on 9th August, 1756. Baron von Watteville took probate in the Prerogative Court [496] of an authentic copy of said will, as executor therein named. In the 1st Session, Michaelmas, 1756, Jones Raymond, Esq., brother and one of the next of kin to deceased, cited him to propound and prove the will by witnesses, or shew cause why administration should not be granted to him as one of the next of kin. On the 2d Session of Michaelmas Term, Fountain appeared for Watteville, and brought in the probate. On the 4th session he confessed Crespigny's interest, who appeared for Raymond. On the By-day, Crespigny opposed and Fountain propounded the will, and prayed decree against the other next of kin; and Crespigny prayed that Fountain might be assigned to bring in the original will; on the 4th Session, Hilary Term, 1757, Crespigny's petition was rejected, and Fountain's allegation propounding the copy was admitted, and he immediately prayed a commission to examine witnesses to be directed to the magistrates of Budissen, in Germany, without staying for Raymond's answer; but at Crespigny's desire the requisition for examining witnesses did not issue under seal till the 24th March, 1757, and was made returnable 1st Session, Trinity, 1757. In the 4th Session, Easter, the answers not yet being given in, Fountain prayed a new requisition, being apprehensive the first would not be returned in time; the second requisition did not issue till the 25th August, 1757, returnable 1st Session, Michaelmas. On the 2d Session, Trinity Term, 1757, the decree was for answers returned, but no appearance given to it till the 4th Session, Trinity, and then Crespigny was assigned to give them in on 28th July following, but the assignation was continued on till the 3d Session, Michaelmas, 23d November, 1757, when they were given in; the [497] requisition has been continued on to this time. In the 1st session of this Hilary Term, Fountain objected to the answers; we are now upon fuller answers, and we pray a new requisition, presuming that the former, which has not been returned, was not executed on account of the war in Germany.

Dr. Hay for Raymond. Deceased, who died a widow at Hernhutt 25th May, 1756, left Jones Raymond, Esq., her brother, and Mrs. Burrell and Mrs. Glanville her sisters and only next of kin. Raymond cited Watteville to prove the will; Watteville's allegation pleading a copy of said will was admitted on 25th February, 1757, and a requisition for examining witnesses, and another for an inventory, were then decreed to the magistrates of Budissen; the last of them is returned, but the inventory is not

full. Raymond's answers were given in on the 23d November, 1757, and Fountain was to prove on the 23d January, 1758; upon that day he prayed fuller answers, but the certificate of the decree for answers having been discontinued from 23d November, he cannot now object to the answers; he prays a new requisition; there is no satisfaction given to the Court that the former requisition has not been executed.

Per Curiam. It being a matter of practice, I asked the opinion of the registrar and proctors whether Fountain, having discontinued the certificate of the decree for answers, could now object to the answers as not full? And they being of opinion that by practice he might, and saying that it was [498] common to discontinue the certificate after an appearance had been given to the decree, I allowed his counsel to object to the answers.

Allegation. 1st article pleads factum of the will, and capacity.

2d article. Deceased lived at Hernhutt and recognized her will before the judge and officers of Hernhutt, and she deposited it with them in the Court.

3d article. She died on 25th May, 1756, and then the officers of the Court secured her effects.

4th article. Baron von Watteville took on him the execution of the will, and the Court then delivered to him two authentic copies of the will.

5th article. The copy propounded is an authentic copy of the deceased's will remaining in the Court at Hernhutt.

Answers to the 1st, 2d, 3d, 4th and 5th articles.

Deceased was a natural-born subject of England, and a widow; deponent and his sisters are her only next of kin, for whom she had great affection. Deceased became an Hernhutter, and went to Germany; respondent has not seen the original will, and cannot answer to it, but believes it was not signed by her, because her maiden name, Raymond, is not rightly subscribed to it; Watteville is an Hernhutter; gives a long account of them and says they are a wicked sect, and that they have erected courts by their own authority contrary to law, and that no faith is to be given to the acts of their courts, as being absolutely under the command of Count Zinzendorf, and his son-in-law, Baron von Watteville.

[499] Dr. Bettesworth objected to all that part of the answer in which the Hernhutters and their tenets were abused, as foreign to the cause, and containing scandalous matter, and also to that part which suggested affection to her relations, because there was nothing in the plea to lead thereto.

Judgment—Sir George Lee. I was of opinion that affection to her relations might be properly suggested as a reason for his believing it was not the deceased's will; but I ordered the abusive matter to be struck out as foreign to the cause and improper, and condemned Raymond in 13s. 4d. costs, according to style, and ordered him to give in other answers, and declared that, considering the present state of things in Germany, I would grant a new requisition, and assign a new term probatory as soon as the answers were brought in.

MERCER against MORLAND. Prerogative Court, 4th Session, Hilary Term, February 18th, 1758.—Where administration is contested by two persons of the whole blood in equal degree of relationship, the rule is to grant it to the one who unites the majority of interests.—But where the contest is between one of the whole-blood and one of the half-blood, the one of whole-blood is to be preferred.

[See p. 506, post.]

Dr. Bettesworth for Thomas Mercer. Edward Mercer died a widower, intestate, without children or parents; left William Mercer, a brother of the whole-blood, and Thomas and John Mercer, brothers of the half-blood, his only next of kin. William Morland, a creditor, entered caveat, which was warned, and then Smart appeared for William Mercer and alleged he was duly sworn administrator, and exhibited an inventory and prayed ad-[500]-ministration to be granted to him. Smith appeared for Thomas Mercer, and alleged him to be a brother to the deceased by the half-blood. Interests on both sides were confessed, and the court assigned on grant of the administration; John Mercer, the other brother of the half-blood, by his proxy prays the administration may be granted to Thomas, and Morland, a creditor by note in 80l., joins in the same prayer. The inventory amounts only to 230l. or thereabouts. Thomas and John Mercer are entitled to two-thirds of the clear effects.

Dr. Hay for William Mercer. Deceased died on the 4th January, 1758; William was sworn administrator and gave security in 500l., but the administration has not been yet decreed; it has been usual to grant it *primo petenti* when the relationship is equal; the securities have justified.

Judgment—Sir George Lee. I declared that when the contest for an administration was between two persons in equal degree of the whole blood, (a) the general rule had been to grant it to that person in whom the majority of those entitled to distribution concurred; but that rule did not hold when the contest was between one of the whole-blood and one of the half-blood, for in that case the whole-blood was preferable in the grant of administration to the half-blood, though the majority of interest concurred in the latter, unless material objections could be proved against him of the whole-blood; and so it was held in the case of *Webb and Griffin*, Prerog., 7th March, 1727, and said there to have been often so determined; but it being suggested [501] that very material objections could be shewn against granting administration to William Mercer, I gave time to exhibit affidavits for that purpose (*vide infra*, p. 506).

BOXLEY AND FRENCH *against* STUBINGTON. Prerogative Court, Hilary Term, February 18th, 1758.—In a contest respecting the validity of a married woman's will made under a power, the Court will decree a monition against the trustee under the marriage articles, though he may not be a party to the suit to bring in the counterpart of the articles which were in his possession.

[See further, p. 537, post.]

Mary Stubington, deceased, wife of William Stubington, had power by marriage articles to make a will and dispose of one thousand pounds; she accordingly made her will on 4th September, 1756, and appointed Messrs. Boxley and French her executors. The husband opposed the will. The proctor for the executors alleged that the original marriage articles were in the hands of the husband, and prayed that he might be assigned to bring them into court, which the husband's proctor opposed, and alleged that the counterpart of the articles signed by the husband were in the hands of Mr. Winter, her trustee.

Per Curiam. I thereupon refused to assign the husband to bring in the original articles, but decreed a monition against Winter (though he was not a party in the cause) to bring in the counterpart, which he did accordingly.

[502] **TURNER, BY HER GUARDIAN** *against* HALL. Prerogative Court, By-Day after Hilary Term, February 25th, 1758.—A party called upon to bring in an inventory and account and see portions allotted: account objected to—objections overruled.

Thomas Hall died intestate in December, 1755, leaving Ann Hall, his widow, who administered, and Sarah Turner, a minor, his granddaughter and only next of kin; she by her guardian called the widow to bring in inventory and account, and to see portions allotted; inventory and account given in; the estate amounted upon a commission of appraisement to 758l. 12s. 0d.; the guardian excepted to two articles in the account; first, to allowing thirty-six guineas for nine days' attendance of four commissioners at a guinea a-day each; secondly, to allowing forty pounds to Mr. Windus, an attorney, for settling deceased's books, making out his bills, and collecting in his effects.

Per Curiam. But I allowed both articles: the first, because a guinea a-day is the usual allowance to a commissioner; the second, because Mr. Windus made affidavit that the trouble he had had well deserved 40l. and he should insist on being paid so much.

LORD CARPENTER *against* SHELFORD AND OTHERS. Prerogative Court, By-Day after Hilary Term, February 25th, 1758.—Administration cum testamento annexo granted to a judgment creditor in preference to other creditors.

Dr. Hay for Young. Sir Harry Pope Blount appointed his wife, Dame Ann Blount, executrix and residuary legatee; she has renounced Mark Young, a creditor by judgment in 210l. and 2l. 10s. costs, prays administration cum testamento; he has exhibited a copy of his judgment. Edward Law-[503]-rence, a creditor by bond in 200l. and interest, and William Mulliners, a creditor by bond in 100l. and interest,

(a) *Vide Earl of Warwick v. Greville*, 1 Phill. 123.

consent that administration should be granted to Young. Messrs. Reyniers, creditors by bond in 150l., pray to be joined with Young in the administration. Lord Carpenter, by virtue of a bond from Sir Harry to his father in 800l., penalty for payment of an annuity of 200l. during Sir Harry's life, prays that administration cum testamento may be granted to him.

Dr. Simpson for Lord Carpenter. Deceased granted an annuity of 200l. a-year for his own life to the late Lord Carpenter by a demise of lands in 1746 for 99 years, and by way of collateral security gave him a bond in 800l. penalty; arrears of the annuity are unpaid; Young is only a nominal judgment creditor, for he has assigned his judgment to one Long, and therefore shewing the judgment is not sufficient evidence.

William Nicolls made the affidavit that from what Cooper, Long's attorney, said to him, he believed Young had assigned the judgment to Long.

Per Curiam. But there being no positive proof of such assignment, and Young therefore standing before the court as a creditor of a superior nature to all the rest, and Lord Carpenter not appearing to have any interest, for he had not sworn any arrears of the annuity were due to him, I decreed administration cum testamento to Young, the judgment creditor, who consented to enter into articles to pay pro rata.

[504] *COOK against COWPER*. Prerogative Court, By-Day after Hilary Term, February 25th, 1758.—An administratrix monished to pay the wife's distributive share in the effects of an intestate to the husband, without her joining in any receipt, she having been divorced from her husband and having absconded.

[See pp. 388 and 487, ante.]

Dr. Hay for Cook. Henry Cowper, deceased intestate, left Mary his widow, and Susanna Cook his only child. On the 8th April, 1756, administration was granted to the widow. John Cook, the husband, he being divorced by sentence in the Consistory Court of London, and she absconding, commenced a suit against the administratrix in right of his wife, to give in an inventory and account and see portions allotted. On the 4th Session, Michaelmas Term, 1757, the court decreed distribution, and allotted for Susanna Cook's share 198l. 11s. 10½d. and ordered that the husband should give bond with sureties to refund in case debts should afterwards appear. The administratrix is willing to pay the said portion, but declines doing it unless the wife joins in the receipt. The husband is entitled to this money, and though in the common cases the wife is required to join in the discharge for the money, yet in this case that cannot be expected, since she is divorced from him and absconds.

Dr. Smalbroke for Cowper. Cook's proctor prays that Cowper may be admonished to pay the money to John Cook the husband. This is not in the usual form.

Judgment—Sir George Lee. But as I had been of opinion he was entitled to carry on this suit in his own name in right of his wife, and as he would be deprived of this money, [505] the title to which vested in him as husband, if it was not to be paid without her receipt, which could not be obtained under the circumstances of this case, I decreed Mrs. Cowper to be admonished to pay the wife's distributable share to the husband, and that he should give a discharge for it as received in right of his wife, and that the minutes of the court as well as the monition should specially state the circumstances of the case; and as Mrs. Cowper had done properly in taking the opinion of the court upon this point, I allowed her to deduct her expences for this motion out of the estate.

SMITH against SMITHSON. Prerogative Court, By-Day after Hilary Term, February 25th, 1758.—Further answers decreed after publication, and when the cause stood for hearing on the second assignation.

After publication and when the cause stood assigned ex 2da si non, I decreed fuller answers, though objected to as too late; but as the cause stood si non, the adverse party might have pleaded on this day, and consequently the cause was open for all purposes.

[506] *MERCER against MORLAND*. Prerogative Court, Caveat Day, March 17th, 1758.

[See p. 499, ante.]

Upon this day no affidavits being exhibited to impeach the character of William Mercer, the brother of the whole blood to the deceased, but on the contrary there being an affidavit read of two persons who gave him a good character, I decreed

administration to pass under seal to William Mercer, and condemned Thomas Mercer in costs, to be taxed the first session of Easter Term next.

MILLER against SHEPPARD AND OTHERS. Prerogative Court, Caveat Day, March 17th, 1758.—An executrix named in a codicil has a right to propound the will as well as the codicil, inasmuch as the codicil was a part of the will and gave her an interest in it.

[See p. 520, post.]

Catherine Hills, deceased, made her will on the 19th March, 1763, duly attested; after giving several legacies she appointed Thomas Wollascot, Esq., and John Sheppard, Gent., her executors, and gave the residue of her estate to them in moieties. On the 20th January, 1758, she made a codicil attested by three witnesses, in which she took notice of her will, and recited that since the making thereof Mr. Wollascot was dead and Mr. Sheppard was grown old, and she being desirous to benefit her dear friend Ann Miller, she therefore made the codicil, wherein she gave to said Ann Miller 3000*l.*, appointed her, together with said John Sheppard, executors of her will and codicil, which she declared to be part of her will, and gave [507] to them two, the residue of her estate in moieties. Miller was not mentioned in the will of 19th March, 1753. Upon deceased's death, Stevens, for Sheppard, entered caveat. Smart appeared for Ann Miller. Scripts and scrolls were ordered and brought in by Miller and Sheppard. Collins appeared for William Norris and Mary Rowley, who were confessed to be cousins and next of kin to deceased. Sheppard prayed probate of the will alone, and opposed the codicil; the next of kin likewise opposed the codicil, but did not declare whether they would oppose the will or not. Ann Miller prayed probate of the will and codicil, and would have propounded both, but Sheppard and the next of kin insisted that she had no interest under the will till she had proved and established the codicil, and therefore that she must first propound the codicil.

Judgment—Sir George Lee. I was of opinion she had a right to propound both the will and the codicil if she thought proper, for if the codicil was good it was a part of the will, and gave her an immediate interest in the will; and if she propounded and proved the codicil alone, the next of kin might afterwards oppose the will and force her into a second suit, which would be unreasonable; as to Sheppard, the executor in both will and codicil, his conduct was not very intelligible, for Miller's proving the will against the next of kin was doing his business for him, but it made it probable that if he alone should propound the will there might be collusion between him and the next of kin to set it aside.

I therefore decreed that she should be at liberty to propound and prove the will and codicil together.

[508] *PITT, BY HIS GUARDIAN against PITT.* Prerogative Court, 1st Session, Easter Term, April 12th, 1758.—An administratrix to the effects of a rope-maker directed to include in her account the profits arising from four apprentices, and to give security to the full amount of the inventory. She, however, was allowed her claim for mourning.

Dr. Hay for the minor. Henry Pitt died in 1755, a widower intestate, left James Pitt his son, aged fifteen; in December, 1755, administration was granted to Maidson Pitt, his aunt, who he chose his guardian; the minor afterwards chose John Davis his guardian, who cited Maidson Pitt to exhibit an inventory and account, and to give better security, otherwise to shew cause why administration should not be revoked and granted to him for the use of the minor. The deceased was a rope-maker in the king's yard at Woolwich and as such had four apprentices; she gave in an inventory, but omitted a stack of clover which sold for 10*l.*, and a horse which sold for thirteen guineas, and also the profits arising from three of the apprentices; in a further inventory she charged herself with the clover and horse, and admitted she had received wages earned by said three apprentices in the yard to the amount of 16*l.* 19*s.* 3*d.* We insist that she has acted fraudulently, and pray that her administration may be revoked, and that she may be obliged to charge herself with the money earned by the three apprentices, and may be condemned in costs.

Dr. Smalbroke, for Maidson Pitt. Richard Weaver, one of the four apprentices, was bound to deceased in 1755, and by his indentures he is bound to deceased, his

heirs, executors, administrators, and assigns, but the other three apprentices who were bound in 1752 are bound to the deceased only, and therefore their apprenticeship to the [509] deceased expired with his death and she has taken them as her apprentices. She admits she has received upon their account 1611. 17s. 3d., which she claims as her own.

Dr. Hay for the minor. The whole inventory amounts only to 395l. 16s. 8d. She now confesses she has omitted 23l. 13s., but our grand objection is that she has not charged herself with the profits of three apprentices, the moiety of which, viz. 1611. 19s. 3d., she admits she has received and applied to her own use; the variation in the indentures makes no difference, for all the apprentices are to serve seven years.

Dr. Simpson, same side. The whole sum omitted is 185l. 12s. 3d., and she has craved an allowance of 14l. for first and second mourning for herself, which we say ought not to be allowed.

Salk. p. 66, *The King against Pecke*, justices of peace made an order upon executors to maintain an apprentice bound to their testator, the Court quashed the order, because it did not appear that the deceased had left effects; but Holt, C. J., said executors must maintain the apprentice of their testator if he leaves sufficient assets, and that by custom of London executors must instruct the apprentice to turn him over to one of the same trade. Salk. fol. 61, the same. The Court has power to revoke this administration, for an administrator durante minoritate is only a trustee.

Judgment—Sir George Lee. I was clearly of opinion that she, who did not belong to the yard, could have apprentices [510] there only as administratrix to the deceased, and that the profits of them belonged to his son as his representative, for whom she was only a trustee, and I therefore decreed her to charge herself with the profits arising from all the apprentices, and with the clover and horse, but allowed her claim for mourning, and did not revoke the administration, but ordered her to give security to the full amount of the inventory, and condemned her in the costs of the motion.

AKERMAN AND NORRIS *against* GYBBON. Prerogative Court, Easter Term, April 12th, 1758.—A declaration held to be sufficiently full.

Thomas Farrant died in 1741, made a will, but no executor or residuary legatee; was a bachelor; left Thomas Gybbon his nephew, Mary Franklyn and Elizabeth Church and others, his nieces and next of kin; by consent of Thomas Gybbon, administration cum testamento was granted to Mary Franklyn in May, 1741. She afterwards died, leaving great part of the estate unadministered, and in December, 1748, administration de bonis non cum testamento was granted to Elizabeth Church. On the 10th October, 1749, Thomas Gybbon died intestate, and administration to him was granted to Jane Gybbon his widow. In November, 1757, Elizabeth Church died, and then Jane Gybbon entered caveat in the goods of Thomas Farrant and Elizabeth Church. Isaac Akerman and William Norris, executors of Church, warned the caveat entered as to her effects; probate of her will was decreed to her executors, they undergoing a [511] monition to exhibit an inventory of the effects of Thomas Farrant remaining in the hands of Elizabeth Church at her death. On 4th Session, Hilary Term, 1758, they gave in a declaration. On the By-day after the said term, Gybbon's proctor alleged the declaration was not full, because it contains only an account of such effects of Farrant's as now remain in the hands of Church's executors.

Judgment—Sir George Lee. But it appearing on the face of the declaration that they swore they knew of no other effects of Farrant's than what they had set forth in the said declaration, I held that it was sufficiently full.

CHRISTMAS HUETT *against* DASH. Arches Court, 2nd Session, Easter Term, April 17th, 1758.—The statute 5 & 6 Edw. 1, c. 4, leaves nothing to the discretion of the judge, but the duration of the suspensions ab ingressu ecclesiæ.

(An Appeal from Winchester.)

Dr. Hay for Robert Dash. Robert Dash cited Christmas Huett to answer to articles for brawling, chiding and quarrelling in the church of Wickham in Hampshire pleaded that on Sunday the 3rd of August, 1755, the said Christmas Huett called Dash "rogue and rascal" and other names, and afterwards in the vestry church-porch [512] abused Dash and others. Witnesses were examined, and on 12th November 1756, the judge pronounced that Huett was guilty of brawling, &c. on the 3d of April

and decreed him to be suspended ab ingressu ecclesiæ for a month, and condemned him in 6l. costs, from which decree Huett has appealed.

Dr. Simpson for Huett. We shall shew from their witnesses, for we have examined none, that Huett was the aggressor.

Witnesses for Dash.

1. Thomas Webb. Huett is a layman; on Sunday, 3rd August, 1755, in the church of Wickham, the deponent heard Dash say to Huett, "You are a rascal;" Huett replied, "You are a rogue," and Dash offered to fight Huett for two guineas.

2. Thomas Cutler. After church on 3d August, 1755, the deponent heard Dash say to Huett in the church-porch he would fight him for two guineas; there was a great quarrel between them, but he knows not which began.

3. John Swan, parish clerk of Wickham. After church on a Sunday in August, 1755, the deponent heard a dispute in the church between Robert Dash and Francis Huett about a poor's rate, but the deponent did not hear Christmas Huett say anything in the church, but there was very abusive language passed in the church-porch between Christmas and Francis Huett and Robert Dash: the deponent cannot set forth the particular words used or who was the aggressor, but he heard Dash offer to fight Christmas Huett.

[513] 4. John Ward. On a Sunday in the summer of 1755, deponent heard a great quarrel in Wickham church-porch, but did not hear the particular words, but heard Dash tell Christmas Huett he would bring a man to fight him if he would fight; deponent did not hear Huett's answer; deponent did not hear Huett call Dash a rogue, &c., but believes they quarrelled in the church-porch; Dash was overseer of the poor.

3. Int. Does not know who began the quarrel.

5. Francis Huett. Christmas Huett is the deponent's son, and is a sober well-behaved man; on Sunday, 3d August, 1755, the parishioners were assembled at Wickham church, and talking of the poor's rate; Dash abused Christmas Huett very much, and offered to fight him; Huett used no angry words to Dash.

Dr. Simpson for Huett, urged that the churchwardens should have presented Huett at the visitation, and they should have promoted articles against him, and not Dash, who was a party concerned and was the aggressor; that he was more the object of punishment than Huett, for all the witnesses proved that he abused Huett, and offered to fight him, and Francis Huett says Christmas used no angry words; two witnesses do not depose to particular words of brawling, chiding, and quarrelling; the statute meant to punish only those who intended to make a disturbance, and there ought to be a clear evidence of such intention, which there is not in this case. By the civil law no action lies against him who only replies to an abuse, because he received the first provocation; the judge below is not warranted for suspending [514] for so long a time as a month under the circumstances of this case, nor in giving costs.

Dr. Hay, *contrâ*, cited the case of *Foot against Richards and Bartlett*, Arches, 23d February, 1753, where it was held that a person cannot justify brawling by proving another person also brawled.

Judgment—*Sir George Lee*. I was of opinion that the statute not having directed who should prosecute, any party whatever might promote articles; that Huett might have articulated against Dash if he had thought proper, but he could not justify himself by shewing that Dash was the aggressor, because the statute had not allowed any such defence, nor left any thing to the discretion of the judge but the duration of the suspension, but had expressly directed that any person who was proved to have brawled, quarrelled, &c. in the church or church-yard should be suspended; that in this case the witnesses had all, except Francis Huett, proved that Christmas Huett and Dash had mutually quarrelled in the church-porch, and therefore had brought him within the statute. I could not think a month an unreasonable time for the suspension; it commonly was six weeks; and as to costs, they are always given when a person is found guilty upon this statute, and these were small costs. I therefore affirmed the sentence, remitted the cause, and condemned Christmas Huett in 14l. costs.

[515] N.B.—Articles were promoted against Francis Huett, the father of Christmas, by Dash, for brawling also at the same time and place; which cause Dr. Simpson admitted was exactly the same; I therefore heard a witness read, and gave the same sentence and costs in that cause likewise.

ARGAR against HOLDSWORTH. Arches Court, 3rd Session, Easter Term, April 24th, 1758.—A clergyman may be prosecuted by any one for neglect of his clerical duty.—A licence from the ordinary is a legal authority to a clergyman to solemnize a marriage, but if a clergyman suspects fraud, delay may be justifiable for the sake of inquiry.

[Referred to, *Reg. v. Bishop of Oxford*, 1879, 4 Q. B. D. 266, 582; *Re v. Dibdin*, [1910] P. 75.]

(Appeal from Exeter.)

Dr. Simpson for Argar. William Argar promoted articles in the Court of the Archdeacon of Totness, against Henry Holdsworth, vicar of St. Saviour's in Dartmouth, for neglecting or refusing to solemnize marriage between the said Argar and Jane How, both of the parish of St. Saviour's, and having a licence to be married from the Chancellor of Exeter. On 18th September, 1756, the articles were admitted at Totness, pleading, 1st, that Holdsworth is a clerk and vicar of St. Saviour's in Dartmouth; 2nd, that by canons, &c. every minister is to obey his ordinary's licence, &c.; 3d, that every minister is obliged by law to marry such of his parishioners as have resided a month in his parish; that the parties named in the licence are his parishioners, and have resided a month, and have obtained a licence to be married together; 4th, that Argar had a proper licence to marry How, and acquainted Holdsworth therewith, and desired him to marry them, but he refused; 5th, that he has thereby incurred ecclesiastical censures; 6th, that he is subject to the [516] jurisdiction of the Court at Totness; 7th, pray he may be censured, &c. From admitting these articles Holdsworth appealed to the Chancellor of Exeter. On 4th March, 1757, the Chancellor pronounced for the appeal for admitting the 3rd and 4th articles, as not concludent, &c. and rejected said articles, but admitted the rest, and retained the cause, with costs. Argar appealed to the Arches from rejecting the third and fourth articles, and retaining the cause, and condemning him in costs, and Holdsworth did not adhere to the appeal.

Dr. Bettesworth for Holdsworth, said that Argar should have brought a suit at law for damages, or if any suit lay in the Spiritual Court, it should have been brought before the Chancellor of Exeter, who granted the licence; that the licence was not exhibited, without which the articles were not concludent; that a minister is not obliged by law to marry by licence, but is only permitted so to do, and if he has reason to think it was fraudulently obtained, he ought to refuse to marry in consequence of it, which was the case with Holdsworth; and, therefore, the judge ought to have rejected all the articles.

Judgment—*Sir George Lee.* I said that possibly Argar might have an action for damages, but nevertheless the clergyman might be prosecuted by any one for neglect of his clerical duty; that the suit for such neglect might be brought in order to his being admonished or suspended in the Archdeacon's Court, notwithstanding the licence was granted by the Chancellor; that the licence might be exhibited at any [517] time before conclusion of the cause; that I was of opinion a licence was a legal authority for marriage, and that a minister was guilty of a breach of his duty who should refuse to marry pursuant to a proper licence from his ordinary. If Holdsworth had reason to believe the licence was obtained fraudulently, and only delayed to gain time for inquiry, that would be proper matter for his defence; but surely the Chancellor had acted strangely in rejecting the articles which alone pleaded the facts relative to this cause, and admitting those articles which pleaded only the general law. I, therefore, pronounced for the appeal, and remitted the cause to the Archdeacon's Court at Totness, and condemned Holdsworth in 25l. costs.

POWELL against BURGH AND OTHERS. Prerogative Court, 3rd Session, Easter Term, April 26th, 1758.—In a testamentary suit, the citation of a party by an erroneous christian name, there being no doubt as to the identity of the person holden to be sufficient.

Dr. Bettesworth, for Mary Powell. Mary Powell, a creditrix, cited Mary Burgh, wife of Henry Burgh, clerk, Emmy Powell, wife of John Powell, Esq., and Ann Williams, widow, the daughters and only next of kin of Godfrey Harcourt, of Wirewoods Green, Esq., widower, deceased, to bring in his will if he made any, and to [518] take probate if they or any of them are executors therein, or if he died intestate to take administration, or to shew cause why it should not be granted to said Mary Powell, a creditrix, and to exhibit an inventory. Farrer appeared for Mary Burgh

and Ann Williams, and declared that deceased died intestate, and that they would not take administration. Smith appeared for Emmy Powell, under protestation, and alleged that she was cited by a wrong name, her true christian name being Amy, and not Emmy, and prayed to be dismissed with costs.

Dr. Simpson for Amy Powell, insisted that she being cited by a wrong christian name, ought to be dismissed, and cited the following cases:—Arches, Easter Term, 1719, *Barwood* against *Lark*, Barwood was cited by name of Burwood, dismissed for the misnomer, and held that a misnomer ought to be alleged before issue joined. Arches, 2d July, 1735, *Johnson* against *Richardson*, Richardson promoted articles against Johnson by the description of rector of Melford, in the county of Norfolk, for brawling in the church-yard of Melford; issue joined, witnesses examined, and sentence given against Johnson at Norwich; he appealed to the Arches here; objection was taken that he was wrong described, for he was rector of Melford in Suffolk, and there is no place of the name of Melford in Norfolk; upon this objection the whole proceedings were set aside, and Johnson dismissed from the cause with costs. Prerogative, 11th December, 1732, William Becker, deceased, Kenrick, a creditor, cited the widow to take administration; she appeared [519] and alleged that the deceased made a will, and appointed John Ayres executor, Kenrick cited him by name of John Ayres, he appeared under protestation, and alleged his name was Eyre; he was dismissed with costs.

Judgment—Sir George Lee. I thought the cases cited did not come up to the present: the two first were upon prosecutions where greater strictness is required, and that case of Eyre, in the Prerogative, was plainly a wrong name, and it did not appear that he had any addition whereby to be ascertained; but in the present case it was doubtful whether Amy and Emmy were not the same name; but be that as it might, here was such a description as left no uncertainty as to the person meant to be cited, for she was described to be the wife of John Powell, Esq., and the daughter of Godfrey Harcourt, Esq., of Wirewood's-Green, in Gloucestershire. If a nobleman is cited by a wrong christian name, if his title of honor is right, it is sufficient, because that is a sufficient description of him. In the Prerogative less nicety in the processes to accept or refuse is required, because those processes run with intimation and do not precisely require an appearance, and I thought trifling objections, which had nothing in them essential to the benefit of the party, but only tended to obstruct justice, ought to be discouraged; I therefore overruled the protestation, and ordered Amy Powell's proctor to appear absolutely.

[520] MILLER against SHEPPARD AND OTHERS. Prerogative Court, Easter Term, April 26th, 1758.—The handwriting and character of a living witness, but who was resident in an enemy's country, admitted to proof.

[See p. 506, ante.]

This day an allegation was offered by Miller, propounding the will and codicil together; the 1st article pleaded the factum of the will in the common form; the 2d and 3d articles pleaded that Francis Wyke, one of the subscribing witnesses, was dead, and pleaded his handwriting and good character; the 4th and 5th articles pleaded that John Boucher, the other subscribing witness, resided at this time in French Flanders, and by reason of the war could not be come at to be examined, and therefore pleaded his handwriting and good character as if he had been dead; the rest of the articles propounded the codicil in the usual manner. The counsel for Sheppard, who is named one executor in both will and codicil, but who opposes the codicil, and also the counsel for Norris and Rowley, deceased's next of kin, joined in opposing the 4th and 5th articles, and insisted that the handwriting of a witness who was alive, and his character, could not be admitted to be proved, for the adverse party would be deprived of the benefit of cross-examining, and the precedent would be dangerous; for it would become a practice to send witnesses out of the way to avoid cross-examination, which perhaps might be the present case.

Judgment—Sir George Lee. But as I thought there was great reason to suspect collusion between Sheppard and the next of [521] kin, and as this witness could not be come at during the war by Miller, I admitted those two articles to proof, but directed she should specify the time when Boucher went abroad, that it might appear whether it was probable he was sent abroad to prevent cross-examination.

GREEN against MAYO FORMERLY HOLLIER. Arches Court, 4th Session, Easter Term, May 5th, 1758.—In a cause of legacy in which issue had been joined, the tender of payment holden not to be sufficient unless accompanied by a payment of the costs incurred in the institution of the suit.

John Hull made his will, 4th June, 1756, appointed Elizabeth Mayo, formerly Hollier, sole executrix and residuary legatee; deceased died 23d October, 1756, and Mayo proved his will that day; bequeathed a legacy of five pounds to his sister Elizabeth Green; she, in May, 1757, and again on the 20th and 24th October, 1757, sent her daughter to demand said legacy of Mayo, and the last time sent a receipt for it; Mayo said she would come to Green's house the next week, and pay it, but she did not, whereupon Green took a citation to call her in a cause of legacy, which passed under seal on 31st October, 1757, and the officer of the court swore he sought Mayo at her usual habitation on that day, and on the 1st and 2nd of November, but could not have access to her to serve her personally. On 1st November, Mayo and her husband and others came to Green's [522] house and tendered her five pounds for her legacy; Green said the matter was now in the hands of her lawyer and they must pay the money to him, and refused to accept it; whereupon they said they would leave it upon her counter, and she might throw it into the street if she pleased; thereupon Green called a neighbour, Mrs. Blower, and desired her to take and keep the money in safe custody, but, as Green expressly swore, did not desire her to keep the money for her (Green's) use. The citation was returned 3rd November, and a citation viis et modis issued. Mayo at last appeared, and on the By-day, Michaelmas Term, 1757, a libel in usual form for the legacy was admitted. 1st Session, Hilary Term, 1758, Mayo's Proctor gave a negative issue. The question was whether this tender, made extrajudicially, without offering costs, after the citation was under seal, and Mayo had been sought by the officer, was a sufficient legal tender to excuse Mayo from costs, and to throw them upon Green; and having heard affidavits on both sides—

Judgment—Sir George Lee. I was of opinion it was not a sufficient tender, for Green had expressly refused it because a suit was begun, and she had been at the expence of taking out a citation; and Mayo's proctor should, when he first appeared for her, or at least before he gave a negative issue, have made a tender of the legacy in court, with such costs (if any) as were due by law; but not having alleged the special matter, but having given a negative issue, she had denied the legacy to be due, contrary to her extrajudicial confession on 1st November, when she tendered the legacy to Green, and had thereby [523] subjected herself to costs. I therefore overruled Mayo's petition, and as issue had been joined, assigned the cause for sentence on the merits; and on 1st Session, Trinity Term, 22nd May, 1758, I heard the cause upon the merits, gave sentence for the legacy of five pounds to Green, and condemned Mayo in 20l. costs.

LLOYD against LLOYD. Arches Court, 1st Session, Trinity Term, May 22nd, 1758.—An appeal on grievances entertained.

David Lloyd, deceased, made his will in June, 1753, and appointed Ann, his wife, executrix, who took probate in common form at St. Asaph, in October, 1755. William Lloyd, deceased's father, cited her to prove the will by witnesses; she propounded it; in February, 1756, the father pleaded deceased's incapacity; she pleaded the contrary; several witnesses examined on both sides. On the 20th January, 1757, both proctors prayed publication, and copies of the depositions were accordingly delivered to both. On the 21st April, 1757, William Lloyd's proctor alleged that since publication more witnesses had come to his client's knowledge, and prayed a commission to examine them touching deceased's insanity: the judge decreed a commission. Ann's proctor protested of appealing, but afterwards waved his appeal. On the 12th May, 1757, William's proctor prayed a monition and inhibition to both parties not to intermeddle with deceased's effects pending the suit, and also a commission to examine witnesses as aforesaid, both which the judge decreed [524] without proof or even a suggestion that she had embezzled any of the effects, and notwithstanding that she as widow would be intitled to a moiety of the estate under an intestacy. Ann appealed from this decree to the Arches, and gave in a common libel. In the 1st Session, Michaelmas, 1757, Farrer appeared for William Lloyd, and gave a negative issue; soon after William died and his representative was cited. Farrer

appeared for her to save her contumacy, confessed the identity and subscription to the appeal, but declared his client, the representative of William Lloyd, would proceed no further in the cause; whereupon the grievances appealed from came on to be heard *ex parte*.

Judgment—Sir George Lee. I was clearly of opinion that both parts of the decree were wrong, and that grievances were done to Ann Lloyd; but I had some difficulty about the commission for examining witnesses, because that part of the decree now appealed from was only a continuance of the decree made on 21st April, 1757, from which Ann's proctor had appealed and then had waved his appeal; but as the first part of the decree relating to the inhibition to meddling with the effects was duly appealed from, and as the Court would upon the hearing have suppressed the depositions of the witnesses taken after publication, in case they had actually been examined, I pronounced generally for the appeal, retained the cause, and assigned it on for sentence.

[525] *BROOME against ELLIS.* Prerogative Court, 2nd Session, Trinity Term, June 1st, 1758.—A subscribing witness who contradicts his own act of attestation may be a good witness to support another subscribing witness in other circumstances.

Isaac Broome, deceased, made his will, dated 3d January, 1758; gave a legacy of fifteen pounds to his brother Joseph Broome, his only next of kin, and gave all the rest of his effects to Jane Ellis, who lived with him as his shop-woman, and made her sole executrix; deceased died on 16th March, 1758, after a long illness; Jane Ellis proved the will in common form on 17th March; the brother cited her to prove it by witnesses; she gave in a common condidit and examined the two subscribing witnesses, whom the brother cross-examined, but did not plead himself; the witnesses deposed to the following effect:—

1. John Keyloch, looking-glass maker. Deponent came to know deceased about six years ago, and often went to him; about a fortnight before the will was made deceased told deponent he had made his will, but was very uneasy about it, and asked deponent if he would alter it for him; deponent said he would whenever he pleased; in the evening of 3d January, 1758, deponent called to ask how deceased did, Jane Ellis then told deponent deceased was very uneasy, and could not rest till his will was altered; deponent went into the parlour to deceased, who directly ordered Ellis to fetch his will, which she did, and deceased desired deponent to read it to him, which deponent did; deceased asked deponent what he thought of it, [526] and whether Mr. Walker had not too near a connection with Ellis, he being an executor in said will, and a principal creditor to deceased; deponent said he thought he had; deceased then desired deponent to write a new will, only leaving out the name of Walker, and making Jane Ellis sole executrix; deponent asked him about that three or four times, and deceased said he would have her sole executrix, but he asked deponent whether she might not take in Mr. Vesey to assist her in getting in the debts; deponent said he believed she might; he replied, then I will leave her sole executrix; deponent, from the former will and said instructions, wrote in deceased's presence the will propounded; deceased desired deponent to read it to him, which deponent did audibly and distinctly; deceased desired him to read it again, deponent did and deceased approved it, and then directed Ellis and Smith his book-keeper to be called in, and they being come, deponent folded down the will and deceased wrote his name as well as he could, but deponent not thinking it legible and plain, wrote over it the mark, &c. and then deponent sealed it with a wafer, and deceased said "I deliver this as my will and testament," in presence of John Smith and deponent, who then attested it in deceased's presence and at his request; deceased then appeared to be perfectly in his senses.

8. Int. Respondent read the will in the words in which it now appears, and believes deceased perfectly understood it. 9. Int. It was executed about nine at night, no discourse passed but what is before set forth. 10. Int. Deceased signed the will voluntarily, and was not importuned to do it. 12. Int. Ellis was shop-woman to deceased, but not [527] a relation. 13. Int. Respondent never heard deceased was dissatisfied with the will, deceased lived till the 16th March following. Int. 14. Deceased was in a weak low condition. Respondent heard Ellis say he was several times out of his senses in his illness, but deceased was not greatly impaired in his senses.

2. John Smith, bookseller. Deponent came to live with deceased as his book-keeper, and staid with him six weeks, about the end of November or beginning of December, 1737. On 3d January, 1758, deponent was sent by deceased himself to Mr. Vesey, one of deceased's creditors, to desire him to come to deceased that afternoon, and from what he heard Ellis say he apprehended deceased sent for Vesey to make his will, but Vesey did not come. About eight that evening deponent being called, went into the parlour to deceased and Mr. Keyloch, and a paper which deponent then apprehended to be a will lay ready wrote, deceased then wrote something at the bottom of said paper, but it not being legible, Keyloch made a cross or something under it, and deceased took an halfpenny off the wafer at the bottom of said paper, but did not say any thing, or that it was his last will and testament, and deponent and Keyloch then both signed said paper as witnesses in presence of deceased; and deceased during said transaction did not appear to deponent to be, and was not as he believes of sound mind, or capable of making a will, as he did not say it was his will, or utter one syllable as deponent remembers.

8. Int. The will was not read to deceased in deponent's presence, deceased was in a bad state of health. 9. Int. Respondent did not hear deceased say any thing to express his approbation of [528] the will. 10. Int. Keyloch desired deceased to sign the will, and deceased did it voluntarily. 11. Int. Respondent attested it. 13. Int. Respondent don't know that deceased expressed any dislike to the will. 14. Int. Deceased while deponent lived with him was in a very weak condition and much impaired in his senses; about a fortnight before the will was made, deponent heard Ellis say that the deceased had not been in his senses a quarter of an hour since deponent had been in his house. 15. Int. Respondent heard Ellis tell Joseph Broome that deceased had left him executor in a former will.

Dr. Hay, counsel for Joseph Broome, the brother. Argued that John Smith having deposed to deceased's incapacity contrary to his own attestation to the will, no credit could be given to him, and therefore he could not be considered as a witness in the cause, and consequently there was only one witness to support the will; but by law, no will for personal estate can be pronounced for without two witnesses, or at least one witness, and such circumstances as are equivalent to another witness.

Judgment—Sir George Lee. But I was of opinion that Smith was a good witness to support Keyloch in every other part of his deposition, but where he contradicted his own act of attestation, and that he had supported him in many material circumstances, and therefore upon this evidence I pronounced for the validity of the will dated 3d January, 1758, and decreed the probate to be delivered out of court to Jane Ellis, the executrix.

[529] *MURPHY against M'CARTHY.* Prerogative Court, 3rd Session, Trinity Term, June 8th, 1758.—A citation which had not been served on the party against whom it had been entered holden to be void.

Felix M'Carthy, a mariner, in one of the king's ships, died intestate; administration was granted to Elizabeth, his widow; on 10th March, 1758, a citation was taken by Hughes, as proctor for Maurice Murphy, who claimed to be executor of a will of the deceased's, against the widow, to bring in the administration and shew cause why it should not be revoked, &c. Hughes obtained a certificate from the Prerogative-office that such citation had issued, which was shewn at the Pay-office at Portsmouth, to prevent the widow from receiving any money due to the deceased; but the citation never was served on the widow.

Upon motion by counsel, these facts being alleged, I declared the citation void, dismissed the widow, and condemned Murphy in 13s. 4d. costs. Hughes was not in court, another proctor appearing for him, but I declared I would have condemned him in costs if I could have done it by law.

ARNOLD against EARLE. Prerogative Court, Trinity Term, June 8th, 1758.—A will made by a minor of sixteen in favour of his guardian and schoolmaster, substantiated by evidence.

Thomas Newbee, a minor, aged near sixteen years, died 27th January, 1756, he left an uncle, Benjamin Newbee, of the whole, and two uncles, William and Richard Arnold, of the half-blood, his only next of kin; on the death of his grandfather on 11th January, 1754, the minor chose [530] George Earle, his schoolmaster at Deptford,

with whom he boarded and lodged, his guardian. On 14th December, 1754, deceased made a will wrote by an attorney, in which he gave all his estate to Mr. Earle and Mrs. Allen, now Earle's wife, but then his housekeeper. In October, 1755, he made another will, all of his own hand-writing, which was almost a transcript of the former by which Earle was made universal legatee and executor; this second will is said to be made, because Allen the joint devisee was become wife to Earle. On 16th December, 1755, he made a third will, wrote with his own hand, which was almost a transcript of the two former in which he made Earle executor and universal legatee; this last will was said to be made, because one of the subscribing witnesses to the second was dead. On the day the deceased died, Earle took probate of this last will. William Arnold, one of the uncles, cited him to prove it by witnesses. Earle propounded the will, and examined the two subscribing witnesses, who were persons of unblemished character; they swore that the deceased read the will twice over to them, declared his entire approbation of it, and said that it was all his own handwriting, that he had no regard for his uncles, for they had shewn none to him, and that he was resolved to leave all he had to Earle, for he and his wife had been parents to him, and that he duly signed, sealed, and published the will in their presence, and desired them to attest it, which they did in his presence, and that deceased was perfectly in his senses. Arnold pleaded that the deceased was influenced by his schoolmaster, by cajollery at some times, and threats and severities at other times, to make the will contrary to his inclinations; he examined [531] several witnesses to prove fraud and imposition, but most of them proved directly the contrary, in so much that the counsel for Arnold confessed that the will was sufficiently proved with respect to the evidence, but that from the circumstances of the case fraud must be presumed, and that the minor was not of legal age for making of a will for personal estate; for that by law he ought to be seventeen or eighteen years of age.

Judgment—Sir George Lee. But I was of opinion that by law a male may make his will for personal estate at fourteen (Godolph. O. L. 22. 2 Black. Com. 497), and a female at twelve, the ages at which by law they are capable of marriage, unless it appeared they had not a capacity to understand the act they did, the contrary of which appeared in this case; and therefore, the evidence in support of the will being strong and clear, I pronounced for the validity of the will, but gave no costs, because the circumstances of the case did *prima facie* create strong suspicions which it concerned Earle to clear up, which I thought he had done, and the uncle lived at a distance and could not himself know the facts. It did indeed appear that one Thomas Gulling (who was a witness in the cause, and with whom the uncles had agreed that he should carry on the suit, and who was to have a share of the estate if the will should be set aside) had attempted to suborn some of the witnesses, but as it did not appear that William Arnold, the uncle, was privy thereof, I thought it not a sufficient ground to charge him with costs.

[532] *BOUGHEY against SIR WILLIAM MORETON.* Prerogative Court, 4th Session, Trinity Term, June 14th, 1758.—The cancellation of one duplicate is the cancellation of both.—Opportunity afforded to the adverse party of shewing that the cancellation was not done *animo cancellandi*.

Dame Jane Moreton, wife of Sir William Moreton, made her will dated 29th May, 1754, pursuant to a power given her by her marriage settlement; the day before this will bears date, a new settlement was made, in which she has a new power given her to make a will; of the said will she appointed George Boughey and Nicholas Gilbert executors, and Jane Compton, Elizabeth Bromfield, and John Bromfield, Esq., residuary legatees; she died soon after. Caveat was entered by Sir William. Boughey warned it (Gilbert did not intermeddle) and prayed probate of the uncanceled duplicate. Sir William alleged that the duplicate which deceased had in her custody was found cancelled; that he, as husband, was entitled to, and he prayed, administration to deceased as dying intestate. Scripts and scrolls were prayed and decreed. Boughey and Elizabeth Bromfield brought in the uncanceled and the cancelled duplicates, dated 29th May, 1754, with an affidavit, in which they swore that the deceased executed duplicates of the said will, one part of which she kept herself, and the other part she delivered to Boughey, which she had never demanded of him, or intimated that she had cancelled the other part, and they further swore that on searching for her will with Sir William's consent about two months after her death, they found in a hair-

trunk in her chamber, or in the closet adjoining to it, the duplicate she kept, with her name and seal and the entire attestation of the witnesses, torn or cut off, and that there were also in the trunk former old cancelled wills [533] made before her marriage, and that she used to carry this trunk with her when she went out of town, which they therefore called her travelling trunk. Sir William swore that he believed the deceased cancelled it herself, it being found in the state it now was upon the search, which was the first time he ever saw it. Upon these affidavits the matter was brought before the Court to determine whether probate should be granted to Boughey of the uncanceled duplicate, or administration should be granted to Sir William as husband.

Judgment—Sir George Lee. I was of opinion that a cancellation of one duplicate was in law a cancellation of both,^(a) and that as the cancelled duplicate was found in her custody, and it did not appear that any other person had access to it, it must be presumed that the deceased cancelled it herself. I therefore refused to grant probate to Mr. Boughey as prayed upon the evidence now before me, but gave him time to next Court to determine whether he will propound the uncanceled duplicate, and will take upon him to prove, either that the other part was cancelled by some other person, or if by the deceased, that she did it inadvertently or accidentally, and not animo cancellandi, otherwise I decreed administration to her as dying intestate to be granted to Sir William Moreton as husband.

[534] *FRANCE against AUBREY.* Prerogative Court, Trinity Term, June 14th, 1758.

—Simple contract debts make bona notabilia where the deceased died; whereas specialty debts constitute bona notabilia at the place where the specialty is at the time of the death.—The mere entry of a caveat will not found the jurisdiction.

Mayzod Dawkins made her will, and (as suggested) appointed Catherine France executrix. Richard Gough Aubrey, claiming to be her next of kin, took administration to her as dying intestate, in the Consistory Court of St. David's, in which diocese the deceased lived and died, and Mr. Rushworth, as proctor for Aubrey, entered caveat in the Prerogative against any thing being done in the goods of deceased without notice. France warned the caveat, and prayed that the administration might be decreed to be brought in and revoked, and that probate of the will might be granted to her. Rushworth for Aubrey, denied the jurisdiction of the Court, and alleged that deceased did not leave bona notabilia. France propounded the jurisdiction, and this day her allegation consisting of three articles was debated. The first article pleaded generally that the deceased resided and died in the diocese of St. David's, and left bona notabilia in divers dioceses sufficient to found the jurisdiction of the Prerogative Court. The 2nd article pleaded that Richard Gough, father of the party, Aubrey, was at the deceased's death, and now is, indebted to her estate in the sum of five guineas, and that he resides in the diocese of Gloucester. The 3rd article pleaded that Aubrey did enter a caveat in the Prerogative in the goods of deceased, and had thereby acknowledged and founded the jurisdiction of that court.

Judgment—Sir George Lee. I admitted the first article as pleaded, ordered [535] the nature of the debt pleaded in the 2nd article to be specified, for if the five guineas were due to the deceased by simple contract, the debt was personal and would make bona notabilia where the debtor lived; but if they were due by specialty they would make bona notabilia where the specialty happened to be at the deceased's death; and I rejected the 3rd article, being clearly of opinion that barely entering a caveat would not found the jurisdiction, for it might be entered (as this was said to be) with intent to deny the jurisdiction, and prevent this court from taking any cognizance of the matter.

N.B.—On the By-day of this term the proctor for France prayed that I would decree Aubrey to bring in the administration and leave it in the registry; but as the allegation pleading bona notabilia was not proved, and consequently my jurisdiction was not founded, I refused to make such order.

MARTIN *against* ROBINSON. Prerogative Court, By-Day after Trinity Term, June 21st, 1758.—Costs decreed against a party who had taken probate of a will which she knew not to be the last will of the deceased.

Peter Petersen, alias Pitts, made a will dated 5th September, 1747, and appointed Erasmus Robinson and Mary his wife (with whom he lodged) executors; he afterwards

(a) *Rickards v. Mumford and Freeman*, 2 Phill. 23. *Colvin v. Fraser*, 2 Hagg. 266.

went a mariner in the "St. George," East Indiaman, where he made another will dated 10th January, 1749-50, and appointed Swain Martin, another mariner in said ship, his executor, and soon after died; the ship returned home in May or June, 1751, and then [536] Mary Robinson had notice of the deceased's death, and that he had made a will of a later date than hers, wherein Martin was executor, who shewed the said last will to two persons whom she sent to him to see it; but Martin said he would burn it, and advised her to prove the will of 5th September, 1747; she accordingly on 13th June, 1751, proved that will in common form, and swore she believed it to be deceased's last will, and by virtue of that probate received the deceased's wages at the India house, and, as she insisted (but did not make a satisfactory proof thereof,) she retained what was owing to her from the deceased, and paid over the residue to Martin; however, it was certain that she took the probate with the knowledge of Martin. On the 12th June, 1754, Martin returned a citation against Mary Robinson to bring in the probate, and shew cause why it should not be revoked, and probate granted to him of the last will. She appeared and denied Martin's will; he propounded and proved it, and she pleaded nothing in opposition to it, and now the question was whether she should be condemned in costs to Martin, who was privy to and advised her to prove the first will.

Judgment—Sir George Lee. I was of opinion she ought to be condemned in costs, because she had been guilty of a gross misbehaviour in swearing that the will of 5th September, 1747, was the deceased's last will, when she knew he had made a later will, and because she had put Martin to the expence of proving the last will, when she had no objection whatever to make to the validity of it, and therefore had used the privilege the law gave her by being pos-[537]-sessed of a probate, to a bad purpose. I therefore pronounced for the last will, revoked the probate granted to Mary Robinson, and condemned her in costs, and referred the bill to the register to report thereon.

BOXLEY AND FRENCH against STUBINGTON. Prerogative Court, Caveat Day, July 28th, 1758.—Administration cum testamento annexo of the will of a married woman made under a power, granted to the extent of that power, to the person appointed by the will.—A general grant ceterorum bonorum decreed to the husband.

Mary, the wife of William Stubington, was empowered by articles executed before her marriage, dated 22nd August, 1747, to dispose, by deed or will executed in the presence of, and attested by two witnesses, of one thousand pounds of her fortune after the death of her husband, who was to receive the interest thereof during his life notwithstanding her coverture. She, on the 4th September, 1756, accordingly made a will attested by two witnesses, and appointed Boxley and French her executors, and disposed of said 1000l. to several persons, particularly she gave 500l. thereof to her niece, the wife of said Boxley, for her separate use, and also bequeathed her wearing apparel, which she had no power to do. The executors propounded the will, which the deceased's husband opposed, and they produced the two subscribing witnesses, who, being strangers to the deceased, did not prove identity, and thereupon the executors pleaded that the subscription to the will was the deceased's handwriting.

Witnesses.

1. Joseph Hurst. At desire of Mrs. Boxley, the deponent, who lives opposite to her, went to her house and there found a gentlewoman, a stranger [538] to deponent, who called herself Mary Stubington; the said woman then executed the will propounded in presence of deponent and William Ward, who was also a neighbour to Boxley; said woman appeared to be perfectly in her senses; and deponent believes she was the deceased in this cause.

Int. William Ward goes now by name of John Fernley.

2. John Fernley, alias W. Ward. Gives exactly the same account as Hurst; says the person who executed the will was an entire stranger to deponent; verily believes she was the deceased in this cause, and she appeared to be very sensible.

Int. Respondent is a barber in Goodman's fields; deponent went by name of William Ward till lately, when he resumed his real name of John Fernley; deponent 16 years ago took on him the name of William Ward upon a family occasion, which, as it relates only to himself, he does not think proper to tell; his true name is John Fernley; within seven years past he has given several receipts to his customers in the name of William Ward.

3. James Loton. In 1741 deponent first became acquainted with deceased ; he has often seen her write and subscribe her name ; verily believes the names "Mary Stubington," subscribed to the will pleaded, are her handwriting.

4. Edward Boxley, Sen. Deponent is uncle to Boxley, the executor ; deponent once saw the deceased write her name ; verily believes the names subscribed to the will were written by deceased.

Mr. Stubington, in his answers (which were read), says he never saw his wife, the deceased, write her name "Stubington," but does believe the names "Mary Stubington," subscribed to the will pleaded, were written by her.

[539] Read the marriage articles, dated 22nd August, 1747 ; the will pleaded, dated 4th September, 1756 ; and a former will, dated 29th September, 1752, in which deceased gave to Mary Boxley, her niece, 500l., to be paid to such person as she shall appoint for her trustee, for her separate use exclusive of her husband.

Dr. Simpson, for Stubington, insisted that there was not a sufficient legal proof of the factum of the will and of the identity of the testatrix ; secondly, that Boxley and French could not propound it as executors, because the deceased had not power to appoint executors ; and, thirdly, that the paper was merely an appointment, and could not be pronounced for as a will. In *Bridgen's case* (a)¹ the [540] whole estate was in the wife's disposal, and therefore a mandamus was refused in the King's Bench ; but in *Cullum's case* in B. R., Sir John Strange's Rep. vol. ii. p. 891, a peremptory mandamus was granted to swear the husband administrator ; in that case it was agreed by articles before marriage, that the wife might dispose by deed or will of a leasehold estate. She made a will, disposed of said estate, and appointed her mother executrix ; the King's Bench held she could not make an executor, that the instrument was an appointment only, and therefore ordered a peremptory mandamus to grant administration to the husband.

Judgment—*Sir George Lee*. I was of opinion that the factum of this will and the identity of the testatrix were fully and sufficiently proved. Secondly, that in some cases a feme covert might appoint an executor, as where a power was given her so to do, as was held in the Delegates in the case of *Hopegood and Delahay* ; (a)² but in the

(a)¹ *Bridgen's case* is thus reported in Strange :—*Dominus Rex v. Dr. Bettesworth*. Mandamus to grant administration to Mr. Bridgen, the late husband of Lady Bellamont, deceased. The dean of the Arches returned that a suit had been commenced before him between Mr. Bridgen and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage, whereby the husband agreed she should have power to make a will, and dispose of her estate, which deed Mr. Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition, but not for the executorship created thereby ; and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen, for administration with the will annexed, which is still depending. 2 Strange, 1111.

But a mandamus was granted in *Bridgen's case* in the following year (13 Geo. 2), on the ground that the husband had not assented to the will, and consequently done no act to exclude himself from the right the law gave him to the administration, although it was admitted that the wife had a separate estate at her own disposal. The case is thus reported :—

Dominus Rex v. Bettesworth. To a mandamus to grant administration to the husband was returned that he wife's mother having by her will given her several effects for her separate use, exclusive of the husband, and to be by her disposed of, as she should think fit, she had accordingly made a will, whereby she devised her separate estate to trustees, with whom the husband was now litigating the validity thereof in the Ecclesiastical Court ; pending which suit the dean of the Arches could not grant administration.

Et per Curiam. This is an insufficient return, for here is no act of the husband to express his assent to her making a will ; and she may have choses in action, or other rights, besides what are included in her mother's will : in these cases there must be some act done by the husband to exclude himself ; which not being pretended in this case, there must be a peremptory mandamus. 2 Strange, 1118.

(a)² *Delahay v. Hopegood*, Delegates, 22d December, 1719. The judges delegates present at the sentence were—Mr. Baron Price, Mr. Justice Dormer, Mr. Justice Eyre, Dr. Pinfold, Dr. Strahan and Dr. Kynaston.

The reader will find all the cases which bear upon this branch of testamentary law,

present case the testatrix had no [541] such power given her; however, that the persons named executors had a sufficient interest to propound the paper as a will; and, thirdly, that the act done by the deceased was of such a nature that this Court could grant administration with it annexed to the persons named executors. That in *Cullum's case* the wife had power only to dispose of a leasehold estate by will, but she went farther and appointed an executrix, to whom Dr. Bettesworth granted a general probate, notwithstanding there were other effects which she had not a power to dispose of, and notwithstanding Mr. Cullum prayed an administration *cæterorum bonorum*, which the court refused him, and thereby deprived him of the administration of those effects which belonged to him as husband, upon which ground that mandamus was granted. (a) I there-[542]-fore, in this present case, pronounced for the paper propounded as deceased's will, so far as it was pursuant to the power of disposition given her by the articles, and decreed administration *cum testamento annexo*, limited solely to the 1000l. she had power to dispose of, to Boxley and French as her appointees, and decreed a general administration *cæterorum bonorum* to Mr. Stubington the husband, in case he desired it, and at the motion of his counsel, ordered that the limited administration *cum testamento annexo* should not issue under seal till after fifteen days.

ANONYMOUS. Prerogative Court, Caveat Day, October 12th, 1758.

N.B.—Mr. Trenley having propounded a letter as a will, Mr. Smith prayed a commission to take his client's answers, whereupon a question arose, [543] at whose expense the letter or will should be sent down to the party who was to answer to it. I was of opinion, and decreed, that it should be sent down at the expence of Mr. Trenley's client, who propounded it, it being part of his allegation, agreeable to the opinion of the court and all the advocates and proctors, 3d November, 1735, in the case of *Hogan and Hogan*, with respect to exhibits annexed to and pleaded in an allegation.

in its several subdivisions, brought together in an excellent work very recently published by Mr. E. V. Williams, entitled, *A Treatise on the Law of Executors and Administrators*, vol. i. p. 39, 211, 633.

(a) The Temporal Court only grants a mandamus where it is clear that the right of the husband to take administration to his wife has been infringed. In other respects it leaves the adjudication of all questions as to the factum and validity of the instrument in the first instance to the Ecclesiastical Courts—holding, that it is the very function of the Court of Probate to decide upon the nature of the instrument, and to say whether or not it is testamentary. So far does the Court of Chancery carry this principle, as to repudiate the idea of the administration taken for the mere purpose of trying a question in the Court of Chancery. In *Rich v. Cockell* and *Rich v. Hull*, Lord Eldon said, the difficulty here is how to proceed at all; for as to separate property, there must be a will proved in the Commons. As to the sum of 500l. not separate property, there can be no will except with the consent of the husband. A suit was instituted in the Ecclesiastical Court, calling upon the husband to say why administration of the will as to both should not be granted. He litigates as to both, contending as to the second fund that his assent was necessary. Upon that question so depending in the Ecclesiastical Court, there is no decision whatsoever; but they have taken administration for the purposes of this suit. No purpose as to this suit can be answered till that question as to her will can be decided in the Ecclesiastical Court. Sir William Scott, whom I have consulted, thought the proceeding perfectly incomprehensible. I cannot here decide a question of a married woman as to separate property, unless the will is proved in the Commons: nor as to property not separate without the assent of her husband. 9 Ves. 380.

So in the case of *Hughes v. Turner*, Delegates, 26th November, 1831, where Sir John Nicholl, having already granted probate of one will of a married woman, afterwards granted a special probate of a former will and codicils to one of the executors, limited only to become a party to, and to attend, supply, substantiate and confirm the proceedings already commenced or intended to be commenced in Chancery, and the question as to the validity of this special probate was brought by appeal before the Delegates. The Court, composed of Mr. Baron Bayley, Mr. Justice Patteson, Mr. Justice Alderson, Dr. Daubeny, Dr. Phillimore and Dr. Blake, were unanimous in reversing that decree; holding, that it was the duty of the Court of Probate to determine which was the last will of the deceased.

HUGHES AND HUGHES *against* RICARDS, BY HIS GUARDIAN. Prerogative Court, Caveat Day, October 12th, 1758.—Administration cum testamento annexo decreed to testamentary trustees for the use of the infant executor, and the next of kin, till he should arrive at legal age to take probate.

Dr. Hay for John and Robert Hughes. George Ricards died a widower, left only one child John Ricards, who is an infant under seven years of age. Deceased made his will on 17th February, 1758, and gave all his estate real and personal, except few small legacies, to his son directly, without vesting it in trustees. After all the legacies he added these words, "I constitute and appoint John and Robert Hughes to be trustees of this my last will and testament for my son John Ricards," and by the very next clause he appointed his said son his sole executor. The will is duly executed and attested by three witnesses. John and Robert Hughes took administration with the will annexed for the use of the son at Landaff; afterwards finding there were bona notabilia, they voluntarily appeared and prayed a monition to transmit the will to this Court; caveat was entered here in name of one Jackson; on 27th July, 1758, Mr. Rushworth appeared for Mrs. Symmonds, the infant's grandmother, and prayed that she might be assigned guardian to him, which was done, and he then [544] prayed that administration cum testamento might be granted to her as guardian for the use of the minor. John and Robert Hughes prayed administration cum testamento for the use of the infant might be granted to them as testamentary trustees. The sole question is whether the administration cum testamento shall be granted to the trustees or to the guardian.

Dr. Simpson *contra*, for the guardian. Deceased had a considerable real and personal estate in the dioceses of Landaff and Worcester; he left a mother, three brothers, and a sister, who all desire administration may be granted to the guardian. I shall rely on the cases in the Prerogative in 1756, of *Boddicot and Hamilton against Dalzeel* (vide supra, p. 294), and of *Sir Everard Fawkener and Freemantle against Jordan* (vide supra, p. 327), in both of which cases the court refused to grant administration cum testamento to trustees, and decreed it in the first to Miss Dalzeel, who was next of kin and of age, and in the last to the guardian of a minor, who was next of kin, for her use and till she came of age.

Read the act of Court and the will.

Dr. Hay for Hughes. The testator's intention is clear, that the Hughes's should manage his estate till his son came to age to take probate.

Dr. Harris, same side. He cited a case in Prerogative in 1752, of *Applebee against Applebee*, when the court granted an administration cum testamento to a testamentary trustee in preference to a guardian of a minor who had the interest.

Dr. Simpson *contra*. The statute binds the [545] court to grant the administration to the next of kin; the grandmother is the next of kin.

Dr. Bettesworth, same side. The administration must be granted to the next of kin; in this case no trust is created.

Judgment—Sir George Lee. I was of opinion the cases of *Boddicot and Hamilton against Dalzeel*, and of *Sir Everard Fawkener and Freemantle against Jordan* were not parallel to this; in the first, Bodicot and Hamilton had real and personal estates vested in them for particular purposes, and especially as trustees for Miss Dalzeel, who was come of age; there was nothing in the will which implied that the testator intended they should have any testamentary management of his estate, and the daughter being of age, and next of kin, and one of the residuary legatees, was entitled to the administration; likewise in the last case, Sir Everard and Freemantle were made trustees for special purposes, they were also appointed guardians by the father's will, but that will not being executed in presence of two witnesses, pursuant to statute of 12 Car. 2, chap. 24, the appointment of the guardianship being void, they had no testamentary interest, but were mere trustees subject to the Court of Chancery, and the minor having both the beneficial interest, and being next of kin, the administration was granted to her guardian for her use; in the present case, to whichever of the parties the administration should be granted it would virtually be granted to the next of kin, for none of them had any title in themselves, but must take for the use and during the minority of the infant, who was executor and next [546] of kin; here was no estate whatever vested in the trustees, for all was given directly to the infant; the testator must therefore intend there should be trustees for the testamentary management of his estate for his son during his minority, otherwise they would be

trustees without any trust, and such an appointment would be nugatory. I thought the testator intended the Hughes's should have the management of his estate till his son came to age to take probate; I therefore decreed administration cum testamento to John and Robert Hughes as testamentary trustees for the use of the infant executor and next of kin, till he should arrive at legal age to take probate, but at the desire of Mr. Rushworth, ordered that the administration should not go under seal till after fifteen days.

BEEBEE against BEEBEE. Prerogative Court, Michaelmas Term, November 15th, 1775.—A commission of appraisement decreed at the suit of a residuary legatee.

William Beebee died, left a widow and children; the widow, Frances Beebee, claims under a will which is not yet propounded. William Beebee, deceased's son, opposes it. By the will the testator left his household goods and residue of his estate to his children, his money in the stocks and twenty pounds to his wife, and made her executrix. The son's proctor on 23d July, 1758, prayed a commission of appraisement, the widow's proctor opposed it, and on 1st September she gave in an inventory on oath, without any assignation of the court. The question was whether a commission of appraisement may be decreed or not.

Judgment—Sir George Lee. I was of opinion to decree it, because it appeared there were several outstanding debts which it concerned the residuary legatees to have a particular account of; and because the expences of the commission must go out of the residue, and so must be paid by those who desired it, and the widow would not be burthened thereby. I decreed a commission of appraisement.

ALFRAY against ALFRAY. Prerogative Court, 2nd Session, Michaelmas Term, November 15th, 1758.—An article in an allegation in an interest cause directed to be reformed on account of its generality.

Robert Alfray died intestate, leaving Mary, who claims to be his widow, and a son by her, named Richard Alfray, he had also two other children by her, who died before him, and John and Euclid Alfray, and Elizabeth Wright his children by a former wife. Mary, as widow, prayed administration, the three children by the first wife entered caveat and denied her interest. She propounded it and gave an allegation, pleading in first article a courtship in 1741 and 1742, and that they were married in or about the month of November, 1742, by a priest in holy orders, according to the rites of the church of England, at a house in the liberty of the Fleet, in the presence of several credible witnesses; the rest of the allegation pleaded the baptisms of the children which she had by deceased as legitimate, constant owning of her as deceased's wife by him, and by the parties in the cause, and several letters from the deceased to her, in all of which he styled himself her husband.

Dr. Hay for the children, objected only to the first article, that both the courtship and marriage were pleaded too generally.

[548] *Judgment—Sir George Lee.* I was of opinion that as the facts pleaded in the first article were matters within her knowledge, she ought to specify the places where he courted her, that it might appear whether it was a public, reputable courtship, or a private clandestine one, and that she ought at least to confine the time of her marriage to the month of November, 1742; but as to her specifying the particular house where they were married, it might be impossible for her to do it at this distance of time, considering that there were formerly a great number of houses within the liberty of the Fleet where marriages were performed, and accordingly I admitted the allegation specifying the places where deceased courted her, and confining the time of the marriage within the month of November, 1742.

BRETTELL against WILMOT AND KING. Arches Court, 4th Session, Hilary Term, December 1st, 1758.—In a debate on the admissibility of a libel in a cause of subtraction of church-rate, the Court can take notice of nothing that is not expressly pleaded, or referred to, in the libel.—If a rate is made only for the repairs of a church, it is illegal to raise more than is wanted for that purpose.

(Appeal from Consistory of London.)

In the vacation after Hilary Term, 1758, John Wilmot and William King, then and now churchwardens of Hornsey, in Middlesex, took out citation against John Brettell in a cause of subtraction of rate; in Easter Term Mr. Stevens appeared for

Brettell, and Mr. Skelton for the churchwardens gave in a libel, pleading that in 1756 the church of Hornsey was very much out [549] of repair; that on 29th September, 1756, after due notice for that purpose, a vestry was held, when it was unanimously agreed the church should be repaired. The repairs were begun in April, 1757, and on 20th October, 1757, the parishioners met in vestry after due notice, and made a rate of 2s. 4d. in the pound upon all houses and lands in the parish to pay the workmen's bills, which rate amounted to 612l. 16s.; that Brettell lives in a house for which he pays 32l. a-year, and that he is duly and equally rated at 3l. 14s. 8d. N.B.—The rate is annexed to the libel, wherein it appears that he is rated 1l. 8s. for his house, and 2l. 6s. 8d. for his lands, called Bath lands, which he had in the parish, making together 3l. 14s. 8d.

The admissibility of this libel was debated in the Consistory Court of London on 3d June, 1758, when the chancellor admitted it, from which Brettell appealed to the Arches. Brettell's counsel admitted that he was not unequally assessed, but insisted that the rate was illegal, because it was made without any estimate of what the repairs would amount to: that on 20th October, 1757, when the rate was made, the vestry knowingly made a rate for the repairs amounting to a greater sum than the workmen's bills came to, for the bills were then before the vestry as appears by the vestry act of that day, which is referred to in the libel, and there it appears that the bills came only to 511l. 11s. 3d.; but this rate is for 612l. 16s.; that by subsequent orders the bills were referred to a surveyor who reduced them to 453l. 5s. 0½d.; and on 4th January, 1758, the vestry appointed a committee to settle the bills and adjust a rate, whereby they had departed from the rate of 20th October, 1757.

[550] *Judgment—Sir George Lee.* But I was of opinion the Chancellor of London had done right in admitting the libel; for upon debate of the admissibility of the libel, the Court could take notice of nothing but what was either expressly mentioned therein or referred to by it; all the acts of vestry therefore, except that of 20th October, 1757, to which the libel referred, were out of the present question, and might be matter of plea for Mr. Brettell hereafter; and as to the grand objection, that this rate (which is annexed to and made part of the libel) was for a greater sum of money than was wanted, it was *gratis dictum*, for at the head of the rate it was said to be made to pay for the repairs of the church and for other disbursements of the churchwardens in their office; I therefore remitted the cause and condemned Brettell in 10l. costs; but I said, if it should appear that this rate was made only for repairs of the church, I should be clearly of opinion it was illegal to raise so much more than was wanted; and therefore in that case it would be most advisable for the churchwardens to drop this rate and suit, and to get a new rate made for the sum really wanted, and as to an estimate, it would have been proper before the repairs were made, but the work was done before the rate was made, and the rate was now grounded (so far as concerns these repairs) on the workmen's bills. It was said the churchwardens had brought suits against twelve other parishioners upon the same rate.

[551] RAYMOND *against* BARON VON WATTEVILLE. Prerogative Court, By-Day, after Michaelmas Term, December 13th, 1758.—It is not competent to the Prerogative Court to require an inventory of a personal estate situated in Germany.—A proctor is not obliged to answer to the seal of a foreign court, or to subscriptions and seals of a foreign notary, for the law cannot presume him to be *consuant* of them.

[See on other points, pp. 358 and 495, ante.]

Dr. Hay for Raymond. Dinah de Larish, formerly Raymond, an English woman by birth, married in Germany, and died at Hernhutt in Lusatia, a widow, without children, on 25th May, 1756, she left Jones Raymond, Esq., her brother, and one of her next of kin, made her will (as said) on 26th April, 1756, and appointed Baron von Watteville, a principal man at Hernhutt, and one of the heads of the Moravians, executor and universal legatee; and afterwards she being sick in bed sent for the judge and officers of the court at Hernhutt to come to her, before whom (as asserted) she recognized her will, and desired them to enter and deposit it in the Court, which they did. 1st June, 1756, an inventory was taken of her effects, and deposited in the Court at Hernhutt. On 9th August, 1756, Watteville took probate of the will in the Prerogative Court by commission, and the next day his agent gave notice to Mr Raymond of his sister's death. On 25th September, 1756, Raymond cited Watteville

to bring in the probate, to prove the will by witnesses, and exhibit an inventory. On 11th November, 1756, an absolute appearance was given for Watteville. On 11th December, 1756, Crespigny, for Raymond, opposed the will, Fountain propounded it, and gave an allegation. On 25th February, and 23rd May, 1757, at Fountain's petition, requisitions were decreed to examine witnesses and take inventory, returnable on 23rd November, [552] 1757. Inventory was then brought in of deceased's effects in England, at the end whereof there was a declaration that the inventory of the German effects was in the court at Hernhutt; Crespigny objected to the inventory generally as not full; Fountain prayed a new requisition for a fuller inventory, which was decreed on 10th December, 1757, returnable in February, 1758, this was not taken out; but a new one was prayed and extracted in May, 1758, which has been expected but is not returned. On 7th September, 1758, Watteville was decreed to be excommunicated for not exhibiting a fuller inventory, and a schedule was signed; on 14th February, 1758, Fountain brought in an inventory without the requisition, but signed by Watteville and attested by an imperial notary; this also contains only the English effects, and does not refer to the German inventory as the first did; Crespigny therefore prayed the court to pronounce that Watteville was still in contempt, and that the excommunication might pass under seal; on 21st June, 1758, a requisition for examining witnesses was taken out, but not returned; Fountain produced one witness in this court, but has not examined him; he has now exhibited notarial acts and instruments said to be under seal of the court at Hernhutt, and prays Mr. Crespigny's answer to them, which we oppose.

Dr. Simpson for Von Watteville. The questions are, whether the inventory is not full; whether Watteville is duly decreed to be excommunicated, and whether Crespigny shall not answer to the notarial acts, &c. The last requisition was not taken out for the examining of witnesses, because the Court at Hernhutt would not examine [553] under a commission from this court. On 11th December, 1756, inventories were decreed on both sides. On 23rd November, 1757, a requisition with an inventory was brought in by Fountain, it only contains the effects in England. Fountain prayed a new requisition, because the word *all* was omitted at the head, not because the German effects were omitted; that requisition was expected till 1st Session, Easter, 1758, and that day Fountain prayed to be heard on his petition. On 4th session a new requisition was decreed returnable on 28th July, 1758; on that day Fountain brought in several exhibits to excuse Watteville. On 7th September, 1758, Watteville was decreed to be excommunicated. On 14th September, 1758, Fountain brought in an inventory, which by affidavit appeared to have been just received, but without the requisition; however, it is authenticated by an imperial notary; the excommunication not being under seal, Watteville is not in contempt. On 2nd Session, Michaelmas Term, Fountain brought in several acts, and then no objection was made that his client was in contempt; by way of return of the requisition for witnesses, and in supply of proof of his allegation and the will, Fountain exhibited several acts of Court at Hernhutt. 1. Dated 8th August, 1758, certifies that Watteville has sworn to the inventory and as to the legality of the will, and insists that this court cannot determine on effects in Germany, and that judges are not to be examined as to the legality of their judgments. 2. A certificate by an imperial notary and two other witnesses, attesting Watteville's declaration of the effects in England. 3. Notarial certificate of a copy of the will, and that three witnesses had sworn before him as to deceased's sanity, and that [554] she had recognised the will in their presence. 4. Certificate under the hand of the judge at Garlitz certifying that the court at Hernhutt is legally established, and has supreme authority. We pray the proctor's answers to these exhibits; the inventory exhibited on 14th September, 1758, is full; he is not obliged to set forth the German effects, because this court has no jurisdiction over them. Prerogative, 7th June, 1735, Ann Colman, a native of Dantzic, died there, leaving effects there and in England; her granddaughters who resided in England prayed an inventory of all her effects; the Court refused as to the effects at Dantzic. Prerog. 1739, *Lord Daer* against *Duke Hamilton*, Court refused to order a paper to be inspected upon a commission of inspection which related to an estate in France; objection is made that the requisition is not returned; in foreign transactions this Court takes such returns as can be had; a supreme court has attested that Watteville signed the inventory brought in, on 14th September, and made affirmation of the truth of it in foreign commissions. The substance and not form is to be regarded, *Arches*, 1730, *Elstrand* against *Gatcliffe*.

Judgment—Sir George Lee. I was clearly of opinion this Court has no jurisdiction over the German estate, and could not require a constat thereof; so adjudged, Prerogative, 1728, *Ployart* against *De Smith*,^(a) and again in [555] 1737, *Wilson* against *Ogle*, as to effects lying in the province of York and in Ireland, and consequently that the inventory was full; and as to the requisition not being returned, the case of *Elstrand* and *Gatcliffe* is in point, that forms are not to be insisted on in foreign transactions; I therefore was of opinion that Watteville had purged his contempt by exhibiting the inventory on 14th September; and rejected Mr. Crespigny's petition, and ordered the excommunication not to pass under seal. As to Fountain's prayer that Crespigny, as proctor, should answer to the seal of the Court at Hernhutt, and to the notarial seals and subscriptions, &c., I likewise rejected that, being of opinion that a proctor is not obliged to answer to foreign seals and to the subscriptions and seals of foreign notaries, the rule of a proctor's answering extending only to the seals of courts in England, and to the seals and subscriptions of English notaries, with which the law supposes him to be acquainted, but does not suppose him to be acquainted with the seals of all the courts and notaries in the world.

[556] COZENS against HELYAR. Prerogative Court, By-Day after Michaelmas Term, December 13th, 1758.—In a case of intestacy, an application that the parties entitled in distribution should give security to repay the proportions they had received in the event of a will being found, rejected.

Robert Helyar, Esq., deceased, made his will, dated 12th February, 1734, appointed his nephew executor, who pleaded the same and prayed probate. Johanna Helyar, deceased's sister, opposed and proved that the deceased made a latter will on 17th December, 1745, wherein she was executrix and residuary legatee, but that latter will did not appear in being in 1754. I pronounced that the latter will, though not produced (1 Lee, 472), did not revoke the former, and that deceased, so far as appeared, was dead intestate. William Helyar, the nephew, appealed to the Delegates (1 Lee, 514, notes. 4 Burr. 2513. 1 Phill. 427), who confirmed my sentence, and I granted administration to deceased's sister; she gave bond with sureties in 40,000l. with a covenant thereon to bring in the administration if a will should appear; she being now ready to distribute 10,000l., her proctor, Mr. Major, prayed that the persons entitled to distribution should give security to repay to her the proportion they had received, in case a will should hereafter appear; Cozens, who was entitled to distribution, opposed that motion, the common bond being only to refund, if latent debts should hereafter appear.

Judgment—Sir George Lee. I observed that the particular covenant in her bond, to bring in the administration in case a will should appear, did arise from the particularity of [557] the case, upon which account the oath, as administratrix, had by order of the Court been particularly adapted to her case, as she could not swear absolutely that deceased died without a will; but there was nothing uncommon in the case of the persons entitled to distribution to induce the Court to oblige them to give bond with an unusual covenant; I therefore rejected Major's petition.

(a) Prerog. 4^{ta} sessione Paschæ, 1728. *Ployart v. De Smith*. De Smith, brother and administrator of Raymond de Smith, deceased, was also administrator of several brothers and sisters who died abroad, and part of whose estates lay in the several countries where they died; the said administrator had not accounted with Raymond, the deceased in this cause, for his share in the distribution of the said estates. Mr. Ployart, nephew of the deceased Raymond, called the administrators to an inventory and account in the Prerogative, and gave in an allegation setting forth that the administrator was indebted to the estate of Raymond for the several shares of the foreign estates which came to him by the death of the said brothers and sisters, and prayed that he might be obliged to make discovery of them, and charge himself with them in his account.

The court was of opinion that the foreign estates were subject to the laws there, and were out of his jurisdiction and cognizance, and therefore would admit no articles of the allegation that related to the foreign estates, because a discovery of them was only to lead a distribution, which he had no authority to direct, and the laws there with regard to intestates' estates, might be very different from what they are here. (MS. Cases of Sir George Lee.)

SMITH against CROFTS. Prerogative Court, By-Day after Michaelmas Term, December 13th, 1758.—A substituted executor cannot propound a will till the person first named as executor has been cited to accept or refuse letters of administration.

William Farrinton, a soldier and pensioner of Chelsea hospital, on 14th June, 1746 (being at that time porter to Sir Robert Rich), made his will, and appointed Elizabeth Wilson, now Smith, his residuary legatee, and appointed his executor in these words: "I appoint my honoured master sole executor, and if he will not accept it, I make my god-daughter, Elizabeth Wilson, my executor." He delivered this will to Wilson, now Smith, and directed on the back thereof that it should be opened in the presence of Sir Robert Rich. The deceased died in January, 1755. On 10th February, 1755, Elizabeth Hewitt, claiming to be his sister, took administration to him as dying intestate. Smith did not hear of his death for some time, but as soon as she did, she carried the will to Sir Robert, who said he would not concern himself with it. On the 10th October, 1756, Smith cited Hewitt to bring in the administration, &c. She was personally served, and soon after died, but made her will, and appointed Jane Crofts, her daughter, executrix. Smith cited [558] Crofts to the same purpose. Cheslyn, proctor for Crofts, declared he should oppose the will, but prayed that Sir Robert Rich might be cited to exhibit scripts and scrolls, and to declare whether he would act as executor before any thing should be done at the petition of Smith. Smith prayed that she might be at liberty to propound the will without being at the expence of citing Sir Robert Rich.

N.B.—Crofts took administration *de bonis cum testamento* to Farrinton.

Judgment—Sir George Lee. Smith being only a substituted executor in case Sir Robert would not accept the executorship, I was of opinion she could not propound the will till she had cited Sir Robert to accept or refuse, and decreed accordingly.

LIEBENROOD against LAMSON. Prerogative Court, By-Day after Michaelmas Term, December 13th, 1758.—Time allowed to an agent acting under a power of attorney to plead and answer in an interest cause, the principal residing in Jamaica.

Thomas Lamson, deceased, made his will dated 20th December, 1733, appointed Richard Wilson, who resides at Jamaica, sole executor; in October, 1757, he proved the will at Jamaica, where the deceased lived and died. Wilson, by the recommendation of Livingstone, a merchant at Jamaica, appointed Mr. Liebenrood, who was a stranger to him, to collect the deceased's effects in England, and sent him a letter of attorney to take administration with an authentic copy of the will annexed, for his use and benefit. Liebenrood accordingly [559] prayed such administration. Cheslyn appeared for one Lamson, and alleged him to be brother to the deceased; declared he would oppose the will, and prayed that Liebenrood's proctor might answer to his interest. Mr. Liebenrood made affidavit that he was a stranger to the deceased's family, and could not answer to Lamson's interest, or plead, till he had sent to Jamaica for information, because he does not know whether the witnesses to the will are alive or dead.

I allowed Mr. Liebenrood time to plead, and to answer, till the last session of Trinity Term, 1759.

CHITTENDEN against KNIGHT. Prerogative Court, By-Day after Michaelmas Term, December 13th, 1758.—Administration decreed to a son in preference to a married daughter, although there was an affidavit from the daughter to shew that the son had intermeddled in the effects without competent authority.

Margaret Chittenden died intestate; her son, John Chittenden, and her daughter, Juliana Knight, the wife of William Knight, both prayed administration. Knight, to divest the son, J. Chittenden, of the preference which by the practice of the Court he has, exhibited an affidavit that the next day after deceased's burial he took possession of deceased's effects, had an inventory made of them, and delivered them without any authority to a broker, who sold them to the best bidder at a public auction.

I decreed administration to the son.

[560] **WALKER against CARLESS.** Prerogative Court, By-Day after Michaelmas Term, December 13th, 1758.—Administration granted to a daughter in preference to a widow who had by her marriage settlement barred herself of all interest

in her husband's property.—Court of Prerogative cannot assign a guardian to an infant in ventre de sa mère.

Robert Carless, Esq., died intestate, left Mary Carless, his widow with child, and a daughter, Ann Walker, each of whom prayed administration. The widow by marriage settlement had barred herself of dower and of all interest in her husband's personal estate; her counsel insisted that she was, notwithstanding, entitled to administration as widow, and also as natural guardian to her child, who, though as yet he was in ventre de sa mère, was considered in law as born, for all beneficial purposes.

Judgment—Sir George Lee. I was of opinion I could only grant it to her as widow, for I could not assign her guardian to a child unborn; it would be well granted to her as widow under the statute of H. 8; but as she had barred herself of all real interest in deceased's estate, she would be only a trustee, and I therefore thought (since it was in the discretion of the Court to grant it to either) that it was most proper to grant it to the daughter, who had an interest immediate in the estate; I accordingly decreed the administration to Ann Walker, first exhibiting an inventory, and giving security to the full value of the inventory, and notice of the sureties.

APPENDIX.

[561] PRÆROGATIVA, TERM. TRIN. 1726.

(DR. BETTESWORTH, Judge.)

LLOYD *contra* BEATNIFFE, ALIAS SMITH.—Although one creditor may proceed against an executor in the Court of Chancery, another may sue him in the Ecclesiastical Court.

Lloyd, a creditor, called Beatniffe, the executrix of her deceased husband, to give in an inventory of his effects in the Prerogative Court. She alleged that she had already given in an inventory in Chancery; but it appearing that Lloyd had not been a party to the Chancery cause, and that he was not privy to any of the proceedings there, the Court was of opinion that, though one creditor had proceeded in Chancery, the other might proceed in the Prerogative Court, and therefore ordered the executrix to bring in the inventory.

PRÆROG. TERTIA SESS. HIL. FEB. 6TO.

DR. BETTESWORTH, Judge.

GROVE *contra* ADDIS.—Objections to an inventory must be specified in an allegation.

Edmund Addis died a widower; made his will, but no executors, nor any disposition of the residue. Barnard, his son, took administration with the will [562] annexed. Grove, a sister, called for an inventory, in order to distribution, which was given in.

Grove excepted to the inventory; and in the act set forth that it was neither full nor plain. It was objected, on the other side, that exceptions to an inventory ought to be specific; that it did not appear, from the act, what the objections were, and therefore Addis could not defend himself.

The Court ordered Grove to specify her objections in an allegation.

PRÆROG. DIES EXTRAORDINAR. POST TERM. HIL. MAR. 9, 1727.

HEATH *v.* HEATH.—An assignation for fuller answers enforced after publication.

An allegation was admitted, and the personal answers of the opposite party decreed and given in.

The adverse proctor alleged they were not full.

The judge assigned to hear his pleasure in proximum.

On that day nothing was done; nor did the proctor pray his assignation to be continued.

A court day or two after, the publication of the depositions on that allegation was prayed; and at the same time fuller answers. No exception was taken at that time, that the assignation for fuller answers was dropped; but after the term probatory was expired, and publication had passed, the proctor who had prayed fuller answers, pro-

ceeded to make his exceptions. It was objected that it was now too late, and that he had waived his assignation by having discontinued it one court day.

[563] *Per Curiam*. The objection that the assignation had been dropped, ought to have been taken before. The Court assigned a second time, upon fuller answers. Though publication is passed, yet, since an assignation for fuller answers was made before publication, and has been continued to this time, we are at liberty to proceed.

HERRIDGE contra BRANSBY.—The Lord Chancellor has no jurisdiction to set aside a will.

This case in Chancery was mentioned by Mr. Lutwyche, in the cause of *Powis v. Andrews* (1 Lee, 251). Lord Chancellor Macclesfield, on pretence that a will had been obtained by fraud and imposition, decreed it to be void as to real estate therein devised, and declared that Herridge, the executor of the will, should, as to personal estate, be a trustee only to the use of the deceased's father.

Herridge appealed to the House of Lords, who were of opinion that the Chancellor had no power to appoint the executor to be as a trustee, and that it was a novel invention, without any colour or foundation, and reversed the decree, in every part of it, by which the will stood, and the executor was re-established, as sued.

PRÆROG. TERTIA SESS. PASCHÆ, MAY 22, 1728.

DR. BETTESWORTH, Judge.

KELLER contra BEVOIR.—The power of femme covert to make a will, established.

Mrs. Bevoir, a femme coverte, made her will, and appointed Keller executor and residuary le-[564]-gatee. Her husband opposed it, and alleged she had no power to make a will. The executor pleaded her marriage articles, by which she was empowered, notwithstanding her coverture, to dispose of her estate real in her life-time absolutely, and as if she had been sole, but no express mention of disposal by will. The estate was vested in trust to her use, and subject to her control; and it was provided that, if she died without any disposal, leaving children, the trustees should be seised to their own use; and in case of no children, nor disposal to the use of the surviving husband; and in case she survived her husband, and died without children, and without disposal of the estate, that the trustees should be seised to the use of her executors, &c.

The question was whether, under these articles, she had power to dispose by will.

It was insisted that she had power only to dispose by deed in her life-time, and not by will, which could not take effect till she was dead; and that it was not intended she should dispose by will, appears from the clause in the articles, by which it is provided that in case she made no disposition, the trustees should be seised to the use of her executors, which would have been absurd if she could by her will have disposed of it to her executors.

Per Curiam. The clause gives her an absolute power of disposal in her life-time; but that cannot be understood to mean that she should have no power of disposal, unless she would divest herself in her life-time.

She has power of disposal, as if she was sole, [565] and a femme sole may certainly make a will. The clause giving it to her executors regards her surviving, and is to be taken in this manner—that if she should dispose by will of any other estate she should have, without disposing of this trust-estate, that then, notwithstanding this neglect of devising, the trust-estate should go to such executors as she had appointed, &c.

And therefore I am of opinion she has a power of making her will by the marriage articles, notwithstanding her coverture.

CONSIST. LOND., QUARTA SESSIONE PASCHÆ, JUNE 4, 1728.

THE BISHOP OF LONDON, Judge.

OFFICIUM DOMINI PROMOTUM PER PAWLET *v.* HEAD.(a)—An incumbent suspended, ab officio et beneficio, for immoral practices.

Articles were promoted by Pawlet against Mr. Head, Rector of Bardwell in Essex, for sodomitical practices, in attempting to commit sodomy with several of the boys

(a) This case of *Pawlet v. Head* was much referred to in the case of *Watson v. Thorp*, 1 Phill. 273, 277.

belonging to the school at Bishops Stortford, whereof he was usher. It appeared that there was a public fame and voice in the neighbourhood that he had made such attempts, and that he had thereupon absconded for some time : but the only witness against him, as to the fact, was a gentleman whose son was at the same school, and who had been attempted by Head.

He deposed that his son told him Head had [566] attempted to commit sodomy with him, and told him all the circumstances of such attempt, to which he deposed and swore that, after such information from his son, he met the said Head at Garraway's Coffee-house, in Exchange-alley, and charged him with the fact, who seemed under great confusion, and then confessed that he had made such attempt ; and further deposed that one Mr. Meriton, since deceased, told this deponent that his (Meriton's) son had stated that Head had also attempted to commit the same crime with him. The children on whom the attempts had been made were not above nine or ten years of age, and therefore could not be examined.

Upon the whole, the bishop was of opinion enough was proved against him to subject him to some punishment, and decreed him to be suspended, *ab officio et beneficio*, for three years from the date of the suspension, and gave 30*l.* costs against him.

CONSIST. LOND. EODEM. DIE.

An incumbent suspended, *ab officio et beneficio*, for non-residence.

Another cause was promoted against Head, for non-residence. It appeared that a monition had been sent to Head to reside on his living, and to certify, by a certain day, that he was resident.

Head left a certificate in the office before that day ; but took no care to exhibit it in Court, so that it came not to the knowledge of the judge.

He was then cited to shew cause why he should not be deprived for not obeying the bishop's monition ; and, on his non-appearance, was sus-[567]-pended, and then excommunicated and outlawed.

The Court was proceeding to deprive him. He appeared, and prayed absolution ; and, on taking the usual oath, he was absolved ; but the Court was of opinion that, since he had not made a proper return to the monition, the proof lay upon him to shew that he had obeyed it, and had been resident on his living.

The evidence for him proved that, after the monition, he had been in his parish, and performed divine service there several times, for several weeks together, but did not prove a constant, uninterrupted habitancy there.

On the other hand it appeared that, during the time of his suspension, which was about a year, he had been absent ; and that while he was in the parish he had resided in his rectorial house. It was confessed that he had been non-resident before the monition ; but the counsel for him insisted that he could not be punished by the bishop for non-residence, till he had been admonished to reside, which was agreed to by the counsel on the other side ; so that all that time was out of the question. The counsel for him further insisted, that residence during the suspension was not necessary, and that there was no proof of his non-residence since the monition except during that time. On the other hand it was insisted that a parson is bound to residence, even during a suspension, to keep hospitality ; that it lay on him to prove that he had been resident, which he had failed to do ; and insisted that, by law, an inhabitancy in the parish, but not in the rectorial house, was no residence.

[568] The case of *Butler and Goodall*, 6 Coke, 21; Moore, 440 ; Goldsborough, 659.

The bishop was of opinion that he had not proved his residence, and decreed him to be suspended for that offence for one year, to commence from the expiration of the three years' suspension for the other offence, and that this suspension should be also *ab officio et beneficio*, and condemned him in 20*l.* costs in this case.

N.B.—Head, in order to defeat the suspension, took up money of the farmer of his tithes, that there might be nothing due for the sequestrator to take possession of, but the Court decreed that the sequestrator should take the tithes in kind, and decreed a monition to the farmer to levy them in such manner.

ARCHES QUARTA SESSIONE PASCHÆ, MAY 28, 1728.

DR. BETTESWORTH, Judge.

JONES *contra* YARNOLD.—An allegation admitted, which had been rejected by the Court below. Witnesses cannot be examined *vivâ voce* in the Ecclesiastical Courts.

Lady Morgan died intestate ; Jones, as son and next of kin, obtained administration. Yarnold cited him to shew cause why it should not be revoked, and alleged that he was husband to the deceased ; the Court below examined witnesses to the marriage *vivâ voce* ; Jones gave in an allegation exceptive to their credit and reputation ; the Judge below was of opinion the allegation came too late, the evidence being known ; and also that it was [569] not relevant, and so rejected it ; and then finaliter interloquendo decreed administration to Yarnold.

The proctor for Jones on the same day, soon after the allegation was rejected, made some prayer, and then appealed *ad statim* from a grievance in rejecting it, scilicet the allegation ; it was insisted that the appeal could not lye, because the proctor had made a prayer before the same Judge after a grievance done, and that the allegation was properly rejected, because it was not given in till the depositions were published ; and likewise that an appeal from a grievance must be in scriptis, and, therefore, this being *ad statim* was null. On the other side it was said that the whole proceedings were irregular and null, and that the evidence being *vivâ voce* they could not except to the witnesses till after publication, that the prayer of the proctor was at the same instant that the grievance was done, and that the appeal was from all the proceedings ; but it appeared that the cause had all along been set out in the Arches as an appeal from a grievance only.

Per Curiam. All the proceedings have been very irregular, but as the appeal is only from a grievance, I can take notice of nothing else. The prayer of the proctor was immediately after the rejection of the allegation, and, therefore, was not an acquiescence in the Judge in such manner as it would have been if time had intervened. The Court having examined the witnesses *vivâ voce*, as soon as they were produced, the appellant had no opportunities of excepting before publication as it is called.

I am of opinion that the allegation is relevant, and that a grievance has been done the appellant.

[570] The Court having pronounced *pro voce* *appellationis*, the proctors on both sides agreed to begin the cause *de novo* in the Arches.

ARCHES, DIE EXTRAORDINAR. POST TERM. MICH. 1728.

DR. BETTESWORTH, Judge.

JONES *contrâ* YARNOLD.—A party who had possessed himself of a portion of the goods of a deceased person, before he had proved his title to the administration, directed to give security for the safety of those effects.

On this day Dr. Strahan informed the Court that Yarnold as husband (though the question whether he is such or not, is still depending, and though he was not authorised by any letters of administration) had possessed himself of plate, money, notes, and bonds of the deceased to the value of 800*l.*, and moved for a decree against him to bring them into court.

Dr. Henchman *contrâ*, said it was very unusual for money to be decreed into court, unless some misfeasance was shewn or alleged against him in possession, which had not been pretended in this case ; and that he had possessed himself of them under the semblance at least of being the husband.

Per Curiam. He is not in possession by legal title by administration ; on the other hand, no necessity appears for the Court to decree the money to be brought in ; but it may be very proper that he should give such security for the safety of the effects as the Court shall approve, which was accordingly decreed.

[571] PREROG. CUR., QUARTA SESSIONE, MICH. 1728.

Upon debate of an allegation, Dr. Paul quoted the following case, which was determined by the Delegates at Sergeants' Inn :—

A. made his will, and appointed B. his executor, and by deed gave part of his estate to C. ; C. obtained in the Prerogative a limited administration to the deed only. The executor appealed from the grant of this administration. The Judges Delegates were of opinion that an executor being *universi juris hæres* to his testator, no administration of any sort could be granted ; but that where there is no executor two administrations may well subsist together. The case of *Sir George Coswall v. Morgan*.

CONSIST. LOND., TERTIA SESSIONE, MICH. NOVEMBRIS 15MO, 1728.

DR. HENCHMAN, Judge.

ANDREW *v.* RAYMOND.—A terrier may be pleaded in an allegation in a tithe cause.

In a suit for tithes an article of an allegation was offered to the Court, referring to an old terrier made 106 years before. It was objected that the terrier was not legally and duly made, that the article referring to that which could be no evidence could not be relevant.

Per Curiam. The terrier has ever since been deposited in the archives of the Court; it is to be presumed that [572] every instrument received and filed in a public office, was legally made, and it cannot be called in question without impeaching the credit of the public archives, and therefore the article referring to this terrier is admissible.

ARCHES, 11MO DIE NOVEMBRIS, 1730.

Coram DR. BETTESWORTH, Decano.

WORSLEY, Mulier *contra* WORSLEY, Virum.(a)—After a reconciliation fresh acts of cruelty will revive acts of cruelty, and also of adultery.

In this case several facts of cruelty and adultery were charged by the wife in an allegation offered by her, which were laid to have been committed some years ago. Since that there had been a reconciliation between the husband and wife; and since that reconciliation he was charged in this allegation with fresh facts of cruelty, but with no new fact of adultery.

Dr. Cottrell for the husband, said that since he was charged with fresh acts of cruelty since the reconciliation, they would indeed revive the former acts of cruelty before the reconciliation; but that since no new acts of adultery were pretended, the former acts of that kind did not come within the rule, and that therefore all the articles of the allegation relating to the adultery were irrelevant, and ought to be struck out.

The Court held clearly that new acts of cruelty would revive the whole, as well the acts of adul-[573]-tery that were committed before the reconciliation (though there were no new acts of this sort) as the acts of cruelty, and that she was now as much at liberty to charge him with these acts of adultery, notwithstanding the reconciliation, as she would have been if there had been no reconciliation at all.

PREROGATIVA, TERTIA SESSIONE PASCHÆ, MAY 22, 1728.

DR. BETTESWORTH, Judge.

ELWES *versus* ELWES.—In cases of administration, the constant rule is, to grant the administration to the greater interest.

Colonel Ralph appointed Sir W. Dodwell executor of his will, and inter alia gave a legacy to the eldest son of Captain Elwes, and a legacy of 500*l.* to William, the third son of the said Captain, and then devised all the rest and residue of his estate to the younger children of the said Captain Elwes, share and share alike, excepting the said William Elwes whom he had particularly provided for by the said specific legacy of 500*l.*, and directed that his executor should, in trust for the said children, sell certain houses, and lay out the money arising therefrom, and all the rest and residue in government or other securities, and that the interest and produce thereof should be expended in the maintenance and education of the children during their minority, and that their shares in the residue should be paid to each of them at their respective ages of twenty-one years, or days of marriage, and in case any of them died under [574] the said age of twenty-one, and unmarried, then that the share of that child so dying should go to the survivor, or survivors. The executor released, and administration with the will annexed was granted to Captain Elwes for the use of the minors *durante minore ætate* to whom he was assigned guardian.

Three of the sons of the said Captain were above the age of twenty-one, when the will was made, which was well known to the testator. Thomas Elwes, the second son, of whom no express mention was made in the will, took out process to call upon his father to shew cause why the administration to him should not be revoked as surreptitiously obtained, and on false suggestion, that all the legatees of the residue were minors, whereas the said Thomas had an interest therein, and was at the time

(a) Cited by Sir John Nicholl, in *Durant v. Durant*, 1 Hag. 734, 766. See also notes, 767, *ibid.*

when the administration was obtained of full age, and capable of taking it, and therefore by law ought to have had it.

The father alleged that the administration to him was expired, one of the sisters, viz. Philippe Elwes, being arrived at the age of twenty-one, and she the said Philippe appeared and prayed the administration might be granted to her; with whom seven of the minors by their guardian joined, and she alleged that the said Thomas had no right to the administration, he having no interest under the will, the testator having meant and intended by younger children only such as were minors when the will was made, and that this did appear from the directions he gave for the laying out the moieties of the residue on the maintenance of the legatees till they came to the age of twenty-one, and for the payment of their several shares when they should arrive at their respective ages of twen-[575]-ty-one, which could not be understood to comprehend Thomas, who was above that age.

Per Curiam. The question before me is properly on the grant of an administration cum testamento annexo. The question as to the legacy, whether any be due to Thomas or not, would have properly been moved in the Arches; but it coming before me on the interest, I must give my judgment on the clauses in the will.

It appears that the deceased knew Thomas was of age at the time of making the will, and then it would be an absurdity in him to direct the payment of his legacy when he came to the age of twenty-one, whereas he was already past it. The expression of excepting the third son looks as if he included, under younger children, all but the eldest; but the other clauses plainly shew by younger children he meant the minors only; and, therefore, if this matter was before me in the Court of Arches, on a suit for the legacy, I should be of opinion that Thomas had no legacy by the will; but now I am only on the grant of an administration, which I shall consider as a common case in which two in equal degree are contending, and in such case the constant rule is to great administration to the greatest interest.

In the cause now before me seven minors by their guardian come with Philippe Elwes, so that she has eight interests against one, and therefore I decree the administration with the will annexed to her.

[576] CONSIST. LOND., TERTIA SESSIONE TRIN. 5TH JULY, 1728.

DR. HENCHMAN, Judge.

ALESON, Mulier *versus* ALESON, Virum.—In a suit for nullity of marriage, by reason of impotency, inspection refused because there had not been a triennial cohabitation.

Mrs. Aleson having been married to her husband six months, gave in a libel, setting forth that he was frigidus et impotens. The Court refused to admit it without she could specify some visible defect, there not having been a triennial cohabitation between them. Afterwards she specified—that libel was admitted, and he in his answer said that he had had carnal copulation with her. She then prayed the court would decree him to be inspected.

It appeared that he had been married to two wives before, with whom he had lived for several years, and they never accused him of insufficiency, but he had no children by them. Motion had several times been made for granting the said inspection. The judge at last declared he would not grant it; and seemed to think he was not obliged by law to grant it till after a triennial cohabitation.

PREROGATIVA CUR., TERTIA SESSIONE TERMI MICHAELMAS, DIE
NOVEMBRIS 13, 1729.

CORAM DR. BETTESWORTH.

LUCAS *contra* LUCAS.—Administration granted to a wife, under a special power from her husband, who was beyond seas.

Mrs. Lucas, widow, died intestate, leaving a son, and the representatives of three other children. The son, being at sea at the time of his [577] mother's death, knew nothing thereof; his wife prayed administration might be granted to her as attorney to her husband, and exhibited a general letter of attorney from him, by which she was authorized to take care of his affairs. Some of the representatives of the other children opposed the grant of the administration to her, and urged that, though administration is frequently granted to attorneys, yet there always is a special letter

of attorney to that purpose, which is here wanting; and the general letter of attorney exhibited bears date 21 years ago.

But the Court was of opinion that no other of the relatives of the deceased, except the husband, being entitled to administration by the statute, and he being so far distant that he could not possibly send a special letter of attorney, and the estate appearing to be perishable, the administration ought to be granted to the wife, as attorney to her husband, and decreed accordingly.

UPON NOTICE FOR A PROHIBITION IN THE KING'S BENCH, NOVEMBER 11, 1729. SMELRIDGE *contra* EDGWORTH.—Whenever a will is proved in the Prerogative Court, a suit under it for a legacy ought to be brought in the Arches, and not in an inferior court.

A will was proved in the Prerogative Court, the executor whereof lived in the diocese of London; suit for a legacy under the said will was brought in the Arches. The executor moved for a prohibition, and suggested that he could only be sued for the legacy in the Consistory of London, for that, by the statute of citations, he could not be [578] cited out of his own diocese; and that the Arches had no original jurisdiction; but the prohibition was denied by the whole Court, which was of opinion that the Arches and Prerogative, being both courts belonging to the archbishop, the clause in the statute, saving the archbishop's prerogative, authorized the citation in this case into the Arches; and that the probate of the will having been of the archbishop's jurisdiction, every thing consequent thereon must belong to the same; and that, therefore, whenever a will is proved in the Prerogative, suit for a legacy under it ought to be brought in the Arches, and that it cannot be brought before any inferior ordinary.

N.B.—This case was thus related to me by Dr. Andrew, who was counsel against the prohibition.

INFORMATIONS IN THE ARCHES, TERT. SESS. TERMI MICHAELIS, 11MO DIE NOVEMBRIS, 1730.

Coram DOMINO BETTESWORTH, Decano.

WELDE ALIAS ASTON, Mulier *contra* WELDE, Virum.—In a cause of nullity of marriage on account of impotency, the charges of frigidity and absolute incapacity may be pleaded in the same libel.

Upon letters of request from Bristol, process was taken out of the Arches to call Mr. Welde to answer to his wife, who was daughter to Lord Aston, in a cause of nullity of marriage, propter frigiditatem, and this day the libel was given in; in the 4th article of which was laid a triennial cohabitation, and the rest laid an absolute incapacity coeundi propter inhabilitatem penem erigendi.

[579] Dr. Henchman for Mr. Welde, observed, that this suit was founded upon the title in the canon law, de frigidis et maleficiatis—that the frigidi were those who have a latent incapacity coeundi, and the maleficiati were not persons bewitched, but those who have partes male formatæ—that the law gives different directions in those two cases: in that of the frigidi a triennial cohabitation is necessary; in the other it is not—that the libel now before the Court took in both cases, and that the plaintiff ought to be restrained to one only—that if they would rest on the triennial cohabitation, they ought to lay specially at what places, and for how long time they cohabited in each particular case, because the cohabitatio triennalis must be a cohabitatio continua.

But the Court held that a triennial cohabitation does not require a living together de die in diem, but a general cohabiting only, as is usual between married persons—that it is not necessary to lay specially when, where, and how long in each place they cohabited, for that is proper matter for a plea on the other side. The Court was also of opinion that both the cases of triennial cohabitation, and the absolute incapacity ob defectum postestatis penem erigendi, were properly laid, and admitted in the libel.

On this occasion the case of *Lewis and Lewis*, before Sir John Cooke, in the Arches, in 1702, was mentioned, and said to be thus—A libel was given in before the three years' cohabitation were expired, in which no visible defect was laid, and therefore was rejected as too early; but when the three years were expired, divorce was had in that case.

[580] ARCHES, QUARTA SESSIONE TERMI HILLARII, 15MO DIE FEB. 1731.

CORAM DOMINO BETTESWORTH, Decano.

HON. CATHERINA ELIZABETHA WELDE, ALIAS ASTON *contra* WELDE.—In a suit for divorce by reason of impotency, it is necessary that there should be either a triennial cohabitation or proof that the party is absolutely incapable.

Mrs. Catherine Elizabeth Welde, alias Aston, daughter of Lord Aston, libelled against her husband, Mr. Welde, propter frigiditatem naturalem et perpetuam impotentiam, pleaded that they had been married three years, during all which time he never had had carnal knowledge of her body, but that she was *virgo intacta, sed capax viri*, and that he *non potuit penem erigere nec fœminam penetrare et cognoscere*. Upon his answers to this plea, he swore that he verily believed he had consummated his marriage once or twice, but did admit that he had declared to the Duke of Norfolk, and others, that he had not consummated, unless that he thought and believed that he might have entered her once or twice, if that could be called consummation.

The lady prayed to be inspected by midwives, who returned that, to the best of their skill and knowledge, she was *virgo intacta*, and had never been carnally known by any man; and divers witnesses were examined, who proved that he had made frequent declarations that he had not consummated his marriage.

On the other hand he pleaded that, though they had been married three years, yet that they had not cohabited together so long as by law they ought to have done, for that she, during a great part of that time, had lived with her father, *sepa*—[581]—rate from him; and also pleaded that he was capable to consummate his marriage, and prayed to be inspected by surgeons, which being granted by the Court, the surgeons returned, that he had all the parts of generation in a due and proper proportion, and that it did evidently appear to them he was capable to perform the act of generation.

And one Mr. Williams, a surgeon, who was examined on the part of the lady, swore that Mr. Welde had an external impediment, arising from the shortness of his frenum, which prevented an erection, but that it was now removed, he having cut the same, and swore that he believed he was now capable to perform the act of generation *datâ occasione*.

The heads of the arguments by the counsel, *hinc inde*.

Dr. Strahan for the lady. The parties are of sufficient age to consummate, and the lady is admitted by him to be capable.

If the consummation was not consummated it was his fault; for it appears from his letters that he was welcome to, and well received by, Lord Aston.

The objection here is not that he has a visible defect, for then it would not have been necessary to have united for a triennial cohabitation—the impotency charged is the *non potuit penem erigere, nec fœminam penetrare et cognoscere*, and the proof of this arises from his own answers.

It must be admitted that the confession of the parties alone, by the canon is not sufficient evidence, but joined with other circumstances, is very material; there are frequent declarations from him that he [582] had not consummated, and that he knew at the end of the year they must be separated.

In June, 1729, he told Lord Aston that a surgeon had cured him of an outward impediment, but in the end of that month he told him what the physicians and surgeons applied to him signified nothing; for that, whenever he attempted to consummate, something came across him that shrivelled up his privy parts to nothing.

When his lady charged him with not having consummated, he said, "My dear, if it appears after three years that I have not consummated, we cannot in conscience live together."

Three midwives have returned upon oath that, in their opinion, she is *virgo intacta*.

With respect to the surgeon's return, they can only speak to outward appearance, and it is not sufficient to take away the positive evidence arising from her being a virgin, and we therefore hope we shall have your sentence, pronouncing this marriage to have been null from the beginning.

Dr. Andrew on the same side.

Zacchæi Quæstiones Medico Legales, lib. 9, tit. 3, quæst. 1, nu. 2, nu. 5.

The first law that settled the time of cohabitation is in the Code 5, lib. tit. 19, de Repud. Si maritus, &c.; and that law made the cohabitation to be only two years, and that to be a *continuum tempus*, and not *de die in diem*.

If there be a doubt whether a man be impotent, or not, they must cohabit three years, and if in that time the marriage be not consummated, the law presumes impotency. Nov. 22, tit. 6, de Impotent. Gloss Gothof. nu. 9, 10.

An inspection, on which virginity is returned, and the woman's oath to the same purpose is full [583] proof. Decret. 4 lib. tit. 15, c. 7. Decret. 2 lib. tit. 19, de Prob. c. 4.

Mr. Welde consulted Dr. Strolhan, but has not thought fit to examine him.

The words in the surgeons' certificate, that it evidently appears to them that he is capable, can be only as to outward appearance.

After triennial cohabitation, it is a legal presumption that he is really impotent, since he has not consummated the marriage in that time.

Dr. Paul contrà. There is nothing in the evidence but confessions.

The only question is, whether Mr. Welde is so incapable that he never can consummate. He says in his answer, he verily believes he has consummated, therefore it must be taken to be so; for if he had owned the contrary, he would readily have been believed, and the law does not require a consummation more than once.

If a man has been married, and hath consummated that marriage, and after in a second marriage is impotent, that second marriage is good.

A confession and rumour thereon is not by law a sufficient evidence, Dec. lib. 4, tit. 13, c. 5, and this, confirmed by the Canons of 1597, and by the Canons of 1603, no sentence of divorce can be given on the sole confession of the parties. 2 Modern Reports, f. 115, *Collet's case*. The Court said, prohibition should go to the Ecclesiastical Court, if they proceeded upon the confession of parties merely.

Mr. Williams, the surgeon, swears he believes Mr. Welde is capable to perform the act of generation datâ occasione, not finding any thing ill-formed in his organs of generation.

Inspection of midwives is a fallacious proof, [584] Dec. c. 27, s. 1, no reason given by the midwives why they believed her to be a virgin.

The certificate from the surgeons necessarily implies that he had erection and immission—if a person can be made capable by the assistance of physicians and surgeons, no divorce shall be had. Dec. lib. 4, tit. 15, c. 3.

Dr. Henchman, on the same side. If the parties should be separated, and marry again, and he should have children, they would be bastards, because the church plainly was deceived.

By Duck, de Usu et Autoritate Juris Civilis, the spiritual court, in spiritual cases, is to determine according to the canon law.

According to Brissonius, de Verb Signif, and Calvin's Lexicon, continuum tempus, is what always runs without interruption; and, therefore, they ought to have cohabited together constantly for three years.

Judicium obstetricum est fallax. Decis. Rotæ Romanæ, Decis. 14, Verb. quod Puella non valet consequentia. The woman is a virgin, therefore the man is impotent.

Extrajudicial confessions, nor even judicial confessions, are any proof. When, in these cases, there are contrary oaths by the man and woman, as to consummation, statur juramento viri.

An inspection by midwives is not so sure as by surgeons; the one are skilful, the other are generally ignorant. The return of the surgeons upon their inspection, amounts to his being able, capable to do everything necessary to generation.

One witness produced by the adverse side is by law as good as a thousand on our side. Mr. Williams, who was produced by them, swears he has cured Mr. Welde of an outward impedi-[585]-ment by cutting the frænum, and that he is now capable.

Dr. Strahan on the reply. There is more than bare confessions, for we have the presumption of law from the triennial cohabitation that he cannot consummate, since we have the lady's oath that he has not consummated, and the inspection by the midwives, which is the proper method of proceeding, for inspectio matronarum is the direction of the law.

Dr. Andrew. The rule of law is statur juramento viri, nisi ipsa velit se probare virginem per inspectionem corporis. Dec. lib. tit. 15, Accepisti. 1.

The spiritual courts are the sole judges in marriage causes and must proceed by their own rules.

A direct proof in this case is not necessary because the defects are internal.

Per Curiam. This is a case of great consequence, and one which rarely happens, for this is the first instance of this sort that has ever been before me.

The only question is whether the proof by law is sufficient to pronounce for a nullity of marriage.

The first proof relied on by the counsel for the lady is his confessions, which is not a satisfactory evidence. Mascard, De Probat. Conclus. 311.

By his answers on oath he denies that he is naturally impotent, and, therefore, that takes off the force of his extrajudicial confessions.

A three years' cohabitation is, in these cases, required by law: the parties have been married three years, but a great part of that time have [586] been absent from one another, but a triennial cohabitation is so requisite, that if the parties are necessarily absent, the man is to be restored as to that time during which he has been absent.

Dec. lib. 4, tit. 15. Laudabilem. Gloss. eod. Mascard, De Probat. Conclus. 890. Christianus, De Repud. vol. 5.

It is said that by the midwives' certificate she is found to be *virgo intacta*, and that is sufficient, but the return is only that in their opinion she is so. By *Causa* 33, 9, 1, and *Clarke's Praxis*, it is necessary that the man should have a visible incapacity in order to annul a marriage before a triennial cohabitation.

The best evidence arises from the inspection of the man. Abroad in foreign courts they have a more solemn inspection than we have, called a *visitatio*, which is performed by surgeons in presence of the judges and parties; and formerly in France they used the *congressus*, but that method was abolished by the parliament of Paris in the year 1665.

It is necessary that it should appear to the court not only that Mr. Welde was impotent but that he is so now; for where there is a probability of capacity the court cannot separate parties.

The libel was given in a year before; he pleaded capacity; but then upon inspection had of him thereon, the surgeons have returned that he has his parts of generation in proper proportion, and that it evidently appears to them he is now capable. And Mr. Williams, the surgeon, swears he has removed the impediment he before lay under.

If the parties should be divorced, and both should marry again, and he should have children by the second marriage, these second marriages [587] must be by law set aside and the first marriage declared valid, for when the church appears to have been deceived the sentence must be revoked. Dec. lib. 4, tit. 15, c. 6, et Gloss. eod.

I am therefore of opinion there has not been the three years' cohabitation required by the law, and also that it does not appear from the evidence that he is absolutely and naturally incapable to perform the act of generation.

The court then gave sentence for Mr. Welde, and decreed a monition against her to return to and cohabit with her husband, by the first session of next Easter Term.

This sentence was confirmed by the Delegates on or about April, 1733.

PEAKE *v.* BARNE. K. B. Mich. Nov. 19, 1732.—A deputy parish clerk may act without a licence from the ordinary.

Prohibition to the Ecclesiastical Court for libelling against a man for serving without licence as a parish clerk in Cripplegate, London.

The case was that the man was deputy to one who was a licensed parish clerk there. The court held that the deputy in this case might well act without a licence, and therefore prohibition was granted *per totam Curiam*.

[588] PREROGATIVE, HILARY TERM, 1725-6.

DR. BETTESWORTH, Judge.

RICHARDS *contra* RICHARDS.—A nuncupative will not established.

This case was concerning a nuncupative will. Mr. Richards, the party deceased, said the day before his death, he then being ill and infirm, to George Richards, his reputed son (whose legitimacy was not allowed by the next of kin, who opposed the nuncupative will), that he would give him his estate. The words used by the deceased were these: "Do you see, George, thou shalt have all my estate, I give it to you, but you shall pay some legacies out of it;" and concluded with saying, "Do you see this is my will?" He did not name any of the legacies, and part only of the words (leaving out, "I give it to you," and "Do you see this is my will") were reduced to writing,

and sworn to by three witnesses. The question was whether the words above mentioned would amount to a nuncupative will.

Dr. Henchman, counsel against the will, objected that the probate of a nuncupative will, by the statute of frauds and perjuries, ought not to be extracted till there was a process from the Court, to cite all who have an interest to appear; and that, therefore, for want of such legal process, according to the statute, though all the parties concerned were voluntarily come into judgment, and had made themselves parties in the suit, yet all the proceedings with relation to this will would be null and void.

Dr. Andrew, on the same side, said that a nun-[589]-cupative will was not to be favoured by the law, but every thing was to be taken in the strictest sense against it, and therefore the statute being express that a process should go out before any probate could be granted, all the proceedings for want of that form must be null.

The Court overruled this objection, because the end, for which the statute requires a process, was fully answered by all the parties concerned, being already in judgment, to contest the will.

Dr. Pinfold for the will. The intent of a nuncupative will is not to be taken from the schedule but from the witnesses. The testator's intention only is to be regarded. No nuncupative will is valid unless proved by three witnesses at least present at the nuncupating, provided the estate bequeathed exceeds thirty pounds. A nuncupative will must be made in the last sickness of the testator, and must be reduced to writing within six days after uttering the words, all which requisites have concurred in this case.

Dr. Phipps, on the same side. It is no objection that the words of the nuncupation are in the future tense, for *hæres erit* or *hæres esto* are the same thing, L. quoniam, 15 C. de Testam. By statute of frauds, no testimony can be admitted to prove a nuncupation after six months, unless the substance of the nuncupation was reduced to writing within six days after the speaking.

Dr. Sayer, on the same side. The statute says no nuncupative will for above thirty pounds is good unless proved by three witnesses; another requisite is that such will shall be made in the [590] last sickness of the testator. If the testimony for the will be brought within six months there is no necessity to reduce the words into writing within six days. There may be a nuncupative codicil to a written will. These words, "Take notice, this is my will," contain publication of the will only, and therefore not necessary to be made part of the will as contained in the schedule; yet they being sworn to by four witnesses within six months it is sufficient.

Dr. Paul against the will for one Mrs. Mary Richards. Nuncupative wills are not favourable; in proving an *animus testandi* it must be shewn that such an *animus* relates to the will propounded. The witnesses to a nuncupative will must be convocation *ad hoc* by the statute; and Wentworth's Office of Executors, page 8, a nuncupative will is properly made only when the testator is in *extremis*, so that he has no time to make his will in writing.

Dr. Kinaston on the same side. A *rogatio testium* is necessary in a nuncupation: *testamentum est quod quisque fieri velit*: the statute of frauds and perjuries, founded on L. 17, lib. 6, tit. 21 C.

Dr. Henchman. There must be express words of giving, to shew an intention of bequeathing, in a testator.

Dr. Andrew. A witness in law may be a witness to a nuncupative will, but they are not good witnesses who are interested or appear to have perjured themselves.

The Court was of opinion that it did appear from these words in the pretended nuncupation, "You shall pay some legacy," that the testator did [591] not design this to be a nuncupative will, but only a declaration that he intended to make a will by which he would give his estate to George; because, since he had mentioned legacies if he had intended the above-mentioned words should contain his will he would have specified the legacies; and it appearing also that the witnesses for the nuncupation were somewhat interested, and that they had contradicted themselves on their evidence, the Court pronounced against the nuncupation that it was not valid as a nuncupative will.

This cause was appealed to the Delegates, and the sentence was there confirmed by the whole Court, on 4th February, 1733-4.

ARCHES CUR., TERTIA SESS. HILL. 1727-8.

DR. BETTESWORTH, Dean.

CREMER *contra* DAKINS.—Question raised whether the shares of deceased legatees descended to their representatives, or went to the executors or to the surviving legatees.

Robert Dakins by his will appointed William and Samuel Dakins and another person his executors, and did therein bequeath several legacies, some of 100l., some of 50l., 25l., 10l., &c. and did, inter alia, devise in manner following:—"I give to my wife Mary the rents, issues and profits of all and every my messuages or tenements whatsoever, for and during her natural life; and after her decease, then I give all my messuages and tenements to my executors and the survivor or survivors of them, in trust that he or they shall then sell or dispose of the same, and the monies arising by sale thereof to be divided to and amongst all my [592] legatees herein before mentioned, in proportion to their several legacies which I have given them, and all the rest, residue, and remainder of my estate consisting in ready money, moneys at interest, lottery annuities, or other government securities, or otherwise howsoever, I give to my executors in trust to pay to my wife the interest and produce thereof during her life," and after her decease he directed that they also should be divided amongst his legatees in the same manner as before.

Several of the legatees died, leaving the wife; after her death, the question was whether the shares of the deceased legatees should descend to their representatives or the surviving legatees, or should fall to the executors of the will? An information in law was prayed and granted by the Court upon this point, whether the legacy of the residue vested in the several legatees immediately upon the death of the testator, or whether their interest did not vest till the death of the widow?

ARCHES, SECUNDA SESSIONE PASCHÆ, 14TH MAY, 1728.

DR. BETTESWORTH, Judge.

CREMER *contra* DAKINS.

The Court having heard counsel on the point of law with regard to the legacies in his case, in which the arguments turned chiefly on the distinction of *dies veniens* and *dies cedens*, the judge was of opinion that the testator never intended that the legacies should in any case fall into his [593] executors. As to the representatives of the deceased legatees, he was of opinion they had no title, for the said legatees having died before the widow, their respective legacies had not vested in them; for which reason they could not transmit them to their representatives. He compared this case with that of *Honour and Godden*, in the Arches, May 2nd, 1726, and decreed that the legacies to the deceased legatees should go to the surviving legatees as joint legataries.

ARCHES CUR., TERTIA SESSIONE TRIN., JULY 2ND, 1728.

DR. BETTESWORTH, Dean.

ROBINSON, Mulier *versus* ROBINSON, Virum.—The admission of a husband to an allegation of faculties is to be taken strongly against him. Permanent alimony allotted. The wife directed to retain such of her paraphernalia as were in her own possession.

This cause began originally in the Arches by consent of the parties, who were subject to the jurisdiction of the Consistory of Exeter. Mrs. Robinson sued her husband for cruelty and adultery, and prayed a sentence of divorce. It appeared in evidence that he had, from the time of the marriage, treated her with a great deal of ill-nature; that he frequently fell into violent passions, at which times he abused and called her names, by which means he had so excessively frightened her as to occasion several fits of sickness; and that when she was sick he refused her all proper assistance, and in every respect behaved as a very bad husband, except beating her, with which he was not charged. It appeared that on the day of the marriage he left her without con-[594]-summating, and did not come to cohabit with her till several months after. The adultery was proved by Mrs. Drake, by whom he had had a child; her evidence was opposed as a *particeps criminis*, but she was backed by other witnesses, who deposed to his taking lodgings for her, to the birth of the child, and his owning it for his child and taking care of it.

The Court was of opinion that the cruelty and adultery were fully proved, and

pronounced for a divorce, and condemned him in 50l. costs. In this case an allegation was given in, setting forth his faculties, which amounted, according to that, to between two and three thousand pounds per annum. Mr. Robinson confessed it *modo et forma*, with a protestation that he did that because he was not able to pay the expence of examining witnesses to it. When the cause was heard he stood excommunicated for not having paid twenty pounds costs, according to the decree of the Court, so that his counsel could not be heard.

The Court said that his confession of faculties was regularly to be taken strongly against him; but he having confessed the allegation, with a declaration that it was done only to avoid expences, and there having been no plea on his part as to that matter, it was not clear to him that his estate was so large as pretended; that as to the lady's fortune, it was only 6000l., 150l. per annum of which was in reversion, and not yet come to the husband: and I therefore decreed 200l. per annum to be paid quarterly for alimony, and decreed a monition to him to pay her 400l. for two years' arrears of alimony, from the going out of the process to the time of sentence, she having received [595] no alimony during the suit; and also decreed that she should retain such of her paraphernalia as were in her possession, but would not admonish him to deliver her the rest which were in his custody.

PREROG. CUR. SECUNDA SESSIONE TERM. MICH., NOVEMBRIS, DIE SEXTO, 1728.

DR. BETTESWORTH, Judge.

MOORE *contra* PAINE.—By the *jus gentium*, one witness to a will is sufficient, but there should be some adminicular proof to corroborate that witness.—The will of a blind person holden to be sufficiently proved.

Susannah Selwyn, deceased, by her will appointed her sister, Mrs. Moore, and one Paine, joint executors; she gave the bulk of her fortune to Moore, 100l. only to Paine, and bequeathed several legacies to other people. Moore opposed the will. It appeared that the deceased was entirely blind. There were three subscribed witnesses to the will, but only one of them (*viz.* the writer, who was of entire credit, and wholly unconcerned as to the event of the suit) could account for the instructions, for the reading of the will to the testatrix and her approbation of it, and for the identity of the paper; the other two only deposing to the publication of it by her as her will, but they did not hear it read to her, nor did they know the contents of it. The capacity of the testatrix was fully proved, and that she had made a former will, which differed from this chiefly in the quantum of the legacies, which were smaller in that than in this.

An information in law was granted upon this point, whether one witness of entire credit is suffi-[596]-cient to prove the will of a blind person? It was insisted, against the will, that the solemnities required by the civil law (though not the same number of witnesses) were necessary to establish the will of a blind person, and that unless it was read over to such testator, and approved by him in the presence of two witnesses at least of entire credit, and who could depose to the contents of it, could not be valid, and to this purpose the commentators on *L. hac consultissima* (*qui test. fac. possunt*) and *Swinb. of Wills*, part 2, § 11, were cited.

On the other side it was insisted that the law *hac consultissima* had never been received in England; that all our wills stood upon the *jus gentium*, and that by the *jus gentium* one witness was sufficient to prove the will, even of a blind man, which *Swinburne* also declared in the Latin note upon the said chapter. The case of *Millett and Wadham v. Fabian*, in the Prerogative, anno 1688, was cited thus: "Nicholas Efford being blind or dim of sight (for in that particular the counsel differed) sent for one Russell, a clergyman, to make his will, who would have excused himself, and desired the testator would send for a lawyer; to which he replied that he could not see, and the lawyer might impose upon him by reading one paper to him for his will, and making him publish another; whereupon Russell made his will, which the testator published in the presence of two other subscribing witnesses, who were not present when it was read to the testator, nor did they know the contents." This will, which therefore stood only upon the evidence of Russell, the writer, was confirmed in the Prerogative; and the sentence, upon appeal to the Delegates, was affirmed there.

[597] *Per Curiam*. There is a difference between the counsel concerning that case of Efford, whether he was quite blind or only dim; but I have looked over the process, and find he was utterly blind, and that the matter rested entirely on the

evidence of the writer, and it is therefore, in all circumstances, a case in point with this before us.

I am of opinion that the solemnity of the civil law is not requisite with us ; the proof of our will is by the *jus gentium*, and by that law one witness is sufficient ; and of this opinion is Swinburne, in the note cited, who concludes with these words : *Et hanc opinionem receptit generalis regni nostri consuetudo*. There should be, indeed, some adminicular proof to corroborate the witness, which in this case arises from the conformity of the former to the present will, and from a declaration which it appears in evidence she made, that she believed some of her relations would not approve of her will, which was some sort of recognition of this will. Upon the whole, the Court was clearly of opinion that the will in question was sufficiently proved, and accordingly pronounced for the validity thereof.

N.B.—This cause was appealed to the Delegates, where the sentence was confirmed, June 28, 1733.

REPORTS of CASES ARGUED and DETERMINED
in the CONSISTORY COURT of LONDON;
containing the JUDGMENTS of the Right Hon.
SIR WILLIAM SCOTT. By JOHN HAGGARD,
LL.D., Advocate. In Two Volumes. Vol. I.
London, 1822.

[1] CASES DETERMINED IN THE CONSISTORY COURT OF LONDON, &C.
THE OFFICE OF THE JUDGE PROMOTED BY WILLIAMS *v.* BOTT. 27th May, 1789.
—Pleading in a criminal suit. Name of the judge wrongly described, in a copy
of the articles, fatal.

[Referred to, *Fagg v. Lee*, 1873, L. R. 4 Adm. & Ec. 140. Distinguished,
Bowman v. Laz, [1910] P. 311.]

This was a question as to the pleading in a cause of office, or a criminal suit, respecting the effect of a wrong description of the name of the Judge. In the citation the party was called upon to appear before Sir William Scott, and the original articles were conformable to the citation; but in the copy delivered to the proctor of the party, by the proctor of the promoter, the proceedings were described as being in the name of Sir William Wynne.

In support of the validity of the proceeding it was contended that the original process being right, and issue given, the variation was not fatal; that according to ancient practice, all papers ought to issue from the registry, as the answers do now. That it was the duty of the proctor, receiving the process, to collate it with the original, and a charge was allowed for that service; that in cases where a misnomer of the party was considered to be fatal, the error appeared in the original process, whereas here it was a mere clerical error, from which no inconvenience could arise, unless the proctor could shew that the copy was the only paper to which he could refer. That in a late [2] case before the commissary of Surry (*Filewood v. Talbot*, 24th January, 1789) the name of the surrogate was inserted in the original citation, but omitted in the copy, which might have been material: the objection was overruled, and there was no appeal; it was there said the objection ought to be taken before issue joined.† In this instance the issue had been joined after the proctor knew of the error.

Judgment—Sir William Scott. This is a proceeding in which the office of the Judge has been promoted against the party under the 5 & 6 Ed. 6, ch. 4, “for quarrelling, chiding, or brawling in the church, or church-yard,” and it has truly been said that the Court is not disinclined to admit suits of this kind, since it is bound to carry the provisions of the law into execution, on this subject, as well as on others; but the party charged is entitled to avail himself of every legal objection, and is certainly not to be considered in an unfavourable light on that account. The party is cited before me, and the articles are in my name, but the copy delivered is in the name of my predecessor, and the question is, whether such error is fatal? It may be proper to consider what would have been the effect of such an error in the original? since, if it would not have been essential there, it would not be so in the copy; but I am of opinion it would have been a ground of nullity in the original, as the suit could not be maintained in the name of Sir William Wynne; the objection would have been a plea in bar and not merely in abatement. In the case of *Filewood v.*

† Oughton, Ordo. Jud. tit. 60.

Talbot, which has been cited, the name [3] of the surrogate was rightly described in the original, but omitted in the copy, and that omission might be no fatal error, as the name might be surplusage, the description of the office being itself sufficient, and there being no direct opposition between the original and the copy; but here a person is described nominatim, in whose name the suit could not be introduced. To whatever length the proceedings had gone, they must have constituted a nullity, if the error had been in the original, and uncorrected.

But it is said it might have been corrected. In a plea of abatement, an objection, on the ground of misnomer of the party, if not taken before issue, would be too late; for, by giving issue, the party allows himself to be the person designed. This was the case in *Bailey v. Bradburn* (Consist., 27th November, 1788), in which it has been said the error was allowed to be rectified. There the party had appeared and suffered the proceedings to go on; here the wrong description of the Judge is different, for no admission of the Judge can give him authority, even if an undue admission had been made by the party. The passage from *Oughton* (tit. 59, s. 1, 4) does not go so far as this, since the words are "actoris vel rei" only, and the expression "quocunque alio" must be understood in *pari materia*, and not generally and in an unlimited sense. I think therefore it could not be corrected in the original; and the only remaining question is, what ought to be the effect in the copy? If it has the effect of an original to the party, the consequence already pointed out may fairly be allowed to apply. Anciently it might not be usual to deliver copies at all, but in later practice it has been differently held, and the copy is that to which the party immediately looks. An error in the copy must have the effect of an original to him, and would even be less subject to the authority of the Court than the original, which might have been corrected; for the Court could not order the party to deliver back the copy, having become his property by the delivery. It is said that the principal object of delivering a copy is to prevent delay, and that the proctor might collate it, if necessary for his party. He may be bound to do that for the benefit of his client, but his obligation goes no further. I think the variance is essential, in the copy as well as in the original, and that the party is entitled to take advantage of it, and, in consequence, to be dismissed.* (Affirmed on appeal, 7th July, 1789.)

[5] *BARHAM v. BARHAM*. 13th June, 1780.—Divorce—protest, as to the validity of the appointment of the guardian of the wife *ad litem*—and as to the effect of a citation, describing the party in a wrong parish, but cured by appearance, over-ruled.

[Referred to, *Mordaunt v. Mordaunt*, 1870, L. R. 2 P. & D. 136; *Mordaunt v. Moncrieffe*, 1874, L. R. 2 Sc. & D. 380.]

This was a case of divorce by reason of cruelty and adultery, brought by the wife against the husband, in which the husband appeared under protest, and prayed to be dismissed on the ground of the incompetency of the person, in whose name the suit

* 20th July, 1810.—In *Thorpe v. Mansell*—on objection, that articles, for an offence under the same statute, were in the name of the Judge, as vicar-general and not as official principal, the Court said—it is not too late to take a fundamental objection at any time of the proceedings, and the question therefore is, whether the present objection can be so considered from the character of the two offices? The vicar-general is the representative of the bishop, and in later times has proceeded only in matters of voluntary jurisdiction,(a) as in the granting of licences, where there is nothing of litigation or contention between the parties. But it appears from the authorities,(b) that he has also a criminal jurisdiction—a power to enquire into crimes, and punish them; but it is not now stated how this inquisition is to be pursued, whether in a forensic form, or as the bishop himself would exercise it in his own hall of audience, or more privately. I think, however, the description given of the official principal does almost exclusively give to him the cognizance of such offences in this court. As vicar-general, I am not sure that he could exercise it. I am of opinion, therefore, that the omission is fatal, as it is clearly the official principal whose office is meant to be promoted here. I think this omission would affect the citation and any instrument under it. I am under the necessity of dismissing the cause with costs.

(a) See also *Hericourt*, *Loix Eccl. de France*, tit. Vic.-Gen. p. 23.

(b) *John de Athon*, in *Const. Othon.* tit. *De Instit. Vicar.*

was brought, as guardian of the wife, to institute proceedings; and, secondly, on the ground that he was described in the citation as being of a wrong parish.

Judgment—Sir William Scott. This is a suit brought against the husband, who has taken a peremptory objection to giving an appearance on two grounds: first, of the incompetency of the person suing; and, secondly, of the false description of the person cited. The first objection is that the grandfather of the wife, in whose name the suit is brought, as guardian or curator assigned by the Court on the renunciation of the mother, is not a competent person; since it does not appear that the renunciation of the mother, on which his appointment depends, was made with the consent of her husband; but it appears to me not to be necessary to enter into the question whether the husband of the mother could dispute the effect of the appointment, with reference to the validity of the mother's renunciation; since it will be enough if a third person cannot take advantage of such an objection. The Court finds a guardian apparently appointed with [6] sufficient regularity, and unless that appointment is shewn by some presumptive proof to have been invalid, the Court will presume the person properly qualified to receive it. It is said that the appointment is too general, and in such a form as would not be allowed by the common law. A reference has been made to some cases of general appointments, for all concerns of personal estate; but here the appointment is precisely limited, not only for carrying on suits, but for this suit particularly. It might be another question if the objection applied to another suit; but this suit is specifically mentioned, and there is a regular act of guardianship not objected to by the person, on whose right alone the objection could be founded. It has been said that the wife might appear for herself, being a femme coverte, though a minor, notwithstanding the course of practice has been otherwise; and that although at common law the husband and wife are eadem persona, in the civil law they are distinct, and that a wife, can sue her husband; but if so, she is subject to other legal disabilities, and particularly to that of minority. I have no doubt, therefore, of the competency of the person instituting the suit.

The second objection is that the party is cited in a wrong parish. It might be more material if it was a wrong jurisdiction, for then it might be contrary to the statute of citations; * but it is not [7] so, as both parishes are in the same jurisdiction. He is described as of the parish of St. Andrew, Wardrobe; and it is stated that he lived in a house in that parish till after the suit was commenced, and that he is still answerable for the rent, but had left the house, and had become a lodger in a public house, in the parish of St. Mary, Abchurch, before the citation. This objection, then, is reduced to a simple misnomer, or false addition, an objection which is very fit to be supported on the danger of citing a wrong person, but not to be carried further; and

* In the case of *The Marquis of Donegal v. The Marchioness of Donegal* (Vice Chancellor's Court, 6 Madd. 375), Mr. Arthur Chichester applied for a prohibition to restrain the Judge of the Consistorial Court of London from proceeding in a suit of nullity of marriage, instituted by the Marquis of Donegal against the marchioness. One ground for prohibition was stated to be, that Lady Donegal had been constantly residing in Ireland for the last four years out of the local jurisdiction of the Court. But the Vice-chancellor refused the prohibition, observing that the writ of citation against the Marchioness of Donegal, described her as resident in the parish of St. James, Westminster. If it had been directed to the Marchioness as living in Ireland, then, on the face of the record, it was clear that the Court had no jurisdiction in the case. She might, if she had chosen, have objected that she was living in Ireland, and consequently was not resident within the jurisdiction of the Court; but she did not think fit to do so, but appeared and pleaded to the citation. (23 H. 8, c. 9, Canon 106.) This then was an admission on her part that she was properly described as living in the parish of St. James, Westminster, and he was bound to say that, having once pleaded to these facts, she had no right to withdraw from them at any time before sentence was pronounced. If the marchioness could not retire, being concluded herself, she had also concluded an intervening party. The jurisdiction of the Ecclesiastical Court depended not on the locality of the subject, but on the locality of the person. How then were the interests of Mr. Chichester to be prejudiced by the proceedings being instituted in London instead of Ireland? His Honour was therefore of opinion, on authority and principle, that the Marchioness of Donegal was now precluded from objecting, having submitted to the jurisdiction, and that Mr. Chichester was bound by her submission.

unless it appears that a [8] wrong person is proceeded against, the Court is not willing to attend to such objections. Here the Court may collect, with certainty, from the affidavit of the party, that he is the person designed, and that there is no danger of proceeding against a wrong person. The identity therefore being proved to the satisfaction of the Court, and the jurisdiction being the same, the Court is inclined to hold the party bound by this citation. What is stated is, "that though he is answerable for the rent of a house in the parish described in the citation, he has lodged and boarded at a public house in another parish." But a man may have two residences; and there are cases where it has been held that the practice of dining at a house in a parish is sufficient to render a person liable to be considered as of that parish. Here is the occupancy of a house, which is abundantly sufficient. I therefore overrule the protest, and assign him to appear absolutely. (Affirmed on appeal, 4th Feb., 1790.)

A prayer was also made on the part of the husband, that he might be admitted a pauper, which was rejected.

[9] ANTHONY v. SEGER. 27th June, 1789.—Election of churchwarden. Alien disqualified; effect of the poll considered as to the other parties, on the disqualification of the person elected. Re-election.

[Applied, *Reg. v. St. Matthew, Bethnal Green*, 1875, 32 L. T. 559; *Reg. v. Wimbledon Local Board*, 1882, 8 Q. B. D. 516. Distinguished, *Rex v. Bishop of Sarum*, [1916] 1 K. B. 472.]

This was a question arising on the election of churchwardens in the parish of Ealing, at a vestry held for that purpose, on the following facts:—Le Cornu and Wineuffe were nominated, and also Mr. Anthony, and on a shew of hands in favor of the former two, a poll was demanded; and on casting up the poll the numbers appeared to be, for Le Cornu, 38, for Wineuffe, 35, and none for Anthony; but an objection being made to Le Cornu when he applied to take the oaths, that he was an alien, he admitted the fact, and was declared ineligible, and a motion was made to admit Anthony as elected.

On the part of Anthony it was contended that those who had held up their hands for him had also given in a paper to the same effect; and in so doing, had actually voted and polled; that on the disqualification of the other candidate, the person for whom they so voted was entitled to be considered as duly elected.

On the other side it was argued that the poll, as taken on the poll book, was the only regular election; the shew of hands being but an experiment to save trouble, and completely annihilated, when the poll was demanded. The Court directed the poll book to be produced; and on a subsequent day (4th July) affidavits were brought in—of the vestry clerk swearing that he saw no poll book—and of twenty-five other persons swearing that there was one. [10] The vestry book was exhibited, in which there was an entry of Le Cornu and Wineuffe, as duly elected, but none as to Anthony.

Judgment—*Sir William Scott*. The proper and regular method is for the church wardens to return two persons to succeed them; but this is not exclusive of other methods, and though customary, it is not indispensably necessary, provided the Court has satisfactory information of the election in any other way. When the persons elected by this parish presented themselves, an objection was made on behalf of the parish that one of them was an alien born, and of course not eligible; that the votes given for such a person were thrown away, and that another who had been put in nomination, and had a few votes, was duly elected.

An alien born has no right, as has been determined here concerning the claim of an alien naturalized to this office, and so, elsewhere, with respect to the offices of constable or overseer, as not the smallest portion of authority in this country can be regularly intrusted to an alien. The fact therefore being admitted, that person was properly rejected. A contrary position has indeed been intimated, and it has been said that there would be ground for a mandamus, but inaccurately, for offices the most ministerial leave a discretion not to join in an illegal act, and if a parish had returned a papist, or a Jew, or a child of ten years, or a person convicted of felony, I conceive the ordinary would be bound to reject. To say that a mandamus would lie is no objection, for the ordinary is not to give way without the authority of some higher Court actually expressed; and though it is the duty of the ordinary not to take

slight objections, [11] he is bound, I conceive, to take care that an election, in his opinion void in itself, should have no legal effect, and this is a duty which he owes to the parish and to the general law of the country. The question is, then, whether the person who had the minority of votes is duly elected? Neither party having resorted to the method which might have been taken, of applying for a mandamus, the question for the present is left open to the Court, and it has directed affidavits to be made of the facts.

It appears that Mr. Le Cornu and Mr. Wincuffe, and also Mr. Anthony, were put in nomination, and a paper was delivered by one person, claiming on behalf of a particular district the right of electing a churchwarden for that part of the parish, and that paper was signed by several persons. There is some dispute when this paper was signed, before or after the shew of hands, which might be material. In one affidavit it is sworn to have been before, in others after; I think the probability is that it was before; because it does not seem to have arisen from any thing which passed at the time, but from a notion of a local privilege, which had been entertained before; and in the contrariety of evidence on this fact, I may conclude that this paper was delivered before the shew of hands. On that supposition, it would not be for the purpose of a poll, as has been suggested in argument, since it could not then be known that the election might not be decided by a shew of hands; and therefore this paper could not be delivered for the purpose of inserting the names on the poll. It has been contended that Anthony being put in nomination, the votes that were given for an ineligible person were thrown away, and the parish could not proceed to another election: [12] and it is certainly a rule of reason and of common sense that if persons will knowingly throw away their votes on a person by law ineligible, such votes must be considered as lost. But it must be shewn that this was the case, otherwise the law will presume that they acted in ignorance of the fact; and in that case it would be hard that they should lose their votes, and that another person should be obtruded upon them. In this case it is not shewn to have been stated to the parties that Le Cornu was an alien, and therefore it is not reasonable that another person should be forced on the parish on such an election, as if it had passed regularly. It appears that Le Cornu had served before; it is fair therefore from that circumstance to suppose that the parish was not acquainted with the objection, but that it thought him perfectly eligible.

Under these circumstances, the shew of hands being very considerable for the old churchwardens, a poll was demanded; and it is not without surprise that I have seen the affidavit of the vestry clerk, declaring, to the best of his recollection, that no poll was demanded, in contradiction to all the other witnesses on both sides; since he ought to have been more accurate in his observation than other persons. A poll was demanded, and the question is, what was done at the poll? I think it appears clearly that the only persons polled for were Le Cornu and Wincuffe. There is no evidence that one vote was given for Anthony; and I see no evidence that the paper was delivered to the vestry clerk for any purpose of polling, or that any thing was done by the persons who signed it to follow up their nomination. Then how is the Court to consider what was done before? Can [13] it hold, as was contended in argument, that when a poll is demanded, every thing that has been done before still continues valid? I think not. Where a poll is demanded, the election commences with it, as being the regular mode of popular elections; the shew of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that on a shew of hands, the person has the majority, who on a poll is lost in a minority; and if the parties could afterwards recur to the shew of hands, there would be no certainty or regularity in elections. I am of opinion, therefore, that when a poll is demanded, it is an abandonment of what was done before; and that every thing anterior is not of the substance of the election, nor to be so received. Then as the poll destroys the previous voting, and no poll appears for Anthony, and the vestry book, which must be taken to be the authentic book, makes no mention of him, I cannot look on him as elected.

It is said that it is improper that the old churchwarden should be continued: this may depend on the discretion of the parish; the Court has no authority to interpose, except in deciding on a dubious case. The election being referred to a poll, and the nomination of Anthony not having been followed up by any act on the poll, I must hold him not duly elected.

On the question of costs, I think there is no ground for giving costs; it is not a private case, but a proceeding to try a public right, and recommended by the Court itself at the visitation, unless they thought fit to apply for a mandamus. I shall therefore only direct the parish to proceed to another election as soon as may be after regular notice.

[14] THE OFFICE OF THE JUDGE PROMOTED BY BARDIN AND EDWARDS v. CALCOTT. 11th July, 1789.—Proceedings against a person for erecting tombs in the church-yard without due authority sustained.

This was a case of office promoted against Thomas Calcott, for erecting tombs in the church-yard of Kensington, without due permission or authority.

Judgment—*Sir William Scott*. This is a case of office promoted against Thomas Calcott, for three offences of the same general description, in erecting tombs in the church-yard of the parish of Kensington, without leave of the ordinary or the churchwardens. There is no question remaining as to the jurisdiction, that point having been fully debated on the admission of the articles. The church-yard, as well as the church is the freehold of the minister, subject to the right of the parishioners for interment. Ancient custom often annexes fees for erecting a stone, or any thing else, by which the grave may be protected and the memory of the person interred preserved. It is no general common law right; but custom will interpose, and, where it is shewn to be customary, such practice will be supported. As to buildings of height, the authority is reserved to the ordinary; and permission ought not to be granted without his authority in some manner interposed. The proper mode, strictly speaking, is to apply to the ordinary for a [15] faculty, who calls on all persons having a right to shew cause why it should not be done, and hears and determines on the force of any objections that may be made against it. The 3d Inst. (3 Inst. p. 202) leaves the matter at large; but all commentators say that the ordinary is to judge of the convenience of allowing tombs or monuments to be erected, and that if done without his consent, he has sufficient authority to decree a removal. This is the rule of law laid down in Gibson (Cod. p. 454), and therefore the Court has only to see how it has been observed; for although no particular inconvenience may have been sustained, if a general rule has been infringed, it will be sufficient to found the censure of the Court; since it is not necessary that a special inconvenience should be proved in any particular instance.

In this case three offences are charged; the first is for repairing a tomb without leave of the churchwardens; and the evidence on this charge, as it is to be found in the depositions of Huntley, one of Calcott's men, is "that he was ordered to repair the brick-work, and for that purpose he took off the flat stone, and took down three courses of brick-work above ground, and next morning finished it as it was before. That the sexton came to him, when he had nearly done, and asked him how he came there? to which he answered that he had borrowed the keys of the clock-maker, and as he had nearly done, he should stay and finish his work." Stratford says, "that he carried a message from Bardin the churchwarden to Calcott not to make any alterations at five o'clock in the morning; but he afterwards saw that he had removed the stone as before described."

[16] Then what is this offence? Not that of erecting any structure, nor of making addition to it, but merely of repairing what had been already placed there by proper authority, according to the custom of the parish. Then came the prohibition to do what had not been intended to be done, namely, to make any alterations, and the man continued only to restore and place every thing as it was before. No alteration or addition was actually made. The only conceivable fault, then, in this part of the case, is that it was done without the leave of the churchwardens. It might have been proper to apply for leave; but the churchwardens were bound to grant it, as far as their authority extended; and if they had not, they would have been liable to the censure of the Court. It is of public consequence that monuments, once built, should be preserved; and if parties are not at liberty to repair, the object of obtaining leave to erect would be defeated. Monuments are memorials of great use in questions of descent, and consequently, in matters of family interest; and decency and propriety likewise require that they should not remain in a state of ruin and decay. It is rather the duty of churchwardens to encourage parishioners to provide that they may be put into repair than to obstruct others in doing it. The only fault in this instance

was that the person so employed did not observe the proper formalities of making application. The complaint, on that ground alone, is one which I am not inclined to visit with severity, although it might have been proper to have made the application, inasmuch as nothing should be done in a church without the knowledge and consent of the churchwardens.

[17] The other charges are for original buildings, and are the subjects of very different consideration. The evidence on the first of these relates to the tomb of one Wilson, who was not a parishioner; and the churchwardens have been blamed in the argument for allowing strangers to be buried there. This is a permission, undoubtedly, which should be sparingly granted, since there can be no absolute claim of that kind; but I think there is enough shewn to prove that the churchwardens in this parish are authorized to give such leave, since there is a table of fees produced, in which there is one "for the burial of strangers." The clerk says that Calcott applied to him to be informed as to the fees, which are paid both to the vicar and to the parish—to the vicar of common right, and to the parish as established by custom. It appears that permission was asked for laying a flat stone, and that the sum of eight guineas was mentioned as the fee.

A question is raised as to the meaning and extent of this permission: no plan was exhibited, and I think it must be understood as for a flat stone. If permission is asked and granted on the usual terms, and the usual fee is paid, it must be interpreted according to the custom of the parish. Witnesses have been examined to prove what the custom is, and none on the opposite side; and I am satisfied that the practice has been to lay a flat stone, and no more, only with so much support as may be necessary to prevent it from sinking into the ground. It appears that Calcott carried the brick-work higher; the curate interfered; and the churchwardens objected and ordered him not to proceed. Two persons swear that they carried the message to [18] Calcott, forbidding him to proceed further. If there had been any mistake, therefore, it was now explained. There is no evidence that any permission for more than a flat stone was originally given, and if it had, it was not now too late to recede. It has been said that there was no harm in this; but I think there is a difference between the use of a flat stone, and that of a building of greater height; and the parish has recognized that difference by permitting the one, and disallowing the other. At any rate, uniformity is injured, and the free access to the different portions of the church-yard is obstructed. It is said that it is not necessary to consult the ordinary, and that it is troublesome so to do; but such liberties, if not allowed by the custom of the parish, should not be taken without the control of the ordinary, who is the proper guardian of the rights of the parish against intruders, and also against the avarice of any individuals who might be tempted, for their own benefit, to grant leave, to the future inconvenience of the parish. On this charge therefore I think it is sufficiently proved that leave was not given for what was done; and if there was any misapprehension, it was corrected at such a time that the party ought to have desisted.

The third charge relates to the monument of Mr. Lambert, and it is said that fuller permission was granted in this instance by the churchwarden to the widow, to do what she thought fit, which would be very improper, if given by them, and a very undue exercise of their authority. The witness Taylor says, "that he was present when leave was asked to do the same as in Wilson's monument; that the churchwarden said 'it was more than he had a right to do, but that he would [19] not officially interfere;' that the workmen carried the brick-work a foot higher." The widow says "she applied for leave, paying the usual fee," which must be restrained to some definite meaning, and ought to mean nothing else, than that it was for the usual indulgence; and accordingly it appears, "that she actually paid eight guineas," being the usual fee for a flat stone; "that she went to the churchwarden, and said she meant to do it as in Wilson's monument, and that it was very hard she could not do it as she thought fit." This does not strictly agree with the account given by Taylor; she says further "that she gave directions to do the same as in Wilson's monument, and that it appears to her not to be so high." The other witnesses say "that it is higher." From my own personal inspection within these few hours I can say that there is a considerable difference. It is visibly higher. I am sorry to observe such an assertion in the affidavit of this witness. Whatever the permission was therefore, it was exceeded. Calcott was ordered by the churchwardens to desist

and whatever other orders were given by the party, they ought not to have been regarded.

It appears, then, that there have been two trespasses in this church-yard, which is a consecrated place, entitled to public protection, and in which nothing should be done but under the direction of public authority. We know, indeed, that many things are often done there that are indecorous enough, as the drying of linen, and spinning of ropes, and other practices that are unseemly enough in such places, but which, importing no special or permanent damage, are overlooked with [20] that sort of laxity which is apt to be exercised upon property of a public nature, and in which no man possesses a particular interest. It is of public importance, however, that these public rights should be protected, and the offence being proved it is only necessary to inquire what the sentence ought to be. The two latter charges are proved, and it will be my duty, in the first place, to admonish the party to desist. There is no prayer for any order to pull down, and there would indeed be a difficulty in pulling down without further directions for building up. I think, therefore, that I shall best obviate the inconvenience that might ensue to the parish, by confining my admonition to the party to refrain.

On the subject of costs, it is said that as some of the charges are proved, the promoter is entitled to his costs. But I do not accede to this position, or think that it is just, that if ninety-nine charges are made, and some few, or one only, proved, the party is to be charged with the expences of the whole proceeding.*¹ I shall therefore give a sum nomine expensarum; and in consideration of the length of the case, and of the number of witnesses which the party has examined, and of his general good character, which weighs with me, I shall fix that sum at thirty pounds.

[21] THE OFFICE OF THE JUDGE PROMOTED BY *BARTON v. WELLS*. 17th Nov., 1789.—Jurisdiction of the Bishop of London over Ely chapel established. Exemption of ancient privileges allowed to the Bishops of Ely, in virtue of their episcopal residence in Ely Palace, overruled, as not continuing after the property had been transferred.

[Referred to, *Combe v. Edwards*, 1878, 3 P. D. 137.]

This was a suit of office promoted by Dr. Barton, rector of St. Andrew, Holborn, against Dr. Wells, for performing divine service and administering the sacraments in Ely Chapel, without licence from the Bishop of London.

Judgment—Sir William Scott. This is a proceeding by Dr. Barton, rector of the parish of St. Andrew, Holborn, against Dr. Wells, for performing divine service, preaching, and administering the sacraments in Ely Place Chapel, without a licence from the Bishop of London. The fact is admitted, and though the form of this proceeding is criminal, the suit is brought for the purpose of trying the civil right, and the real parties may be said to be the Bishop of London and the Bishop of Ely, or the grantee of the Crown. In one of these persons the jurisdiction resides; Dr. Barton lays it in the Bishop of London, Dr. Wells in the Bishop of Ely, or in the grantee of the Crown, though it cannot be in both; and the counsel for Dr. Wells have argued it almost entirely as for the grantee, and thereby seem rather to admit that the Bishop of Ely must be excluded. I may add also that the nature of the present proceeding scarcely raises the question of general jurisdiction; since it is founded only on the charge of officiating in the performance of divine service without a licence.

[22] In many chapels it is necessary that the minister should have a licence, or institution from the bishop, although the bishop may have no general jurisdiction over the place. *² Free chapels are of that nature; and in many pure donatives, the bishop has authority over the persons officiating, though not over the place. (*Colefatt v. Newcomb*, Ld. Raymond, p. 1205.)

*¹ A similar rule seems to have been held, on the quantum of costs, in the King's Bench in *Middleton v. Croft*, 2 Strange, 1056—the case in which Lord Hardwicke delivered the judgment of that Court against the force and effect of the Canons of 1603 as not binding on the laity.

*² “Free chapels were places of religious worship exempt from all jurisdiction of the ordinary, save only that the incumbents were generally instituted by the bishop and inducted by the archdeacon of the place.” Tanner, Not. Mon. p. 28.

“Free chapels may continue such, in point of exemption from ordinary visitation, though the head or members receive institution from the ordinary.” Gib. Cod. p. 211. Registr. f. 307 b. cited, *ibid*.

The question then is whether it is necessary that Dr. Wells should have a licence from the Bishop of London to officiate in Ely Chapel? and not whether the general jurisdiction of the Bishop of London, as ordinary in a larger sense, may extend there. On the part of Dr. Wells it is not shewn under what authority he acts; he declines all authority from the Bishop of London, and alleges none from the Bishop of Ely or from the grantee; and he may be said almost, on his own representation, to stand in the character of a mere intruder. The Court is under the necessity therefore of supplying this defect, by information derived from other sources, or from presumption founded on the tenor of the defence; and I must presume that he officiates by permission of the grantee of the Crown, in whom the counsel contend that the right resides of appointing an officiating minister, without the control of the Bishop of London as general ordinary. Such [23] a claim must be supported by clear proof, since it is against common right and order; and all presumptions of law must be held strongly against such a breach of the general rules of our ecclesiastical constitution, especially when it may lead to great irregularity and inconvenience. Many anomalies may have existed in former times, when special privileges were more easily allowed, which have been long discountenanced. Where they still can be shewn to exist on legal ground, they remain as ancient fixtures, not to be removed, though placed at variance with more correct principles, and retained not without some sacrifice of general convenience and propriety; but when their legal existence is in question, the Court must incline against them, and prefer the known rule, till the grounds on which they are to be supported are clearly and indisputably established.

The ground assumed in this case is that Ely Chapel was an ancient chapel of the Bishop of Ely, and within the diocese of Ely, as part of the episcopal house, which was conveyed by act of parliament, with all rights, privileges, and immunities, to the Crown; that in this manner it became part of no diocese whatever, and was afterwards granted by the Crown to the present grantee who holds, as the Crown held, free from all jurisdiction. On this plea, it is necessary to consider, first, the ancient state of the place, and, secondly, the changes which it has undergone. On these points the case is very slightly instructed in the evidence. The whole rests on the ancient constitution of the place; but when it was founded, or when it came into the possession of the see of Ely, or how it stood while [24] it was the property of that see, or in what particular it was separated and distinguished from its former relations, does not appear. It is the duty of the Court, therefore, to look further, as the rights of other persons, besides the immediate parties are concerned; and it must take other information, if it is to be had, and so far as it can be properly introduced. General authentic history is of that kind. It appears from thence that the see of Ely was founded in 1109, but that of London subsisted many ages before. The house was purchased by Bishop Kirby in 1290, consisting then of a messuage and several cottages.* His successor, Bishop de Luda, purchased more houses, and left them to the see on payment of 1000 marks to his executors.* It is not shewn at what time the chapel was built; but it must have been either by Bishop Kirby or De Luda, since there is mention in the will of the latter of an endowment for a chaplain, and it does not appear that there was on that occasion any other interposition of the royal authority than to legalize the gift.

What then was the condition of this place before the purchase by the bishop? It must have stood on the common footing of all ground in and about London, which is not distinguished by any known appropriation, as part of the diocese of London. There is no suggestion to the contrary; since the whole argument is built upon the change that is supposed to have been made by its becoming part of the diocese of Ely; and it is said that it became thereby exempt from the ordinary jurisdiction of the Bishop of London. But that is to speak improperly, since there was no special exemption from London, only as every other part of Ely, or as any part of one diocese is exempt from another. There was no special exemption as in the nature of a peculiar jurisdiction. And here I must observe that a fact has been adverted to in the answers in a manner rather incautious: it was pleaded, "that the chapel was immemorially a part of the diocese of Ely," and this is admitted in the answers in the terms of the

* See Bentham's *Church of Ely*, p. 151, 153; also Godwin, *De Præsulibus*, "Episcop. Elien."

allegation, though the fact is otherwise, and open to observation on the first enquiry, that it was no part of the diocese of Ely till a century after legal memory, which is fixed at 1189. This is an oversight of which advantage has been taken in argument; and if Dr. Barton was the only person concerned, he might have no reason to complain that advantage should be so taken of his admission. But as other parties are concerned, I think I am warranted to assert against this admission that it did not become part of the see of Ely till after the time of legal memory.

The next consideration is, by what law, or on what tenure, it became a part of that see. I conceive, by the ancient law, that bishops should be empowered to act in their London houses as in their dioceses; and for that purpose their residences in London were considered as part of their dioceses. We collect this from what is stated by Bishop Gibson (Cod. p. 132, n.), and from the statute 33 H. 8, c. 31, relating to the bishopric of Chester, where it is provided "that he shall be held resident in the diocese of Chester, and have jurisdiction in his [26] house at Weston, within the diocese of Coventry and Litchfield, during his abode there, as other bishops have in the houses belonging to their sees, wheresoever they lie." It is said that this is only a private act—and it is so in its enactments, but it gives a general description of the bishop's jurisdiction in such places. It refers to a rule of law which was going into desuetude; and in the statute 31 H. 8, relative to the exchange of houses between the Bishops of Carlisle and Rochester and the Lord Russell, there is a clause providing "that they should have the same authority in their new houses at Lambeth and Chiswick as they had exercised in their old houses;" and Gibson says that at the time when he wrote "there were none left but Lambeth House and Croydon, belonging to the Archbishop of Canterbury; Winchester Place, now removed from Southwark to Chelsea; and Ely House in Holborn" (Cod. p. 132, n.). The same privilege has not been attached to new houses, and is not annexed to the present Ely House, though a visitatorial jurisdiction is allowed in it by statute.^{†1}

It is made a question what was the nature of the authority allowed, whether voluntary or contentious; but I see no reason to limit that privilege in the present case; though it is certain that by the old canon law (x. 1, 30, 7. Vide Gloss, "Terminos"), it is laid down as a rule that one bishop could not exercise jurisdiction in another diocese, [27] even with the consent of the other bishop, "*nisi cognosceret inter volentes*." The objection from the statute of citations (23 H. 8, c. 9) is not material; since, in such instances, there would not be a going out of the diocese more than in the case of detached districts, and I see no reason to presume that the bishop might not have held a Court of Audience or Consistory Court in such places, though it was seldom done.

Another question is raised whether the ancient jurisdiction remained concurrent, or was excluded or removed. In the older editions of Ecton, I perceive that Ely Chapel is classed in London; and it is more consonant to general principle that it should be so, than that it should have become absolutely and exclusively a part of Ely.

Such being the ancient law and usage, is it to be inferred, in reason or in fact, that a place so becoming part of the new diocese is thereby irrevocably detached from the ancient diocese? The intention of the rule was to protect the bishop from the penalty of non-residence,^{†2} and to provide for the necessities of his diocese, by enabling him to perform the duties of it when called away by public business. Suppose the first bishop, Kirby, had soon quitted this residence, on both reasons he would have carried the privilege to his new house. In such a case, on what ground could the person who might succeed him, not being Bishop of Ely, claim jurisdiction, on any principle of security to himself, or grounds of public convenience? Suppose the [28] same of Bishop de Luda, or his immediate successors. If the privilege would not have remained attached to the house when they left it, then it can only be by the effect of time, as it is contended that the personal privilege is now become local. But how is this proved? It is only said that time has done so in other cases,

^{†1} The act 12 G. 3, c. 43, provides that the bishop may continue to exercise his appellate jurisdiction as visitor of certain colleges in Cambridge; and also directs that payment of the reserved rents belonging to his see may be made in the new episcopal residence, Ely House, Dover Street.

^{†2} Burn, Eccl. Law, vol. i. p. 213. Watson's Clergyman's Law, c. 37, p. 368

and that in detached parts of counties. The history of that fact however is subject to much obscurity and doubt, and even taking it to be true and certain, is accounted for on other principles. When counts, having hereditary counties, had also manors elsewhere, it is supposed that they obtained permission of the Crown, that the detached manors should be parts of their counties. But there is no general principle that is known to have prevailed at any time, that the demesne lands of an earl should, during his residence there, be deemed appendant to his county; and it is most probable that it was by special grant that such peculiar exceptions were established. But supposing such grants were obtained, they became under such grants local; and succeeding earls could not, by changing such manors, affect their local character, and cause their new demesnes to be considered in the county where situated, whilst the antient ones lost that character.

With respect to bishops, the origin of their privilege was very different, as it was principally founded on the ancient rule that their residence should be within their diocese. The cause and the nature of their privilege was personal; and in the several instances which are mentioned in the acts of parliament, it is not to be doubted that they had all oratories consecrated, and probably by them-[29]-selves, for divine service; yet there has been no claim of local exemption for these. It is truly said that if others have relinquished such privileges, it cannot affect the rights of those who wish to retain them, but it is some presumption against such a claim, that no one having the same ground of pretension has made the same claim, particularly in a case of privilege, which is seldom given up, even when it is burdensome. Is there any privilege in this case then which distinguishes it from others? It is said that these possessions of the see of Ely were large and of great importance: taking the fact as so represented, it could not make any legal difference. It is said also that Ely House was part of the diocese of Ely, but others not; the contrary is proved by the act of parliament referred to; and it is impossible to shew Ely House to have been part of the diocese of Ely, in any other manner than other houses of the same description belonging to other dioceses. It is then contended that the conveyance by act of parliament to the Crown, and the grant founded upon it, have produced a stronger effect. As an actual conveyance it would be no more than any other conveyance in extent of powers, and if, before the act, this house had been like other houses of the same kind, it must remain so, unless the act had expressly made it otherwise, which it does not appear to have done.

I am next to consider what was the more modern state and condition of this chapel. During the sitting of Parliament, service was performed in it, which marks the use of the chapel to have been for the private convenience of the bishop, and of him only. It is not suggested that it was open at other times to other persons. But it is said that strangers were [30] admitted, and very probably, by indulgence, as they may be admitted at the Foundling Hospital or other places. It is said "that marriages were celebrated there as at the Fleet," but this practice ceased after the Marriage Act, which implies that it was not a regular and established place for the performance of that rite. Baptisms also of children born in the demesnes have been administered there; but that might be by permission of the bishop, and would not furnish any proof of the particular character of the place (x. 3, 49, 9. Gib. Cod. p. 190).

But the effect of the statute (12 G. 3, c. 43) is relied on, by which this palace was transferred to the Crown, "with all rights, immunities, and advantages." But what were the advantages connected with this question, that belonged to Ely House? I know of none belonging to the house, exclusive of the bishop. As respecting the bishop, the personal privilege belonging to him was that his residence should be part of the diocese of Ely, and as such exempt from the jurisdiction of the Bishop of London. In what character then is the Crown to take? as part of the diocese of Ely? if not, it takes one part of the privilege, and not the other part. It has been said that the King would hold it as the bishop had held—the bishop held it as part of the diocese of Ely, but the King is to hold as part of no diocese, though no moment can be pointed out when one part of the exemption subsisted not accompanied by the other; it was exempt from the ancient diocese, only as having become a part and appendage of another. The statute gives all rights, immunities, and advantages; but it transfers no portion of episcopal [31] rights. The privilege had been that this place should be considered as part of the see of Ely—all other consequences were

dependent on that. If they are now to be transferred to the holder, without any connection with the see, it must come to this, that the privilege having been first personal, in the Bishop of Ely, as Bishop of Ely, has become a local privilege in a person to whom no such character belongs. Nothing arises from the possession of the Crown, as the King may hold places exempt, and others which are not so. The ancient demesnes of the Crown were exempt as *terra regis*; but in more modern possessions of the Crown, the Crown holds them as the former owner, and as parts of the same diocese, unless its connection with that diocese, as in this case, is derived from the mere personal and peculiar character of the former possessor. The result then is that this place became part of the diocese of Ely by occupancy of the bishop only, having been before part of the diocese of London; that occupancy ceasing, it falls back to its former relations: and if it is asked how the Bishop of London's right attaches under the act? I answer—by instant resumption; and the question is whether the act has taken away such right, and given it elsewhere in derogation of the ancient right?

It is well known that great part of the possessions of the see of Ely were taken away by violence in the time of Queen Elizabeth, and given to Lord Hatton, and that there were many Chancery suits respecting them, which were not terminated until 1707 (Grose's *Antiq.* vol. 3, p. 135). Many streets have been built there, yet no notion has ever [32] been entertained that persons residing in them should apply to the Consistory of Ely; on the contrary, they have always obeyed the citations of this Court; and if those parts have sunk into the diocese of London, why should not the rest of the same possessions? It is true that this part came to the Crown, but what is the effect of that? That the Crown might erect this into a free chapel, I will not absolutely deny; but I am not satisfied that though the Crown may erect a free chapel on its ancient demesnes, it can therefore cut out a part of an old diocese for that purpose. But if the Crown could exercise such a power, there is no proof that it has so done. There is no grant, no erection, no act of the Crown, that can be alleged to have produced any such effect. The Crown then took as any subject would have taken; and he could only hold, as he would have done before the occupancy of the Bishop of Ely. The place would not have become extra-diocesan on coming to a subject.

Something has been said of the ecclesiastical character of the Crown, that it may possess ecclesiastical jurisdiction, and transfer it to others. But the same question recurs, Has the Crown exercised any ecclesiastical jurisdiction, or has it transferred it? There is no proof of any such fact. It is said also, suppose a bishop of another diocese had taken, what would have been the consequence? If the old rule on which the personal privilege of the bishop was founded has become extinct, as I think it has, he would not have succeeded to this privilege, more than any other individual; or if the rule can be shewn to be still in existence, the place would have become part of his diocese, by virtue of his own [33] personal privilege, but not as derived in any manner from the Bishop of Ely. But it is not so with the Crown: for there is no such rule that a house purchased by the Crown becomes, in perpetuity, part of any ecclesiastical jurisdiction belonging to the Crown.

It is said that the place having been consecrated is inapplicable to other purposes, and that the present proprietor having purchased it as a place of religious use, must have such use of it. That it has been consecrated may be an indifferent circumstance as to any question of jurisdiction, but it may furnish a good reason of expediency, why this chapel should not be exempt from the jurisdiction of the Bishop of London, since no other can be shewn, and it is impossible to foresee into what hands it may come, and to what uses* it may be converted, unless subject to some jurisdiction. Admitting that the purchaser had a right to the religious use of the chapel, he must admit also that he is subject to the direction of the law; since the right to religious use no more excludes the ordinary than the right of the parishioners to the parish church. Some observations have been founded on a trial at law, in which it is said that Ely Place has been determined to be extra-parochial, in a suit for parish-rates. The extra-parochiality is not proved in this case; but I will go as far as the allegation

* The chapel is still in existence, and used as a place of divine worship for the children of the National School in Baldwin's Gardens; having been presented in 1819, by Mr. Joshua Watson, as a private benefaction to that establishment.

of the parties. Supposing the jury, on a question concerning an assessment to the poor of Saint Andrew, Holborn, had been of opinion it was extra-[34]-parochial—that the place may be so, and not extra-diocesan, is not to be denied. Poor rates were first established in 43 Eliz. : their allegation states that it was then part of the diocese of Ely. Dr. Wells appears also to have applied to the Bishop of Ely for his licence, acknowledging the necessity both of a licence and of a dependence on some diocese, and if it may be dependent on one episcopal jurisdiction, it may on another, and if any licence be necessary, the rights of the proprietor are not more injured by application to one diocesan than to another.

The claim of total independence cannot be supported:—First, it is against the general law : secondly, it is the claim of a layman to a privilege now extinct in the bishops, to whose episcopal character it belonged : thirdly, it is a claim of local privilege, whereas it was merely personal, and was confined to the residence of the bishop. I must therefore pronounce for the jurisdiction of the Bishop of London, by decreeing that Dr. Wells has officiated without authority, and direct a monition to issue to him to desist.

On the question of costs, in a suit of this kind, according to the principle of the Court, some costs must be given ; but it would be little less than injustice to give real costs ; there is nothing positively criminal in the suit, as it could not be expected that the proprietor should resign a claim of this kind without submitting the question to the decision of the Court. That has been properly done, and upon a discussion attended with many difficulties. I shall therefore give a sum nomine expensarum, and fix that sum at 40s.

[35] EVANS v. EVANS. 2nd July, 1790.—Divorce by reason of cruelty. What circumstances constitute cruelty in construction of law. Dismissed. [Discussed, *Curtis v. Curtis*, 1858, 1 Sw. & Tr. 192. Followed, *Kelly v. Kelly*, 1870, L. R. 2 P. & D. 61. Approved, *Russell v. Russell*, [1897] A. C. 395.]

This was a case of divorce, by reason of cruelty, instituted by Mrs. Evans against her husband.

Judgment—*Sir William Scott*. This cause has been carefully instructed * with evidence by the practisers, who have had the conduct of it ; and has been very elaborately argued by the counsel on both sides. It now devolves upon me to pronounce the legal result of the evidence which has been thus collected, and of the arguments raised upon that evidence—a duty heavy in itself, from the quantity and the weight of the matter ; and extremely painful, from the nature and tendency of a great part of it, and from the inefficacy of this Court to give relief adequate to the wishes of both parties. Heavy and painful as it is, it is a duty which must be discharged ; and which can only be discharged with satisfaction under a consciousness that it is discharged with attention and impartiality, and under the reflection that if, after the endeavours which I have used in cleansing and in instructing my own conscience upon the subject, I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing a mode by which the parties may be relieved against the infirmities of my judgment.

The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second [36] virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness ; but my situation does not allow me to indulge the feelings, much less the first feelings of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case.

To vindicate the policy of the law is no necessary part of the office of a judge ;

* There were several pleadings, and one in exception to witnesses, on which the observations of the Court will be introduced, as a note, in the latter part of this case.

but if it were, it would not be difficult to shew that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the du-[37]-ties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of "*per quod consortium amittitur*" is but an inadequate test; for it still remains to be enquired what conduct ought to produce that effect? whether the consortium is [38] reasonably lost? and whether the party quitting has not too hastily abandoned the consortium?

What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

Still less is it cruelty where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and, therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated [39] merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed: of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessities, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters: the great ends of marriage

may very well be carried on without them; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum.

These are negative descriptions of cruelty; they shew only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It [40] has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect.

The parties in this case are a Mr. and Mrs. Evans, proceeding in a cause of cruelty brought by Mrs. Evans against her husband.

The libel states the marriage at Calcutta, in the East Indies, in the year 1778; and it proceeds to plead the character of the parties; that he is a person morose, sullen, tyrannical, and so on; and that she is in every respect the reverse, a woman of a mild and tender disposition. These pictures are reversed, as is the usual manner, in the responsive allegation. It is usual, in these sorts of causes, to admit articles pleading in this manner the characters of the respective parties; it is usual, I say, to admit such articles, but I have not understood that it is usual to examine upon them, or at least to examine upon them in the proportion which has been done in the present cause. And I think that I feel the weight of some reasons which [41] would induce me very much to question the propriety of admitting such articles at all, if they were likely, in other cases, to lead to the consequences they have done in this; for a very great part of this voluminous enquiry has turned, not upon the matter in issue in the present cause, but upon the general character of the two parties; and I have been loudly called upon, on both sides, to determine that which I am not called upon, either by the nature of the authority which I possess, or by the necessity of the present case, to pronounce, the result of that evidence upon general character.

Upon evidence of this kind it is impossible not to remark that it is unsatisfactory in the extreme; it is opinion at best; the opinion of persons whose powers of judging upon any question of delicacy and importance are utterly unknown to me; whose partialities and prejudices, to colour and influence those opinions, are equally unknown to me. To take such opinions then, and to apply them to the proof of controverted facts, and those facts too of a criminal nature, does seem to be extremely unsafe. The case indeed is civil, as has been repeatedly observed, but the facts undoubtedly are criminal; or else why plead the bad disposition of the husband? why plead it, except for the purpose of shewing that he has committed bad acts? Now I know hardly any case in which it is allowed to create a presumption in favour of the probability of criminal facts having been done, where that presumption is founded upon the mere opinions of men concerning general disposition. Criminal facts must be tried by themselves. To try them by opinions, and by opinions collected in [42] this sort of way, is extremely dangerous for the Court: to the individual, who is exposed to an enquiry of this kind, it is dangerous in the extreme: to place a man in this sort of legal pillory, where all who choose may pelt at him, is exposing an individual to the injustice of mankind, in such a way, as I am sure the justice of Courts cannot relieve him from.

What I have to say upon this part of the case, therefore, will be extremely short,

because it is merely a digression for the satisfaction of the parties; it is no foundation, no principle, no part of that legal proof, upon which I shall determine this case.

And I must here take the opportunity of saying, that if the truth of this charge rested upon matter of character alone, it would determine me very favourably in behalf of Mr. Evans. Here are the attestations of a great number of persons—gentlemen extremely respectable in their own characters and situations; connected with him by early and familiar acquaintance; by habits of a long intercourse; by habits of business. But all this, it is said, is the partiality of friends. What, is it nothing in a man's favour to have friends? Can a man say any thing that bears more strongly in his favour, than that he has friends? partial friends? friends who have become so, and can have become so, from the opinion only of his good deservings? They are persons, many of them, who have lived with him in a distant country, where countrymen collect together in close and intimate connection; where they form, as one of the witnesses describes it, one community: some of them, two of them in particular, have lived with him in the same family; [43] in the family of Mr. Hastings: they have been connected with him in the conduct of business, where his temper was daily seen and daily tried; for business, as we all know, is very apt to expose the real dispositions of men: it is a tyrannical master; and if a man can go through the difficulties, which even the smoothest course of business will throw in his way, with an unruffled temper, it is no mean argument of a tractable disposition.

All this, it is said, may be very true; but it has happened in other cases that a man has worn a mask to the public, and pulled it off to his family. Undoubtedly there may have been such cases; cases of moral prodigies; cases of disgraceful exception to the ordinary course of nature; but the general presumption at least is strong the other way. If a man shews upon all occasions an obliging disposition in his general intercourse with the world, the presumption certainly is that he carries that disposition with him into the private recesses of his life. If he is a good friend, the probability is that he is a good husband, which is a friend only of a nearer and dearer nature. It is to be added, too, that in this case almost all the witnesses speak to this very specific part of Mr. Evans's character, even the witnesses who are examined on the part of Mrs. Evans. There are particularly Mr. Wood, Dr. Curry, Tomlings, with the exception of one fact, Mr. Paumier, Mr. Griffiths, Mr. Boehm, Mrs. Webber, with the exception of one fact likewise, all these witnesses, who are examined on the part of Mrs. Evans, bear an honourable testimony to his general and visible conduct.

Well, but it is said there are witnesses who depose in a contrary manner, and you cannot recon-[44]-cile these two sets of witnesses together, but upon the supposition that what is said by the first set of witnesses is the effect of mere hypocritical assumption. Now the other witnesses, who depose unfavourably, with the exception of Mrs. Hartle, and a young French woman, Madame Bobillier, whom I shall speak of by and by, are Mr. and Mrs. Thackeray, and Mr. Moore. Mrs. Moore has not been examined in this cause, and the reason given for that has been that she, being the sister of the party, might be a witness whom the Court would hear with a great deal of jealousy and suspicion. Most assuredly the same circumstances of jealousy hang upon the characters of every one of these witnesses: they are all persons nearly allied; are subject of course to prejudice: I don't say to a dishonest or dishonourable prejudice, but from that circumstance they are subject to prejudice.

There is another observation that strikes me, and that is this, that all these witnesses, with the single exception of Mr. Moore, found their opinions upon the very facts controverted in the cause. Mr. Thackeray, who has given a very candid testimony in the cause, and on whom I shall very much rely in the determination of it, says expressly, "that till some time after Mr. Evans's return to England he had always a good opinion of him," and he expressly founds his present opinion upon the facts that are now in issue between the parties. Then, only consider what is done in this case. In the first place, the witnesses extract their opinions from these particular facts, and then it is expected that the Court shall take those opinions and apply them to the establishment of the very facts in question. To be sure, if there is such a [45] thing as circularity in argument, this is that; and grosser injustice than that could not be committed. Mr. Moore, indeed, stands upon a very different footing, he goes back to a remoter opinion; his opinion does not arise out of the facts in issue; he refers to a much earlier period of time. Now there are one or two observations which strike me pretty forcibly upon the testimony of Mr. Moore. Mr. Moore is a man of

sense ; he knows, I dare say, extremely well, that caution and that sobriety of mind which belongs to a witness deposing in a Court of Justice to the character of another individual. And I am very sure he does not come here to amuse himself or the Court with drawing highly-finished pictures. I am therefore to suppose, as I do, that Mr. Moore is not only perfectly sincere, but that he rather falls short than exaggerates the impression upon his mind, in the character which he gives of this gentleman ; that character is, "That he became intimately acquainted with Mr. Evans, and was a good deal in his company, and saw much of him, prior to his marriage ; that after his marriage until the month of April, 1780, their families visited ; but from the said month until the arrival of Mr. Evans in England he had little or no intercourse with him ; but that upon his said arrival, and for some time afterwards, he the deponent often saw and was a good deal in his company ; and has at different periods prior to his marriage, when he was likely to become allied to the deponent's family, and until Mrs. Evans was obliged to quit his house, given a watching and scrutinizing eye over his conduct and disposition, and is thereby enabled to say that he knows him to be a man of [46] wicked, profligate, and abandoned principles, and of a morose, tyrannical, cruel, and savage disposition, void of common humanity, vindictive, full of animosity and revenge, of a turbulent and intolerable temper, avaricious and mean to excess, a great dissembler and hypocrite, filthy in his ideas, and delighting in the dirty expression of them ; and so much given to deceit, scandal, and falsehood, that, from a very early period after his aforesaid marriage, it was a rule in the deponent's family never to believe what he said ; and that he, the deponent, has often heard him scoff at the religion of the church to which he was brought up or professed ; that he has often heard him pride himself on his apathy and callousness, and knows him to be of callous feelings ; and that he had the character of a morose, tyrannical, cruel master amongst his native servants in India." And he concludes by pronouncing him, in another passage of his deposition, a person unfit for admission into society.

Now, taking this character into consideration, I think there are circumstances in the conduct of Mr. Moore which are a little extraordinary. This young lady went over to India into the family and under the protection of Mr. Moore ; Mr. Moore was acting by her with the substituted authority of a parent ; he was perfectly acquainted with the detestable character of this gentleman ; it is a courtship which goes on for many months, as is proved by Mr. Moore himself, and yet it does happen that this poor young creature is suffered to fall into the hands of this monster. The marriage is graced by the presence of Mr. Moore, by the presence of some of the most respectable persons then resident in the [47] country—Mr. Vansittart, Mr. Perring, Sir John D'Oyly—an afflicting ceremony it undoubtedly must have been to Mr. Moore ; it must, in fact, I am sure, have been considered by him literally as leading her to the altar to be sacrificed. It may be said, indeed, that this was an act of necessity on his part. Be it so : this however might have been expected from a brother's affection and attention, for a brother he certainly has shewn himself throughout this business, that he would at least have taken the most early opportunities of acquainting the other parts of his family with this great misfortune which had happened to it. Mr. Thackeray, Mrs. Thackeray, and every member of the family in England, must have been informed by him, if it was only for the security of this poor unhappy young woman, who was so sacrificed, that she was in the hands of one of the most detestable of mankind. Yet nothing is more clear to me than that nothing of this sort ever was communicated, otherwise Mr. Thackeray could not have deposed that he continued his good opinion of Mr. Evans till after his arrival in England. It is impossible, therefore, that it could have been communicated to Mr. Thackeray, or, in short, to any one of the family. I think, therefore, I have, in this case, Mr. Moore's deposition speaking one way, and Mr. Moore's conduct speaking another ; and, where they speak different ways, I know which I have to trust to. I have only one way of conceiving the matter, and that is this ; his present opinion is sincere, but it is only his present opinion ; he has not cautiously watched the rise of it in his mind ; he is inaccurate in tracing back its commencement to the period that he does : it is [48] not, as he supposes, the fruit of early and dispassionate observation ; it is the fruit of passion, of modern passion, produced by the resentments excited by the later dissensions in this family.

Upon the whole, then, I see most honourable attestations to the character of Mr. Evans ; and I think I have reason to presume that, if late dissensions had not

happened, I should have seen no attestations but such as were perfectly honourable to his character.

On the character of Mrs. Evans I shall say much less ; for this reason—because it is much less connected with the issue in the cause ; because, if the facts imputed to Mr. Evans are false, there is an end of the question. On the contrary, if they are true, they are of that nature and species, that they cannot be justified by any misconduct on the part of Mrs. Evans ; for though misconduct may authorize a husband in restraining a wife of her personal liberty, yet no misconduct of hers could authorize him in occasioning a premature delivery, or refusing her the use of common air. In every view therefore of the matter, Mrs. Evans's character has nothing to do with the cause ; and in a cause where so much is to be said upon the necessary parts, I shall waste but few words upon such as are unnecessary and altogether impertinent to the cause. The little that I have to say is for the satisfaction of the parties ; and it is this, that here again if the matter rested simply upon the evidence given of character, yet after all the unhappy pains which have been taken to blacken each other, I see no reason why these two persons might not have passed through the world comfortably together, with a little discretion and management on [49] their own side, and some discretion and management on the part of those who are mutually connected with them. To be sure, if people come together in marriage with the extravagant expectations that all are to be halcyon days, the husband conceiving that all is to be authority with him, and the wife that all is to be accommodation to her, every body sees how that must end : but if they come together with the reflection that, not bringing perfection in themselves, they have no right to expect it on the other side ; that having respectively many infirmities of their own to be overlooked, they must overlook the infirmities of each other ; then, if friends will be discreet enough to support them in the execution of their duty, there is a high probability that something like happiness might be produced.

With respect to Mrs. Evans, there are many attestations much too honourable to be applied to any character that was unamiable, and these too come from witnesses examined for Mr. Evans. What bears a contrary aspect seems to have come at a later period, when dissensions had arisen, when servants and friends had entered into the factions of the family, had taken sides, and had, of course, a bias hung upon their judgments. But what I principally rest upon is the testimony of early acquaintance—of acquaintance before hostilities commenced—of Mr. Hannay, Mr. Maxwell, Mr. Halhed, and others. Such persons, I think, must form a safer judgment than Mr. Mason, much of whose judgment, in all probability, is formed upon the complaints of the husband. I think the attachment of her family, the zealous and animated part which they have taken in her behalf on this [50] occasion, speaks strongly in her favour ; and I do assent to the observation that has been made, that if she had been the worthless person she is represented, they would not have stood forward in the manner they have done.

There is one odious imputation in the cause, which I have heard with great pain, and to which I advert with great reluctance, and it is merely for the purpose of saying that I think it an imputation unfounded and ill-advised ; and I can never give way to it upon the evidence that has been given. The appearances of a woman affected by nervous disorders, in a way in which this poor lady, it is in proof, was often affected, are equivocal enough to mislead a stranger, as Mr. Mason appears very much to have been ; and as to the servant Fraser, the facts themselves are so trifling to which he speaks, that they amount to little ; and when I reflect upon the licence of observation exercised by people of this kind upon the conduct of their masters and mistresses, I must consider it as amounting to nothing. I have then no evidence before me on which it is possible to suppose that the character of this lady is at all polluted by so degrading a habit.

So much, then, for matter of character in this cause ; which part of it I now gladly leave, to come to the real subject of the cause—the conduct of Mr. Evans towards his wife ; and, in order to examine that, I must look back a little into their history.

Mr. Evans went to the East Indies, I think, in the year 1770 ; he was employed in the usual occupation of gentlemen who resort to that country—in making or improving his fortune. He [51] was in the immediate service of Mr. Hastings, the then governor-general. In 1776 Miss Webb, the daughter of a respectable person in His Majesty's military service, went over to Calcutta, upon a visit to two sisters, who

were married and resident there—a Mrs. Moore and a Mrs. Thackeray. It appears, I think, that Mr. Thackeray and his wife were at this time resident with Mr. Moore, but that they left Calcutta before Miss Webb was settled in marriage. In November, 1778, the marriage took place, after a courtship of some months, as I have already stated. At the time of the marriage, he made a settlement upon her, to which Sir John D'Oyly was a trustee; and Mr. Boehm, his agent in England, speaks to his belief, that this was a settlement to her sole and separate use. Mrs. Evans appears to have been of a delicate constitution, and the climate of India by no means agreed with her. It is proved by Sir John D'Oyly that she was often in fits in a very early period of the marriage—that is what he expressly swears. Mr. Maxwell proves, that when she pressed a return to England upon her husband, it was stated that the climate of India did not agree with her. In other respects I see no reason to presume that the marriage was not as productive of mutual happiness as marriages usually are. Sir John D'Oyly swears expressly that she at that time appeared very fond of him; Mr. Griffiths, Mr. Wood, and several other witnesses, who are examined as to the character and conduct of the parties, and who lived in considerable habits of intimacy with them at that time, give me no reason whatever to suspect that any thing like unhappiness then subsisted between them; and all the witnesses, I think, who [52] depose to that period, speak with as little apprehension as to what has since happened as is possible.

In 1781 Mrs. Evans left India on account of her health. Mr. Evans's counsel have taken credit on account of his acquiescence in this separation. Now, this credit is denied, upon the ground that this acquiescence might have been merely for the purpose of getting rid of her. Why, to be sure, if his preceding conduct had been that of a disaffected husband, such a construction might have been fair enough; but, if otherwise, it is rather hard to give such an interpretation to the very step which the most affectionate husband must have taken. Credit is taken likewise, by the counsel on behalf of Mr. Evans, that no cruelty is imputed to Mr. Evans at this time. It is answered, that though no cruelty is proved, yet there might have been acts of cruelty, which the prudence of the party, and a just regard to time and expence, have prevented her from now bringing forwards. It is within my recollection, and if it had not, I have been reminded of it, that in the original allegation given in this cause, she expressly pleaded that her original return to Europe was occasioned by his cruelty. That assertion I directed to be struck out, because it was pleaded in a way so loose as to be incapable of proof, and therefore shewed that the party herself could have had no intention of proving it. It satisfies me, then, of this, that there was no disposition to suppress it, if it had been maintainable; because it is actually noticed in the cause. Taking then the whole together, I am supported by the testimony of all the witnesses, and I think I am also supported by what is full as [53] good evidence, by Mrs. Evans's conduct in this suit, in saying that no cruelty is at this period of time, her first departure for Europe, imputable to Mr. Evans.

She arrived in England in October, 1781. She pursued the means of health—by medical advice, by travelling to different parts of Europe, by proper amusement—in all of which it is not denied; on the contrary, it is fully admitted that she enjoyed the most liberal assistance from the fortune of Mr. Evans. It is proved by his agent, Mr. Boehm, that the expence during her residence in England, amounted to about £5600, which, by a calculation rather, I think, unfavourable, has been made to amount to near £2000 a year. This certainly is a large sum out of a fortune that was making, that was not yet made; it was in fact so large as to alarm the friends of Mr. Evans, and Mr. Boehm took a liberty, which I presume an agent does not often take, of remonstrating on account of the drafts. I think that in the deposition of Mr. Thackeray, notwithstanding he deposes with the guarded and discreet tenderness of a relation, it is yet very easy to see that he hints at something like profusion on the part of Mrs. Evans; he says expressly that she was too generous, generous to a fault, and a fault that undoubtedly is, because the province of a woman, in matters of liberality out of her husband's property, is certainly extremely limited. She may be the almoner of her husband, but in the disposal of his fortune she is under very great restrictions. There is one fact particularly mentioned, which is, the lending a large sum of money to a Captain Barnwell; and I own, that if I was to look sharp to find [54] out the commencement of impropriety of conduct, I should be apt to say that I think I see the first speck of impropriety here attaching upon the conduct of Mrs. Evans, and one sees the folly, the imprudence of such conduct, in the event of this,

for it does appear that this very Mr. Barnwell, to whom this money was lent, was the very first person to complain of her extravagance. It appears that Mr. Evans felt the impropriety of this, but he felt it in a way that an affectionate husband, a considerate man, would feel it; he said to Mr. Griffith that she had spent a good deal of money, but that nothing gave him so much uneasiness in her expences, as the sum of money which she had lent to another person. However, though this produced some dissatisfaction, it produced no rupture, it was overlooked.

She sailed for Calcutta in December, 1784, she arrived in 1785, and there they remained until 1787. It is a little material to see what passed during this interval. They were visited by a Mr. Wood, a respectable person, who is examined as a witness on the part of Mrs. Evans. Mr. Wood does not give the slightest intimation of any disagreements in his family; on the contrary, he says, that his behaviour, as far as he ever saw it, was studiously and affectionately tender. Mr. Maxwell, a person who was almost domiciled in the house, who dined and supped there very frequently, and was often upon parties with them, speaks likewise of their living upon terms of the greatest harmony imaginable. Mr. Griffith, who was much in their company, has no insinuation to the contrary in the least. Mr. Hannay, who states himself to have been intimate, never heard the most distant surmise [55] that he treated her improperly. Mr. Hahed, and other witnesses, speak to the same effect. Then, taking the whole of this evidence one way, it is certainly evidence extremely strong; and if to this we add the total absence of all evidence the other way, I think myself warranted to say, that Mr. Evans's behaviour, up to this period, was in every respect unexceptionable.

Two facts in particular appear, which it is impossible not to notice; one is upon the evidence of Mr. Maxwell—and that is of Mr. Evans's going up into the country, at a distance from Calcutta, to Moorshedabad, I think, or some other place, on account of her health. It may be said, there is no merit in that, any husband who had a sick wife would do as much; but, it must be allowed, she might have gone by herself: at any rate, therefore, there is great attention shewn in this instance of his personal attendance.

The next fact, and a very material fact it is in the cause, is this, that, purely to gratify her wishes, and to consult her health, he quitted India: a country where he was almost naturalized, and where his prospects of avarice and ambition, at that period of time, were extremely inviting. He was then, as Mr. Maxwell says, a senior merchant. But, say the gentlemen, there is no great merit in that, he had got enough. There is surely some merit in knowing that; it is a merit every body does not acquire; it is a proof of moderation, at least; and that he is not the mean and avaricious person which he has been represented to be: and, supposing he was that mean and avaricious person, still there is the more relative merit towards Mrs. Evans, because, if he was a man extremely [56] fond of his money, and yet gave up his money on account of his wife, it is hard to say that he had not some degree of fondness for his wife. Well, but say the gentlemen, his reputation was concerned. How so? She had already shewn that she could come to Europe without his personal attendance. I shall not then diminish the merit of so good an action, nor suffer it to be diminished, merely because it happens at the same time to be, what every good action is, a reputable one.

I am clear, therefore, that up to the time of the voyage nothing material had happened to cloud the happiness of this family. The voyage itself; the application made for it by Mrs. Evans; the undertaking of this voyage by Mr. Evans, are all a security to me that the fact was so; for, if he had been the savage tyrant that he is represented to have been, it is clear to me that she would never have ventured upon such a solicitation with any idea of success, and it is equally clear to me that she would never have succeeded in it. Till this time, therefore, I see in the conduct of Mr. Evans nothing to blame, I see much to approve.

It is however upon this voyage, "*malâ ducit avi domum*," that a change of conduct in Mr. Evans is first suggested to have taken place. It is not very well agreed what this change was, whether it was an indulgence of ungovernable sallies of ill temper, or whether it was a cool systematic plan of distressing his wife, by the most atrocious ill usage: but certainly two things more inconsistent cannot be, than cool hypocrisy and wild passion. Now it is a strong presumption with me against the supposition of its being a case of ungovernable passions, that passions so inordinate appear to have [57] developed themselves for the first time in the course of this voyage. If so, I

think there must have been an alteration in the constitution of this man's mind ; which is highly incredible. The material witnesses therefore resort to the other supposition. This is the turn given to his conduct by the great witness in this case—Mademoiselle Bobillier—namely, that it was a crafty command of his passions ; that every thing that he did visibly was studied for ostentation ; and that his passions were kept for a secret operation when nobody was by.

One cannot help observing, that taking it to be a cool deep-laid plan, to be pursued and carried into effect in a secret way ; the scene for the execution of such a plan is as unhappily chosen as can be. Everybody knows that secrecy on board a ship is a thing not to be thought of. People cooped up in a ship live, and are forced to live, in that state of miserable intimacy, which makes almost every thing that is done or said known to every other person : there is for a time a very unhappy circumstance, it is almost a suspension of every thing like personal delicacy—every word and every act is known to almost every body. Now to suppose that a man in such a situation should first think of opening a plan of secret violence, one must first suppose, not only that he left his temper in India, but that he had left his common sense with it.

There are three witnesses only who are examined on this part of the case : there is Mr. Curry, a Mr. Humphry, and a Mrs. Hartle. When the question is asked, why other witnesses are not examined ? the first answer is that Mr. White is [58] dead—the second answer is that it is not more necessary to call witnesses on the one side than on the other : not to have called more, therefore, is, if any, an equal imputation on both parties. This latter answer might be some answer to the other party ; might serve, in some degree, to stop their mouths, but it is no answer to the mind of the Court. In the next place, I say it is no satisfactory answer to the other party ; because Mrs. Evans is the complainant, and she is the party who is bound to make out her case. But, to go further, is Mr. White the only witness who could have been adduced ? Were there no other officers but Mr. White on board this ship ? They have vouched indeed one female servant, and it is an extraordinary thing that there should not have been more female attendants, a little black girl, whom they represent as too stupid to be examined as a witness ; but I find also two men-servants of Mr. Evans, who are vouched in the case, and who are likewise mentioned both in the libel and in the depositions. They would surely have been most important witnesses if they had been produced ; because they would have spoken a great deal to what has been described respecting the foul cloaths, delaying the breakfasts, and the nature of the several orders that were given to them by both the parties in this cause. However, it does happen that the case is left utterly destitute of all the illustration which it might have received from their important testimony.

Of the three persons actually examined, to be sure Mr. Curry, so far as situation and character are concerned, is extremely worthy of particular attention. He was a medical gentleman, who at-[59]-tended this lady during the whole of the voyage ; whenever she was ill, she was under his immediate care. He swears that he saw her, and saw her in his professional capacity, every day during the whole of the voyage, three days only excepted, during which he himself was confined by indisposition. It has been well said by the counsel for Mrs. Evans that a medical person is a confidential person—every thing affecting her health must unavoidably have come to his knowledge—it could not have escaped him. He gives an enumeration of symptoms ; he applies a blister, about which Mr. Evans differed in opinion ; and I think this gentleman shews a sensibility, more than enough, about the honour of this blister. He has his own resentments against Mr. Evans, and he candidly states them ; yet I still think I do see enough in his deposition to satisfy me that, though he would not misrepresent nor exaggerate in the slightest degree, nothing that he knew of Mr. Evans's conduct, to his disadvantage, would be either much softened or at all concealed.

Mr. Humphry was a fellow-passenger, but a witness of no particular intimacy whatever with either of the parties ; I think he says that he was not in the cabin, in their particular apartment, during the whole of the voyage. He gives his opinion of Mr. Evans's temper and disposition ; he thinks that it was harsh and austere. That, however, I am to take merely upon the credit of Mr. Humphry's discernment, for he speaks to no facts whatever, and I must remark that observations made upon a man's temper, upon the temper of a landsman, during a voyage of six months, ought not to be turned very strongly to his disadvantage ; for [60] every body knows that a

voyage of that length is no very great sweetener of any man's disposition during the time that it lasts.

Mrs. Hartle is a witness who appears to have lived in considerable intimacy with Mrs. Evans, but most clearly she lived upon very indifferent terms with Mr. Evans. She charges him with much personal incivility to herself during the voyage, and it appears that her resentments have since been sharpened by later indignities; so that she is, as Dr. Arnold has well described her, a sort of co-plaintiff in the cause. I am to consider her, therefore, as deposing under the double danger of having inducements to take very strong impressions of facts to Mr. Evans's disadvantage, and of feeling no unwillingness to give such impressions to their full force in representing them to the Court.

The facts agreed to by these three witnesses are these: In the first place, that Mr. Evans had procured, at a great expence, the very best accommodations a gentleman of fortune can have in a passage from India. So far all agree. And, in the next place, it is agreed that she had of those accommodations, as it was highly proper she should have, the best share. Two of these witnesses, Mr. Humphry and Dr. Curry, are totally ignorant of any quarrels or disagreements during the whole of the voyage. It is said Mr. Humphry not being particularly intimate, his is merely a negative testimony; however, for the reason that I have above stated, I think that a negative testimony, in such a case, is a very strong testimony; because it is not possible that any act of atrocious outrage could have happened on board this ship, without its travelling to the knowledge of most [61] persons on board. Dr. Curry's testimony is still stronger; his is not merely a negative testimony; he says that, as far as ever he observed, Mr. Evans's conduct was studiously affectionate. Now his ignorance seems to me still more irreconcilable with the notion of this ill usage; because it seems hardly possible that it could have existed without coming to the knowledge of a person who attended this lady constantly upon the occasion of ill health. It is still more irreconcilable with the notion of its being a fact within the possession of any third person; because, though some secret ill usage might have passed between Mr. and Mrs. Evans, which was known only to themselves, and which, from a natural concern for their common reputation and quiet, they might not have divulged, yet it is very unlikely that if there were facts of outrage which got into the possession of a third person, that such facts should have rested there, and not have travelled farther.

There is, however, a third person on board this ship, Mrs. Hartle, who undoubtedly differs widely from both these witnesses, and upon her single testimony, the single testimony of an ardent witness, inflamed with resentments of her own, I am to take these facts, contradicted as they are by the silence, by the emphatical silence, of the two other witnesses: facts of a nature so atrocious that they certainly have but little probability to support them, which can be founded on any argument arising from the general disposition of mankind, and which, from what I have stated in this particular instance, had no probability whatever, which is founded in the antecedent conduct of this gentleman.

[62] The first fact which I shall observe upon is that most atrocious fact which is mentioned in the libel, article 6; "That during the passage, Mrs. Evans being in a very low and bad state of health, and fresh air being absolutely necessary for her, Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, a door to be kept open, or even opened at all, except when he wanted to pass in or out; that at the times he refused the benefit of the air to his said wife, he was not able to stay in the cabin himself during the exclusion of the air, but always retired to his own cabin, or some other part of the ship: and that once, when Mrs. Evans attempted to open the door to admit the air, she was prevented by Mr. Evans, who, with savage fierceness, seized her by both her arms, and, in great rage, with his utmost force and violence, threw her down three times, alternately raising her for that purpose upon some earthen gurglets, or vessels used for cooling water, and thereby very much hurt and bruised her, put her to great pain and anguish, and increased her illness."

The account given by Mrs. Hartle of this transaction shews that even this account given in the libel is not at all overcharged. What she says is, "That one morning, in their passage to St. Helena, the deponent and Mrs. Evans were in Mrs. Evans's room, walking towards Mr. Evans's room; that they observed him sitting there;

that seeing them approach, he got up, and immediately went to and shut the door of the cuddy; that they were then under the Line, and there was not a breath of air stirring, and this deponent was extremely faint." So that in fact the cruelty stated seems to be a cruelty that rather attached upon the witness than the party, and so [63] indeed Mrs. Evans represents it; for her application, according to Mrs. Hartle's testimony, is this: "Do, Mr. Evans, let us have the door open—Mrs. Hartle is ready to faint." She then goes on to say that, "Mrs. Evans then went towards and proceeded to open the door; that Mr. Evans, who was sitting with his legs up in an easy kind of posture, and was reading, then got up, and with a savage fierceness laid hold of both her arms, and then with violence threw her down, and she fell upon some earthen gurglets for holding water, which stood close by the said door; and lifting her up again by her arms, with equal violence threw her down on the said earthen gurglets; and she the deponent thought that by means thereof she was almost killed; and being greatly terrified thereat, went out to send the black girl to her assistance; that on going out she heard a noise, as if Mrs. Evans was falling a third time; that she returned into the cabin, and found her sitting in a chair, her whole frame appearing convulsed, and her face quite pale; that the deponent observed grasps of fingers on her arms, which appeared black and blue, and that the deponent had not before observed such appearances on her said arms, and they appeared in parts of which Mr. Evans took hold, and, as she is well convinced, were occasioned by him; that the said Mr. Evans, on his so throwing the said Mrs. Evans down, appeared in a very great rage, and he extended his mouth, and clenched his teeth in a revengeful manner, and his countenance quite changed with anger; and that the said Mrs. Evans appeared very ill and low for many days afterwards."

This, indeed, is such an act that one can hardly find an epithet to give it its due character. It is, [64] as has been said, a demi-murder, a murder more than half executed. It is an act not to be excused upon any sally of passion; that a man, on so slight a provocation as this, should three times knock his wife down, a woman of very tender health, in the way that is here described, is an act that does go to the very full extent of what the law must deem to be matrimonial cruelty. It is a fact of that atrociousness that a court of criminal jurisdiction would pursue with the greatest vengeance, and I need not add that the common indignation of mankind would follow it to the latest period of the life of the offender.

Mrs. Hartle I cannot upon any idea suppose to be a person who comes deliberately to misrepresent; nothing looks like that. She is totally unimpeached as to general character; therefore, a priori, there is no reason why she is not to be fully credited. However, it is a good safe rule in weighing evidence of a fact, which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the persons who describe it. If their conduct is clearly such as upon their own shewing it could not have been, taking the fact in the way they have represented it, it is a pretty fair inference that the fact did not so happen. If their actings, at the very time that the fact happened, represent it one way, and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter. Now, in trying Mrs. Hartle's narrative by that test, I think I do see enough to satisfy me that she has deposed, I do not mean to say without principle, but she has deposed with passion; and that this is a very grossly inflamed representation, [65] produced by repeated resentments, conceived partly on her own account and partly on that of Mrs. Evans.

What is the conduct that any person of common sense and of common humanity would have adopted, who had been present at such a scene of infamous brutality as this is? Why, a man, be his powers of body ever so weak, that had the common spirit and feelings of a man, would have interfered, without the least apprehension of personal consequences to himself: but here there is a lady present, a friend of the suffering party: is it credible that she should be present at such a transaction as this without raising a general alarm? Not to do so, for the purpose of obtaining assistance, is an act of brutality almost as brutal as the act itself: it is really being an accessary after the fact. Why, without reasoning upon it, mere instinct would have compelled her to do so. Now, what does she do? Does she apply to Mr. White? Does she apply to any officer? Does she apply to the surgeon? Does she apply to any one person who could have interfered with effect? There is not a man on board the ship, undoubtedly, who would not have lent a willing hand. Mr. Evans would

have had good luck if he had not been voted into the sea, by general consent, upon such an occasion as this. Instead of this, what does she do? Why, she runs out, and sends in the little black girl, who, they tell me, at this moment is too stupid to be examined as a witness; she sends her in to rescue this poor lady from the hands of this tyrant, and thus discharges the office, it seems, of a good friend, of a good christian, and of a human being.

[66] What is done afterwards? Her friend is extremely weakly, is attended constantly by a medical person, and, as she swears, is made ill for many days in consequence of this treatment; yet this lady does not communicate one syllable of the matter to the physician, who was so much concerned to know it, and whom she saw every day: he is in total ignorance of all that has passed.

The counsel on the part of Mrs. Evans have very properly reproached Mr. Evans with cruelty, for not having communicated to Mr. Paumier the unhappy habit of intoxication with which he has charged his wife. They say it was his duty to have done it, as undoubtedly it was. Then, what am I to think of the conduct of Mrs. Hartle upon this occasion? She was a person who was certainly under no restraint from any partiality to the defendant; directly the reverse. It is a behaviour, in my apprehension, so totally unnatural under such circumstances, that I am satisfied such circumstances could not have existed. But what does she do when she comes to England? What would any body have done in such a case, with common reflection? Why, clearly, have advertised the family, not maliciously, but confidentially; would have put them upon their guard; would have told them that, with all the speciousness of manners which this gentleman assumed, she had been witness to a scene of horror, which shewed him to be a most intolerable tyrant. Not a word of all this passes. She visits regularly, upon the invitation of this very gentleman, as if nothing extraordinary had happened, and the family remained perfectly uninformed. I rely for these facts upon the testimony of Mr. Thackeray; for, how is the [67] continuance of this gentleman's good opinion any way consistent with his knowledge of this fact? or, how is his ignorance of the fact consistent with the knowledge of it by any one of the family? I have all the reason in the world, therefore, to believe that the disclosure of this fact took place very recently before the commencement of this suit.

Let us now see the conduct of Mrs. Evans under all the pain, and all the terror, which such a situation must excite. No alarm is given by herself; yet in the account given by her of attacks made at other times, she pleads and proves that her piercing cries brought people from all parts of the house. Mere animal nature would have made its appeal to the ordinary feelings of other people: she must have done it; nobody could submit to be murdered in this sort of way, in silence. Yet I hear nothing of any cry of distress; it does not appear that a single person was collected by any expression of pain or suffering. She is equally silent before her coming to England: not a word to the physician in attendance; not a word upon her coming home to her own family. It is said that all this was tender dissimulation for the character of her husband. That seems to me to be very hard to be conceived. I have been put in mind of *Lady Strathmore's case*, where a continued series of ill usage, for years together, was kept from the knowledge of every body, but three or four people: but then I must take along with me this fact, that the gentleman charged had taken every precaution to preclude a possibility of detection; for he had planted his own creatures about her: and the very first opportunity that she had [68] of disclosing her real situation, the business blew up immediately. There was, I remember, in this Court, the case of Mrs. Prescott: that was a case, to be sure, of a person who had suffered as atrocious ill-treatment as one human being can receive from another, and she bore it with great, with wonderful resignation. But this was proved in that case, that she did not keep it entirely unknown to others; she implored the protection of her father, whenever she was ill-treated; she communicated it to medical persons; not a word of harshness in the style of her complaint; her complaint to the Court was conceived in strong language, but it was in language more expressive of sorrow than of anger; but still there was no dissimulation. Now, I do not conceive that Mrs. Evans would have been less prompt to complain than Mrs. Prescott was. I have looked into the libel in the present case, which certainly does appear to me to be drawn with sufficient acrimony; I have looked into the personal answers, and I cannot help saying that these personal answers are written with full as much passion as prudence: I do not see in these answers the marks of that perfect resignation

which is so much contended for. I do not mean to say, Mrs. Evans appears in her conduct in this suit, or in any paper produced, to be a person who would assert her rights improperly; but I do say this, that she appears to me to be a person who would not dissemble her injuries in a way beyond all example, beyond all propriety, and all reason.

Then, taking the fact upon this view of it, I feel no hesitation in saying, that what I collect is this: that there was something of a struggle, [69] how arising I don't know, but it was a struggle of no consequences; and that is the important point. If it had drawn consequences after it, there must have been other witnesses, and the witness who was there would have acted otherwise. It must have been therefore a trifle, and in being coloured as a matter of importance it has received an undue colour; the basis of the fact is extremely slight, and all beyond it is colour—is exaggeration—is passion.

Having disposed of this great leading fact in the voyage, I shall dispatch in fewer words the other facts which are charged: in the first place, because they are, compared with this fact, very slight; in the next place, because they stand upon the single testimony of Mrs. Hartle, who, in my opinion, has taken a very undue and extravagant impression of the whole business.

There is another charge, which is so strong a proof of this, that I shall notice it for no other purpose than to exemplify the strong bias of this witness to make mountains of mole-hills. I mean her evidence upon that article which charges the business of the noises. It is pleaded, that while Mrs. Evans was in a very weak and sickly state, Mr. Evans accustomed himself, in the most unfeeling and cruel manner, to distress her and increase her pain, by making a violent noise with a hammer close to her.

I had very great doubts about admitting this article. I admitted it upon an idea suggested naturally enough by the words, that this gentleman came, without any reason whatever, with a heavy massy instrument, to make a loud noise quite close to the head of a very sickly and infirm person. [70] These are the ideas which that article, worded as it is, certainly excited in my mind. I do not believe that it could have entered into the conception of the most ingenious person in this Court, to have imagined how this would have ended—to have imagined that it should end in this gentleman's cracking almonds in an adjoining room with a hammer, which, being proper for such a purpose, could be no very ponderous instrument, and his afterwards coming to eat them in his wife's apartment. I do protest it is so singular a conceit, that if I did not see a great deal of unhappy seriousness in other parts of this cause, I might rather suspect that some levity was here intended against the Court. I am sure of this, that if a man wanted to burlesque the Ecclesiastical Courts, he could not do it more effectually than by representing that such a Court had seriously entertained a complaint against a husband, founded upon the fact of his having munched almonds in the apartment of his wife.

Another offence charged is, that he obstructed the circulation of air. Certainly, that may be cruelty, because health may be affected by it: life may be destroyed by it. Here, again, I look in vain for the testimony of the physician. It is pleaded expressly that her complaints were much increased by it. In the libel it stands thus: that Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, the door to be kept open, or even opened at all, except when he went in or out. Now, any body would suppose that this door was kept obstinately shut during the whole voyage, except when he went in and out; and that this poor lady [71] was shut up in an apartment from which the common element was excluded. How does it turn out? Mrs. Hartle, herself an invalid, chooses to reside almost constantly in this apartment. Her account is, that he often shut to the door, sometimes the cuddy-door, which I take to be the external door, in consequence of which he would suffer the inconvenience in common with themselves; that at other times he would shut the inner door, between his apartment and theirs; and this, she says, he did without apparent cause, that is, without a cause apparent to her. Now, am I therefore to presume, that because there was no cause apparent to her, that there therefore was no real cause? Am I to call upon a gentleman, at the distance of two or three years, to shew a reason why he shut a door; merely because another person chooses to think, and it is conjecture and inference only, that he did this for the purpose of plaguing his wife? Were there no calls of private convenience? Were

there no calls of private decency, but Mrs. Hartle was to be previously informed of them? Were there to be no moments of privacy from his own wife, much more were there to be none from the wife of another gentleman? It is said, that in the fact particularly alluded to, he was reading at the time. Why, is a man to be bound down so strictly to time that he must put on his clean shirt at the very moment of his shutting the door? that he is not to be permitted to take up a book, even for a few minutes? It is said, by way of aggravation of the cruelty, that he himself did and could walk out upon the deck. Why could not the ladies do the same? If he did shut the door, they could have opened it with as slight an effort as he shut it. Is [72] it pretended that he locked the door? It has not been contended that he did; but if he had locked it, they had still another retreat, for, as I understand the evidence, their cabin had a door opening to a gallery, communicating with the open air. But supposing some inconvenience was actually produced, yet, in order to make it cruelty, I must affect him with a knowledge that it would have that effect, and in a painful degree; for unless they prove that he was perfectly sensible of that, namely, what the number of necessary inlets for air was, there is nothing like cruelty in the case. How is he to know more than Dr. Curry, who is convicted of a gross mistake respecting this subject? He describes the number of doors and windows, and amongst the rest, the door which led into the apartment of Captain White and the officers; and then goes on to say, that if any one of these doors or windows leading into this (Mrs. Evans's) apartment were shut, the circulation of the air would be obstructed in a very high degree. Now, the fact proved to me by Mrs. Hartle, in this case, is that the door which led into the apartment of Captain White was kept shut during the whole of the voyage, except only three days; and that it was so kept shut at the particular request, and for the particular convenience of Mrs. Evans. What reason have I to say, then, that Mr. Evans knew the consequences of opening or shutting one inlet of air, when I find a medical person, perfectly well acquainted with the apartment, lying under so total an ignorance with respect to the very same particular.

The article of foul cloaths was another article which was admitted merely upon the ground of [73] its being associated with other articles of more weight; because, where there are articles of great strength in their own nature, the Court is always less delicate about admitting slighter articles, which it would not have admitted singly and standing by themselves. To be sure, it might be a cruelty if, as described in the libel, he brought large collections of loathsome cloaths, in a very hot climate, into the apartment of a person extremely sick, without any necessity for it, or without any signal convenience. Either this necessity or some signal convenience would justify it; and it must be shewn that there was neither; for certainly I shall not presume it so, in order to make it out to be cruelty. Now, what is proved in this case? These foul cloaths hung at first in the quarter-gallery. Upon a suspicion entertained by Mr. Evans, whether right or wrong is utterly immaterial, that these cloaths were pilfered by Mrs. Hartle's black servant, they were removed into his own room, where they generally remained; sometimes, as Mrs. Hartle says, for near a month. He therefore had the general inconvenience of them; and it certainly is to me a pretty strong presumption, that he did not conceive these bags to be bags of poison, when he made his own room their ordinary station. Mrs. Hartle says that they were from thence occasionally brought into Mrs. Evans's room, which being a larger room, they undoubtedly could not be more offensive than they had been in his smaller room. She says, she has seen him bring them in, and his man Oliver assist in sorting them. In order to be sorted they must be spread, and accordingly they were spread. Now, what hindered the ladies from retiring during this operation? And it has, besides, been justly [74] observed by the counsel, that in such situations as these a great deal of accommodation must be practised. Every body who has been in such situations knows that he must submit to a great deal that is very loathsome; and he must perform a great deal that is very servile. But, however, she says, they were removed before dinner: and supposing that the smell did not entirely remove with them, who had the most of it? Undoubtedly this gentleman had not been upon a bed of roses all the time, according to their own account of the matter. But, all this could not be for convenience, he says. Why? Because he used to spread them, under a pretence of sorting them. Why, has not she herself proved in her deposition that he actually did sort them, and that she had seen both him and his man Oliver employed in that operation.

Another cruelty is that respecting the denial of breakfast, which is charged in the seventh article of the libel; and it is charged thus: that she used to give orders to one of Mr. Evans's servants to boil her tea-kettle, that she might get her breakfast early, as necessary for her health, not only on account of a blister on her side, and a burning thirst that then afflicted her, but also by reason of her being then pregnant; at which times Mr. Evans positively refused to suffer, and would not suffer, his said servant to boil her tea-kettle, and thereby deprived her of the means of satisfying the cravings of nature, and obliged her to resort to drugs for relief.

Now the proof of this last consequence, of her resorting to drugs for relief, is this, that one morning Mrs. Hartle saw her take some pills; but that those pills were specifics against the want of a breakfast, or had any connection with the want of [75] a breakfast, there is not the least suggestion. In this case the men-servants to be sure would have been the satisfactory witnesses; because they could have spoken to the orders that were delivered on both sides—to the orders given by Mrs. Evans, and to the orders given by Mr. Evans. But all that I can find upon this article is, that Mrs. Hartle positively swears, she knows of no general orders given to the servants not to boil the kettle. I find also from her, that Mrs. Evans did send, upon several occasions, about eight o'clock, to her for tea. I find, on the contrary, from Mr. Humphry, that he generally saw, every morning at eight o'clock, the servant going with the tea-kettle: and therefore it is no unreasonable presumption, that an omission of any one morning of a punctual attendance at that hour, might be the effect of some accident, or of some particular inconvenience.

It is true indeed, as I find from Mrs. Hartle, that she one morning heard Mrs. Evans desire Mr. Evans, whilst dressing, to let one of his men-servants come to get the breakfast, and he replied he should not come: but I do not find from Mrs. Hartle that this application was made under a representation of some particular urgency or distress. It amounts to no more than this; that the servants were at that time engaged about his person; that she desired one of them might come immediately, and he refused. This might be uncivil, or it might not: that depends upon the manner of the refusal, upon the delay interposed, and upon the occasion that was at this time occupying the attention of the servants. But I shall not hold this to be decided cruelty, till I am first satisfied of this position—that if a husband is employing his servants [76] about his own person, he is, upon the very first summons, to detach them on the commands of his wife; and that if he declines this, the very instant that it is required, it is not only an incivility, but that gross inhumanity for which the law will grant relief.

There is one charge of a graver complexion, and that stands in the tenth article:—That one evening, whilst the ship was in her passage, and whilst Mrs. Evans continued in a very weak and sickly state of body, pregnant, and scarce able to move, and being desirous to go to bed, she called to Mr. Evans, who was in an adjoining cabin with two of his men-servants, desiring he would send one of them to unlash her cot, that she might go to bed; but that he positively forbade his said men from following her directions, and she thereupon called a little black girl to assist her; upon which Mr. Evans ran into Mrs. Evans's cabin, and in great rage and anger pushed the said little girl away, and, with great fury and force, gave Mrs. Evans so violent a blow or push as drove her to the further or other end of the said cabin, and laid her prostrate on the floor, where she remained a considerable time without being able to rise, and thereby greatly hurt and bruised her, and put her in great peril of her life; and that Mr. Evans, without regarding the helpless situation to which he had reduced her, with the greatest indifference retired to his own cot in the next cabin, and from thence uttered the most shocking and abusive oaths and imprecations against his said wife.

There are three witnesses who are vouched in this very article, who certainly could have proved a very considerable part of it; they are, the two [77] men-servants, and the black girl. It stands however a naked charge, without evidence, or even an attempt at evidence—a charge in itself almost of direct murder, and subject to all the observations which I have made, upon the impossibility of such a fact as this escaping notice; and yet not a single witness is produced to it! Surely it is not a sufficient apology in such a case to say, that it is a misfortune that it could not be proved; because it is a misfortune which must have been perfectly known, I apprehend, to the party, at the time when she inserted this article. And I must say, that to blacken the records of the Court with an accusation of so very grave a nature, without

calling one witness to support it, is taking something of a liberty with the Court, and is taking a pretty gross one indeed with the person who is the subject of such an accusation.

Upon the whole history of the voyage, and the facts contained in it, I find myself compelled to say that I have no evidence which satisfies me that Mr. Evans has acted in this voyage in a manner inconsistent with the duties, and the rights, of a husband. If he had so done, it is impossible but that there must have been ample evidence; on the contrary, a great part of the evidence is absolutely irreconcilable with the notion of such misconduct having been practised. The evidence that does support it comes from the mouth of a person who is in a great degree disabled by her prejudices. But let me not be understood to insinuate that this witness comes forward to deliver a false testimony. I am firmly persuaded that she believes every word she says; but she trusts to her resentments rather than to her recollections; she [78] brings with her sincere intentions, but she does not bring a dispassionate mind; she does not bring that caution, and that sobriety of mind, which belong to a witness deposing in a Court of Justice, upon matters by which the character of another individual may be so deeply affected.

The voyage ended in the middle of September, she being then, I think, as was observed by Dr. Laurence, not above three months pregnant; and about six weeks of this time had been spent upon the voyage from the Western Isles to the chops of the Channel; so that the pregnancy is clearly proved, I think, to have been in such a state of mere incipency, during some of the facts spoken to, that it cannot be understood to make any material ingredient in the cruelty.

Upon their arrival they were received, as far as appears, with affection, and with politeness, by their friends on both sides. Nothing transpires of all these horrible businesses, which had happened on board this ship. Mr. Evans is proved by Mr. Thackeray to have then possessed his good opinion, and that of other persons of his family.

What is Mr. Evans's behaviour upon his arrival? In three or four days he invites Mrs. Hartle, a person not very acceptable to himself, but the friend of his wife; he likewise desires Mr. Paumier to give her all necessary attention, to give her every possible attention during her illness. He soon after goes over to France with her, where he engages in his service a Mademoiselle Bobillier, a young French woman, at the express request of his wife: they return, and they settle in Bond Street. Mr. Thackeray, to whom I very much adhere during the whole of this business, says [79] that Mr. Evans's general conduct and behaviour to Mrs. Evans was very attentive; and that he saw nothing improper therein till near the time of her lying-in: he admits too that Mr. Evans supplied her liberally with money till almost the time of the unhappy separation.

The evidence of this Bobillier is that she herself never was a witness to any quarrel between them; but that, she says, was mere craft on his part; for she infers, from tears which she has found Mrs. Evans in, and the counsel have laid much stress upon these tears, that there must have been secret ill-treatment. I own that tears, in the case of a very nervous person, do not seem to me to lay the foundation of any very conclusive evidence one way or the other.

In January, going to a ball at Mr. Hastings's, she had, somewhere or other, I think it is not clearly proved where, the accident of a fall. It is spoken to by a great number of witnesses on both sides. This fall was not the occasion of much immediate injury, as far as appears: this appears however from many of the witnesses that, upon that occasion, Mr. Evans acted with a very laudable tenderness. He carried her up stairs in his arms. He applied to Mr. Paumier to recommend a doctor, having his apprehensions of the consequences which it might occasion: Doctor Denman was the person who came. And it appears that she actually did miscarry within three or four days after this fall. To be sure, the argument of "post hoc, ergo propter hoc," that because the miscarriage immediately followed, therefore it was occasioned by that which it followed, is not a very conclusive one; for it is no very easy matter to trace a mis-[80]-fortune of this sort to a precise cause, and with such exactness as to say that, either in the whole or in part, it was owing to the fall, and to nothing else. But, however, this at least is clear, that to her nurse, Mrs. Tate, a confidential person most certainly, Mrs. Evans did herself ascribe her miscarriage to that accident. It certainly is not improbable, though no immediate injury had happened; because, as it is generally

understood, fright, alarm, and agitation of spirits, frequently do precipitate such matters; and what makes it more probable in this instance is that it is in proof that this lady was in the habit of miscarrying, for it is proved she had had two miscarriages before her return to Europe.

Yet, in her libel, Mrs. Evans herself has ascribed the miscarriage to a very different cause; for it is pleaded that it was occasioned wholly by the pain, anxiety, and terror that she was continually in, from the cruel treatment of Mr. Evans. I have above stated what Mr. Evans's visible conduct was, from Mrs. Evans's own witnesses; from her own family; from persons of honour and of caution, and who certainly would not have dissembled it, had it been otherwise. What was not visible must be merely conjectural, and, in my apprehension, very perversely so, if it is to be represented as opposite to that which was visible. To what this miscarriage was imputable I do not pretend to say; but I do say that it was not owing to the cruel conduct of Mr. Evans; because, if it had, it is most perfectly clear that such conduct must have been proved. Now, to whom is it known that Mr. Evans was the author of that miscarriage? Why, to one witness only. To Mademoiselle Bobillier, a young [81] woman of the age of twenty-five, who does take upon herself positively to swear, that this premature delivery—I use her own words—was entirely occasioned by the unkind behaviour of Mr. Evans to his wife, and for want of proper attention to her during her pregnancy.

As this witness makes a pretty conspicuous figure in this cause, it is necessary to consider a little who she is. Her deposition, upon the face of it, is highly coloured and inflamed, very descriptive, full of image and epithet, something in the style really of a French novel, of the trash of a circulating library. At the time of her giving in her deposition, it is also in proof that she had had a pretty acrimonious suit with Mr. Evans. She is a young woman, who, having been first known to Mrs. Evans upon her former excursion into France, was, on this second excursion, taken into the family as a governess, and was brought to England in November; she therefore was in the service only two months of the pregnancy, and she most positively declares his visible behaviour to Mrs. Evans was perfectly proper during the whole of the time.

She appears to have been on terms of great intimacy and confidence with Mrs. Evans. I need not observe upon the abuse that is too frequently made of that sort of situation. Female friendships are often hazardous, in the case of married women, but of all friendships, humble friendships are the most dangerous. The humble friend has an obvious interest in falling in with the present humour—in creating and in inflaming differences between the husband and the wife—in acquiring importance to herself by being a sort of third [82] estate in the family. I own I cannot but think that it has been a very great misfortune to the family that this person ever became a member of it; for in this I am clear that if she aggravated matters, in her reports to Mrs. Evans, only half of what she has done in her reports to me, she has employed an activity that has been most fatally successful in troubling the repose of this family.

To be sure it is a monstrous proof of an intention to exaggerate, beyond all decency of appearance, that this witness, who had been little more than two months in the family, takes upon herself positively to say that this miscarriage was owing to her being kept, during the whole period of her pregnancy, in a state of persecution. Taking this assertion in the most qualified way, it is a very unwarrantable assertion, undoubtedly, for the witness to throw out. What possible confidence can I then have that any thing she says is true, when I find her swearing at random to what it is impossible she could know, whether it be true or not? The fact is she is not supported by any one witness in the case: there is not another witness examined, on the part of Mrs. Evans, who refers the miscarriage to the same cause. Mrs. Thackeray makes no reference of it to that cause; Mrs. Evans herself makes no reference of it to that cause; she refers it, in her conversation with Mrs. Tate, to another cause entirely: to Dr. Denman and to Mr. Paumier, she does not pretend to insinuate that it is the effect of any such ill-treatment. And as to his want of attention to her, which is stated by this witness, it is most positively contradicted by the person who must know it best; [83] that is, by the very apothecary who attended her, and who speaks, in the strongest and most unreserved terms, to the care and attention shewn to her by Mr. Evans.

The libel pleads, in the eleventh article, to this effect: that after the arrival of

Mr. Evans and his wife in England, and whilst they resided in Bond Street, she was delivered of a seven months' old child ; which premature birth was wholly occasioned by the pain, anxiety, and terror she was continually in, from the cruel treatment of Mr. Evans ; and that whilst she was in labour, he barbarously refused to call any assistance to her ; and when, at last, assistance was had, he obliged her attendants to leave her, when he bolted the door upon her, and detained her from them for more than an hour, notwithstanding the pains of labour were then severely upon her, and her life was in imminent danger for want of assistance : and that after her delivery, she was for six weeks, or thereabouts, confined to her room, in a very low, weak, and languishing condition, and her life was despaired of ; notwithstanding which, Mr. Evans greatly disturbed, harassed, and tormented her, by frequently making great noises, and by knocking and thumping in her bed-chamber, and thereby preventing her from taking any rest ; and also by suffering and allowing his men-servants to make great uproars and disturbances, when intoxicated, over her head ; all which endangered her life.

Now here we are all agreed ; the counsel on both sides concur in the atrocity of this conduct ; because if it be true that he treated his wife in this brutal manner, in an hour when every animal and every moral feeling called for is tenderness, he is one of the most disgraceful excep-[84]-tions to human nature that one has ever heard of ; a more enormous conduct cannot be figured by the imagination ; thus to attempt the life of his wife, and the life of his own infant, is a cruelty that out-herods Herod. It is impossible that the friends of any woman should suffer him to live one minute afterwards with her, if they were not destitute of common sense, as well as common humanity.

Bobillier is the principal witness upon this article. I had almost said the only witness ; and I am satisfied that the account which she gives is utterly discredited, even by herself, as well as by the other witnesses who are vouched for this article.

The account that she gives is this : that "in the month of January, 1788, she was delivered of a seven months' child ; which premature birth was entirely occasioned by the unkind behaviour of Mr. Evans towards his wife, and for want of proper attention being paid to her by him during her pregnancy ; she having been constantly kept, during the whole period of her pregnancy, in a state of agitation of mind, by the teasing contradictory behaviour of her said husband, who never suffered her to have a minute's peace, and who always took occasion to quarrel with her from the most trifling occurrences. That about two o'clock in the morning of the day on which Mrs. Evans was so brought to bed, Mr. Evans came into the deponent's bed-chamber, and, having awoken her, he told her that Mrs. Evans wished to speak with her." This is the proof that this gentleman barbarously refused to call assistance, when he was the very first person that got up and went into the apartment of this confidante, and for this express purpose. "She went into her apartment," she says, [85] "and then gave her such linen as was necessary for her situation." What she means by that expression is not very clearly to be understood, because it is most clear from what follows that she had not any idea that at that time Mrs. Evans was going to miscarry ; for she goes on to say that neither the deponent, nor Mrs. Evans, as she verily believes, had then any idea that she was going to miscarry ; the pains she suffered, and the symptoms attending them, being entirely different to what the deponent understood had been the case on her first lying-in : that Mrs. Evans then informed the deponent of her having made Mr. Evans acquainted with what she felt, and the deponent verily believes that he well knew that his said wife was then in the pains of labour and going to miscarry." That is to say, these two women, this woman of the age of twenty-five ; the other lady, who had had children, and who had twice miscarried before, have no suspicion of what is going to happen ; but, for the purpose of making out an act of cruelty, he is to be affected with the knowledge of this circumstance, with the knowledge of a fact of which these two women, as she declares, were themselves utterly in ignorance.

She goes on to say that "he desired the deponent to return to her apartment, and said that he would give her notice if she became worse ; that Mrs. Evans then told the deponent that she wished her to stay by her ; but Mr. Evans having expressed his intention to abide by her himself, Mrs. Evans did not dare to insist on the deponent's continuance with her, for fear of the resentment of Mr. Evans."

[86] That her continuance was pressed is not at all stated. Mrs. Evans desired

she might stay ; her husband said he would stay, in order to give notice if the intervention of any other person was necessary. This desire, from what appears, was immediately given up, and this woman accordingly returned to her own bedchamber. About seven o'clock on the following morning, she says she went into the bedchamber of Mrs. Thackeray, the sister of Mrs. Evans, who was then on a visit to her, whom she acquainted with what had happened in the course of the night. I think she would have acted at least with as much prudence if she had done this at the very moment when she had been summoned by Mr. Evans. She however acquainted her with what had passed, and Mrs. Thackeray instantly said, she was sure her sister was going to miscarry, and she immediately got up. Mrs. Thackeray then sent for Mrs. Webb, the mother of Mrs. Evans, and Dr. Denman ; they both came about half after ten o'clock in the morning, at which time, Bobillier goes on to say Mr. Evans was still in the bedchamber with Mrs. Evans, and had not himself given any directions whatever in regard to her, although fully aware of her dangerous situation ; in short, that he remained so many hours perfectly cognizant of the situation of his wife, without giving any directions with regard to her. Now let us enquire what Tomlins says on this part of the cause. But I must first take notice that Tomlins is the waiting-maid of Mrs. Evans, and a witness who is examined on her side ; yet she is a witness whom they have not thought fit at all to examine, to this matter of the lying-in. All that she deposes on the subject comes out upon the interro-[87]-gatories put by Mr. Evans. In the next place, I must take notice that there is another person, and that is the nurse, who must have also been cognizant, and in a very informed degree, of every thing that passed ; and it is a circumstance that cannot escape the observation of the Court that this nurse is not at all produced on this side. Why, it is impossible but that these two persons must have known every thing that happened upon this occasion.

Tomlins, however, is examined upon interrogatories as to this fact, and what she says is this : that in the morning the housemaid told her that Mrs. Evans had been ill ever since three or four o'clock in the morning ; that she, the respondent, going up between eight and nine the same morning, found Mrs. Evans in bed, crying ; when she told the respondent she was ill, but knew not what was the matter with herself ; but the respondent, from the account she gave her, thought she was in labour ; and the respondent almost immediately went down and told the circumstance to Mr. Evans who desired her to send for the doctor as quick as possible.

Then it is proved by this witness that at this time Mr. Evans was down stairs, though Bobillier positively swears that he was shut up in the room with her till between nine and ten o'clock. He was then down stairs, and, upon the first intimation of an opinion given to him that she was going to miscarry he did immediately order a doctor to be sent for as quick as possible. That he had not himself given any directions with regard to her, where is the wonder ? why, were there not women in the house upon whom that office naturally devolved ? Mrs. Thackeray, her own sister, was in [88] the house. Why, is it to be understood that on such occasions it is a duty which adheres so close to the character of husband, that it cannot by any possibility be discharged by deputy ? Is it to be insisted that it was his duty, and his duty alone, to give such directions himself ; and that it is a crime in him that he relies upon the discretion of the persons about her ? This is such an imputation that would affect the character of almost every married man if it was permitted to weigh for one single moment. However, he then came out of his bedchamber, as Bobillier says, but not before the arrival of Doctor Denman. She says, Mrs. Evans told her a great deal of conversation, and taking hold of her by the hand, begged her not to leave her any more. This is one, amongst many, of the proofs of that sort of unhappy intimacy, I think, which subsisted between these two persons. She goes on to say that Doctor Denman being afterwards introduced, immediately told Mr. Evans, Mrs. Webb, and Mrs. Thackeray, that she was going to miscarry ; and the said ladies last-mentioned thereupon sent for a nurse to attend Mrs. Evans, but Mr. Evans gave himself no concern about it. Why, what concern was he to give himself about it ? The doctor was called, and the nurse was called. What then remained for the husband to do ? I should have been glad to have had it stated, by either of these ladies, what the proper or possible conduct of a husband in such a situation should have been.

Bobillier then goes on to say that he afterwards burst into the room in a very abrupt manner, so as greatly to alarm and terrify Mrs. Evans, who was then in the pains of labour, and said that they had [89] got his tea-pot ; which was immediately

sent out to him. Mrs. Thackeray mentions the same circumstance of the tea-pot; but not one word of this abrupt manner, which had the effect of frightening this poor lady. in this situation: all that she says is that he put his head into the room, made enquiry after his tea-pot, but made no enquiry after Mrs. Evans. This then is the whole of the cruelty; that when he came, having some particular fancy for this tea-pot, which, perhaps, was not in particular use at that time, he desired to have it out, and retired without at that moment making a particular enquiry after his wife.

Another fact of cruelty is that he refused the nurse the elbow chair. That, every body knows, is one of the high prerogatives of these ladies upon such an occasion; and one would have expected that the nurse herself would have come forward, with no little acrimony, on such an account; but, on the contrary, she is examined, and I don't find that this circumstance of the elbow chair has made that impression upon her mind, which it seems to have done upon that of Mademoiselle Bobillier.

I come now to that which is the most atrocious fact in the cause—and a most atrocious one it is—that after it was fully ascertained that this lady was going to miscarry, this gentleman turned out the attendants, and kept this unhappy lady by force, with the pains of labour then upon her, to the manifest danger of her own life, and to that of his own infant, and kept her shut up, absolutely excluding all sort of assistance.

This is what is positively sworn to by this Mademoiselle Bobillier. I own, upon the face of it, it is a thing grossly improbable; knowing, as [90] every man does, the natural and the laudable warmth of women respecting a business of this nature—the delivery of another woman. I think, therefore, it is impossible but that, if a barbarity of this nature had passed, nothing could have stopped the women who were in the house from making their immediate way to the assistance of this lady; and I am very sure that nothing would have stopped them from making their way to this Court to give a representation of what had happened. There is not a single witness who comes forward to say one word about it; and yet the nurse has been examined, who is stated to have been in the outer apartment, and to whom it is positively said to have given great uneasiness; Bobillier's words being, “to the great surprise and disappointment of her mother, of this deponent (Bobillier), and of the nurse, who was uneasy thereat, for fear of the bad consequences which might attend the delay.”

What the nurse says is this, that she has every reason to believe that Mrs. Evans was, during her lying-in, attended by proper persons, and had proper assistance, comfort, and support; that she has seen Mr. Evans several times carry his wife in his arms, and treat her with great tenderness and affection; that she knows not that the premature birth was occasioned by the ill-treatment of Mrs. Evans by Mr. Evans, and never heard the same while she continued to attend her, and never witnessed any ill-treatment of him towards her. That Mr. Evans did not in her presence, or to her knowledge, when she was in labour, refuse to call any assistance, or oblige her attendants to leave her, or detain them from her, nor was her life in danger for want of proper or any assistance. This then [91] is the account given by this nurse, who is vouched as a person upon whose mind this transaction made this deep impression.

Bobillier goes on to say that she verily believes that the life of Mrs. Evans was in danger by the cruel behaviour of Mr. Evans towards her, as well during the night preceding the delivery, as during the time she was locked up in the room.

I have, in opposition to that, the evidence of Frances Tilbury, who was the house-maid; of Mary Tate, who was the nurse; of Mary Mayall, the wet-nurse; of Dr. Denman, and of Mr. Paumier; and I ask if it is possible that all or any of this could have happened, and that not one of these persons should speak at all to the matter? Is it possible that they should have given a representation of it so totally inconsistent? But look at the conduct of the parties in this case. What is proved? Undoubtedly the mother, who had come at this time; undoubtedly Mrs. Thackeray, who was in the house at the beginning, must have fired with indignation upon such an occasion. But there is nothing of this sort intimated in the evidence of Mrs. Thackeray. The account she gives is simply this: that she was at Mr. Evans's in January, 1788, and then saw her sister, Mrs. Evans, and staid there with her four days; that Mrs. Evans then spoke of her expecting to be delivered in two months from the said time; but that on the last morning of her being there, the deponent understood Mrs. Evans was very ill, and was in bed with Mr. Evans; and, being about seven o'clock in the morning, the deponent was alarmed by the account, and desired of the servant who

told her of the circumstance, that the doctor should be sent for. Very properly, without doubt; Mrs. Thackeray was the proper person [92] to have delivered these orders; and as to the formality of sending to the husband, that the orders might be delivered through him, that was a formality that might certainly be very well dispensed with. About nine o'clock in the same morning, Mrs. Thackeray says she made enquiry whether the doctor had been sent for? when she understood, to her surprise, he had not; on which she sent a message to Mr. Evans, desiring he would not delay a moment sending for the doctor, as he knew her to be in a very dangerous critical way. This is about nine o'clock; though Bobillier has sworn that between nine and ten she found him shut up with her in the room, and that nothing had been done. Now, there is no proof in this case at all that this message was delivered to Mr. Evans. However, Mrs. Thackeray goes on to say that, understanding Mr. Evans had arose, she went into his room, and found Mrs. Evans in bed therein; that she was very feverish, greatly agitated, and in pain, and she thought her in labour: that about eleven o'clock the same day, she, the deponent, was making tea for Mrs. Evans in her room, when Mr. Evans came to the door, and putting his head into the room, told the deponent that she had got his tea-pot, but made no enquiry about Mrs. Evans; that shortly afterwards Dr. Denman came, and confirmed the certainty of her being in labour.

All then that I see proved in this case, by Mrs. Thackeray, is this: that she in the morning gave very proper orders that the man-midwife should be sent for; that the man-midwife was not sent for, as he ought to have been, owing to the neglect of the person who received those orders, but not, as it appears, owing to the neglect of Mr. [93] Evans: that between nine and ten, understanding he had not been sent for, she then sent a message, desiring that he might be sent for; and there is evidence over and over again in this case to shew that Mr. Evans not only did send, in the manner which has been mentioned, but that he did what most husbands, I presume, don't think themselves under any moral obligation to do; and that is that he actually took his hat, and went out upon the business himself. But what weighs most with me in this case, and which is constantly uppermost in my mind and repels every intimation of this sort, is the consideration of what was the behaviour of the persons who must best have known, and most deeply have felt, the misconduct of Mr. Evans, if any such had existed.

Well, the delivery is effected, and is happily effected; the child is born. Now, is it possible, that after a behaviour so atrocious as Mr. Evans's is represented; is it possible that no resentment should have been expressed on the part of Mrs. Webb, the mother, and the other relations of the family? This is absolutely incredible. It is proved by Tilbury that, presently after, Mr. Evans hearing the door of Mrs. Evans's room open, he went to it, and Mrs. Webb came to the door, and plainly told him, in her hearing, "Thank God, it is all well over with Mrs. Evans, at last!" on which Mr. Evans asked her what Mrs. Evans had got? to which she replied, a girl; and Mr. Evans, about an hour afterwards, went into the room. I here ask, if it is conceivable, for one moment, that a business of this sort should have passed off just as smoothly as if nothing had happened to have discomposed the temper of any one person who was concerned in [94] it? That is absolutely impossible. Taking then the whole of this business, without entering into the more minute circumstances, the principal conclusion which I arrive at is this, that there is no one fact in this case which I shall take upon the credit of that witness Bobillier. Of the other witnesses I go the length of saying that they have deposed with passion; but of her I have no hesitation to say that she has deposed absolutely without principle.

The next charge is that of making the noises, and which is deposed to singly by Bobillier: there is not another witness who has spoken to it. Tate, the nurse, who must have heard these noises, and who must be a nurse, in the constitution of her mind, very different from all other nurses that one has ever heard of, if she was willing to dissemble this ill behaviour of the noises, she is not examined at all by them. Tomlins, the waiting-maid, who must have been frequently in the room, is not examined upon the subject. Mayall, the wet-nurse, is not examined upon the subject. On the contrary, here are a cloud of witnesses who depose the reverse. There would be no end of going through them all; there is Mayall, there is Frazer, Tate, Tilbury, who all depose, uno ore, that they know nothing of these noises, excepting, that when there were noises, Mr. Evans interposed, and expressed a great deal of resentment;

that he cautioned his servants against making these noises ; in short, that he did as much as any master of a family can do to prevent the interruption of his wife's quiet.

As to his general attention to her during her illness—they have pleaded a total want of it ; [95] which, to be sure, would have been a very natural consequence of that which they have pleaded—his barbarous refusal to call assistance. But his attention to her is established beyond a doubt. Tate speaks to it ; Mayall speaks to it ; Tilbury speaks to it ; Dr. Denman speaks to it ; Mr. Paumier speaks to it more fully. I do believe that there is hardly a case in which a husband could collect upon the subject so many favourable testimonies, as it has been the good fortune of this gentleman to bring together of that fact.*

* On the depositions of some of the witnesses referred to in this part of the case and on others ; an allegation, exceptive to their credit, was given on behalf of Mrs. Evans ; and opposed, on the grounds noticed in the observations of the Court. Which, as they discuss the general principles of evidence and of practice on these points, are introduced here.

6th May, 1790.—Court : This is an allegation exceptive to the credit of witnesses, and it is objected, amongst other things, that there has been improper delay in introducing it. Some delay has appeared in the progress of the cause, but I see no reason for saying that the allegation is liable to a fatal objection on that account alone, if it is in its contents admissible. This cause was originally instituted by Mrs. Evans for a separation by reason of cruelty. In her libel she pleads, as is usual, (a) though not necessary, and sometimes disadvantageous, her virtuous education, and good disposition, and her excellent conduct in the characters of a wife and a mother. One inconvenience arises from an article of this kind that it gives opportunity and invitation to the other party to counterplead, in contradiction to this good character, as has been done in this case, in which a counterplea is given full of unfavourable epithets applied to her, and amongst others, that she is a woman subject to habits of intoxication.

Now certainly it may go to the very point in issue, whether she is so subject or not ; because many acts in a husband, which would constitute legal cruelty towards a sober woman, may be acts of necessity towards one who is subject to such an odious infirmity. It might be no cruelty to deprive such a person of the management of her family, or to restrain, upon some occasions, her personal liberty. In this particular case likewise, in which Mrs. Evans is pleaded "to be a woman of great morbid delicacy," if she was proved to be guilty of habitual intoxication, it would account for many appearances that might be referable to that cause.

It has been made a question, incident to the general argument on these objections, what is the duty of the examiner ? Whether he should have admitted particular specifications or not in taking the depositions. And it may be a matter of great difficulty to prescribe what an examiner is to do in all cases. To lay down an universal rule is impossible ; but, in general, he should strongly disincline to receive specific facts, where the article, admitted by this Court, is in general form.

It must be understood to be the intention of the Court, where the articles in the plea are general, that the examinations taken upon it should be likewise merely general. I will not say that cases may not arise where a specification, under such an article, may be received, particularly in cases merely civil ; but where it is introduced, such specification should be exact as to time, and place, and all other material circumstances : for without such exactness it remains little better than the general plea. The present case is brought for civil relief, but founded on a criminal imputation ; the charge is that he has treated his wife with want of due tenderness ; and the vindication is that she is a person of such habits as to make the want of tenderness in some degree justifiable. It thus becomes of a criminal kind as to her also. And in examining on the general charge of habits of intoxication, the examiner ought not to admit specification, but adhere to the form of the plea. And it is a general rule that, whatever specification is introduced, it shall be so exact as to give the party full opportunity of defence.

Another rule by which the conduct of examiners, particularly in these cases of character, should be guided, is that the facts allowed to be stated must be plain and simple, and not such as will probably run into intricacy of discussion or ambiguity.

(a) The practice has since been discontinued.

[96] After this discussion, it would be idle for me not to say that I do consider the whole imputation as an absurd calumny. I have no other way of accounting for the conduct of the relations. If the fact had been as is pleaded, it is impossible but that they must have known it; and if they had known it, they must have been destitute of all common sense, and of all common humanity, if they themselves had not been forward in loudly demanding a separation the very day after it had happened.

[97] From that time there is a chasm in the history of actual cruelty till the fourth of October, 1788; of actual cruelty, I mean, so far as it is concerned in bodily acts. They travel, by the advice of Dr. Denman. Bobillier says that Mr. Evans made disagreeable difficulties. What those difficulties were I don't know; they might be real difficulties. Mr. Evans had not been able to settle his affairs in India, and it might have been very inconvenient to him to leave town; and the difficulties being [98] real, might not be the less disagreeable for being real. But however they do travel; and there is a space of nine months, I think, in which his cruelty appears to have been in a pretty deep sleep. However, it was only the sleep of the lion; for, upon the fourth of October, an act of barbarity was practised, which, to be sure, is equal to any of its predecessors.

In *Wilson v. Wetherell* (Prerog. 27th May, 1789), which has been quoted by counsel, an attack was made, in an allegation, upon the general character of an individual. Several witnesses were examined upon it, and the examiner let them run on into specifications. Some said they thought him a bad man, because he had defrauded them, as members of a public company. Now, fraud itself is composed frequently of such ingredients, that, to establish it, might occupy an inquiry of some years in a court of equity. How, then, could this Court entertain, incidentally, and only as an excrescence from the original cause, a matter which might easily have overgrown the cause from whence it sprung?

These are general rules fit to be observed; and there is one more—that if an examiner entertains a doubt, it is safer for him to decide in the affirmative, and to receive what the witness can say than to reject it totally; because the Court can do that at last, if it thinks proper; and there is no irreparable injury done by admission, as there may be by too hasty exclusion. Subject to these observations, I shall proceed to consider this allegation. The first article is general, and excepting to the credit of certain witnesses, as persons of infamous character, and not to be believed on their oaths. It has been disputed whether such an article can be admitted substantively, or only as introductory, when offered after publication; and, most certainly, the practice has been a little fluctuating upon that subject. By the ancient text law, to which it is most safe, in such variation, to adhere, it cannot be admitted substantively. That principle is to be found in the Decretals (Decret. Greg. lib. 2, tit. 19, c. 9). Whether the more ancient practice of our own Ecclesiastical Courts may have deviated from this rule, I do not find; but it was considered as an existing rule in the case of *Cunnington v. Coxe* (Prerog. 28th June, 1781), of which I have an exact note, “that as to the mere general character of a witness, the exception ought to be taken before publication.” This rule was, for the first time within my memory, impugned in *Arabin v. Arabin* (Consist. 15th July, 1786. Arches, 15th February, 1787), where there was an objection taken on that ground. The rule was sustained in the Consistory, and in the Arches; both those Courts being of opinion that a general article merely ought not to be admitted after publication. The cause went to the Delegates, upon appeal on that point from the Court of Arches; where the party appellate being anxious, on private considerations, to have the cause heard on the principal merits, and not thinking that incidental point sufficiently material to retard the proceedings, consented to the repeal of the two former sentences, which passed, on motion, by consent, and wholly sub silentio. But when that cause came on for sentence on the merits, it was strongly signified to be the opinion of one of the Judges that the old practice of excluding such matter was correct and proper.

In *Bailey v. Bradburn* (Consist. 27th November, 1788) the same doctrine was held here very recently; and I understand the same to have been since recognized in *Raybold v. Raybold* (8th December, 1789) in the Court of Arches. I hold it, then, to be the known and existing law, and to which, till I am otherwise instructed by superior authority, I shall adhere—that an article of this kind can be admitted only as an introductory article after publication. It must be observed, then, that it being merely introductory, the examiner is not to examine upon it.

It is stated in this way in the libel: that, after Mrs. Evans recovered from her lying-in, Mr. Evans [99] would seldom let her lie at her ease in her bed, he frequently thrusting his elbows and knees into all parts of her back, sides, and loins, and thereby greatly hurting her; that in the night of the fourth day of October, 1788, Mr. Evans and Mrs. Evans being in bed together in their house in Conduit Street, he, without any cause or provocation whatever, began to quarrel with and abuse his said wife, and with great force and violence seized her, and dragged her to every part of the bed; beat her head against [100] each of the bed-posts, and twisted, distorted, forced her limbs to so violent a degree, that he brought her feet close up to her mouth; in which condition she swooned away; and in that helpless state, after giving her several dreadful blows and kicks, which caused the blood to issue from her mouth and other parts of her body, he turned her out of bed naked on the floor; in which condition, helpless, and apparently lifeless, she lay a considerable time, until her piercing cries brought three women from different [101] parts of the house to her assistance, who found her naked on the floor, with her mouth full of blood, to all appearance dead; her limbs quite cold and stiff, and her legs crossed, and so twisted

The first person excepted against is Mr. Finch Mason, an officer in his Majesty's service. And it has been said that an attack of this nature is injurious to his character. But every witness, produced in a court of justice, is liable to such an attack; and it does not rest with the Court, but the party, if the attack is injuriously made. On this account, however, as well as on more general considerations, exceptive allegations are to be carefully watched. Parties state their case, and examine their witnesses, and it becomes occasionally an object with one party, having sinister designs, to lie by till after he has seen the depositions, and then to endeavour to get rid of such witnesses as are most likely to operate to his disadvantage. Courts of justice, therefore, are tender in suffering evidence to be attacked in this manner, without strong reasons given for it. And where there is ground for it, the rule is universally laid down that the exception taken must not be of an ambiguous nature; and the party excepted to, if on the ground of general bad character, must be attacked in such terms as plainly assert that imputation. This is the rule for exceptions "*contra personas*." If the exception be "*contra dicta*," that is, arising out of the depositions of the witness, it must be observed that, by allowing such an exception, it is not meant that you are at liberty to controvert every declaration of witnesses, but that you may except to their credit and character, from what arises out of their depositions; and, to do this, it must be shewn that a witness has misrepresented the matter corruptly and wilfully. There must be what the law calls "*falsitas cum corruptione*." Every man is liable to error; and on the supposition that a witness states his opinion from appearances, it is not merely from misapprehension, or from proof of his being deceived, that he is to be contradicted, in the way of exception to his credit; and that he is to be sent forth into the world as a person of disgraced character: this must be only from wilful and corrupt falsification.

How will this apply to Mr. Mason? The principal facts of his depositions are such as, if contradicted, would not do more than affect him with inaccuracy or misapprehension. In one place he goes on to say, "that he once saw Mrs. Evans in a state of disorder from liquor," which, unless it means when he first arrived, and this is not averred, is objectionable for want of specification of time. The fact ought not to have been taken down without such plain specification, and being so defective, the Court would not regard it as evidence. If the facts alleged in contradiction to him, therefore, were all to be proved, it would not invalidate his testimony as to his belief. I will not say however that it might not perhaps warrant an application to the Court to open the cause for a defensive purpose. On this point, I think the general and correct rule is that, wherever the matter is originally laid down in the libel or allegation with due specification, you shall not be at liberty to introduce a contradictory plea, on account of any thing which arises on the depositions of the witnesses. But if there is such want of sufficient specification in the plea, you may then be at liberty to do it. I find this to be the text law as laid down in the Decretals, in a case of an alibi referred from England to Rome for decision (Decret. Greg. lib. 2, tit. 20, c. 35. Mynsinger in loc. p. 68). Panormitan (*b*) also lays down the rule to the same effect. And he goes on

(*b*) "*Sed tamen falsitas directa admittitur post aperturam propter oblivionem debitæ specificationis articulorum.*" Processus Jud. Ord. tit. "*Probatio Formæ*," et seq.

that it was with great difficulty they could extricate them, and which they could not begin, until she shewed some appearance of returning life, and could not effect until they had been with her upwards of an hour; and that, by the aforesaid cruel treatment, Mrs. Evans was put to great pain and anguish, and her life was in [102] imminent danger; and on the next day several marks and bruises were very plainly to be seen on various parts of her body.

There are three women, therefore, who are vouched in this case; that is, this Bobillier; there is likewise a person of the name of Glover; and there is Tomlins. And this is the only fact of barbarity to which Tomlins is called to depose: she speaks to all other circumstances of Mr. Evans's behaviour towards his wife with the utmost par-[103]-tiality. As to Bobillier's testimony, I have already expressed myself in pretty strong terms of the opinion which I entertain of the truth of any assertion which comes from that witness; and therefore, certainly, in weighing this business, I shall pretty much lay her out of the question. I will only just observe upon one circumstance, which shews pretty clearly the degree of alloy with which her evidence must be considered as debased. She describes herself as coming into the room at midnight, and finding Mrs. Evans in the situation stated in the libel, and to which she speaks very fully. She then says that after Mr. Evans had retired, and with great

to state, if there has been a failure of due specification in the original articles, "tunc admittitur." And it is the true rule, that if a fact, material in the case, has been pleaded without such specification as would enable the party to apply his defence to it, by way of counterplea, and he is therefore in some degree taken by surprise, on the particulars stated in the depositions of the witnesses, it is in the discretion of the Court, under great caution, to allow him to give in a defensive plea after publication. But it would relax the rules of evidence in a way liable to abuse, and open to perjury, if I permitted that fundamental rule to be departed from, and, after publication of evidence, on a plea laid with sufficient specification, suffered the matter to be the subject of re-examination, merely because the witness had deposed circumstantially, and so as to be capable of being contradicted on some incidental points; as there can hardly ever be a cause in which some of the witnesses will not disagree with others on trifling circumstances.

It appears to me that if the witnesses were to prove every thing laid in the exceptive allegation as to Mr. Mason, it would amount to no more than to shew him to be mistaken, and not to shew that he is a corrupt man. I therefore reject that article and direct his name to be struck out of the general introductory article, in conformity to what I have before observed. Another witness objected to is Benjamin Frazer, the butler. Some parts of his evidence are recited, to which a direct contradiction in fact is pleaded, but others, which are mere matter of appearance, and so incapable of precise contradiction. What he has stated, as matter of fact, may affect his credit, if satisfactorily contradicted, and therefore, I admit so much of this article as may establish such contradiction; but I reject the rest; and the article must be reformed accordingly.

With respect to the exceptions which are opposed in this allegation to the other witnesses, Glover, Newland, Tilbury, and Dr. Denman, they are (a) all reducible to one or other of the general heads, on which I have already observed. They either assign contradictions, which do not involve any impeachment of credit, or they apply to specifications, which ought not to have been introduced into the depositions—or are so imperfect as not to afford the means of defence, and, on that account, will not be received as evidence; or they lead to re-examination, on points which have been already fully in issue between the parties, and which ought, therefore, not to be examined to again. There are parts of the depositions where the witnesses have spoken definitely as to time. I do not say that the conclusion of the cause might not be rescinded, in order to counterplead where they have thus spoken. But when they have spoken indefinitely, I shall not permit a contradiction to what does not, in itself amount to evidence.

With these considerations, I reject the particular articles mentioned, and direct the names of the witnesses in the rejected articles to be struck out of the general article, and shall suffer the rest to stand for admission when reformed.

(a) This remark was confirmed by detailed references to the allegation and depositions.

unconcern [certainly a very odd appearance for a man to assume, taking the story to be real], she staid with Mrs. Evans till two o'clock in the morning, when Mrs. Evans recovered from her state of insensibility. So that this poor lady, according to Bobillier, had been lying in this deplorable state from midnight till two in the morning, and then awaked to give an account of what had happened to her!

Now it is positively sworn by Tomlins that the lady was actually restored, and that she herself had taken Mr. Evans's night-clothes into another room; that she was afterwards called in by Mademoi-[104]-selle Bobillier, and was ordered to deliver a letter, which was written to be sent to Mr. Thackeray, at one in the morning! and it does so happen that Mr. Thackeray himself deposes that this letter bore date at one. Yet this witness, in order to augment this transaction, pretends to state that it was not till after two that Mrs. Evans awoke, and that consequently it must have been after two that that conversation took place between her and Mrs. Evans, which produced the writing and the sending of this letter. However, the account given lies between Glover and Tomlins; and the account that they give in substance amounts pretty nearly to this: that Mrs. Evans was found certainly in a situation of apparent distress; what produced that distress non constat; for every thing had passed in the room between Mr. Evans and herself before any body was admitted. One witness says that her mouth was full of blood. The other witness says that she saw nothing of blood. The account given of what had passed in *recenti facto* is given to me simply upon the credit of the French lady; and I am decidedly of opinion to take no fact upon the credit of that witness alone. I am then not ascertained, by that witness's singly telling me so, that Mrs. Evans did at that time give this account. That there had been something of a struggle, in the course of which Mrs. Evans fell out of bed, or threw herself out of bed, or was thrown out of bed by Mr. Evans, these are the three possibilities which might have happened. But, supposing I got at it as a fact that she was actually shoved out of bed by Mr. Evans, I must still go farther, in order to establish a case of cruelty; for I must go to the ex-[105]-tent that this was done intentionally, and not by accident. Both the fact and the intention must be proved to make it a case of cruelty; I certainly shall not presume circumstances in order to make out such a case.

It has been asked, and very properly asked, don't courts of justice admit presumptive proof? Do you expect ocular proof in all cases? I take the rule to be this: if you have a criminal fact ascertained, you may then take presumptive proof to shew who did it; to fix the criminal, having then an actual *corpus delicti*. Shew me, then, in this case, that a crime has been committed, and I shall not be at a loss to fix the criminal: but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature; and would, I take it, be an entire misapplication of the doctrine of presumptions. This fact, then, not being a criminal one upon the face of it, and being subject to three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say that I ought, by presumption merely, to make out this fact to be necessarily an act of delinquency.

However, what weighs more with me than all this again is, what I perpetually resort to in this case—the *evidentia rei*; the conduct of the parties: that always arises in my mind. Upon any other supposition than Mr. Evans's innocence in this case, the conduct of every person who appears in the business—the conduct of the party, of the witness, of the agent, in short, the conduct of every [106] body, is the most unnatural that can be devised; it is directly the contrary of what every rational person in that sort of situation would have pursued. Whoever reads the description in the libel, and then recollects the extreme bodily weakness of the person who was racked and tormented, and in this variety of almost inexplicable ways, as they have been well stated to be, must suppose that she must have continued, for many days afterwards, in a very languishing state, and in a situation of great personal hazard; that her body must not only have been greatly bruised, but must wonder that it did not appear entirely dislocated the next day. Now, where are the medical persons in this case? Was no assistance of that kind invoked? Surely Mr. Evans could not have prevented the interposition of aid of that nature, because the matter was immediately communicated, and consequently assistance, if necessary, must have been called in. Mr. Thackeray, to whom a letter had been sent [here again I see the finger of this busy incendiary, this Mademoiselle Bobillier], Mr. Thackeray, like

an affectionate brother, comes at the first call. There is some difference in the account of the witnesses as to the time when he came. Bobillier says it was between the hours of nine and ten. Mrs. Evans comes down to Mr. Thackeray—one would suppose that she came in a situation of great visible peril—there is nothing of that sort, as far as I see. He enquires what was the matter—she declines at first telling him—then Mr. Evans takes up the matter, and begins to tell it—she stops him short and gives the history of it herself; and the only particulars which stick [107] upon the mind of this gentleman—a man of sense, and of strong attention to the cause of his sister-in-law—the only particulars which stick upon his recollection, and which he states to me, are that Mr. Evans had hurt her with his elbows, and violently shoved her out of bed. Now, I ask, is this account consistent with the variety of tortures that were applied to this poor lady, who was racked in the way that she is stated to have been in the libel? Is it possible that these two circumstances, and these two circumstances alone, should, in such a case, remain upon the mind of this gentleman? It is most highly incredible.

But the matter does not rest there. The consequences, whatever they may have been, were not in the slightest degree visible. Witnesses have been examined to them: there is particularly Jessop, who swears that he saw her at dinner the next day, just as usual. Fraser saw her at dinner the next day, just as usual. In short, she appears, upon a reconciliation which then took place with her husband, to have appeared just in her usual guise, without any alteration of body or mind. And when I have the total silence of all the persons who must have been able to speak to the fact, if it had existed as a matter of any consequence at all, I cannot help giving the whole business up, as a matter absolutely without weight or any significance whatever.

In the conversation which then took place, Mr. Thackeray was convinced that a separation was necessary; and then, as far as I can conjecture, was convinced of it for the first time. He accordingly proposed it. Mr. Evans was urgent for it. [108] Mrs. Evans was violently averse to it. Now from thence I collect three things.

First of all, that Mr. Thackeray never could have heard of the previous brutality which had been charged upon Mr. Evans; because if he had, there could have been no question but that he would have had that conviction in his mind long before.

The second that I collect is, that if Mrs. Evans had sustained these horrid outrages, it is most extremely unnatural that she should herself have been averse to a separation; the mere love of life would have induced her to desire it. The gentlemen say, and say very truly, that it is very hard that this should be pressed to the disadvantage of Mrs. Evans's character, that she was willing to continue with her husband; and so it would be: but it is not pressed to the disadvantage of her character; it is pressed only to the disadvantage of the truth of her case. Yes; but it is next said it was the love of her children. Clear it is to me, from a fact which I shall afterwards mention, that it was not the desire of continuing with her children that operated in her mind as a motive to make her feel a repugnance to the separation proposed.

Mrs. Evans's counsel have made very strong appeals to the humanity of the Court, and have said, what a prodigious cruelty I should commit if I were to send this lady back again to this gentleman after such cruel usage. There would be some colour for that if I did not find that this lady herself, after almost every thing which they have stated to the disadvantage of this gentleman had passed, nevertheless remained firm in her attachment, and remained extremely desirous of continuing the cohabitation.

[109] In the third place, it seems to me highly unnatural that Mr. Evans, if I am to consider him as a person labouring under the conviction of this deep and detected guilt; it appears, I say, extremely unnatural that he should be the party to assume the tone of complaint, of disaffection and dissatisfaction; and should be the person to clamour for a separation. As to his declining to state his grievances to Mr. Thackeray, I own I see many reasons why he might decline doing it, without any impeachment either of his own innocence or of the honour of the gentleman whose jurisdiction upon that occasion he thought fit to decline. If a man has a dispute with his wife, which turns upon facts that are in controversy between the two, I do not think the relations of the wife are the proper tribunal before whom the husband is bound to answer.

This quarrel, however, was made up, yet it was but "*gratia male sarta*;" for, after cohabiting together for some time longer, their harmony is again interrupted by

an act, or an accident, which happened at the latter end of November. It is related by Mrs. Newland and by Mrs. Webber. For as to Bobillier, I say again that no credit is due to her.

It is, as is pleaded in the libel, to this effect: that at the latter end of November, or beginning of December, Mrs. Evans being in the drawing-room of their house in Conduit Street, in company with two ladies and her eldest daughter, Mr. Evans came into the room and seated himself on a sofa, and asked her what book she was reading: that thereupon she immediately went to him with great good humour, and, by way of answering his question, continued to [110] read aloud a part of the book which she had before been reading; upon which he pulled her on his knee, where she sat some short time, when he, without any cause or provocation whatever, in great passion, suddenly and violently, and with his greatest force, threw her from him on the hearth-stone, and thereby greatly hurt and bruised her.

The account given by the two witnesses whom I particularly point out in this case, Mrs. Newland, a sister of Mr. Evans, and Mrs. Webber, who is a particular friend of Mrs. Evans, is this:

Mrs. Newland does not depose at all as to the fact of throwing down, for she did not see it. All that she saw was that Mrs. Evans came and sat upon his knee; that he complained of the interruption of something that he was reading; and the next thing she saw was this lady rolling upon the hearth. So that her evidence, taking the whole of it, cannot affect Mr. Evans. Well, but it is said, from her account it nevertheless appears that, immediately upon the occasion, Mrs. Evans brought home the charge to Mr. Evans; for, as Mrs. Newland deposes, on his offering to assist her up, she said, "You brute, let me alone." Mrs. Webber says that Mrs. Evans expostulated with him in a mild manner when he offered to assist her; but the manner is this, "You brute, let me alone." And she then rolled from him, and got up without assistance.

Now, taking it that Mrs. Evans did suppose, at this time, that it was the intentional act of Mr. Evans, still her supposition is not sufficient for the Court to raise an evidence of actual intention upon it. Mrs. Evans, prone to take offence, might perhaps ignorantly ascribe that to design which was [111] the mere effect of accident. To take that, then, for the true representation of the fact upon the single ground of her supposing it so, would, I think, be going a very dangerous and unreasonable length of admission indeed.

But what is the account Mrs. Webber gives of this business? She speaks very imperfectly to a great deal of what passed. She admits her hearing not to be very good. She says, however, she saw Mr. Evans lift up his knee, as she could plainly discern, and Mrs. Evans then fell down upon the hearth before the fire, near to which Mr. Evans was sitting; on which the deponent, who was very much frightened, screamed out, and said, Good God, sir, how could you do so? or, how could you be so cruel?

In the first place, supposing the fact that this lady did actually see what she says she did see; is it at all a necessary conclusion, or what have I to satisfy me that this small motion on the part of Mr. Evans, which possibly might have been made with an intention to dislodge his wife from her seat, was yet done with the intention of producing the consequence which it produced, namely, that of tumbling her down upon the hearth and hurting her considerably? She comes and seats herself upon his knee. She enters into a conversation with him. A husband is not always in a disposition to converse with his wife. She upon that occasion continues there. He makes a motion to dislodge her from her position, and this consequence happens that she falls upon the hearth. He immediately, as it appears, attempts to give assistance, which she repulses in the way that Mrs. Newland says, "You brute, let me alone." The other witness, Mrs. Webber, says that she [112] upon the occasion exclaimed, Good God, sir, how could you do so? to which he answers, he did not intend it; which answer this lady chuses to call an equivocal answer, but which appears to me as direct an answer as could be given. Is there any thing like an equivocation, or ambiguity, in that answer? Taking the utmost of the fact, then, upon the evidence of these two witnesses compounded together, for, as to weighing minute circumstances there is no end of it, there might be perhaps a little want of caution, a want of some little attention at the time, just at the moment of removing this lady from his knee: but that there was an intention of cruelty; that there was an intention that this lady

should be affected by the slight motion, to which perhaps he involuntarily had at that time recourse ; I have nothing in the world that applies to my mind, with any degree of force whatever, to satisfy me that it was so.

But what was the effect of this fall ? And here again I resort, as I must do from beginning to end, to the conduct of the parties—that is the key by which, I think, every thing here is to be unlocked. Why, Mrs. Evans had been, it seems, reading a novel for the entertainment of the company. This accident, as tragical as almost any that happens in a novel, happens at this time ; and what is the consequence of it ? What is the impression it makes upon the mind of Mrs. Webber herself at the time ? Why, having given a detailed account of this cruel transaction, she goes on to say that she remembers she regretted much the entertainment that she had lost by the discontinuance of the reading of the novel. That is her impression. The lady sees an act of horrid barbarity performed, and what is up-[113]-permost in her mind is the loss of the reading of this novel, which had been the entertainment of the evening. However, it did happen that she was not even deprived of this entertainment, because she goes on to say that Mr. Evans staid in the room, and he read the novel. Then I have this fact, that, after an act so brutal as this was, these ladies not only continued in the room with the monster who had been guilty of it ; but submitted to receive from him the entertainment which they had been prevented, by his behaviour to Mrs. Evans, from receiving from her. I do think, then, that the coming afterwards and representing such a matter as this, with any degree of gravity, is absurd and ridiculous in the highest degree.

It must also be observed that Mrs. Evans herself came down that night after supper ; and it has been made a proof of great barbarity on the part of Mr. Evans that he observed to a gentleman who supped there that night, that the poor thing was not very well. Now that depends entirely upon the manner of saying it, whether it is to be taken as an expression of insult or of condolence ; of the condolence of a very affectionate husband, sorry perhaps that he had not practised all the care and attention, in that matter, which an affectionate husband might have wished to have done. He might then have very well said, the poor thing was not very well. But that it was done with any intention to insult her feelings—to be sure the manner in which this Mrs. Webber has deposed to her own feelings on the occasion abundantly satisfies me that it could not be done with any such intention.

[114] Now, here concludes the history of personal cruelty, so far as it consists in personal and corporal acts. An history very heavy and formidable in its commencement, whilst it rests in mere allegation ; but which grows weaker and more insignificant every step as it advances towards proof. Comparing the charge and the proof, I think it, then, my duty to discharge that debt which the justice of this Court owes to the character of Mr. Evans, by declaring that upon the most careful and the most conscientious investigation of it, this prosecution, so far as it respects these facts, is unadvisedly and unwarrantably brought. I therefore fully exculpate him from that charge of unmanly cruelty, which is founded upon these facts ; and I do very sincerely regret that, under any advice, this poor lady should have preferred so black an accusation against her husband, and one so totally destitute of all reasonable colour.

On the 23d of December Mr. Evans took the resolution of finally separating from his wife. It is pleaded in the fourteenth article of the libel that he did arbitrarily, and without any cause or provocation whatever, deprive his wife of all government in his family and authority over his servants ; and that he did, on or about the 23d of December, 1788, finally withdraw from her and without cause.

From stating the deprivation of authority first, and the separation afterwards, one would suppose that he had deprived this lady of authority in his house, before he quitted it himself ; and to that effect Tomlins positively swears : that “some time about the fourth of October he gave her orders not to obey Mrs. Evans, but to obey other persons,” who are there mentioned. This, how-[115]-ever, is erroneously and carelessly stated ; because it is most positively contradicted by all the other servants who are examined—Odell, Fraser, Glover, Jessop ; all of whom are examined upon the thirteenth article, and who say that this deprivation of authority did not take place while Mr. Evans continued in a state of cohabitation with her. However, there is a fact which comes out upon the evidence of Odell, and it is this : that Mr. Evans had taken into his own hands something of the department of the house economy : I don’t

think it very clearly appears what. It is upon the third interrogatory, to which she answers that Mrs. Evans declined giving orders when the respondent applied to her, soon after her first going to live in her service, which was, I think, upon the first day of November, and told her to go to her master; that she would not take the management of the house; that as Mr. Evans did part he might do the whole: and she could not then settle her bills; in consequence of which he took the management of all his household concerns; and on a new servant coming, the respondent told Mrs. Evans of the servant's coming to be hired; but she would have nothing to do with it, on which Mr. Evans hired her; and he did not, to her knowledge, refuse to permit her to hire a maid-servant, or to do any other domestic office of that or the like nature.

The counsel have taken up this quarrel pretty strongly in behalf of Mrs. Evans, and have inveighed very loudly against the barbarity of a husband, for taking into his own hands any part of the family economy; but, in my apprehension, a good deal without reason. I cannot call it cruelty, if a gentleman chuses to settle his weekly bills [116] himself; because, I take it that a wife acts in this respect not by any original right, but as the steward and as the representative of her husband. And if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own, if he does chuse to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere. I say I see nothing in that; but I do see, here again, on the other side, a proneness to take offence; a disposition to revolt; a disposition to return a supposed insult by something very like disobedience.

On the 23d of December Mr. Evans took the resolution of finally separating from his wife. There had been for a time growing dissensions, which had frequently ripened into proposals for a separation; and these proposals, which had always come from Mr. Evans, had been withdrawn upon the interference of friends, and the parties had become half reconciled.

In September, 1788, he had very abruptly quitted Mr. Thackeray's, where he had been upon a visit with his wife; and he proposed a separation in a letter, the contents of which are stated in a great measure by Mr. Thackeray. Now, there could have been no fact of cruelty at that particular time, which gave occasion to the desire of a separation; because Mr. Thackeray swears that he does not know the occasion of this quarrel, though it clearly happened at his own house. It could then have been no more than mere private disagreement. In the separation proposed was this circumstance, that he had acceded to her having the charge of [117] the children. After this I can never surely admit it to be said that the reason why this lady chose to remain with her husband was an apprehension that she might be debarred of the comfort of her children; because the terms of the separation then proposed were that she should have the charge of the children. Mr. Thackeray, very prudently anxious for a reconciliation, as I think he was, supposing him ignorant of all these atrocious facts of cruelty, he, after all this, wrote a letter to Mr. Evans—stating what? “Mrs. Evans's uneasiness, and her anxiety for a reconciliation;” though she was then either in possession of the children, or at least had the possession of them absolutely secured to her. It is impossible, then, for me to suppose one moment after this that her anxiety for a reconciliation proceeded from any thing else than an attachment to her husband.

Mr. Thackeray says he requested a meeting; Mr. Evans declined it, but desired the means of meeting a third person, after Mrs. Evans had agreed upon a separation. I see nothing that is at all particular in that. It seems to me a proper caution on his part that he should have desired to have his family controversy submitted rather to the judgment of a third person, than to the judgment of a person, who, though a very honorable man, was yet, it is to be remembered, the brother-in-law of Mrs. Evans. However, a reconciliation was effected at this time, and the parties lived together again until October the 4th, when the accident happened which I have before described.

Then again Mr. Evans insists, as he always does, upon a separation. He is the party always insisting upon that. Mr. Thackeray, for the first [118] time, then yields to the necessity of the case; though he clearly yields with a good deal of reluctance. However, by the good offices of Mr. Henniker, they are again half reconciled.

On the 23d of December Mr. Evans withdraws himself totally, taking with him the person of his eldest daughter; and offers to Mrs. Evans, in a letter, which has my notice, because it has been noticed by the counsel on both sides, a settlement of £500 a year. The letter, though written in the height of irritation, does not insinuate that species of misconduct with which she has been improperly charged in his allegation; it only charges her with intolerable manners.

Here, I think, that an impropriety for the first time attaches on the conduct of Mr. Evans; for Mr. Evans must be informed that the law of this country, and of every Christian country, does not allow a man to use the language, "I will be separated from my wife." If Mrs. Evans had been guilty of any misconduct for which the law would decree a separation, he would be perfectly right in withdrawing himself; but, in all cases where the law does not pretty positively allow, it pretty positively, I believe, condemns.

Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view, not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. To this contract is superadded the sanctity of a religious vow. Mr. Evans must be told that the obligations of this contract are not to be relaxed at the pleasure of one party. I may go farther; [119] they are not to be lightly relaxed even at the pleasure of both. For if two persons have pledged themselves at the altar of God, to spend their lives together, for purposes that reach much beyond themselves; it is a doctrine to which the morality of the law gives no countenance, that they may, by private contract, dissolve the bands of this solemn tie, and throw themselves upon society in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.

There are, undoubtedly, cases for which a separation is provided; but it must be lawfully decreed by public authority, and for reasons which the public wisdom approves. Mere turbulence of temper; petulance of manners; infirmity of body or mind, are not numbered amongst those causes. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement was to take for better, for worse: and, painful as the performance of this duty may be; painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance.

Mr. Evans, in determining to quit his wife, does that which the law does not approve, and for which it provides a remedy. But the remedy is certainly not that which is sought for in the present suit; the remedy is the remedy of restitution. It would be absurd to suppose that the law which furnishes that remedy, furnished at the same time another remedy which is totally the reverse of it, [120] and totally inconsistent with it. To say that the Court is to grant a separation, because the husband has thought fit to separate himself, would be to confirm the desertion, and to gratify the deserter; and the Court would then become the perpetual instrument of these voluntary and illegal separations.

I can never, therefore, make desertion a ground of separation, though, in conjunction with acts of cruelty, it frequently is; and, though it may be thought hard to send a wife back to a husband who has given her such a proof of alienated affections, yet the Court does not send her back without due care for her reception; for the monition is not only that he shall take her back, but that he shall treat her with conjugal kindness; and though the Court cannot interfere in the minute detail of family life, for much must ever be left to the consciences of individuals, yet the Court will see its monitions so far obeyed that the great obligations of conjugal duty shall be complied with.

What I have to say upon the remaining part of this case will be comparatively short, because every thing that follows in this history arises out of this act of separation; and I have already said that this suit is not the proper remedy for a complaint for separation. The true remedy cannot be obtained by this suit; for it is a mistake to say, as it has been said on this occasion, that, in the present suit, I can issue a monition to either party to return. This suit can lead to no such sentence.

Mr. Evans quits his wife, and, in that respect, does an improper thing; that improper step is followed by others of the same nature; for there is no such thing, and one has often occasion to [121] observe it, as doing an improper thing with strict

propriety. He is charged with having denied to his wife access to her child. If the fact were true, though he certainly might do it, yet I should deem it a most improper exercise of the marital power, very disgraceful to the person who practised it, and a most wanton and unnecessary outrage upon the feelings of a mother. But the evidence, as far as it goes, does not, in my apprehension, support the imputation. In his letter he expressly engages that access shall not be denied. Mr. Henniker, who carried that letter, knowing its contents, is to be considered as guarantee of that engagement. As to the letter mentioned by Bobillier, of a contrary effect, I take that to be one of the many fictions with which that lady has thought fit to adorn her evidence. And as to the taking her away to a boarding-school, though I do wish it had been done with less privacy, and less precipitation, as that would certainly have been more prudent; yet the placing of the child in a place of education, does by no means prove that he meant to debar her the sight and access of her mother; and therefore I do not hold that fact to be proved in this case.

When Mr. Evans quits his wife, he withdraws, not, as is insinuated in the libel, a proper contribution to the support of his wife; but he does withdraw, I think, a proper mode of making that contribution. He commissions his agent, Mr. Jackson, in conjunction with Mr. Evans senior, to furnish all necessities for Mrs. Evans and the family; he offers £500 a year separate maintenance; and this furnishing of necessities was, as I understand Mr. Jackson, merely provisional till [122] some settlement was actually made. He leaves directions with the servants, of which a copy is exhibited, certainly drawn in terms sufficiently peremptory, in which he refers those servants, for all orders to Miss Evans. Now this is, certainly, a situation of dependence and indignity in which Mrs. Evans is placed. It is putting her, for the supply of her necessities, into the hands of his sister and his solicitor. But then I must remember the fact that Odell says that at this time Mrs. Evans had abdicated the government of the family, in consequence of the offence which she had taken at some conduct of Mr. Evans. She had refused to carry on the family business. Somebody must take care of the house. If Mrs. Evans would not undertake it, perhaps Miss Evans was as proper as any body else. To be sure, if Mrs. Evans had at this time signified her desire to act as mistress of the house; if she had remonstrated at this moment against this entire transfer of domestic authority, there would have been ground of complaint; but I think Mr. Evans, under the circumstances, had no reason to presume that she would have done that under a state of separation, which she had refused to do, living in conjunction with him. Though I think it is a degradation under which she ought not to remain; yet I cannot help thinking that she has herself very largely contributed to place herself upon that footing.

It is charged, in the next place, that he deprived her of all pecuniary credit. I should be unwilling to remark that, if proper supplies were furnished by the attention of Mr. Evans senior, and Mr. Jackson, credit was not absolutely necessary. However, the proof of the fact is this; that Sir Herbert [123] Mackworth, his banker, and Mr. Boehm, were forbid to furnish her with money, as proved by Mr. Moore, without his written order. Now, I protest that I have never understood it to be a part of the prerogative of a wife that she shall have a right to draw for what she likes upon the banker of her husband. The purse is her husband's; and it seems to me a matter of indifference, in its own nature, whether the supplies pass through the hands of Sir Herbert Mackworth, or Mr. Jackson and Mr. Evans. It is necessary, undoubtedly, to supply her with money; but the mode of doing it by a banker, I suppose, is not absolutely necessary: I do not take it to be perfectly usual. He had indulged her before with an unlimited liberty of this kind, which, upon the separation, it is proved he withdrew. That under the present circumstances he should not leave her an unlimited power of drawing upon his banker, nobody could wonder. And as far as £500 a-year went he professed, and gave every evidence of sincerity in those professions, that he was ready to leave her that power. No proof, here again, is offered, that Mrs. Evans ever requested any money of him. If a husband, upon request, refuses to furnish necessities, either by himself or his agent, undoubtedly he is culpable; but if a wife does not think fit to make any request or demand, it is going too far to fix upon a husband cruelty, merely because he refuses one particular mode of supplying her with money, and which mode he was never bound under any circumstances to practise; but which in the present case, as far as it appears, he has never even been requested to conform to. The fact is, that finding her credit stopped at the

banker's she trusted, as [124] well she might, to the kindness and liberality of her relations; and, without making any application to her husband, as I see, avails herself, not very advisedly, of this as a circumstance on which to found a charge of cruelty.

He is charged, in the next place, with refusing her the aid of medicine, and that, with that view, he sent Mr. Jackson, his attorney, to Mr. Paumier, to forbid him supplying her with medicines. They have both been examined, and they differ in their evidence. Mr. Paumier says he received orders from Mr. Jackson. Mr. Jackson swears he accidentally met Mr. Paumier, who asked if he was to attend her on Mr. Evans's account; that he declined giving any directions, as she had left the house; that he never forbid any person from giving her credit, nor was ever sent for that purpose by Mr. Evans; nor did he, nor did Mr. Evans ever, to his knowledge, forbid any person from giving her credit. Then, I am either to suppose that Mr. Paumier misunderstood Mr. Jackson, which might easily be, or that Mr. Jackson delivered those orders of his own head; for he does positively swear that he was never sent with any such orders from Mr. Evans; and in order to affect Mr. Evans with this fact, he must be the orderer. Supposing it to be fixed upon Mr. Evans, it might still remain, I think, for consideration, how far the discharging of Mr. Paumier, who, for any thing that appears, was not particularly desired by this lady to attend her; how far the discharging of him merely from the obligation of attending on Mr. Evans's account is to be deemed an act of cruelty; more particularly where the husband knew, as he could not but know, that she was under circumstances, where [125] she was sure to receive every assistance of that kind from her relations. I do think, to call this a refusal of all necessary medical aid to a person who was ill, does seem to me to be putting upon such a business no very fair colour.

That a woman, under such circumstances as she now was placed, should not chuse to continue any longer in the house, is not to be wondered at. It was certainly a state of indignity. But Mr. Jackson positively swears that he offered no violence; that he threatened none; that he was not authorized to do either the one or the other; and that it was a matter of considerable surprise to him when she quitted the house. To me, however, I own it would have been a matter of surprise if she had continued there, considering the footing upon which she then was. Mrs. Thackeray swears that she saw two or three letters from Mr. Jackson, intimating that Mrs. Evans must quit the house, or he would take steps that would be disagreeable. Now, taking it that Mr. Evans meant to have two houses, two separate establishments—to have an establishment necessary for the wife—to be sure a less house would be sufficient for her in consequence of this separation, and no just cause of complaint could arise, unless the house to which she was desired to withdraw was such an one as it was improper for the wife of Mr. Evans to inhabit; for, I cannot but say, that a husband has a right to direct the removal of his own family.

There is another matter, which has been made a pretty long subject of discussion in this case; a matter of trunks and boxes, which has been introduced into the allegation, but not into the libel. One representation is given of it by Mr. Jackson; [126] another by Mademoiselle Bobillier: and I think I do not pay any one individual any sort of compliment, when I say that I shall take his deposition in preference to hers.

After all, there are, certainly, circumstances sufficiently hostile attending this separation. I wish it had been conducted with more care; with more caution; with more tenderness, on the part of Mr. Evans; for care, caution, and tenderness, would have been prudence. I must, however, remember that there were at this time declared hostilities subsisting; great mutual exasperation. It was now become a contest of etiquette, of honour and spirit, on both sides. Nothing can be more clear to me than that the husband meant to support his wife with sufficient liberality; he had always done it; for want of liberality is no where in the cause to be found imputable to him. However, the parties agreeing in substance, they disagree in terms; they disagree only in the nature of the security that was to be given for the allowance proposed. It is not my business to drop an opinion upon that subject; for, after what I have said, it will be sufficiently clear that it is not the business of this Court to approve at all of such separations. But, if I could with propriety for one moment abstract myself from the public situation which I am now in, and could stand in the situation of a private individual, and as the adviser of Mr. Evans, I should say that the generous part would be the prudent part in such a business; and that a conduct of that nature

would be that conduct, under all the circumstances, which it was most advisable to adopt: however, with that I have nothing to do. The spirits of the [127] parties are mutually irritated against each other; the treaty goes off upon that ground; and the refusal to adopt a particular mode of securing the allowance is to be construed a denial of all necessary support, and to be made the foundation of an accusation of cruelty.

The truth of the case, according to the impression which the whole of it makes upon my mind, is this: two persons marry together; both of good moral characters, but with something of warmth, and sensibility, in each of their tempers; the husband is occasionally inattentive; the wife has a vivacity that sometimes offends and sometimes is offended; something like unkindness is produced, and is then easily inflamed; the lady broods over petty resentments, which are anxiously fed by the busy whispers of humble confidantes; her complaints, aggravated by their reports, are carried to her relations, and meet perhaps with a facility of reception from their honest, but well-intentioned, minds. A state of mutual irritation increases; something like incivility is continually practising; and, where it is not practised, it is continually suspected; every word, every act, every look, has a meaning attached to it; it becomes a contest of spirit, in form, between two persons eager to take, and not absolutely backward to give, mutual offence; at last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of disgust: treaties are attempted, and they miscarry, as they might be expected to do, in the hands of persons strongly disaffected towards each other; and then, for the very first time, as Dr. Arnold has observed, a suit of cruelty is thought of; a libel is given in, black with criminating matter; recrimination [128] comes from the other side; accusations rain heavy and thick on all sides, till all is involved in gloom, and the parties lose total sight of each other's real character, and of the truth of every one fact which is involved in the cause.

Out of this state of darkness and error it will not be easy for them to find their way. It were much to be wished that they could find it back again to domestic peace and happiness. Mr. Evans has received a complete vindication of his character. Standing upon that ground, I trust he will act prudently and generously; for generosity is prudence in such circumstances. He will do well to remember, that the person he contends with is one over whom victory is painful; that she is one to whom he is bound by every tie that can fasten the heart of one human being to another; she is the partner of his bed!—the mother of his offspring! And, if mistakes have been committed, and grievous mistakes have been committed, most certainly, in this suit, she is still that person whose mistakes he is bound to cover, not only from his own notice, but, as far as he can, from that of every other person in the world.

Mrs. Evans has likewise something to forget; mistakes have been made to her disadvantage too in this business: she, I say, has something to forget. And I hope she has not to learn, that the dignity of a wife cannot be violated by submission to a husband.

It would be happy indeed, if, by mutual sacrifice of resentments, peace could possibly be re-established. It requires, indeed, great efforts of generosity, great exertions of prudence, on their own part, and on the part of those who are connected with them. If this cannot be done; if the breach is too far widened ever to be closed, Mrs. Evans must find her way to relief; for, she must not continue upon her present footing, no, not for a moment: she must call in the intervention of prudent and respectable friends; and, if that is ineffectual, she must apply to the Court, under the guidance of her counsel, or other persons by whom the matrimonial law of this kingdom is understood.

But, in taking this review, I rather digress from my province in giving advice: my province is merely to give judgment; to pronounce upon what I take to be the result of the facts laid before me. Considering, then, all those facts, with the most conscientious care, and with the most conscientious application of my understanding to their result, I am of opinion that Mr. Evans is exculpated from the charge of unmanly and unlawful cruelty. I therefore pronounce that Mrs. Evans has failed in the proof of her libel, and dismiss Mr. Evans from all further observance of justice in this behalf.

[130] LADY FERRERS v. LORD FERRERS. 11th Nov., 1788; 5th March, 1791.—Divorce, by reason of adultery, on the part of the wife—how affected—by delay in instituting proceedings—by alleged condonation, &c. Ultimately granted.

This was a question on the admissibility of a libel in a cause of divorce, instituted by the wife against the husband, by reason of adultery, on objections which are stated in the observations of the Court.

Judgment—*Sir William Scott*. The question before the Court arises on the admissibility of a libel, given in on the part of Lady Ferrers against her husband the Earl of Ferrers, in a suit of separation, by reason of adultery. The adverse counsel have taken particular objections to separate articles, and also a general objection applicable to the whole. The counsel, in support of the allegation, have given up the latter part of the fourth article, pleading a letter from Lord Ferrers, and the subsequent article exhibiting the letter—the exhibit itself being in so mutilated and imperfect a state as not to correspond with the recitement of it.

In objection to the sixth and ninth articles, which plead specific acts of adultery, prior to a connection which took place between them in 1784, it is said that adultery should, at the utmost, in such a case, be pleaded generally; for the effect of condonation extinguishes the right of complaint, except for subsequent acts. But Dr. Bever has very fully explained the effect of condonation by matrimonial intercourse.* It is a conditional [131] forgiveness, which does not take away the right of complaint, in case of a continuation of adultery, which operates as a reviver of former acts. The objection appears to be founded on a supposition, that the facts of adultery, pleaded subsequent to the condonation, would not be proved; in which case the proof of those facts, previous to the forgiveness, could not weigh. But in debating an allegation, the facts laid are always supposed to be true. It was said, by Dr. Nicholl, that it resembled the case of *Bowes and Strathmore* (3d March, 1789, Deleg.), where facts of adultery, previous to cohabitation, were not permitted to be pleaded. But there is an obvious distinction between the two cases, and in this respect, that the husband there was not aggrieved, and the fact alleged against Lady Strathmore, if true, could be no injury to him. But is that the case here? In respect to any expence, which may be occasioned by it, in taking out a commission for the examination of witnesses in France, the Court must undoubtedly guard against unnecessary charges, but all circumstances must be fully stated, and the Court is bound to admit them to proof. To say there is sufficient evidence without it, is saying nothing, for you cannot narrow the adverse case in that way.

The seventh and eighth articles plead and exhibit a letter from Mrs. Nicholas, sister to Miss Munday, which is said to be a clear admission of her guilt by her nearest relation. It is objected that if Mrs. Nicholas is not examined it is no evidence, and if she is it is unnecessary. The first objection is well founded, it is “*res inter alios acta*.” The admission of Miss Munday’s guilt by [132] her sister cannot affect Lord Ferrers, even if on oath, which it is not. I therefore reject that article and the exhibit.

The latter part of the fifteenth article pleads, that Lady Ferrers has been seen by Kirby, Jones, and others, and their declarations, “that she is not the person who cohabited with Lord Ferrers at their respective lodging-houses.” But this is no evidence. They must be produced, or their unauthenticated declarations will be nugatory. This article must be reformed therefore by pleading, “that they are satisfied on their consciences, and verily believe, she is not the same person,” and on this they must be produced and examined.

The general objection is to the acquiescence of Lady Ferrers, from the year 1780, which is said to amount to condonation. It is contended also that she is barred by length of time; and that if a suit of this description was to come before the House of Lords, or before a jury, they would not sustain it. It is not my business to advert to what would be the conduct of the House of Lords, or of a court of common law. The House of Lords do not sit merely in a judicial capacity, tied down by certain rules, but as a legislative body, which has full power to act according to its own wisdom; so that their proceedings are not to be considered as mere forensic acts, but as acts of the legislature: nor will the action at law, which is instituted, diverso

* On the same principle, reconciliation was pleadable, to a charge of elopement and adultery in bar of dower. *Lady Ann Powes v. Herbert*, Dyer’s Rep. fol. 106.

intuitu, for the recovery of damages, apply to proceedings of this nature. It is not brought against the same person, but against the adulterer, for the injury sustained; and where the husband has not felt the injury, no damages, or, at least, nominal damages only, will be given. [133] But in this Court it is not the measure of the injury which is to undergo consideration, but whether the party plaintiff is entitled to a separation or not? So that the courts of common law do not afford any conclusive rule which should bind this Court in a question of this kind.

The case of *Boteler v. Boteler* * has been mentioned; but I see a material distinction in that case. An application was there made to the Court in favour of Mrs. Boteler, who had brought a suit against her husband for separation. Witnesses had been examined, and publication had passed. The suit then lay dormant for seven or eight years, during which time the original depositions were by some accident lost, and application was made to the Court to hear the cause on attested copies. The Court adverted to the special circumstances of the case, and placed the question on this ground, whether Mrs. Boteler was entitled to any special indulgence? and so placing it, thought that she was not, and therefore dismissed the suit. But if the original depositions had been existing, there is little doubt but that the Judge would have proceeded to hear the cause.

In the case of *Cibber v. Cibber* (Consist. 1739) there was an active concurrence in the husband to the guilt of the wife—a state of fact very different from a forbearance in bringing the suit, which may not only be excusable, but meritorious, in hopes of reconciliation; and, as was observed, there is a great difference between the husband and wife on this point. The husband may, by his authority, [134] command the adherence and obedience of the wife; whereas the woman, in case of elopement and criminality of the husband, must adopt some other mode than that of compulsion. The case of *Harris v. Ball* (Arches, 1788), also, stood on a different ground. That was a case of impotency, pleading a species of defect not capable of proof. The circumstance of time was also an ingredient, but not the leading one in the case, that libel being dismissed as *felo de se* upon the other ground. No case has been cited to shew that lapse of time alone is a sufficient bar.† It is impossible for me to say that

* Consist. Commenced in 1775, went on to 1777, suspended till 1788.

† So in *Dodwell v. Dodwell*, 13th June, 1789, the only act of adultery pleaded was in 1782, and it was objected that acts of adultery could not be given in evidence to obtain a divorce after five years. But the Court over-ruled the objection, observing that the objection as to time could not be maintained, as there was no limitation in suits of this nature. There had been a rule of the canon law “*adulter accusari non potest post quinquennium*,” but that has been held to apply to criminal and not to civil suits (Sanchez, lib. x. disp. 3, § 9. Lex Julia Dig. lib. 48, tit. 5, 29, p. 6). It appears, indeed, from Dr. Bettesworth’s notes, to have been doubted at one time in civil suits. In the case of *Mule v. Mule*, 1710, before the Delegates, it was strongly contended that evidence to facts of adultery, which had passed more than six years, could not be read, but the objection was over-ruled, and the law is now settled otherwise. Over-ruled.

In *D’Aguilar v. D’Aguilar*, 5th November, 1793, the libel pleaded acts of cruelty in 1773: and an objection being taken to the libel on the ground of time. The Court observed—this is a suit brought by Lady D’Aguilar against the Baron, the parties being Jews, and married according to the Jewish rites; but the Court is under the same obligation to interfere and grant aid on violation of any duty arising out of such marriage, as well as any other. An objection is taken to the libel, that the facts are very ancient, and that they had been buried in silence for many years, and that it would be proper to exclude such complaint, by analogy to the statute of limitation. There might be more force in the objection, if it was not taken off by the subsequent conduct of the parties. If the wife had lived in the society of her husband, it might be improper to take notice of a complaint of such ancient date: but it appears that she was obliged to leave him, and lived separate till 1792. The effect of that separation, though not regular and formal, or under the authority of the Court, rebuts the inference of acquiescence, and affords a ground of presumption that her life had been rendered uncomfortable, and that she had been obliged to seek an asylum with her friends. But there had been a condonation by a reconciliation in 1792—and it is said, that though this might be taken away by subsequent facts, they must not be

this suit [135] might have been brought before, consistently with prudence; and I will not lay it down as a rule, that a woman, not bringing her complaint immediately on the discovery, shall be afterwards barred from laying her case before the Court.

This cause went on, and was ultimately terminated 5th March, 1791, by the judgment of the Court pronouncing for the divorce, as prayed on the part of Lady Ferrers.

[136] *PERTREIS v. TONDEAR, FALSELY CALLING HERSELF PERTREIS.* 3rd Feb. 1790.—Marriage in the parish church, or some public chapel, required by 26 G. 2, c. 33, s. 1. Exception, as to the chapel of a foreign ambassador, between foreigners, not being of the ambassador's country not admitted.

This was a cause of nullity of marriage; on the ground that it was not celebrated in the parish church, or in a place where marriages had been usually solemnized, according to the provisions of the marriage act; the marriage having been celebrated in the chapel of the Bavarian Ambassador, without banns or licence, and between persons not being of the ambassador's household, nor of his country.

In support of the marriage, it was argued that there was nothing in the libel to shew that the marriage was invalid; that when an attempt is made to dissolve a marriage, it ought to appear on the face of the libel, that it could not be valid: that it was not sufficiently pleaded, that there was no special licence, but only "that the marriage was had without banns, and without licence from persons having authority." A chapel of an ambassador is to be considered as part of the country to which the ambassador belongs; and in that character, is excepted, under the clause of the marriage act, which relates to foreign marriages. A marriage between English persons celebrated in the ambassador's chapel in a foreign country, where the parties might be only in transitu, and not domiciled, would be held to be good. It is not contended that two English subjects could marry in an ambassador's [137] chapel here, since they must conform to the law of England; but, in this case, the man is a foreigner, living in the house of the Spanish Ambassador; and the woman appears also from her name to be a foreigner, and it is not shewn that she was domiciled in England.

In reply, it was said that the form of pleading, as to the licence, included the licence of the archbishop; and, on the general law applicable to such a case, reference was made to a former precedent of *Heinel v. Fierville* (Consist. 1783), in which a marriage was solemnized in the Venetian Ambassador's chapel, without consent, one of the parties being a minor. In that case the Court gave sentence interlocutory, rejecting the formal sentence prorected, and pronounced the marriage invalid, on the ground that it was celebrated in a place where banns had not usually been published.

Judgment—Sir William Scott. This is a suit for nullity of marriage, brought by Pertreis against a person calling herself Pertreis, but whose real name is charged to be Tondear, under the alleged invalidity of their marriage. The libel states that clause in the act of parliament, whereby all marriages celebrated in any place, unless where banns are usually published, shall be null and void. The second article pleads, that the marriage was celebrated in the chapel of the Bavarian Ambassador, where banns of matrimony are not usually published, and without banns or licence. It has been said that a [138] sentence of nullity is an unfavourable one, and discretionary on the part of the Court, and that the Court, if it be discretionary to grant or not, would naturally decline it. But it is not my opinion, that this Court has any such discretion on this subject. Every person interested, who thinks there is a legal defect, may apply, and has a right to a declaratory sentence, if his application is well founded. slender facts, but such as would be sufficient to found a sentence. This is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore that they may revive the ancient facts. Libel admitted.

In *Mordaunt v. Mordaunt*, 1st June, 1714. On restitution of conjugal rights. The libel pleaded the marriage 27th February, 1759; desertion of the husband in April, 1759: that he left Ireland and came to England, where he remained concealed from the wife till he was lately discovered, when being required to receive his wife, he refused. On objection to pleading desertion at such a distance of time, the Court said, it knew of no limitation of time: there was none imposed by statute, or by any rule which the Court had laid down for itself. It was not in its power to refuse relief on that ground. Libel admitted.

It may be necessary, for the convenience and happiness of families, and of the public likewise, that the real character of these domestic connections should be ascertained and known. An observation has been made that the citation suggests minority, which is not pursued in the libel. But the party having abandoned that plea, and not proceeding on the double ground, as in *Heinel v. Fierville*, whether she was a minor or not at the time of celebration, is not material.

The next objection is, that the marriage is stated to have been had without banns or licence, but without negating that it might be by special licence. But the words "without licence" are sufficient, and will comprehend every kind of licence; and in *Heinel v. Fierville* it was pleaded in the same manner.

The principal objection, however, is that this act of parliament will not operate under the circumstances of the case; for that the house and chapel is to be considered as the country of the person residing there, to which our law will not extend. But the authority of the case, which has been cited, sufficiently decides this question, so as to oblige me to admit this libel. The party who proceeds was in the suit of the Spanish Ambassador, and not of the [139] Bavarian; and the other party, though she has the name of a foreigner, is not described as being of any ambassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in England, inasmuch as one month is sufficient for that under the act of parliament. Supposing the case, therefore, to be assimilated to that of a marriage abroad between persons of a different country, it is difficult to bring this marriage within the exception, as this woman is not described as domiciled in the family of the ambassador. Taking the privilege to exist in ambassadors' chapels (which perhaps has not been formally decided), I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shewn that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the libel. The matter may receive further illustration of facts, which may entitle it to further consideration.

This cause stood on assignations to prove, till 2d April 1792, when it appears that nothing further was prayed, and it is presumed that the cause was discontinued.

[140] NASH v. NASH. 6th May 1790.—Felonious acts, on what principles admitted, and under what limitation allowed to be pleaded in the Ecclesiastical Courts.

This was a cause of divorce by reason of adultery, brought by the husband against the wife. The parties had separated by agreement. The libel charged the woman with cohabiting in an adulterous intercourse, and also pleaded a pretended marriage with the adulterer; and exhibited a copy of the entry of such marriage. It was objected that this marriage being bigamy, and a felonious act, could not be pleaded in the Ecclesiastical Courts.

Judgment—Sir William Scott. In this libel, given in a case of adultery, an objection has been taken to an article which pleads a marriage between the party accused of adultery and a certain person with whom she is pleaded to cohabit in an adulterous intercourse, under the assumed character of wife, and to have so done for a considerable time; and it is said that the crime of bigamy, being a felony, is improper to be pleaded before an Ecclesiastical Tribunal, where it is not triable; and many good cases have been cited by Dr. Lawrence tending to shew that this Court cannot inquire criminally into cases, where it could otherwise inquire, if not cognizable at common law. [141] Certainly this Court cannot inquire into a felony directly, even where a clergyman is sued for the purpose of deprivation.* And in a late determination of

* 12 Jan. 1. "Searle had been tried at common law and found guilty of manslaughter, whereupon he was questioned to deprivation before Doctor Bird, Judge of the Court of Audience, when he desired to be admitted to his defence, that he was not guilty, contrary to the verdict. Dr. Bird came to me for direction, and we agreed that felony or other capital crimes were not examinable in the Ecclesiastical Courts; no, not for purposes that were examinable there, as in this case of deprivation; and therefore they may not originally examine such a crime to prove a man criminous, much less, when he is so proved in the proper Court, impeach the sentence

Cummins v. Mayo (Prerog. 28th April, 1790), the allegation, which was exceptive to witnesses, a species of plea upon which the Court always entertains some jealousy, charged a witness with felony in direct terms, and was properly on that ground rejected. But it is very frequent, and has so occurred in the course of practice, to admit a fact in itself criminal to be pleaded, as a necessary fact of the evidence in a civil suit. Such is the case in causes of nullity of marriage by reason of a former marriage. There was also a late case in the Arches, where the parties were married and signed the entry of marriage by fictitious names, which it is felony to do (26 G. 2, c. 33, s. 16); yet that consideration was held not to bar the right of the party to proceed to a sentence of nullity in a civil suit, though it would, equally with the present case, have subjected the party to a prosecution [142] by statute for the felony. There was another case of a person who had been guilty of altering a licence, which would have amounted to the crime of forgery. The marriage, in the present case, though amounting, if criminally prosecuted, to what the law describes as felony, will afford a strong presumption, and go in corroboration of the other evidence that may be offered as to the charge of adultery; for, if the parties have gone so far as to perform the ceremony of marriage in a church, and they have since lived together ostensibly as man and wife, that fact, so assisted by the subsequent cohabitation, is strong presumptive evidence of an adulterous intercourse, and will fix it. It is, therefore, proper to be pleaded. As to the length of time which has elapsed without the husband having brought his suit, that, undoubtedly, comes under another consideration of the Court; but there is, as has been rightly observed, no legal limitation, and there may be reasons of discretion which may make him so far passive: that has never been held to amount to a condonation; which is effected by the return of the parties to live with each other; nor has a separation by articles or agreement ever been considered as a bar to a suit of this kind.* Another objection has been made [143] to one of the articles for want of sufficient specification in point of time, it pleading "that some time in the course of the year;" but, taken with the cohabitation which follows, I think it is admissible. If it shall be proved that the parties were married together, and lived in a state of habitual cohabitation, it is, in a case so composed, an averment sufficiently distinct, under the latitude which such circumstances give to a case of such a nature (affirmed on appeal, 27th Jan., 1791).

[144] *FORSTER v. FORSTER*. 6th Dec., 1790.—Recrimination, in a suit of divorce by reason of adultery, alleged in bar, &c. Party dismissed.

[Referred to, *Synge v. Synge*, [1900] P. 192; *Hodgson v. Hodgson*, [1905] P. 243.]

This was a case of divorce, brought by the husband against the wife, by reason of

in the proper Court. But they may build a sentence of deprivation upon such a conviction, and they are bound by it." Hob. p. 121. In the case of *Bromley v. Bromley*, Delegates, 1794. This form of pleading the conviction was adopted in proceedings for divorce by reason of sodomitical practices, of which the husband had been convicted.

* 16th Nov. 1798.—*Beeby v. Beeby*. In this case, being a cause of divorce by reason of the adultery of the wife, it was objected that the libel shewed that the parties had lived in a state of separation, and that it was not competent to the husband to bring a suit of divorce, as he would not at common law be allowed to bring an action for damages. But the Court observed that separation is not considered by the Ecclesiastical Court as a bar to divorce for adultery, either previous or subsequent to the act alleged. It was not an answer to such a charge, even in cases of malicious desertion. But in cases of voluntary separation it would be more unreasonable that the wife should be at liberty to impose a spurious issue on the husband. The Ecclesiastical Court (a) does not look on articles of separation with a favourable eye; but they are not held so odious as to be considered a bar to the charges of adultery.

In the case of *Woodcock v. Woodcock* (5th Dec., 1801) the act of adultery alleged was committed during separation.

(a) See the principles of the Courts of Common Law and of Equity on articles of separation, *St. John v. St. John*, 11 Vesey, p. 526. *Beard v. Webb*, 2 Bos. & Pul. p. 93. *Marshall v. Rutton*, 8 T. R. p. 545.

adultery, in which recrimination, as pleaded in bar of the relief prayed by the husband, was much discussed in the observations of the Court.

Judgment—*Sir William Scott.* This is a very melancholy case, arising on a prosecution brought by the husband against the wife to be relieved from the obligation of cohabiting with her, by reason of her adultery.

The libel states the marriage between the parties in Jamaica, which is confessed, so that nothing arises on that part of the case. For near ten years after, she had behaved in the most exemplary manner, fulfilling the duties of a wife and mother in a way that defied all reproach. It is with great concern the Court sees a defection from virtue, which it must admit to be proved. The libel charges facts of adultery, and states the history of a criminal connexion, commenced at Lisle in 1787. Witnesses have been examined, and it is, I repeat, with considerable concern that I am compelled to say there is no doubt of the fact being proved by which the charge is supported. The proof principally arises from the evidence of Sarah Walker, who was in attendance upon her at Lisle, and afterwards in England, and was privy to most of the transactions. It is proved by her in a manner to exclude all reasonable doubt that there was an intimacy of an [145] extraordinary nature between her mistress and a Mr. Mussell that commenced at Lisle. This witness is produced on both sides, and therefore not subject to impeachment from either. She proves a correspondence by letters from Canterbury, and a private meeting between the parties at Egham at night, clandestinely, and without the knowledge of the husband. An elopement takes place, and they are traced to different places in this town—particularly to the White Bear in Piccadilly—which is corroborated by Purser, the maid there, who knew Mussell personally, and proves his cohabiting there, at that time, with a female answering the description of Mrs. Forster. There are acknowledgments of the guilty connexion expressed in letters of her own writing, which are exhibited. There is a verdict giving only a shilling damages, but which certainly affirms the proof of the fact by giving any damages at all. In short, there is a combination of proofs, which would make it a mere waste of time to observe minutely and particularly upon them.

The defence set up consists, first, of a denial of the facts, upon which it is unnecessary, after what I have just observed, to make a single remark; secondly, a species of justification arising from the similar misconduct of the husband, which certainly is not at all inconsistent with the plea of denial; for it is fairly open to the party to say in the same breath, "I have not committed adultery; but if I have, you have barred yourself from the remedy you pray by your own misconduct of the same species, for though adultery cannot be justified in itself, it may be legally justified against you, by the proof that you have produced the evil of which [146] you pretend to complain." A third plea of defence offered, but with less effect, is that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this Court for the protection of a separation by reason of cruelty: and if the ill treatment is not of that gross kind, against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect where infidelity, on the part of the husband, is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects. A fourth defence is, that he has connived at, encouraged, and promoted his own dishonour; for, in that case, the general rule of law comes in that *volenti non fit injuria*, no injury has been done, and therefore there is nothing to redress.

Having dismissed the first ground of defence, the denial of the fact, I proceed to the second, founded on an asserted principle of law, which withholds from a guilty husband the remedy against a guilty wife. Something has been said as if this ought not to be the law: with that question I have nothing to do; for I must take [147] the law as it is, and I shall therefore content myself upon that matter with observing that it appears a good moral and social doctrine, which I have not the inclination, if I had the power, to innovate. It is unquestionably the rule of this Court. The

principle is found in the Roman law: "Viro atque uxore invicem accusantibus, causam repudii dedisse utrumque pronuntiatum est: id ita accipi debet, ut eâ lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutuâ pensatione dissolvuntur" (Dig. 24, 3, 39). Judex adulterii ante oculos habere debet et inquirere, an maritus pudicè vivens, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat" (Dig. 48, 5, 13, 5).

It could not be applied directly, in that system of law, to the immediate subject of divorce, because divorce being a matter altogether within the authority of the husband himself to dismiss his wife, the magistrate could have no power to apply any such principle to that transaction. But if the wife applied for dower, of which the magistrate had the cognizance, and the husband pleaded her adultery in bar of her demand, she had a right to object to the husband his own adulteries in bar of that objection. The magistrate then applied those principles which, expressed in the general terms in which they appear, must have governed the case of divorce itself, if the magistrate had possessed a jurisdiction that reached to that subject: for there is nothing that saves that subject from the reach of that principle of compensation, but that the subject itself is out of the reach of the magistrate. The canon law, therefore, [148] which attributed to the Ecclesiastical Magistrate the jurisdiction of divorce, carried this principle (x. 5, 16, 7) along with it for the exercise of his authority.

It appears from Gibert's *Jus Canonicum* (p. 121, § 4) that this rule of compensatio criminum was not received in France,† but it is undoubtedly received in England; and in the case of *Lord and Lady Leicester*, in 1737, was unanimously recognized by all the delegates, as the standard canon law of this country in all cases of divorce; and so in all other cases. Where a wife is prosecuted criminally for adultery, not for divorce, but ad publicam vindictam, it can not be pleaded; for there the public, and not the husband, is the injured party, and it can be no excuse for the wife's breach of the good order of society that her husband had done so before her, whatever it might be in a mere civil prosecution instituted by himself.‡ Taking the law, therefore, to be clear, I have only to examine how far the evidence supports the charge of the husband's criminality, with the satisfaction of knowing, that if it does, I am relieved from the necessity of inquiring minutely into the other pleas of defence.

This proof arises from the testimony of several women. First, Faris, who says, "That about nine years ago she went to live with Mr. and Mrs. Forster, and that, in the morning of the third day after her arrival at their house at Egham, she [149] went into a room, up one pair of stairs, to open the windows, supposing it was a spare room, and seeing the window curtains down, she drew them up and proceeded to a bed in the room, and drew back the curtains, and was then surprised at seeing her master awake in bed; that he then immediately put his arm out of bed, and laid hold of her arm, and said something she does not now recollect, and looked her in the face, on which she begged his pardon, being flurried, and immediately left the room: that Mrs. Forster had not then arrived from Southampton, and that soon after Christmas she was directed by Mrs. Forster to go to clean a house at Englefield Green, where they afterwards resided, which she did. It was a ready furnished house, but no person then resident in it, and Mrs. Forster said, Mr. Forster said she must go there, and she went and slept there alone for about a fortnight; and about three o'clock in the afternoon of a Sunday, during that time, Mr. Forster came to the house alone, and the deponent went over the house with him, taking an account of the furniture; and that, in the last room they went into, no other person being in the said room, he tempted her, and said to her, 'Did not you come into the world for the use of men?' and she said to him, 'It was a sin; that he had a wife; that she was a poor girl, and what would become of her?' That he said, 'What is matrimony? a man with a black gown preaching before you, that is nothing; that he wondered such a girl could withstand such temptations;' and said, 'I hope you will consider

† This may be connected with the principle in the French law, "that adultery, committed by the husband, is not a ground of divorce or separation on the part of the wife." Pothier, vol. 3, p. 177.

‡ So under the *Lex Julia* "Quæ res potest et virum damnare, non rem ob compensationem mutui criminis inter utrosque communicare." Dig. l. 48, tit. 5, 13, § 5.

of it.' To which she said, 'I hope you will.' And he then left her: that about a week afterwards she returned to Egham House, and about [150] five days afterwards he came into his dressing-room, where she was cleaning the stove, and as she was going out of the room, he laid hold of her, and said, 'Have you considered?' To which she replied, 'Sir, if I have not considered, I hope you have,' and immediately left him. And afterwards, on the same day, up stairs, he asked her if she had no victuals in the house, and gave her two half guineas; and the witness being asked, agreeably to the contents of the allegation, whether he had carnal knowledge of her? says she is ready to answer every thing fair, but such questions as that she does not choose to answer."

Taking the witness to have spoken true, it is a decisive proof of corrupt inclinations and endeavours on the part of Mr. Forster; and I see in it enough to induce me to infer that there was no absolute want of corrupt inclination in her, and moral conviction would not hesitate to draw the conclusion, however legal reasoning might be compelled to pause.

The same witness goes on to say, "that about six years ago, she being then a married woman, with a child in her arms, met Mr. Forster, and told him, on his noticing her, that she heard he wanted somebody to clean the house, and she should be glad to come and do his work; and he appointed her at four o'clock the next day, when she went, and accompanied him to the different rooms, where he told her to follow him, and said he would tell her what she should do, and he turned down the bed-cloaths, and desired her to mind all the beds, and particularly in the yellow room, where he gave her half a guinea." And the witness being again asked, "whether he had not then, and frequently, carnal [151] knowledge of her?" replied as before, "that she does not choose to answer." He asked her, if she could recommend him to any body, she says she could not.

Thus stands the evidence of this witness, leading to a conclusion, which every man's private conviction must draw, even if it presented itself singly; but it derives confirmation strong, from proofs furnished by other females, on whom similar attempts have been made in a course of conduct familiar and habitual in this person.

Ann Slark, who is a nursery maid, says "that about nine years ago, the family, who were all at Bath, went out, but Mr. Forster would not go with them, and he did not; but the witness being in the act of warming his bed at night, he came from an adjoining room undressed and in his shirt, and said he would kiss her, on which she screamed out and ran away." An attempt certainly of great indecency in the master and father of a family.

The next witness is Sarah Walker, who has been examined as well by the husband as by Mrs. Forster. She says, "that on a day when her mistress was out, she being in her said mistress's bed-room, was desired by Mr. Forster to go with him into a room up stairs to look at some curtains, in which room there were several spare beds, and she, not suspecting his intention, went, and after having opened and looked at some spare furniture, he took hold of her by the shoulders, and endeavoured to throw her down on the beds; that she struggled very much with him, and having also hurt his arms by pinching him, prevented his throwing her down; and, having disengaged herself, she said she would tell Mrs. Forster of his conduct, which he begged she would [152] not, and promised never to take liberties with her again; and she says, she has no doubt it was his intention to have committed adultery with her, if he could have prevailed upon her."

Another young woman says, "that when she first went to live in his service, about two months after Mrs. Forster went to France, she took some water into his library to wash his feet; upon which he locked the door and said he would not let her go, unless she would promise to let him into her bedroom at night; and when she had retired to her room, which she locked, heard him knock at the door, and he said she had promised to admit him, to which she replied, that she did not mean it, and he continued at the door nearly half an hour: and afterwards at another time he held out his hand to her with money, which she struck away, and beat out of his hand, saying, she neither wanted him or his money."

In these cases I am to understand that he failed in his endeavours; but failed from no want of purpose or activity on his own part, but from an honest and powerful resistance on the other. These instances therefore furnish a strong corroboration to the conclusion to be drawn from the other case, where it is evident that no such

resistance was to be apprehended, and where the conquest, by such arguments, and solicitations, and bribes, and his bodily force, all of which were used, must be presumed to be easy. But even if no such definitive presumption attached, I should be inclined to hold that the general conduct of the husband, as shewn, is quite sufficient to support a plea in bar, though not sufficient to support an original accusation of adultery. For it is a principle that [153] runs through a variety of cases, that many things are good for the one purpose, though deficient for the other. The husband who enters the Court with a criminal imputation on the conduct of his wife, must purge his own conduct of all reasonable imputation of the same nature; and if he complains of her impurities, must be untainted by any gross impurities of his own. It is a satisfaction to find this doctrine in the case alluded to of *Lord Leicester and Lady Leicester*, laid down by the able person who then presided in the Court of Arches, the elder Dr. Bettesworth. In an accurate note of his judgment, I find it expressly laid down "that where adultery was pleaded by way of recrimination only, to bar, it was not necessary to prove such strong facts against the plaintiff as would be required to convict the other party in a suit for divorce; for, to obtain a sentence of divorce, the husband must have a pure character."

Let me apply this observation to the present case. Here is a woman for ten years acting irreproachably; exemplary in her conduct as a wife and a mother, and who after gross neglect and gross provocation on the part of the husband, falls at last victim to the arts of a seducer. In the mean time, what has been the behaviour of the husband? Planting corruption most sedulously all around him—soliciting the chastity of his female servants, by every art of profligacy that he could apply—converting his own house into a brothel, and even engaging these females in the employment of finding for him other objects of his criminal gratifications. Surely this is not the man who can call out, in a court of justice, against the unfortunate delinquency of his wife: he cannot be listened to on any such complaint.

[154] After what I have said upon this point it is unnecessary for me to travel much into other parts of the case. Upon his general treatment of his wife, I will content myself with stating the deposition of Mr. Stephenson, a man at a grave time of life, in a grave profession, being the medical attendant on the family, and having nothing to prevent him from making his observations in the most dispassionate manner. His account is this, "That she was a very pleasing and agreeable woman, and, as far as he ever saw or observed, always behaved with as great propriety and tenderness towards her husband and children, as a man would wish to see; that Mr. Forster treated her with great indifference and inattention, not to be expected by a young, handsome woman, as Mrs. Forster was; every way qualified to make an agreeable companion to a man who treated her with affection; that in 1785 he learnt, in consequence of a question he necessarily put to Mrs. Forster, that Mr. Forster had withdrawn himself from her bed, at which time she appeared to him to behave with great propriety; and he knows of no cause or provocation for his so withdrawing himself."

Most certainly what Dr. Harris has said is true, "That the duty of matrimonial intercourse cannot be compelled by this Court, though matrimonial cohabitation may. This species of malicious desertion is a ground of divorce in some countries—certainly not so here—and still less will it justify a wife, in a resort to unlawful pleasures, the lawful ones are withdrawn. It is not however to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the [155] very institution of marriage; and if he has so done, he ought to feel less surprised if consequences of human infirmity should ensue.

I have to observe likewise that his marital conduct is, in the present instance, the highest degree inofficious. A husband is expected by the law to pay a due attention to the behaviour of his wife, and to give her the benefit of some superintendence where she is placed in dangerous situations. He sends her to Lisle, a French garrison town, amongst French officers living with the known profligacy of that profession that country, and the resort of dissolute persons both of our own and other countries. He had a confidence, it is said, in the discretion of friends, whom he placed about her and of those friends, Mr. Mussell, who was one, does not appear to be entitled to a high panegyric on account of his attention to her conduct. This clearly appears from her own letters, that she was the object of criminal pursuits. Mr. Forster is more acquainted with the amorous billets which she had received from the *Monsieurs*,

they are there called. One of her letters speaks of an attack almost by force; still Mr. Forster does not think it necessary to repair to her, but lingers two months in England, though such attempts of French gallantry upon his wife had become matters of general conversation, and even of general merriment, in which he was not indisposed to join unreservedly. It would lead to a suspicion that events, which have unfortunately been produced, were the very events intended to be produced. At any rate, there is a want of that delicate sensibility, of that prudent attention, of that honest caution, which belong to the character of a husband. A Court of [156] Justice is not the first place in which that sensibility should be shewn.

The verdict has been little alluded to; and I only observe the rate of damages given by the Court cannot be accounted for, on the common grounds on which very small damages are sometimes given: they are given here for the stigmatizing purpose—to establish the fact, but to establish the fact to be no injury to the individual who presumes to complain of it.

The case will probably travel to places where it will receive decisions from superior authorities, possessing superior lights. It is my duty to form my present judgment upon my own view of the case, and certainly not without an anticipation that the same view will be entertained of it by all who may have occasion to consider it hereafter. If I am mistaken in that, it will become my duty to conclude that I have formed an erroneous judgment upon its real merits. But I have the satisfaction of thinking that I pronounce at least an honest judgment, in declaring that this party had no right to institute this suit, and that his wife is dismissed from all further attendance in this Court.

In this case an appeal was prosecuted to the Court of Arches, in which two further allegations were admitted on the part of the husband. An appeal was afterwards interposed on the part of the wife from an interlocutory order of that Court, to the Court of Delegates, in which a further allegation on her part was admitted. On the final hearing, 6th July, 1797, the wife was dismissed from the original citation, and all further observance of justice.

[157] THE DUKE OF PORTLAND v. BINGHAM. 26th Jan., 1792.—Licence to preach in Quebec chapel in Mary-le-bone not allowed to be impeached, by proceedings on the part of the impropiator, in a civil suit—he not shewing an interest that would entitle him to maintain such a suit.

[Approved, *Fagg v. Lee*, 1874, L. R. 6 P. C. 41. Referred to, *Richards v. Fincher*, 1873, L. R. 4 Adm. & Ec. 110; *MacAllister v. Bishop of Rochester*, 1880, 5 C. P. D. 204; *Davey v. Hinde*, [1901] P. 125.]

This was a case arising upon a decree taken out by the Duke of Portland, as lay rector, impropiator, and parson of the rectory and parish of St. Mary-le-bone, against Dr. Bingham, citing him to appear and bring in a licence granted by the Bishop of London, authorizing him to perform the office of joint Sunday preacher in a chapel in Quebec Street, in the said parish, and to shew cause why the same should not be revoked, as unduly, illegally, and surreptitiously obtained.*

The case was argued by Dr. Harris, Dr. Laurence, and Dr. Nicholl, on the part of the Duke of Portland; and by Dr. Arnold and Dr. Swabey for Dr. Bingham.

Dr. Bingham appeared under protest, alleging “that the Duke of Portland, as lay rector, &c., has no interest or right whatever to call on him in such a cause; and that, by the law and practice of the Court, he is not bound to answer in this suit; but that if he has preached without being [158] duly and legally authorized, and the Duke of Portland, or any other person, was minded to proceed against him, it should be by a criminal suit.” To this it was answered, “that the Duke of Portland had sufficient

* The citation was to the following effect:—“More especially for publicly reading prayers, preaching, and administering the Holy Sacrament, and performing other ecclesiastical duties, and divine offices, according to the rites and ceremonies of the Church of England; in a certain building newly erected, and never before used for celebration of divine service, situate in Quebec Street, in the parish of St. Mary-le-bone; under colour of a certain licence, by him illegally and surreptitiously obtained, under the Episcopal Seal of London; and also then and there to bring in the said licence, and to shew good and sufficient cause, if he has or knows any, why the same should not be revoked, and declared null and void.”

interest to call for the production of the licence; and the object of the suit being not penal, but only to revoke the licence, as unduly obtained, and in violation of the rights of the Duke of Portland, the present suit was regularly brought."

Judgment—Sir William Scott. Upon the proceedings in this cause, as they have been stated by the counsel, these facts appear—First, that the purpose of the suit is solely to assert the right and interest of the Duke of Portland. Secondly, that his asserted rights are those of lay rector, parson, and impropiator. These alone are suggested to be affected in this case. Thirdly, that there is a licence in the possession of Dr. Bingham. It is alleged that the interest of the Duke of Portland may be affected by the exercise of the office of preacher in this chapel by Dr. Bingham under this licence, and that the licence has been surreptitiously obtained.

The instrument is as solemn and perfect in form as any instrument can be, and as regular in the way in which it has been obtained. There are not two ways of acquiring such instruments, as there may be in other matters. In probate of wills, for instance, there is one form, which is slight and summary, for ordinary and undisputed cases, and another more formal, by solemn decree of the Court; and it is usual, where the former mode only has been observed, on due occasions, to call on the parties to bring in the probate as surrep-[159]-titiously or unduly obtained. Here all the solemnities which the law can impose for the case have been observed; and though I cannot say that such an instrument may not be revoked for proper cause, it must certainly be a clear and sufficient cause. It cannot be on a mere possible interest only that it ought to be disturbed. If it is to be impeached by third parties, it must be on clear evidence of some interest of theirs, that is affected by the grant; since it would be extremely hard to put a person who is apparently in full legal possession of such an instrument, on proof of its validity, at the call of any one, who may allege a possible interest only in the grant. Dr. Bingham claims no title in this chapel, and may therefore be entirely unprovided with documents to repel any claim that may be set up.

There are other interests indeed in which every man partakes, such as that of maintaining public order, &c. These are clear and direct, and universal, and will entitle any one to institute proceedings to preserve that order. But such proceedings must be ad publicam vindictam, and by criminal articles exhibited in due form, which is the usual way of trying such matters as the present, and the most convenient. In that course the question would be reduced to one point only—the right of the party who is the object of such proceedings; whereas, in civil suits, a previous question may arise, of equal difficulty, on the right and title of the person instituting the suit. This then is an important distinction; and I know of no case of civil proceedings of this kind, and none has been mentioned in the argument, but that of *Lyne v. Harris* (Arches, 1750), which, as far as it [160] goes, taking it with deductions on account of irregularity, imports in the party there proceeding a right which will not be denied. In that case there was a civil injury sustained, but I am not satisfied with the reasons that led to this mode in the present case. There can be no consideration of delicacy respecting the person, in the nature and consequences of criminal proceedings, that should make this form of civil proceeding necessary, or expedient, since the form and phrase of the proceedings only are criminal, where they are had to try a civil right: they are so understood by the Court, and convey no imputation on the party, and are not necessarily accompanied with costs. The civil form has been adopted in this case; and it is not for the Court to consider so much whether it is expedient, as whether it is competent? If competent, it can only be on the ground that the licence affects or directly tends to affect the interests of the complaining party; that inquiry will therefore be the first object of the attention of the Court.

The licence authorizes Dr. Bingham simply to be "joint preacher," and not to officiate generally, nor indeed in a chapel under the legal Church Establishment, for it is called a pretended chapel, nor authorizing the administration of sacraments or sepulture, or conferring any title to fees, oblations, or obventions, &c. It does not therefore, interfere with the legal dues of the incumbent. For though the service under such licence, may intercept mere voluntary contributions; and though this consequence might be an object of consideration with the Court, where the title of the party in the particular church was established on any [161] legal foundation, it is no so clear that such diversion of mere voluntary contributions, will constitute that direct civil injury, which can properly be made the subject of civil proceedings in the Ecclesiastical Court.

The case of *Lyne v. Harris* is not analogous; for that was a proceeding instituted by the vicar of a parish with a chapel annexed, against a party officiating in that chapel, which the vicar claimed as part of the parish church. There was therefore a direct interest in the emoluments of the chapel. And the authority of that precedent is by no means conclusive as to a case in which there are no such interests capable of being alleged as the foundation of the suit.

That a bishop licensing a person to preach within a parish (not in the parish church, for that is clearly and entirely in the incumbent), ought to hear the incumbent first—is a proposition generally true: and it is generally true, likewise, that the consent of the incumbent, to the erection and use of a chapel, is requisite. No decision, that I know of, has gone the length of laying down that, even in the case where the necessity of an increased population was urgent, and where the consent of the incumbent has been obstinately and causelessly withheld, the authority of the bishop, who certainly has the general cura animarum throughout the whole of his diocese, could yet be interposed to remove the obstruction. When such a case arises, it may require grave consideration, to find the proper remedy, against so improper an abuse of the general rights.

This is not, however, the case of a spiritual incumbent. The Duke of Portland does not claim spiritual incumbency—he does not expressly claim the patronage of the mother church, or of the [162] chapel—but it is said, that as lay rector, impropiator, or parson, being a layman, he has some, or all, of these rights. Nothing can be more clear than that, as lay rector, he has not cure of souls, in fact, or in presumption of law. For, as to what is said in some books, that he may have it, habitualiter, it is a distinction which more properly applies to cases of another description, where there is a spiritual rector* but sine cura, and an endowed spiritual vicar of the same church, who has the cura animarum, actualiter, whilst the other is said to possess it only habitualiter.

The foundation of that opinion, that the lay rector had the cura animarum, habitualiter, is a dictum of Mr. Noy, in argument in the case of *Britton v. Wade* (3 Cro. Jac. 518), referring to passages in the year books, which, to my apprehension, hardly appear to convey any such meaning. The case of *Clerke v. Heath* (1 Mod. p. 13. 2 Keb. p. 484. 1 Sid. p. 426) was one in which there was a spiritual rector, and endowed vicar, in the same parish, in which it was held, that both may have cure of souls, making institution the necessary foundation of such cure: and I think the effect of this reasoning is strongly against the claim of a lay rector and impropiator.

It must be evident to any one, who considers the history of impropriations, that a lay rector cannot have cure of souls: and the statutes (27 Hen. 8, c. 28. 31 Hen. 8, c. 13) of dissolution having directed that impropriations|| [163] should be held by laymen, as they were held by the religious houses from which they were transferred, it may be convenient that this point should be a little more fully considered.

There is some confusion in the books, in not always distinguishing between two sorts of appropriation, which were fundamentally different. Appropriations are an abuse which took their rise in the darker ages. They are termed usually in the canon law “annexiones, donationes, uniones,” &c., and the term appropriation, which was borrowed from the form of such grant “in proprios usus,” appears to have been peculiar, or principally confined to England. Ducange cites a letter from England, in which it is used (Gloss. p. 592): it is seldom indeed to be found in any foreign canon without reference to this country, and there is scarcely a foreign writer who, in noticing it, does not say, quas in Anglia vocant appropriationes.

* “Quand il n’y a plus d’habitans dans une paroisse, soit que les guerres, soit que quelque autre raison, les ait fait disperser, le benefice est une cure, que les canonistes appellent, cura habitu.”—Loix Eccl. de France, par M. de Hericourt, p. 203.

|| Impropritate is used as synonymous with appropriate, 1st Eliz. c. 19. See also 1st & 2d Phil. and Mary, ch. 4. In a petition to Parliament, temp. H. 8, the term is improprided; and in the 10th Henry 6th, for further enforcing 15 Ric. 2, c. 6, and 4 Henry 4, c. 12, which did not receive the royal assent, the terms are “Benefices held in proper use,” so also in 15 Ric. 2, c. 6. See also Kennet, *Appropriat.* p. 131. As these last instances were before the dissolution of religious houses, there appears to be no real distinction in the origin of this term, though it may have prevailed subsequently in common use, as to interests of this kind, in the hands of laymen, as mentioned by Ayliffe, p. 90, perhaps from Spelman, *Tithes*, p. 137.

There were two sorts of appropriation, or rather appropriation was authorized to be made, with different privileges, in two forms,^{†1} the one *pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus*, where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other, non *utroque jure*, though *pleno jure*, as it is described, in *temporalibus*, [164] where temporal interests only were conveyed, such as the tithes or patronage of the benefice, but the cure of souls resided in an endowed perpetual vicar.

In the first species, the religious house had the cure of souls and all rights, and performed the duties of the church by its own members, or by stipendiary curates, and the distinction on this point is summarily described, in a passage, from the proceedings of the Court of Audience; "*Cum ecclesia conceditur alicui monasterio, pleno jure, in temporalibus, tunc episcopi debent instituere vicarium perpetuum; ubi vero unitur mensæ episcopali, vel abbatiali, et spectat ad illam, pleno jure, tam in spiritualibus, quam in temporalibus—tunc ponitur in ea presbyter, temporalis, ad nutum removibilis, ad exercitium curæ, quæ principaliter residet in eo cujus mensæ est unita.*"* This description of these two species of appropriation is to be met with, also, in frequent passages of the *Aurea summa Hostiensis*, a learned commentator of the thirteenth century (A.D. 1255).^{†2}

Against holding benefices *pleno et utroque jure*, great complaints were made in the Gallican Church, in which on no subject was dissatisfaction more [165] loudly or more frequently expressed. And it is mentioned, as a fundamental maxim in that church, that, since the Council of Constance (A.D. 1414, Concil. Gener. tom. 12, p. 254. Vicar's Plea, p. 4), it has become a legitimate cause of revocation in that kingdom.

In England it was ordained by the Constitution of Othobon that all religious houses which possessed churches in *propriis usus*, should present vicars, with competent endowment, to the diocesan for institution within the space of six months; and that if they failed so to do the bishop was empowered to fill up the vacancy: this however proved insufficient against the power of the monks. The civil Legislature next interfered, and passed the statutes 15 Rich. 2, c. 6, 4 Hen. 4, c. 12, which require that vicarages should be regularly endowed. Such was the general and legal character of appropriations in England by the canon law and by the statutes of the realm. The vicarage became a benefice with cure of souls, and the monks held in *proprietatem* in some sort as a lay fee.^{†3}

But after the statute of appropriations the monks were too subtle and cunning for the law, and still nevertheless obtained appropriations, as annexed to their tables, as before, under the plea of poverty and inability to support themselves. These *uniones ad mensam*, for the sustentation of the monks, were always presumed in law to be in *utroque jure*, and it was an universal rule that they were never vacant, but that there was a perpetual plenarity; as it had been held that the canon "*de supplendâ negligentia*" (x. 1, 10, 2. Clem. 1, t. 5. Vicar's Plea, 107) which gave the right of presentation on lapse, did not apply to such appropriations. The monks, who thus may be said to have been the immortal incumbents, had [166] the cure of souls remaining in them, and the minister whom they employed was a mere stipendiary.

From this root sprung the peculiar kind of appropriation without a vicarage endowed; and this is the origin of stipendiary curacies, in which the impropiator

^{†1} X. 5, 33, 3. Panormitan et Hostiensis, in loc. cit.

* Vicar's Plea, p. 107. Selden on Tithes, c. 12. Aylliffe's Parer. 86. Lyndwood 157, 158.

^{†2} "*Ubi ecclesia ad monasterium pertinet pleno jure, habet monasterium in e institutionem, destitutionem, investituram, fidelitatem, obedientiam, correctionem, e quædam alia: episcopus nihilominus desuper est; nisi privilegium, vel præscriptio vel contraria consuetudo obest: sed ubi pleno jure non pertinet, tunc habet il monasterium temporalia, et representationem presbyteri vicarii tantum, qui non debe ab episcopo recipi, nisi per monachos sufficiens portio assignetur.*" On a further discussion, how the bishop could grant such powers in *pleno jure*, being greater than what he himself possessed, the answer is, "*non potest transferre, nisi ex causâ, put propter paupertatem mensæ religiosorum, quæ non sufficit ad sustentationem ipsorum*" &c. Lib. 1, p. 296, et seq. De officio ordinarii.

^{†3} Gibson, 719. Mallet v. Trigg, 1 Vern. 42.

is bound to provide divine service—but may do it by a curate, not instituted, but only licensed by the bishop; and might reckon himself under no obligation to present a vicar to the bishop for institution, but might provide for the service of the church as the monks did by a licensed curate. Since that time the statutes of dissolution enact that benefices of every description should be held as they had been held by the dissolved religious houses, a grantee, who has obtained what was before held, as above described, *ad mensam, pleno et utroque jure*, would have the complete incumbency, as *intitulus*, and beneficiary. If such an impropiator should take orders, he might perform the offices of the church without institution, only taking the oaths imposed by later statutes. And it would be only the circumstance of not being in orders that would prevent him from exercising his ecclesiastical rights in full form, as those spiritual persons, the monks, did before. But it was not so in ordinary impropriations in which there had been a vicarage endowed; because the vicar holds by something extrinsic of the impropiator.

Mary-le-bone may, for any thing which the Court knows, be an impropriation of this peculiar kind; and the Duke of Portland may be the real beneficiary and entitled to claim as such. But he has not done so in the present instance, claiming only as lay rector, impropiator, and parson. Now a parson has temporal rights; and the term being joined with that of lay rector must be understood in a qualified sense and as referring only to lay rights. [167] The terms rector and parson do not add, necessarily, therefore, to the term impropiator. Then in what character am I to consider the Duke of Portland in this case? As ordinary impropiator? or as extraordinary—holding *utroque jure*, but standing on privileges which, founded as they were on abuse, were yet in their own nature limited to persons possessing a spiritual character?

In the presumption of the canon law, the monks were held to be impropiators in the ordinary and common way: so says Hostiensis, "*Semper præsumo contra Monachos, nisi auctoritatem episcopi probent intervenisse*" (*Aur. Summ.* p. 297). And this presumption is still more strongly fortified in the law of England by the statute of impropriations, and the further presumption that the provisions of that statute have been observed. The presumptions of law then are that the benefice though impropriated is not impropriated *pleno et utroque jure*; and, if so, that there is an endowed minister to whom the *cura animarum* belongs. It is true that where a person claims tithes as a vicar, he must shew his endowment in order to shew of what he is endowed: but in him the cure of souls entirely resides. And it is clear that the Duke of Portland, claiming as lay rector, does not shew the cure of souls to be in him, and the legal presumption is against him.

But the right of patronage in the mother church is suggested as a ground of interest. Supposing him to be necessarily patron, *vi termini*, I incline to the opinion that such right will not constitute an interest that will sustain proceedings of this description. For what is it? A mere right to present, and therefore accompanied with all rights of action concerning the presentation. But other actions respecting the interest of the church belong to the incumbent, in whom the fee is, and [168] not to the patron, except in two instances: one where the clerk was himself the wrongdoer (*Strachy v. Francis*, 2 Atkyns, 217. *Barnardiston*, 399); the other (in *Hoskins v. Featherstone*, 2 Brown's Chancery Rep. 552), when the benefice was vacant, and there was no one to protect the rights of the church. These arose *ex necessitate rei*, and form therefore no precedent for other cases not lying under similar necessity. It is not pleaded in this case that the church is vacant, and it is not to be presumed; patrons are not generally entitled to institute such actions. Indeed the claim is not described to be made as for the patron. And though it might be shewn that as impropiator he may be the patron, there are so many instances in which that consequence might not attach that it cannot be generally assumed on mere implication of law.

As to an implied right of patronage to a chapel, arising from the right of patronage to the mother church, questions have been agitated between the patron and the rector of the mother church, and have been not always determined in one and the same way. But the balance of authority is greatly on the side of the incumbent, and it is, since the case of *Dixon v. Kershaw* (*Ambler's Rep.* p. 529), considered as settled in favour of the incumbent. In the case of *Herbert v. The Dean and Chapter of Westminster* it was finally settled that the right of nomination lay in the dean and chapter,

after a strong inclination of the chancellor's mind to lodge it otherwise.*¹ But the dean and chapter were spiritual persons, [169] possessing the same rights pleno et utroque jure, which the abbot and monks had done before. They were actual incumbents, and served the church and chapels of Saint Margaret by one of their own body, and were in that character entitled to nominate. The Duke of Portland being a lay rector, and being disabled by his lay character from any power of serving the church, cannot, till that incapacity is removed, enjoy the same precise extent of right as was attributed to the dean and chapter in their spiritual character.

Having thus considered the several foundations of right or interest, which have been very learnedly pressed and discussed in argument, I am of opinion that enough is not shewn to distinguish the Duke of Portland from other common impropiators. If he does possess rights that would so distinguish him, they are not shewn in the characters in which he claims; and I therefore dismiss Dr. Bingham from the effect of the present citation.*²

By 57 G. 3, c. 98, provisions were made for the sale of the impropriate rectory and right of presentation of and to the perpetual curacy of Saint Mary-le-bone to the Crown, with the several chapels called Portman Chapel, Bentinck Chapel, Quebec Chapel, &c. &c., with a view to the future division and improvement of the said parish, as specified in the said Act, and on the terms therein contained.

[170] THE OFFICE OF THE JUDGE PROMOTED BY HUTCHINS v. DENZILOE AND LOVELAND. 9th Feb., 1792.—Proceedings against a churchwarden for interfering to obstruct and prohibit the form of singing, &c., which had been authorized by the minister, sustained.

[Referred to, *Barnes v. Shore*, 1846, 1 Rob. Ec. 382; 8 Q. B. 640; *Sheppard v. Bennett*, 1869, L. R. 2 Adm. & Ec. 339; *Ritchings v. Cordingley*, 1868, L. R. 3 Adm. & Ec. 119; *Rector of St Michael, Bassishaw v. Parishioners of Same*, [1893] P. 239; *Howell v. Holdroyd*, [1897] P. 203; *Lee v. Hawtrey*, [1898] P. 73; *Girl v. Fillingham*, [1901] P. 183.]

This was a proceeding against the churchwardens of the parish of St. Botolph, Aldersgate, at the promotion of the Rev. John Hutchins, officiating and licensed curate of the said parish, by articles; and the offence was thus stated in the citation: "More especially for obstructing and prohibiting, by your own pretended power and authority, and declaring your resolution to continue to obstruct and prohibit the singing or chanting by the parish clerk and children of the ward and congregation, accompanied by the organ."³

*¹ 1 Peere Williams, 774. See also *Mallett v. Trigg*. The Lord Chancellor Nottingham observed, "There was a great difference as to the parson's right of naming or choosing his vicar where the parson was of a lay fee, and where he had a cure of souls: for, in the latter case, there was reason he should approve of the man who was to act under him in so high a trust." 1 Ver. p. 42.

*² 26th Nov. 1792.—A citation was afterwards taken out against Dr. Bingham, on the part of the Duke of Portland, reciting the duke to be "patron, rector, impropiator, beneficiary, incumbent, and parson imparsonnee, of the parish of St. Mary-le-bone," calling on Dr. Bingham "to appear and receive articles, and also to bring in his licence and shew cause why it should not be revoked as unduly obtained." Objections were taken to the form of the proceeding, under protest, which were over-ruled. Articles were afterwards given which were also opposed but admitted. That judgment was affirmed, on appeal, by the Court of Arches, in May, 1794, and subsequently by the Court of Delegates, in May, 1795. The cause was then discontinued, and nothing more appears to have been done upon it.

*³ 17th Nov.—Question of practice. Whether on a citation to appear on a day fixed and receive articles, etc., the person is entitled to demand that the articles shall be delivered on the first Court-day or that otherwise he should be dismissed. Not so held.

In this case a question of practice arose on the prayer of Mr. Denziloe, who had given an absolute appearance to a citation personally served upon him, "to appear on the first day of the session," and then appeared in Court, and prayed "that the articles should immediately be exhibited against him, on the same Court-day, or otherwise that he might be dismissed." The promoter prayed the continuance of the

On the part of the churchwardens it appears to have been supposed that, as they paid the organist and managed the children, they were to direct when the organ should or should not play, and [171] when the children should or should not chant. The clergyman had ordered the playing and singing at certain parts of the service. The churchwardens forbade both.

Judgment—Sir William Scott. This is a proceeding by articles against the churchwardens of St. Botolph, Aldersgate, the nature of which has been fully set forth.

The articles are objected to on many grounds. First, on point of form that they are not against the proper parties; for that if it was criminal to discontinue the chanting, it was so in those who discontinued it—in the organist and clerk; and that the threats of the churchwardens to enforce acquiescence to their directions would not discharge those other persons of responsibility; for though the churchwardens might have authority to command, yet if that command was illegal, it [172] was not to be obeyed. But surely if a command is illegal it is a distinct misdemeanour in the person who gives it; as if a churchwarden should give orders to remove a monument or a body without a faculty, he may be sued in the Ecclesiastical Courts.

An objection has also been taken that the articles do not agree with the citation by their dropping a part of the charge.* This position makes it incumbent then to maintain that the whole makes one charge which is not divisible, and that taking away a single part makes a new charge which the party had no notice to defend. The citation is divided, in fact, into two charges, which have one thing in common, that they were both obstructions to the service, but yet they were distinct obstructions. Another objection is that no law has been set forth: to which it has been answered that where the general law is relied on it is not necessary that it should be specifically stated.

The real question in the case is whether the fact charged is of a criminal nature? The charge is that of having obstructed a practice approved of by the inhabitants and by the bishop. These are the material averments, for the statement that it had been done by the approbation of former churchwardens is of little effect, as that could [173] not in this instance operate as a rule to their successors.

Cause till the next Court-day, alleging it to be the practice to allow such time. The Court observed: the grounds of the objection are very imperfectly stated in the act: it is alleged only "that the words *then and there* in the citation bound the party to time as well as place," in criminal proceedings, although the practice is allowed to be different in civil cases; but no proof is given of the existence of such a rule, except some ancient authorities, which extend to civil cases also, and are admitted to be obsolete as to them. On reason and principle the rule should be the same in all cases, and precedents have been cited in which time has been allowed. It is said there was no prayer of dismissal in those cases, but when the stream of practice has flowed uniformly and silently one way, it shews almost as strongly as decided cases the sense of all practisers. But it is said the rule is enforced in cases of defamation. In that class of cases, founded on reproachful words, and mostly between the lower orders of the people, there is a strong call on the Court to make the necessity of personal attendance as short as possible, and therefore a distinction may properly be made in such cases under the discretion of the Court. In criminal cases the Court will certainly expect all reasonable expedition and will discountenance any unnecessary delay: but when a prosecutor conforms to the practice of the Court, it cannot impute criminal negligence to him. Then the only question is, whether the party is chargeable with criminal inactivity? I think he is not. The prayer of the promoter is only "for a continuance till the next Court-day;" and although the cause began in the vacation, and there may have been time for the articles to be prepared, yet, as the practice of the Court has been understood to be otherwise, and as the party could not know what appearance would be given, I shall allow the continuance, and overrule the prayer of dismissal.

* The variance that was stated to exist between the citation and articles was that in the former the churchwardens were called upon to answer for "obstructing the singing, in the morning and afternoon, two sentences from the prose psalms of David, and also for obstructing the singing Gloria Patri in prose," while in the latter it was only charged "that they prohibited, by their pretended authority, the singing of the Gloria Patri in prose at the conclusion of the psalms of David, and in other parts of the divine service."

The first point is, whether these churchwardens have a right to interfere in the service of the church? as if that interference is legal in any case, it is so in the present. To ascertain this, it is proper to consider what are their duties; and I conceive that originally they were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for specific purposes. In all other respects, it is an office of observation and complaint, but not of control, with respect to divine worship; so it is laid down in Ayliffe (*Parergon*, p. 170), in one of the best dissertations on the duties of churchwardens, and in the canons of 1571 (c. 5). In these it is observed that churchwardens are appointed to provide the furniture of the church, the bread and wine for the holy sacrament, the surplice, and the books necessary for the performance of divine worship, and such as are directed by law; but it is the minister who has the use. If, indeed, he errs in this respect, it is just matter of complaint, which the churchwardens are obliged to attend to; but the law would not obligate them to complain if they had a power in themselves to redress the abuse.

In the service the churchwardens have nothing to do but to collect the alms at the offertory; and they may refuse the admission of strange preachers into the pulpit. For this purpose they are authorized by the canon (1603, c. 50), but how? when letters of orders are produced, their authority ceases. Again, if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary of his conduct. I do not say there may not be cases where they may be bound to interpose; in such cases they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or from disorderly habits, I will not say that the churchwardens, and even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to be pursued by a churchwarden—if private and decent application to the minister himself shall have failed in preventing what he deems the repetition of an irregularity. At the same time, it is at his own peril if he makes a public complaint, or even a private complaint, in an offensive manner, of that which is no irregularity at all, and is in truth nothing more than a misinterpretation of his own. I shall pass over a case which has been cited from the *State Trials*,^{*1} [175] as it was one of party heat that took place in times of party ferment, and is of smaller authority on that account.

I am next to consider whether the churchwardens, if having authority, have interposed in this case to hinder an illegal or legal act? And in this branch of the question I dismiss all consideration of expediency which is in the ordinary himself alone—the Court judges only of the legality. Has then the bishop a discretion upon this subject? Those who have undertaken to shew that he has not must shew a prohibition which restrains it; and in order to establish this, it is said that though singing part of the Psalms is properly practised in cathedrals, it is not so in parish churches. No law has been adduced to this effect, but modern usage alone has been relied on; and it is said that such has been the practice from the time of the Reformation. This, however, is not supported by any particular statement of fact or authority.

In the primitive churches the favourite practice of the Christians to sing hymns in alternate verses is expressly mentioned by Pliny, in one of his epistles to the Emperor Trajan.^{*2} The Church of Rome afterwards refined upon this practice; as it was their policy to make their ministers considerable in the eyes of the common

^{*1} Trial at Rochester Assizes, July, 1719, before Sir Lyttleton Powys, vol. 10 App. p. 88, fol. ed. In this case, on a collection for charity, in the church of Chislehurst, the magistrates interfered, and a scene of violence and confusion ensued. They indicted the clergyman at Rochester Assizes for collecting money without authority. The clergyman, in the meantime, instituted proceedings in the Ecclesiastical Court of Rochester against the persons who interrupted the offices of the church.

^{*2} “Affirmabant hanc fuisse summam vel culpæ suæ, vel erroris, quod essent soliti stato die, ante lucem convenire, carmenque Christo, quasi Deo, dicere secum invicem.—Ep. tit. 10, 97.

people; and one way of effecting that was by appointing them sole officers in the public service of the church; and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity; and it [176] became the distinguishing mark of the reformers, to use plain music, in opposition to the complex musical service of the Catholics. The Lutheran Church, to which the Church of England has more conformed in discipline, retained a choral service.*¹ The Calvinistic Churches, of which it has sometimes been harshly said, "that they think to find religion wherever they do not find the Church of Rome," have discarded it entirely, with a strong attachment to plain congregational melody, and that perhaps not always of the most harmonious kind.

The reformation of the Church of England, which was conducted by authority, as all reformations should be, if possible, and not merely by popular impulse, retained the choral service in cathedrals and collegiate chapels. There are certainly, in modern usage, two services to be distinguished; one the cathedral service, which is performed by persons who are in a certain degree professors of music, in which others can join only by ear; the other, in which the service is performed in a plain way, and in which all the congregation nearly take an equal part. It has been argued that nothing beyond this ought to be permitted in ordinary parochial service; it being that which general usage at the present day alone permits. But that carries the [177] distinction further than the law will support—for, if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a parish church or chapel.

The first Liturgy was established in the time of Edward VI., in 1548. This was followed, after a lapse of four years, by a second, which was published in the reign of the same king, in 1552; and the third, which is in use at present, agreeing in substance with the former, as ordained and promulged 1 Eliz. in 1559.

It is observable that these statutes of Edward VI., which continue in force, describe even-service as even-song. This is adopted into the statute of the first of Elizabeth. The Liturgy also of Edward VI. describes the singing or saying of even-song; and in the communion service the minister is directed to sing one or more of the sentences at the offertory. The same with regard to the Litany; that is appointed to be sung. In the present Liturgy the Psalter is printed with directions that it should be said or sung, without any distinction of parish churches or others; and the rubric also describes the Apostles' Creed "to be sung or said by the minister and people," not by the prebendaries, canons, and a band of regular choristers, as in cathedrals; but plainly referring to the service of a parish church. Again, in the burial service: part is to be sung by the minister and people; so also in the Athanasian and Nicene Creeds.

The injunctions that were published in 1559 by [178] Queen Elizabeth,*² completely

*¹ See the common service of those churches. The agreement of the Lutheran Churches with the Church of England was set forth in a tract under that title in 1715, in which it is said, "It might indeed have been shewn further; the agreement of the Lutheran Churches with ours, in the manner of celebrating the public worship, that they agree with us in using a Liturgy, in singing of anthems, &c. But it is not necessary," p. 10.

The above tract appears to have been written to obviate any public prejudice against the illustrious House of Hanover, on account of King George the 1st being a Lutheran.

*² "For the encouragement of the art, and the continuance of the use of singing in the Church of England, it is enjoined that, because in divers collegiate as also in some parish churches, heretofore there hath been livings appointed for the maintenance of men and children for singing in the church, by means whereof the laudable exercise of music hath been had in estimation and preserved in knowledge: the Queen's Majesty, neither meaning in anywise the decay of any thing that might conveniently tend to the use and continuance of the said science, neither to have the same so abused in any part of the church, that thereby the Common Prayer should be the worse understood by the hearers, willeth and commandeth that, first, no alterations be made of such assignments of livings as hath heretofore been appointed

sanction "the continuance of singing in the church," distinguishing between the music adapted for cathedral and collegiate churches, and parochial churches; also in the articles, for the administration of prayer and sacraments set forth, in the further injunctions of the same Queen, in 1564, the Common Prayer is directed "to be said or sung decently and distinctly, in such place as the ordinary shall think meet, for the largeness and straitness of the church and choir, so that the people may be most edified" (s. 1). If, then, [179] chanting was unlawful any where but in cathedrals and colleges, these canons are strangely worded and are of disputable meaning. But in order to shew they are not liable to such imputation, I shall justify my interpretation of them by a quotation from the "*Reformatio Legum*"—a work of great authority in determining the practice of those times, whatever may be its correctness in matter of law. With respect to parish churches in cities, it is there observed, "*eadem parochiarum in urbibus constitutarum erit omnis ratio, festis et dominicis diebus, quæ prius collegiis et cathedralibus ecclesiis (ut vocant) attributa fuit.*"^{*1} The metrical version of the Psalms was then not existing, the first publication not taking place till 1562, and it was not regularly annexed to the Book of Common Prayer till 1576, after which those Psalms soon became the great favorites of the common people.† The introduction of this version made the ancient hymns disrelished; but it cannot be meant that they were entirely superseded, for, under the statutes of the Reformation, and the usage explanatory of them, it is recommended that the [180] ancient hymns should be used in the Liturgy, or rather that they should be preferred to any others: though certainly to perform them by a select band with complex music, very inartificially applied, as in many of the churches in the country, is a practice not more reconcileable to good taste than to edification. But to sing with plain congregational music is a practice fully authorized, particularly with respect to the concluding part of different portions of the service.

If it be urged that there is any incongruity in this, I answer that I have to discuss a question of illegality, not of incongruity. It is true, indeed, that what is obsolete is liable to the objection of novelty, and, likewise, that it has been tried and laid aside. The Court would not therefore advise the minister to introduce what may be liable to such remarks, against the inclination of the parishioners, and the approbation of the Bishop. But this is matter of expediency and discretion, which the Court must leave to the consideration of others. Having thus declared that the churchwardens are not entitled to interfere, and that the practice is legal, it may be expected I should admit these articles. I am certainly authorized to do so; but I shall suspend their admission till the first day of next term, recommending an accommodation to the parties, and only intimating that the general sense of the parish, properly obtained, will weigh very much with the Court in the further consideration of this subject.^{*2}

to the use of singing or music in the church; but that the same so remain; and that there be a modest and distinct song, so used in all parts of the Common Prayers in the church that the same may be as plainly understood as if it were without singing; and yet, nevertheless, for the comfort of such as delight in music, it may be permitted that in the beginning or in the end of Common Prayer, either at morning or evening, there may be sung an hymn, or such like song to the praise of Almighty God, in the best melody and music that may be conveniently devised, having respect that the sentence of the hymn may be understood and perceived." Vid. also *Reformatio Legum* Eccl. p. 85, s. 5.

^{*1} c. 6. This work was published in its present form, chiefly under the direction of Walter Haddon, LL.D., Master of the Requests, Judge of the Prerogative Court of Canterbury, and Master of Trinity Hall, Cambridge.

† "Plain song was retained in most parish churches for the daily psalms; so in the Queen's own chapels and in the choir of all cathedrals and some colleges, the hymns were sung after a more melodious manner, with organs commonly, and sometimes with other musical instruments, as the solemnity required. No mention of singing David's Psalms in metre, though afterwards they first thrust out the hymns, and by degrees also did they the *Te Deum*, *Magnificat*, and the *Nunc dimittis*."—Heylin on the Reformation, p. 289.

^{*2} The articles were admitted as reformed: when the proctor for the promoter declared he would proceed no further: upon which the Judge dismissed the other party, but gave no costs.

[181] THE OFFICE OF THE JUDGE PROMOTED BY HUTCHINS v. DENZILOE. 14th May, 1792.—Proceedings, under stat. 5, 6 Edw. 6, ch. 4, s. 1, must be supported by two witnesses on the specific charge, dismissed.

[See note to last case, p. 170, ante.]

This was a criminal proceeding against one of the same churchwardens for “quarrelling, chiding, or brawling, under the stat. 5 & 6 Edw. 6, c. 4, s. 1.”*

Judgment—*Sir William Scott*. This is a proceeding on the statute of Edward VI., an Act certainly made on the exigency of the times at the Reformation, when there prevailed great heats and animosities on religion; which were likely enough to break out in churches. The Act did not create the offence, as it subsisted by the common law before the statute was enacted; and there is no doubt that the Ecclesiastical Court had a right to interfere, to correct or punish any act of disturbance of the public worship. A party may now proceed either upon the statute, or upon the ancient law; for wherever the statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either.† This proceeding [182] is upon the statute, the construction of which has now extended beyond the original purpose, and is now applied to suppress any violation of public decorum, arising from other motives than religious differences. The church is not the place where private quarrels are to be carried on, and it is no justification that there was misconduct on the other side, which might give the first provocation. The Court cannot consider this as a set off between the parties; for the misbehaviour of one will not authorise the same acts in another—the Church not being a place where human infirmity can be pleaded to justify violent and indecent conduct however produced.

The statute admits a discretion in the ordinary as to the punishment. By the ancient ecclesiastical law he might impose censures, and might admonish; or, in case a minister was the offending party, he might even sequester his benefice. The statute requires that the offence shall be proved by two lawful witnesses; but by the ancient ecclesiastical law, I conceive, one witness to the fact, and one to the circumstances was sufficient, and would be so still in a proceeding in that form, according to the ordinary rule of the ecclesiastical law, which satisfies its own demand of two witnesses by receiving one to the fact and one to the circumstances. The statute requiring two witnesses, the Court might feel some delicacy about presuming to hold that such words of a statute would be satisfied in the same way.

Three charges are contained in the articles; and the Court may here observe that it is always laid, as a matter of form, that the subject of them gave scandal; but these are merely words of form, for, [183] if the words are of such a nature as to give scandal, the proof of impression on other persons around is of no consequence. The only question is, whether they amount to an offence under the statute? The immediate interpretation of the statute, in its application, belongs to the Ecclesiastical Court; and if one witness is only adduced to one charge, so that the articles stand on this proof alone, this Court will not take upon itself to say that the statutable demand is satisfied.

The witness says, “he several times heard Denziloe call Mr. Hutchins a troublesome fellow, and that he would do everything to make his situation uncomfortable.” This occurred in the vestry-room, and will come within the mildest interpretation of the statute, and would be sufficient to call upon the Court to exercise its authority for the protection of the clergyman. It is further deposed, “that the words were said in an angry tone.” This circumstance is always of consequence; but here it is not wanted, as no doubt this is the very offence which the statute was meant to prevent, though, standing only on the evidence of one witness, the Court is not authorised to notice it. The same witness speaks to the second charge: “That on 21st August, 1791, immediately after service, he came to the christening pew, and addressed himself to the sponsors in these terms: ‘Has that man charged one shilling for registering? if he has,

* “If any person shall by words only, quarrel, chide or brawl in any church or church-yard; it shall be lawful unto the ordinary of the place, where the same shall be done and proved by two lawful witnesses, to suspend every person so offending; if he be a layman, from the entrance of the church, and if he be a clerk, from the ministrations of his office, for so long a time as the said ordinary shall think meet, according to the fault.” 5 & 6 Edw. 6, c. 4, s. 1.

† *Wenmouth v. Collins*, Lord Raymond, p. 850.

he has imposed upon you, and pocketed it, and ought to be publicly called to account for it.' Now when I consider all the circumstances, I must think it as just a subject of prosecution as ever came before the Court. A churchwarden, whose duty it is [184] to prevent all indecency, comes, at the celebration of one of the sacraments, and makes a violent charge against the minister, thereby disturbing not only the persons present, but the performance of the divine office itself: surely such behaviour is strictly within the statute, and must produce all the mischief which the statute was intended to prevent. If the suit had been brought on the ancient law, where the Court was not restrained in its punishment, and the offence was legally proved against the party; it would have used its utmost power to suppress such indecency, and may trust that it would be supported by the approbation of all serious persons. It would teach this person that a minister of the Established Church is fully protected by law, particularly in the celebration of divine worship. But as this article also is proved by one witness only, the Court feels a difficulty in pronouncing that fact to be legally proved, in a proceeding upon the statute.

On the third article there is no doubt that if the witnesses speak with sufficient precision to the fact the churchwarden must be convicted; the only question is as to the effect of the evidence. The first witness says, "that Denziloe charged Hutchins, in an angry manner, with tearing the leaves out of the book—with having taken more for his fee at christenings than he is entitled to; and threatened to cite him to the Ecclesiastical Court." These circumstances are also spoken to by Purney (the second witness) who adds that he said also, "he would prosecute him as far as he could." With respect to cases of chiding, quarrelling, or brawling, there is a discretion in the Court, which would induce it to consider the time [185] and place: that may be "chiding or brawling" in the church, which would not be so in the vestry. The vestry is a place for parish business, and the Court would not interpose farther than might be necessary for the preservation of due order and decorum.

The express words used are not sworn to: the witness only says "that he charged him," a way of deposing that does not clearly shew they were words of reproach; and the rule, in criminal matters, inclines to take words "in mitiori sensu." These are not so brought before the Court, as to oblige it to consider them as invective: it is said that they were spoken in an angry manner, but unless they are so proved, the tone alone is not a circumstance sufficient to satisfy the Court that they were words of contumely. I think, therefore, they do not amount to the legal offence; and that the churchwarden saying "the clergyman had taken more than he ought, and that he would seek redress in the Ecclesiastical Courts," though in the manner in which that charge is proved here, is not enough to convict him of the offence laid in these articles. I cannot then pronounce the censure as prayed, but feeling a suspicion that the churchwarden has acted improperly, and that, if the fact had been legally proved, I should have punished him as severely as the law would have allowed, I content myself with simply dismissing him, though I doubt the propriety of the lenity with which I treat him.

[186] PRITCHARD v. DALBY. 3rd Feb., 1792.—Misnomer, how considered. Averment of the party, as to his true name, required, and binding on him.

This was a question of practice, as to the effect of a misnomer, and the effect of the averment of the party, as to his true name.

In this case a citation had issued against Sarah Dalby, in a suit of defamation, on which an appearance was given under protest, alleging her true name to be Dolby. The usual assignation was made that the objection should be argued, on petition of both proctors, the following Court. But, on the next Court-day, after the cause had been further continued, during the sitting of the Court, the proctor for Mrs. Dalby alleged the name of the person cited to be Sarah Austin, and prayed to be dismissed. In reply to this averment it was argued that, on an objection of misnomer, the party must plead the true name, and will be held by that allegation; and cases were cited in which the rule had been held strictly at common law (*The Queen v. Stedman*, 2d Lord Raymond, p. 1307). On the other side it was said that the Court would relieve the party from the mistake of his proctor, in any stage of the proceedings, and that she was at liberty to vary the protest till it came before the Court for decision, as the party could only be bound by actual appearance.

[187] Judgment—*Sir William Scott*. In my opinion this protest cannot be sustained

It is within the recollection of the Court that, on the first allegation of misnomer, it had intimated that it was not a material variation, but apparently the same name; it however allowed the objection to be argued on petition. It is now alleged that the true name is Sarah Austin; but whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he shall not be at liberty to aver, for, without such a limitation, the other party might be carried on for ever.

When a person appears, it may morally justify the presumption that he is the party intended; the law, however, allows the benefit of the exception, as to the validity of the citation, but under the condition before mentioned. The material question is how the mistake originated: upon that question the Court must presume that the proctor would not make that averment without authority; it must therefore be considered to be the act of the party. It may be true that a proctor may introduce new matter on his protest, but not such as is inconsistent with a former allegation. I think, therefore, that the attempt which has been made to delay these proceedings on this last objection is improper, and that the protest must be over-ruled.

[188] GROVES AND WRIGHT v. THE RECTOR, PARISHIONERS, AND INHABITANTS OF HORNSEY, &C. &C. 19th June, 1793.—Faculty for erecting a gallery, for the accommodation of the increased population of the parish, granted.—Objections, on the part of certain parishioners, over-ruled.

[Referred to, *Evans v. Slack*, 1869, 38 L. J. Ecc. 38. Distinguished, *Taylor v. Timson*, 1888, 20 Q. B. D. 677.]

This was a proceeding in objection to an application for a faculty to erect a gallery in the parish church of Hornsey.

Judgment—*Sir William Scott*. This is an application for a faculty to erect a gallery in the church of Hornsey, in the county of Middlesex. The citation, calling upon all persons to shew cause against the grant, was returned nearly three years ago; and the Court would feel a painful responsibility if this delay arose from the proceedings of the Court itself; but it is relieved from that apprehension by the explanation given, that the proceedings had been suspended, in consequence of overtures of accommodation. The libel recites the increase of parishioners, and that there is not room to accommodate them; that at a vestry on the 29th August, 1790, a committee was appointed to inspect the church, and consider the measure; that a second vestry was held, after due notice, on the 16th September to receive the report, which was then considered and approved. It was resolved that a gallery should be erected, and the churchwardens were authorised to apply for a plan and estimate of the expence. An appearance has been [189] given to this citation for Toft and five others; but the allegation is in the name of twenty parishioners.

The first article pleads "that the church is ancient; that there are seats on the floor for 300 persons, and that in the present gallery there is room for 150; that the pews are unappropriated, except three; that more than two-thirds of the parishioners live at Highgate, and resort to a chapel there, and that the church is sufficient for the remainder." It is then pleaded, "that the resolution of vestry, for an application for a gallery, had passed without the knowledge of a greater part of the inhabitants; and that, at a subsequent vestry, it was annulled by a majority of six to one. Notice was then left with the churchwardens not to apply for the gallery." The subsequent articles plead, "that the church is old, and would not bear an additional gallery; that it would obstruct the light to the pews underneath; and that a great majority of the inhabitants disapprove of it."

This last averment is most material, and is one to which the Ecclesiastical Court pays great attention, though it certainly is not the only circumstance to be considered; for the majority may incline to unnecessary expence, against which the Court ought to protect the minority, or it may object to necessary expence. The Court is not bound by this circumstance alone; it may refuse the whole parish joined together, or may grant, if it appears necessary, a prayer, on the application of one against all the rest. But though the Court is not bound by the wish of the majority, it will pay great attention to it. The parish-[190]-ioners are, in the first instance, the best judges of the inconvenience, and the remedies for that inconvenience; and the Court will not lightly presume that a majority would authorize or willingly incur an unnecessary expence.

The first point then to which the Court looks is, whether the disapprobation of

the parish, on which the objection is founded, is capable of being duly ascertained by the resolution of vestry, or by the opinions or sentiments of others, who, being prevented from attending there, have joined in the proceedings in this cause? The number here, in either way, is about 26, in the vestries and in the proxies signed, which certainly is not a majority of the parishioners; besides this, there is not one witness produced to support the averment of the allegation: I am under the necessity therefore of considering that it is not shewn that the majority disapprove of the measure on their own plea.

What then is the nature of the responsive allegation, given in on the part of the churchwardens? It states an increase of inhabitants, and the insufficiency of the church to supply those with pews who have applied for them; that a gallery would not endanger the fabric, or darken the present pews; that a regular notice was given of the vestries, and it sets forth the orders and confirmation of them that passed: this appears to be the custom of the parish; and highly proper it is to give the orders of vestry a second consideration. It is said that the order was not confirmed at the vestry held in January; but it was not annulled, and it was confirmed afterwards at a third vestry, when the churchwardens were directed to use their endeavours to procure a faculty, and to abide by [191] the former resolutions. If, therefore, the facts are to be taken as stated, the sense of the majority must be presumed in favour of the measure, unless it can be shewn that the order and confirmation were unduly obtained.

Three objections have been stated; first, that the parishioners were ignorant of the first vestry, when a committee was appointed to report upon the expediency of erecting a gallery. It is not, however, pleaded that there was no notice; and if it can be shewn that due notice was given, persons who do not choose to attend are not to plead ignorance, even if the notice was general and for parochial purposes only; but still more so, if particular, and the vestry was called for this immediate object. According to the general rules of law, a churchwarden cannot make a rate himself, but, if he gives notice of a vestry for that purpose, and if no other parishioner attends it, he may alone, or where only two or three attend, they have the power of the parish delegated to them on that occasion; and I think, in this instance, the notice is sufficiently proved. The next objection is that the committee was attended by others who did not belong to it. It appears that nine persons attended, but that of this number five were parish officers, who, by custom which is extremely proper, are standing members of all committees. However, other persons attended, and if it appeared that they controuled the proceedings by a fair majority, it would vitiate the present application; but it is proved that the resolution for a gallery was unanimous, and therefore a thin attendance was of no consequence. The third objection is that on the 16th January, in a vestry [192] held on that day, the whole order was rescinded, but all that appears from the exhibit of what passed there is that the minutes of a former vestry, of the 26th December, were read and confirmed. Those minutes contained the opinion of the surveyors that the proposed additions would not injure the fabric, and also the order for the plan and estimate. But little is to be inferred from an order rescinding these minutes, when no notice is taken of all the former orders, which should have been rescinded by a resolution then passed, and then that rescinding order should, conformably to their practice, have been confirmed by a subsequent meeting. On the 9th March another vestry is convened with particular notice, in order to receive the report, and on other parochial business. It might be a question, whether this notice was sufficiently full under all the preceding circumstances? and if the former resolutions had rescinded all the former orders, I doubt if this would have been sufficient; but others were then subsisting. It is not objected that this meeting was not duly called, nor is any irregularity alleged against the confirmation of the order on this occasion.

After the admission of the allegation, the churchwardens gave notice of another vestry; this was held on the 21st July, 1791, and was confirmed on the 27th, when the resolution for the churchwardens to continue the application was carried by a majority of 41 to 22. Then the Court is to presume the strength of all parties was collected, and the result was a decision, of nearly double the number, in favour of the present petition. I am then bound to take the fact, as incontestably proved, that a majority of the [193] parishioners is in favour of the measure; nor is this inference impeached by saying that it was an approbation obtained by personal canvass, and that one of those who formed the majority was active in the procurement of it, since,

in all public business, some one individual must take the lead. If, indeed, he does it corruptly, if he intimidates or bribes his fellow-parishioners, that may impeach a measure which has been effected by such means: but if he obtains a majority fairly by interference, the degree of activity and zeal that might have been used for that purpose will not affect the validity of the measure. The mode of agency here was free and unexceptionable; and even should the numbers have been obtained by personal application, they yet must be taken as a majority not improperly obtained. It being then proved that a majority was in favour of this application, it must be a strong case to induce the Court to over-rule their decision. One or other of these circumstances must be clearly made out, either that a gallery was unnecessary or that it was highly inexpedient. That some enlargement of the church is not unnecessary is very clear. In a village near this town, every one knows the increase of population. The church, which is of great antiquity, never monastic, but a mere parochial church, constructed for the then state of population, which has one gallery only, and that very ancient, half occupied by a school, and the other half by cottagers and inferior people, cannot be supposed to serve the parish in the present state of its inhabitants.

On this general statement little evidence would satisfy the Court that the church is inadequate [194] to the due accommodation of the parishioners, and that it would be highly proper that it should be enlarged. It is distinctly proved that new houses have been built, and that several families are prevented from going to the parish church by want of seats, while others are obliged to go to neighbouring churches; that repeated applications have been made to the churchwardens for pews, that the church is not capable of holding more than 200 persons, and that there are 70 or 80 families, which, on the lowest calculation, will be too many for the present capacity of the building.

These then are inconveniences against which the parish is bound, and may be compelled by ecclesiastical censures, to provide; for every man, who settles as a householder, has a right to call on the parish for a convenient seat. The inference, indeed, is almost admitted by the objectors, and on their own shewing, that the church is insufficient—for how do they attempt to prove the contrary? First, that several persons omit coming to church. I am sorry for it; but it is impossible to sanction an objection to a reasonable increase of the accommodation of the church on the supposition that any of the parishioners neglect their duty. The Court must rather adopt the supposition that they are desirous of doing their duty and of availing themselves of their right to be accommodated. Secondly, it is suggested that the churchwardens might put different families into the same pew, as the pews are not appropriated by any faculty from the ordinary. But they do not say that they are not so by custom, or by some other title, which the Court would respect till it was disputed in a regular and proper [195] manner. They may be appropriated by prescription or by a possessory right on the allotment of churchwardens. Now, a prescriptive title cannot be altered by any authority, nor a possessory title by the churchwarden alone, though it may be by the ordinary. But good ground must be shewn before the Court would exercise such an authority. It is said that these pews would afford more sittings, and that they are sufficient for eight persons. On my own view, I think not, without inconvenience to the occupiers; and, if they were, I cannot say that there is any thing so extravagant in the proposed addition, as for the Court to over-rule such a resolution, and to put individuals of different families in the same pews, which may produce contention and inconvenience.

I think, then, it is clearly shewn that some addition is necessary, and the only question is, whether the proposed method is expedient? It certainly is not sufficient to say that others might be more so; and though other plans are mentioned, there is no evidence to shew that they are better than the one proposed to the notice of the Court. I shall express no opinion which might be the most expedient, as the faculty can regularly be only for the plan proposed; and it is no objection to that, that other means might be devised, if they have not been regularly brought forward.

Two grounds of opposition to a gallery have been stated; danger to the fabric, and that it would darken the pews. It is not said that the expence would burthen the parish, which is often pleaded, nor that the symmetry and proportions of the church would be violated, which the Ecclesiastical Court would be careful to preserve. With [196] respect to the first objection, the church is of considerable antiquity, and apparently not of firm architecture; but I see no reason to suppose that a gallery of

light fabric might not be constructed without danger. Two surveyors say it would be safe; one speaks otherwise, but with this reserve, that, without other walls, it would endanger the church. It does not appear that it must necessarily be so constructed, and the Court is not to suppose that the parish would employ improper persons to spend their money, especially when the approbation of the proposed plan is manifest by a majority of two against one.

The second objection is not material; for it appears to the Court that the church is competently lighted, and that it is capable of receiving additional light from the form and glazing of the windows. The surveyors have no doubt upon this point, and some of the parishioners are of the same opinion. Some, that are seated under this proposed gallery, join in this application, and others are ready to exchange their pews for these. I do not then think that I am warranted to say that it will either weaken or darken the church. On the whole, considering the evidence, I am bound to conclude that the erecting a gallery is conformable to the wishes of the parishioners, and that their opinions have been fairly obtained; and thinking some addition is necessary, and no other method being proposed of which I can judicially take notice, I am of opinion that this faculty ought to be granted.

The only question is as to costs; and I am first to consider that the churchwardens have a claim upon the Court for its support in the expenditure of money in the way directed by the parish, [197] and finally confirmed by the Court; and also that the conduct of the persons opposing them is open to this observation, that their resistance was not withdrawn when it ought to have been, namely, when the parish made its final determination on the 27th July, 1791; and the whole transaction has been such as the Court would not wish to see.

The witnesses are all of one family, except the surveyor, which may justify a suspicion that the opposition originates less in the wishes or opinions of the parish than of one or two families in it; and, as the family, from which the opposition principally comes, is well accommodated in the church, an acquiescence in the general wish of the parishioners might reasonably have been expected. I think, therefore, that I should be warranted to give costs from the time of the final approbation of the parishioners; but there are other reasons which incline the Court to withhold them; first, it appears that there has been difference of opinion in the parish, though the majority is in favour of the gallery, and I am not willing to pronounce what the sentence of the Court would seem to imply, that the opposition was not on public grounds. Secondly, costs are in the discretion of the Court, and not matter of strict law. One great object of the Court in parish contests is to quiet them as soon as may be, and the Court indulges the hope that moderation on its part in not condemning the objecting parties in costs may teach them moderation in their future intercourse with their neighbours and fellow-parishioners; and, on these grounds, I think I shall best consult the interests of the parish, by decreeing the faculty, but not condemning the opposers in costs.

[198] THE CHURCHWARDENS OF SAINT JOHN'S, MARGATE *against* THE PARISHIONERS, VICAR, AND INHABITANTS OF THE SAME. 3rd Nov., 1794.—Faculty for accepting and erecting an organ, offered to the parish church of St. John's, Margate, granted, without clause against future expences being charged to the parish. Objection, on the part of certain parishioners, over-ruled.

This was a case before Sir William Scott, as official to the Archdeacon of Canterbury, on an application for a faculty for accepting and erecting an organ.

Judgment—*Sir William Scott*. This is an application to the Court for the grant of a faculty for erecting an organ in the parish church of Margate; and it is brought in the Court of the Archdeacon of Canterbury, who, by ancient composition with the archbishop, exercises episcopal jurisdiction in a great part of that diocese.

It originated in a citation with an intimation, and an objection is made that the size of the organ is not specified, which is usual and convenient; since the size may be a material ground of objection. But I think it is not a fatal objection, since the parish must take the faculty, if it is granted, as applying to a proper and convenient organ only, and though the intimation is liable on this ground to objection, it may be cured in the way that has been mentioned.

The law respecting church ornaments is now generally understood and settled. The consent of the parishioners is not indispensably necessary, [199] unless to charge

the parish with any expence for the support of the ornament after it has been put up. But if there is no such charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary.*

Then if all objection on ground of expence is removed, the ordinary is not restrained by any want of consent on the part of the parish, which is only requisite when it is put to expence for things not necessary, but merely ornamental. It may be difficult indeed in some cases to distinguish whether an addition of this kind to the service of the church is to be deemed necessary or ornamental; because organs in some churches may be necessary, though in others only ornamental. In cathedral churches they would, I conceive, be deemed necessary, and the ordinary might compel the dean and chapter to erect an organ, as proper and necessary for the service usually performed in such places. In parish churches it would be otherwise; and though I do not concur in the observation that organs in such places are to be generally discouraged; it might be proper to do so in some cases, and it would depend on the circumstances of the parish what judgment the Court would form on the particular case. In the present case it appears by the application that the offer of an organ has been made by a parishioner, so that no expence will be incurred in the first instance.

[200] It is said that a proper organ will cost more than the sum proposed to be given; but I understand the proposal as not limited to any precise sum, but as the offer of a proper organ. There may, however, be the expences arising out of it, as for erecting and keeping in order, and for an organist; and as these may fall on the parish, it may render the consent of the parishioners necessary. On the effect of consent I am disposed to hold the majority of the parish binding on such a question as this, though it might not bind in all cases, as if an organ was to be voted without the authority of the ordinary. In all cases where the parish is competent to act by its own power, it is the majority which must bind; and the majority of a vestry, in cases fit to be there decided, will bind the minority of the parish, though it will not bind the ordinary in matters subject to his discretion. And if he sees that many of the parishioners object, though they may be the minority, it may be very proper that he should not be totally inattentive to their opinion. It is usual, therefore, in cases of mere ornament, to tender affidavits shewing what the majority in vestry was, in order that the Court may ascertain what may fairly be considered the predominant wish of the parish. In cases of this kind, the intimation goes out to all persons, and therefore every one not appearing must be regarded as consenting, by virtue of this notice, and also of the representative character of the churchwardens who apply for this faculty.

The balance of number in favour of this application are 213 to 42, about five to one; and though it is said by the opposers that they could [201] have brought more, but that they chose to stand on the merits; I must suppose they have brought all they could, as the merits on the present enquiry depend, in no small degree, on the numbers. In interest, it appears that the rental of the parish is about £12,000; of which a proportion of £4494 is for the organ, and £3353 against it. On this representation it is to be observed that the whole interest is not brought forward; but it is reasonable to presume that all who do not come forward on the call of the intimation agree to the measure. There is then the legal consent of the vestry, and a sufficient constat to satisfy the Court of the sentiments of the real majority of the parish in favour of the application.

The consent, however, is not the only thing that is material, since the measure may be improper, in consideration of the parish or of the church, or private rights may be affected. It might be the duty of the ordinary, therefore, under particular circumstances, to interpose and protect the parish from its own indiscretion, if any inconvenience was to be apprehended from it; as if the parish was small, and the rent of houses very high, or there were other circumstances that rendered such an addition to the church inexpedient. Attending to such considerations, the Courts have usually adopted the rule of inserting a clause that no expence shall fall on the parish; but this rule is discretionary only and, though generally proper, by no means binding.

In London, where parishes are small and the rents high, an organ might be a considerable burthen, and therefore the rule is often adopted, [202] though seldom well observed in practice; since the course pursued is that several persons certify,

* *Butterworth and Barker v. Walker and Waterhouse*, 3 Burr. Rep. p. 1689.

that they are willing to subscribe to provide a settled fund for the maintenance of the organist, though no permanent endowment is arranged; a fund for the present being all that is usually required. That there should be a settled fund is not prescribed by any rule of law, which is to be found in books, or in practice, except in particular cases in which the ordinary may think it necessary. If the circumstances of the parish are different, where the parish is large, and the inhabitants are opulent and desirous of such an instrument, is it unfit or beyond the discretion of the Court to sanction such a grant to them? A faculty does not enjoin the raising of any rate; and if it is found a burthen, it may be removed by another faculty.

Is it necessary then that such a clause should be inserted, either on principle or settled usage? I have already said that I know of no principle that can make such a rule obligatory in all cases; and as to usage, the cases, which have been cited by the counsel, relate chiefly to small parishes, in which the ordinary would be unwilling to bind the inhabitants without a very general consent. A case of real authority, as a negative, would be shewn, if the Court had said it would not grant without such clause, and the parish had refused to accept it on those terms. That would be a case in *foro contentioso*, whereas all the precedents cited have been of cases in which the parties have been willing to receive. I have seen grants of two or three faculties in the Consistory of London, on the application of some of the parish, without [203] any provision for an organist: as for Fulham, in 1732; St. Mathew, Friday Street, in 1734.

It is said that this should be done only when the parish are unanimous. The rule of unanimity may be proper in some cases, and not in others; and it is rather an argument against the effect of unanimity that the vote includes posterity also. In the case of St. Stephens, Walbrook, where the inhabitants were unanimous, the clause was inserted. All precedents prove only, that in some cases the Court has thought proper to insert such a clause, but not that it is bound to do so by any rule of law with which I am acquainted. If it is a rule of discretion only, what are the circumstances in this case? Here is a populous parish, of great public resort, with a rental of £12,000, and with inhabitants in easy circumstances. The expence on resident inhabitants will be little more than one halfpenny in the pound. If such a parish is willing to have the power to tax themselves, and the Court should refuse, it would amount almost to a declaration that no parish ought to have an organ.

But it is to be considered also whether any private right will be affected by it. All that I find on that point is that one person makes an affidavit, that three pews, belonging to himself and two other persons, will receive much detriment; but in what manner is not stated. It appears that his pew was erected by himself without a faculty; there is, therefore, no prescriptive right. It appears that it was not built by leave of the parishioners, and although the churchwardens have the general right, usage in some places gives it to the parish [204] in vestry; and on the affidavits that have been exhibited, I think it is so here. This private right, therefore, which is claimed, is founded on no legal ground, nor is it good against the churchwardens or the parish.

Considering all the circumstances of this case, I am of opinion that the Court has authority to grant the faculty, and that there is no such general rule requiring the unanimous consent of the parish to obtain the faculty without the clause mentioned: there is a decided majority in favour of the application, and they have acted on a reasonable and prudent confidence.

It is highly proper that there should be an organ in this church, if in any; and I pronounce for the grant, without inserting any clause respecting the provision for the organist, or for exonerating the parish from the expences that may be incurred in maintaining it.

[205] THE OFFICE OF THE JUDGE PROMOTED BY MAIDMAN v. MALPAS. 15th Dec., 1794.—Proceedings promoted by the rector of the parish against a person for erecting a monument in the church without a faculty, sustained.

[Applied, *Ritchings v. Cordingley*, 1868, L. R. 3 Adm. & Ec. 122. Followed, *Nevill v. Bridger*, 1874, L. R. 9 Ex. 217; *Rector of St. Michael Bassishaw v. Parishioners of Same*, [1893] P. 237; *Lee v. Hawtrey*, [1898] P. 72. Approved, *Keet v. Smith*, 1875, L. R. 4 Adm. & Ec. 405. *Batten v. Gedye*, 1889, 41 Ch. D. 516. Referred to, *Julius v. Bishop of Oxford*, 1880, 5 A. C. 245; *McGough v. Lancaster Burial Board*, 1888, 21 Q. B. D. 328; *Winstanley v. North Manchester Overseers*, [1910] A. C. 10.]

This was a cause of office or criminal proceeding, promoted by the Rev. Mr. Maidman, rector of Greenford, against the defendant, for erecting a monument in the chancel of the church of Greenford without a faculty. The party appeared under protest, alleging that he had already been cited for the same cause and dismissed, and that he was not therefore liable to be proceeded against a second time; that there was the further irregularity in these proceedings that he was cited, in the name of the bishop, to answer to articles to be exhibited against him by his officer; whereas the citation should have been in the name of the Judge.

In support of the protest it was contended that the defendant was entitled to be dismissed for the reasons alleged in the protest, that he had been dismissed on a former citation; that the citation was irregular in form; that the promotor had been privy to the act complained of, and that the monument had been taken down; that the party had been in error as to the necessity for a faculty, and it was obvious that the present proceeding had been instituted only to exact a fee of £30, which had been demanded; that if there had been any [206] violation of public decency, or private right, the Court might not be at liberty to enquire into the motives of the promotor, but there had been neither in this case, only a mere omission of form in not applying for a faculty, which would undoubtedly have been granted; and it was hoped, therefore, that the Court would not permit its authority to be used in the promotion of this suit. On the other side it was said that the citation, in the name of the bishop, calling upon the party "to appear before our vicar general and official principal, and to answer to articles to be exhibited on our behalf by virtue of our office," might be a style properly used in any case of articles to be exhibited by the chancellor; that the jurisdiction exercised by the chancellor was in law the act of the bishop; and there was in fact no innovation in this form, though of late it had been deemed sufficient to describe the office and the promotor, without suggestion on whose behalf or in virtue of whose authority the suit was promoted. Various cases were cited: of *Thompson v. Saunders*, in 1737, in the Peculiars, for erecting tombstones; of *Russell v. Musgrave*, in the Consistory in 1778; and of *Hinde v. Martin* in the same Court; all litigated cases, in which there was no suggestion on whose behalf the articles were to be exhibited. In *Lovegrove v. Mason*, 1749, they were in the name of the bishop, as here; and in the ancient language of the Court, when the proceedings being in Latin were more precise, the usual form was "ad respondendum articulis," without special suggestion as to the office promoted. That in 1717 there was a suit of office on a cita-[207]-tion in the name of the bishop, and without any behalf, against two persons for having been present at a clandestine marriage; and in 1718, in *The Chislehurst case* (vide supra, p. 174), for disturbance of prayers against laymen, the style was "in the name of the Bishop of Rochester, ex officio nostro, ex promotione A. B."

These instances shew that there has been no substantial irregularity; and as for the former dismissal, it was by direction of the Court, for a reason which it intimated during the argument, without prejudice to the right of further proceeding. That the party was bound therefore to give an appearance; and if he then wished to put an end to the suit, on confession of the facts, the promotor was desirous to shew that he had no private motives, and was ready to take the judgment of the Court without further proceedings. That if the party had been precipitate in taking down the monument, it was not by the consent of the rector, since the answer which had been given to that application was "that he must be left to do as he should be advised." That there was no demand for the gratuity, but a declaration only that the rector expected what other clergymen usually received: which was candidly acknowledged and not denied, though it was not made in the form of an absolute demand.

[208] *Judgment*—*Sir William Scott*. This is a proceeding in which the office of the Judge has been promoted by the rector of Greenford against the defendant for the reasons set forth. There can be no question as to the jurisdiction of the Court, which is established by its own decisions, and those of the Temporal Courts, and that no monument can be erected without leave of the ordinary. All parishioners have a right to be buried in the church-yard without leave of the incumbent; but the permission of the ordinary is necessary before any monument can properly be erected. It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals. The consent of the incumbent is taken on such occasions; and especially of the rector, for monuments in the chancel. A faculty likewise is required, though it is frequently omitted, under the confidence

reposed in the minister, and the Ecclesiastical Court is not eager to interpose. But when cases are brought before it, it is necessary to enquire whether the thing is proper to be done, and whether the consent of the incumbent has been obtained.

Something has been said in argument of the extortion of money; but I am not prepared to say that the demand of a usual fee is to be called extortion. I conceive the clergyman may legally demand and accept a fee for his consent; nor is it an improper thing that the Ecclesiastical Court should see that it is done, and that all temporal interests are duly protected; as in other instances, in the [209] putting up of an organ, &c., temporal interests are always attended to.

A former citation was taken out in this case from which the party was dismissed in consequence of a rule which the Court had laid down,* and which had been intimated on former occasions, that the leave of the Court should be first obtained; since it is a part of the ecclesiastical jurisdiction, which is not to be exercised without discretion, or to be left entirely to the judgment or passions of private persons. That rule had been overlooked in extracting the former citation, and it was superseded on that account, but without prejudice to the cause. A new citation was then extracted, and an appearance is now given under protest, objecting to the irregularity of the proceedings, on the grounds which have been stated.

It is first said that it is against form, and against the principle of these proceedings, that the office of the bishop should be promoted, instead of that of the Judge. But I have directed the register of the Court to be examined, and find that there has been great variation in the form: as "in the name of the bishop," "of our office;" in others "at the promotion of the Judge;" in others, neither; mentioning only the offence, the place of appearance, and the name of the promotor. But it has [210] been said that if the proceeding was personally at the instance of the bishop against a layman, it would not be valid.

The office of the Judge is not original, but derivative, and may fairly be styled the office of the bishop, for it is the office of the bishop exercised by his Judge—officialis iudex episcopi. It is conformable to former precedent, and not objectionable in principle, and the proceedings are not to be impeached on this ground. Then on what other ground is the party entitled to be dismissed, according to the prayer of his petition. It is objected that the history of the transaction shews that the suit would not have been commenced if the clergyman had not been dissatisfied with his fee, with an insinuation as to some sum of five pounds that had been paid, as is said, for the consent which was obtained. But the consent of the rector alone is not sufficient. The Court has a right to animadvert on a party erecting a monument without a faculty; and when such an irregularity is brought to its notice, it is obliged to see that all the requisites of law are rightly observed. The consent of the rector alone cannot be alleged as a bar to the proceedings. The Court will not look too narrowly into the motives of public prosecutions, since there are few, perhaps, which are not, in some degree, influenced by some private considerations. But I see nothing improper in an application being made to the Ecclesiastical Court by the clergyman, in this form, if his right is denied.

It is less material, however, to look to the motives of the parties than to the facts; for, be the former what they may, they will not, I think, [211] be sufficient to procure a dismissal. It appears that a corpse was buried in a vault in the chancel, under a faculty, as may be presumed, or a prescriptive right which supposes it, and that five guineas were paid to the rector—a liberal fee, but not as I conceive, intended to be given for leave to erect a monument. It is said "that consent was given;" but it is answered, "not without condition;" intimating the expectation of a fee. The monument was then erected without application to the Court. After some time, the clergyman observed, that his fee had not been paid, and though no regular demand was made, it was intimated that a fee of £30 was usually paid to the neighbouring clergymen on similar occasions. It is to be lamented that all this was not made

* In the case of *The Duke of Portland v. Dr. Bingham*, 26th Nov., 1792, the Court had observed that the rule was clear that where the office of the Judge is promoted by any private individual, a personal application should be made to the Judge, in the presence of the registrar, to be taken down and appear in the minutes of the Court, and that it would in future hold any omission of that rule fatal. In consideration of the circumstances in that case, it gave leave for the cause to proceed.

matter of friendly discussion. But as the case has come before the Court, it would not act properly towards rectors or impropriators, lay or ecclesiastical, if it was to say that any person might erect a monument without their leave; which would be the effect of these proceedings, if I was to dismiss the party under this protest.

The course which the clergyman adopts to do himself justice is, by promoting this suit in the Ecclesiastical Court, for erecting the monument without a faculty; and I see no impropriety in such proceedings. It is alleged that the party offered to procure a faculty, or to take down the monument; but a faculty would not have been granted, as a matter of course, without proof that the leave of the rector had been obtained. It is also said, that the clergyman ought to have informed the party that a faculty was necessary; but every one is bound to know the law, so far as is requisite for [212] the proper guidance of his own conduct. Then it is alleged that the rector had given his consent that the monument should be taken down, which, however, is denied. But the taking down the monument would be an offence, for which also the party would be liable to prosecution; since, when once erected, it cannot be removed without the sanction of the ordinary. The consent of the rector, therefore, would not be sufficient.

On the whole matter of this protest, I am of opinion that it is not sufficient to excuse the party from giving an absolute appearance. At the same time, as it is intimated that it is not the wish of the promoter that the suit should proceed further, the Court would be desirous that it should not. I think, however, that the suit has been properly commenced, and I overrule the protest, and condemn the party in the costs.

[213] BOWZER, AS GUARDIAN OF HIS SON v. RICKETTS, FALSELY CALLING HERSELF BOWZER. 3rd March, 1795.—In nullity of marriage, by reason of minority, at the suit of the father, a prayer, on the part of the wife, “that the minor, now of age, might be called to declare whether he would carry on the suit, or that otherwise she might be dismissed.” Not sustained.

This was a petition on the part of the wife, stating that the libel had been admitted, but no issue given; that the suit had been commenced by the father, as guardian of the minor, who is now of age; and praying that he may now be cited to appear, and carry on the suit in his own name, with intimation that the Court would otherwise dismiss the wife.

It was contended that, before issue had been given, it was competent to call upon the minor to declare, whether he chooses to carry on the suit; for that, before issue given, a suit was not held to be commenced by the canon or civil law; and that in defamation, where it was necessary that the suit should be commenced within a year, it was held in *Goldingay v. Hill* (Arches, 1783), before Dr. Calvert, that issue should be joined within the year. After issue, applications of this kind may have been denied, but before issue, it is competent to the wife to call on the minor to declare whether he will carry on the suit.

On the other side it was replied, that in the case of *Shaw v. Page*, which was a very early, if not the first case argued under the marriage act, a question to this purpose had been agitated, whether the father, having brought a suit in the minority of his son, the son should not be called on; but, in that case, the son married again, and the proceedings dropped. Since that time, how-[214]-ever, it has always been held, that where the suit has been brought by the father in his own right, he would be entitled to proceed; and that if such suit was commenced only a day before the son came of age, the father might continue to carry it on, whether the son was willing or not. That in the present instance the citation had been returned on the third session of Michaelmas Term; and on the third session of Hilary Term, the wife stood assigned to give an issue, when the proctor alleged the minor was then of age, which was not true: if this fact had not been alleged, the Court would have required an issue to have been then given. It will be a question, therefore, whether the party shall take the benefit of a false suggestion, or whether this application should not be considered as if issue had actually been joined?

Judgment—*Sir William Scott*. In cases of this description the Court would not be inclined to maintain the objection; for it is the interest of both parties, that the suit should proceed, in order that they may know the exact legal relation in which they stand to each other. The marriage act declares marriages in such cases to be ipso

facto void, the sentence of the Ecclesiastical Court is declaratory only, it does not make them void: if then I should dismiss the suit, it would not legalize the marriage, but the marriage might be questioned, upon any claim of the wife's, in any future transaction, in any Court where such claim was made. It is therefore proper that the parties should know their situation in the early state of their cohabitation, and the Court would not be disposed to dismiss the suit, unless for very cogent reasons. Under the act of Parliament the [215] father has an interest of his own, and though he proceeds as guardian of his son, he may be considered as proceeding *pro interesse suo*; for his own authority is violated.

The consent of the minor is not in any manner necessary for such suits; and in *Lord Courtenay's case* (Consist. 1762. Deleg. 1763) the Earl of Aylesford proceeded as testamentary guardian, after Lord Courtenay came of age; and though his authority was questioned, it was held that he had clearly such right. In *Perkins v. Allen* (Consist. 1778) the same doctrine was recognized by Dr. Bettesworth, in the Consistory Court. It is clear, therefore, that the father may go on after the minor comes of age, and if the minor should appear in the cause, it would not abate the suit. I do not know that it has been determined that the father or guardian might commence a suit after the minor had come of age; but I will not say that he might not, as in case of the son's death, or other particular circumstances, it might be convenient that he should have such right.

In the present case, the suit was clearly instituted in the minority of the son; issue was directed to be joined, and on that day the assertion was made that the minor was of age, which was not true, and on which the matter stood over. I think the party cannot take advantage of that false assertion, but must stand on the same ground as if he was discussing the question on that day. This suit was substantially commenced: the case comes therefore within the narrowest rules, and I am of opinion that the father has a right to proceed.

[216] LINDO, BY HER GUARDIAN v. BELISARIO. 5th June, 1795.—Validity of Jewish marriage, tried by evidence of the laws of the Jews, as in cases of foreign marriage. The asserted marriage held invalid.

[Referred to, *Earl Nelson v. Lord Bridport*, 1845, 8 Beav. 537. Distinguished, *In re De Wilton*; *De Wilton v. Montefiore*, [1900] 2 Ch. 491. Referred to, *Rex v. Dibdin*, [1910] P. 71. Dictum cited, *Lanston Monotype Corporation, Limited v. Anderson*, [1911] 2 K. B. 23.]

This was a case of jactitation of marriage, brought for the purpose of trying the validity of a marriage, according to the Jewish rites; instituted by the wife against the asserted husband.

Judgment—*Sir William Scott*. This is a case which comes before this Court by the direction of the Lord Chancellor. Under the sanction of that high authority I shall certainly apply myself closely to the investigation of the question, though otherwise I should have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in this case. The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages, in cases of British subjects, and sometimes of aliens; and it does this from necessity, in order to prevent a failure of justice; and with the satisfaction of knowing that the principles, which regulate English marriages, are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of Europe being founded on the same general principles, and having for its basis the antient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis. This is a question of marriage of a very different kind—between [217] persons governed by a peculiar law of their own, and administered, to a certain degree, by a * jurisdiction established

* On the state of the Jews in this country, see Selden, 3d vol. p. 1459. Molloy, lib. 3, ch. 6. 1 Atkyns, p. 41, and a pamphlet, "Whether a Jew might hold lands," A.D. 1753, &c. They appear to have been brought here in considerable numbers by William I. from Rouen, 1070. They were considered as merchant strangers, and were allowed to have *medietatem linguæ Judæorum*, 1 Edw. 1. Selden, 3d vol. p. 1460. They had also the power of excommunicating their own members. Special justices

among themselves—a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority. It would, therefore, have been a matter of grave consideration with me, if the question had been brought in the ordinary way, and without any such recommendation; whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I can—[218]—not but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law. I feel also the weight of the consideration, that a decision on the present question may affect a very numerous and respectable body of people. Under this responsibility I repeat that nothing but my respect for the high authority which has prescribed this duty, would have induced me willingly to undertake it. Being, however, under the necessity of addressing myself to it, I shall take care to use every caution respecting the means of information, and the manner of applying it, that my judgment can suggest: under these observations I proceed to consider the particular question that is thus brought before me.

A libel has been given charging “that Mr. Belisario has boasted of a marriage which is not good and valid in law.” He has admitted the fact of jactitation, and at the same time he asserts, as he has a right to do, the factum of the marriage, and its validity. The factum of marriage, I presume, was not the principal subject of the reference, from the high authority to which I have alluded; for, if that had been the question, it would have been referred probably to another mode of inquiry, on an issue directed to a jury, who would have been more capable of examining it than this Court. However, the factum comes before me; and I cannot help observing that this part of the question [219] has been rather singularly introduced. The libel stated the jactitation. An allegation was then given in, on the part of the defendant, stating the general law of the Jews, and asserting the factum of marriage agreeably to it, on which he relied, as being a complete marriage. In answer to that, another allegation has been given in on the part of Miss Lindo, reciting what had been stated to be the law, and denying that such ceremony does constitute marriage, “but only a betrothing.” It proceeds in the second article to recite the factum, as alleged in the fourteenth article of the husband’s plea, which is agreeable to the ceremony as before described, and denies that it did even constitute “a complete betrothment.”

It appeared inconsistent, I own, that the first article of the responsive allegation should admit the ceremony of giving the ring in the presence of witnesses, and accompanied with certain words, to be a betrothment; and that the second article, which recites the same ceremony as having actually passed between the parties, should allege that it did not constitute a betrothment. There followed another allegation which the Court did not admit, because it appeared to offer no new information; and though it may be singular to notice what has been rejected by the Court, yet, as it comes out on the interrogatories, and in a case of this special nature, which calls for particular attention to all its parts, I may be permitted to make some observations upon it.

were appointed “*ad custodiam Judæorum*,” whose decisions, in certain cases, were *secundum legem et consuetudinem Judaismi*. Selden, *ib.* Molloy, *ib.* They lived as bondmen of the kings, and under special protection, regulations, and exemptions, till they were banished, 31st August, 1290. They did not appear again in this kingdom as a distinct body till the time of Charles II. They had petitioned in 1648 to be allowed to return and enjoy their religion (see Appendix, No. 1); and the question was much agitated, but nothing was done. On the Restoration, Charles II. promised them protection and the use of their religion, and an Order of Council issued to that effect (see Appendix, No. 2).

Many Jews obtained letters of denization during that reign. They were not (as it is believed) mentioned in the exceptions in the Marriage Acts as projected in the reign of William III. though Quakers are: but they were included in the same exception in the Act 26 G. 2, ch. 33. Their state and condition having recently become an object of public attention on the discussion of the Act 26 G. 2, ch. 26, for the Naturalization of Jews, which passed in 1753, but was repealed in 27 G. 2, ch. 1, 1754.

That allegation stated that there was a tribunal among the Jews, composed of an archisynagogus and assessors—persons of competent learning and abilities to decide their matrimonial questions; that they had called the parties before them, and, on deliberate examination, pronounced the cere-[220]-mony in question to be a doubtful betrothment; and that the asserted married woman, in this case, was a doubtful betrothed. I do not mean to impeach that sentence; but, according to our notions, it is not very intelligible, as expressed. Judges ought certainly to come with minds open to all doubts, to the consideration of a question; in other words, they must not yield to hasty impressions, but they must ultimately decide those doubts; since it is the business of judges to send into the world, not doubts, but decisions; and they must make up their minds on one side or the other, on the balance of the evidence that is before them. The only way in which I could reconcile this result of their deliberation to any mode of proceeding familiar to us, would be to compare it to what might be a sentence of failure of proof, in our Ecclesiastical Courts, in a matrimonial cause. In which case, we well know that such decision would not be definitive, according to the rule of the canon law, “non transit sententia in rem judicatam contra matrimonium” (x. 2, 27, 7); but the party might give supplemental proof, and so establish the marriage in subsequent proceedings. But if the law is otherwise amongst the Jews, as I have understood, this cannot be done; and I cannot think that this mode of pleading this sentence has been the most proper; because it should have been alleged that when the judges had given a decision of doubtful betrothment, it was, in fact, a definitive judgment against the validity of that betrothment. If it had been so pleaded, this Court might have acted upon it, and have thought itself precluded from entering into [221] any further examination of the marriage. But without some such conclusive declaration, in the ordinary acceptation of the words, and without the assistance of any technical interpretation, the circumstance that it appeared doubtful to them was a strong reason why this Court should proceed in the investigation of it. This Court, therefore, cannot consider the report of that tribunal, even if it was directly before it, as any bar to the present enquiry into the matter of fact, whether that which they held to be doubtful is a certain and existing fact or not. Having considered that subject, I must say that I do not entertain doubts upon it.

It appears on the interrogatories that the doubts, which were entertained by that tribunal, were founded on this—that one of the witnesses could not distinguish which of the two young women present was the person supposed to have been married by the ceremony described. A doubt was raised as to the identity; but, on the present evidence, there is no room for entertaining any doubt on that point: it had been pleaded in the allegation that the man paid his addresses to the lady promoting this suit, and she admits that she is the party.

If there is no peculiar rule in the Jewish law that a marriage cannot be established in point of fact, if one of the witnesses had a doubt about the identity (and I cannot suppose there is such a rule as it has not been pleaded), I am certainly not concluded by that sentence; and, upon the present evidence, I find it impossible to entertain a particle of doubt that a factum has really passed between these two parties. That factum which, according to one statement, constitutes a marriage, but [222] according to the other, only a betrothment. Upon the factum no doubt remains; and the only question that presents itself for decision is, which of the two descriptions, betrothment or marriage, is entitled to be considered as the true legal character which belongs to it.

In proceeding to consider this question, it will of course be necessary to remove all circumstances that do not essentially belong to it; and I shall immediately exclude all imputation of fraud, because no such imputation is supported by the evidence. In the allegation the Court permitted several circumstances to be pleaded, because it was not then known what effect the peculiar law of the Jews might give to those circumstances—such as disparity of age, and of fortune, and the clandestinity of the engagement. But it does not appear that all the circumstances of this case as proved taken together, can be held to compose a case, which I can judicially consider as case of fraud. Such disparity of age, as exists in the present case, is by no means uncommon, and disparity of fortune is by no means demonstrative of fraud. I observe likewise there is no marked disparity between the families. As to the private manner in which the communication was carried on, it is a sort of artifice so much used in the common habits of mankind, in similar cases, that if I was to hold that to be

material enough to invalidate a marriage, I might unhinge no small number of marriages in the kingdom. This objection is the less to be regarded in this case, because it does not appear that, by the laws of the Jews, the consent of the family is absolutely necessary, and therefore privacy is of the less importance.

[223] I shall next dismiss from the case every imputation of force; for there appears to have been as perfect a correspondence and concurrence of inclination as possible. The letters, which have been exhibited, breathe the warmest sentiments of affection on her part; and though she is said to be a very young person, she is, by the laws of the kingdom, as well as by the Jewish law, supposed capable of protecting herself against imposition and force, and competent to enter into any matrimonial engagement. In the letters written after the ceremony she declares herself to be his wife; and I observe, in the petition to the Lord Chancellor, the guardians represent their fears that a marriage will very soon take place, unless the authority of that Court is interposed to prevent it. She was removed under the care of her brother for that purpose, and since she has been placed under the protection of the Court of Chancery, access has been denied to the asserted husband only by external authority; and there is no evidence of any force being attempted upon her: this Court therefore considers the question simply as a question of law on the validity of the marriage, abstracting all suggestion of force or fraud in the person against whom this proceeding is instituted.

The factum of marriage is described in the allegation, and has undergone so much discussion that it is, perhaps, unnecessary to advert to it. The allegation, after pleading the letters, goes on to describe the factum of the ceremony to this effect: "That before sunset, and between eleven and twelve o'clock in the morning of Friday the 26th day of July, 1793, Esther Mendes Belisario, [224] then Lindo, thereby meaning Esther Lindo, spinster, the minor in this cause, went to and met Aaron Mendes Belisario, the other party in this cause, at the house of his brother, Jacob Mendes Belisario, in Little Bennet Street, for the performance of their marriage, and Abraham Jacobs and Lyon Cohen, two credible persons of the Jewish nation, attended at the said house to be present at the ceremony thereof; that the said Aaron Mendes Belisario, then in the presence of the said Abraham Jacobs and Lyon Cohen, addressed himself to the said Esther Mendes Belisario, then Lindo, thereby meaning the said Esther Lindo, spinster, the minor aforesaid, in the words or to the effect following:— 'Do you know, that by taking this ring (meaning a ring which he then produced to her), you become my wife?' to which she answered, 'I do.' That he then said to her, 'Do you take this ring freely, voluntarily, and without force?' to which she answered, 'I do;' or they, the said Aaron Mendes Belisario, and Esther Mendes Belisario, then expressed themselves in words to that very effect; and the said Aaron Mendes Belisario immediately thereupon, in the presence of the persons aforesaid, delivered to and placed upon the fore-finger of the left hand of the said Esther Mendes Belisario, which she tendered to him for that purpose, and freely and voluntarily accepted and received the said ring, and at the same time repeated to her certain words in the Hebrew language."

That is the ceremony which is described to have passed, and is proved to have passed, between these persons. It comes then more to a question [225] of law. On one side it is asserted that this is a complete marriage, on the other side it is alleged that it is not a marriage, but only a betrothment; and they proceed to state that which, if true, is decisive of the whole question, that the ceremony essential to constitute effectual and complete matrimony is as follows:—"That a formal contract in the Hebrew language must be entered into by the bridegroom with the bride, according to the formalities and rules of the congregation; and such contract must be drawn up by the priest, and be signed by the bridegroom; be entered and registered in a certain book kept for that purpose by the priest, and the entry must be signed by the bridegroom and other two witnesses, which being done, the original contract is delivered to the bride." This being pleaded to be the ceremony which constitutes an essential and valid marriage, it would follow that, as nothing of that kind has passed, there is an end of this pretended marriage entirely if the law is proved to be conformable to this description of it.

In order to establish that proposition three persons are produced, who compose the judicial synod, called the Bethdin. Some observations have been made upon the character of those persons, but without apparent foundation; and I am inclined to

treat them with the respect due to their situations. I must, however, examine in what manner the proposition, which is advanced as the main issue of this cause, is proved; and I think I do not depart from that civility which I am inclined to shew to them when I presume to think that, from not perfectly understanding the form of words in the English language, or from [226] other causes of that kind, there appears some little inconsistency in their depositions.

The first person is Mr. Julian, who expresses himself nearly in the terms of the allegation: he says "that the ceremony essential to, and which constitutes an effectual valid and legal marriage among the Jews, is that a formal contract, in the Hebrew language, must be entered into by the bridegroom with the bride, according to the rites and ceremonies of the Jews, and the rules of the Jewish congregation to which the parties belong, which is drawn up by the priest or minister who marries them, and must be signed by the bridegroom and two witnesses before the ceremony of marriage, and must also be entered and registered in a certain book kept for that purpose in the synagogue, or by the priest or minister of such congregation."

According to this opinion, if it stopped here, the position would be perfectly correct in point of law; but, in the very next sentence, I find what appears to me to be rather inconsistent; for it goes on to say, "that if a Jew and Jewess having given and received the Kedushim, the Jew was to say, in the presence of two witnesses respectively Jews, that he was going to have connection with such Jewess in the name of marriage, and then retired and had such knowledge of her, it would be a good and lawful marriage between such persons, according to the Jewish law, and would be so pronounced to be by the Bethdin." Every one must perceive that this is inconsistent with what had been said before; because it cannot be essential to the validity of the marriage that the ceremonies described above should have passed, [227] when it is in the next sentence declared that without several of these ceremonies a legal, valid, and effectual marriage may take place to all intents and purposes.

The next witness is Mr. Almosnino; and he appears to be rather more familiarly acquainted with the force and meaning of English terms; since, in the original deposition, the word essential is corrected and altered for the word customary; and all that he ventures to say is that the customary ceremony is that described in the allegation.

Mr. Delgado, the third witness, introduces this distinction. He says "that the ceremony required by the Mosaical law is as follows." He then describes it, and adds, "It is not required by the law of Moses that there should be a written contract; for though it is required by the Rabbinical law it is not essential; and if a Jew and Jewess were to declare that they were going to retire, for the purpose above described by the other witness, and were so to retire, the same would be a good and valid marriage, although no ceremony is performed, and no contract entered into." Then I think we have established, so far at least, that the written contract is not essential; we have it completely so proved by witnesses, who are referred to as above all exception, and who speak not only with knowledge, but with authority, on this subject. What I infer from it is that there exists among the Jews, as in many other communities and societies, a distinction between marriages solemn and unsolemn; that there are marriages which have certain solemnities attached to them, for the purposes of public notification, and for the complete satisfac-[228]-tion of the civil and ecclesiastical law, although not necessary for the purpose of validity.

There is also a particular exhibit introduced to which the Court is inclined to pay great respect and attention; being a certificate signed by a person who was himself archisynagogus, and by two assessors, in which the opinion of these persons is delivered corresponding with that expressed by the witnesses, but given by them on a case long prior to the present. That certificate states a case of facts like the present, and declares "the marriage to be valid." For they say, "In conformity to your orders given to us, in virtue of the memorial presented to you by Mr. Benjamin Mendes Henriques, wherein he requested that the contract of marriage shewn to us bearing date the 24th April, in the year 1776, should be examined by us, that we might determine whether the said marriage is valid according to our holy law, and whether the children born from the said matrimony are held as legitimate or spurious. We say that the said contract contains a narrative of the Kedushim, which the said requirant, Benjamin Mendes Henriques, had given, in presence of two witnesses, unt Rabbia de Matta Henriques, with a gold ring, saying the usual words; at the sam

time he put the ring on her finger, and the witnesses declared that the said Benjamin Mendes Henriques and Rabbia de Matta Henriques, in their presence, said that they made this act of espousal of their free and mutual consent, without force or compulsion, and the said parties signed that declaration in presence of the said witnesses, who likewise signed the narrative of the fact."

[229] Now, on this authority those persons pronounce this marriage to be valid, and that the woman is prohibited from marrying again with any other person, notwithstanding other contracts of marriage before or after the Kedushim, unless after legal divorce, and that children born under that marriage are legitimate, &c. But they go on to observe: "But inasmuch as there did not follow to the Kedushim the nuptial benediction, which, without exception, all Israel used; and also as the said Benjamin Mendes Henriques did not make unto his wife a Ketuba or marriage contract, ordained and established by the law of Moses, it is certain that they are living in venial sin, but not criminal." It is clear, I think, that there was not a Ketuba, nor the sacred benedictions and blessings, yet the marriage was held to be good and valid.

The addition that the parties are living in sin venially but not criminally has been pushed too far in argument, when it is contended that the parties would not have the lawful use of each other's persons in the way of marriage; for, I conceive, it only means that they were offending against the orders of the Church—that it was an irregularity similar to what is known to have existed in the books of the canon law, where it is held that marriages, though clandestine and irregular, are nevertheless valid. It is a distinction very familiar to the readers of the books of the Canonists that practices and acts frowned upon by the Church as irregular, and, on that account, partaking of the nature of sins and offences, are nevertheless not so mortal or deadly as not to be venial, and to have their sinful character totally removed by subsequent conformity to the public regulations. [230] The sin they commit is against public order, but will have no effect on the validity of the marriage: and it is to be inferred that these parties, in the performance of the personal duties of marriage towards each other, are not doing any thing which is thought inconsistent, to any further effect, with the laws of marriage. The inquiry then is narrowed to this question, whether what was done in the present case was sufficient or not? It being proved that the whole of what is stated in the allegation to be essential and necessary, is not essential and necessary. Was then enough done in this case? Before I examine that point I will venture to say a few words on the nature of the marriage contract.

The opinions which have divided the world, or writers at least, on this subject, are, generally, two. It is held by some persons that marriage is a contract merely civil, by others, that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or religious contract; and, at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter [231] something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes, might safely be presumed to be, as it is popularly called, a marriage in the sight of God.

It has been made a question how long the cohabitation must continue by the law of nature, whether to the end of life? Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature, in the intention of the parties. The contract, thus formed in the state of nature, is adopted

as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries. In some there is a *communio bonorum*. In some, each retain their separate property. By our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

In most countries it is also clothed with religious rites, even in rude societies,* as well [232] as in those which are more distinguished for their civil and religious institutions. Yet in many of those societies, as I have had occasion to observe, they may be irregular, informal, and discountenanced on that account, yet not invalidated. Scotch marriages have been mentioned. The rule prevailed in all times, as the rule of the canon law, which existed in this country and in Scotland, till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world, at this day, that a mutual engagement, or betrothment, is a good marriage, without consummation, according to the law of nature, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The *vinculum* follows on the contract, without consummation, if expressed in present terms; and the canon law itself, with all its attachments to ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne in his book on *Espousals*, where he says "that it is a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only" (s. 4).

Now the ceremony which is described to have passed in the present case would certainly be a complete marriage by the law of nature; for, besides [233] verbal declarations made in the presence of two witnesses, there is the delivery of the ring—a form which has found its way into the marriage ceremonies of most countries; and it is the very symbol of marriage, and the particular act, in our country, that gives a character to the whole ceremony; since we say "with this ring I thee wed." There being then this ceremony, which is more than enough by the law of nature, the question is reduced to this, whether the institutions of the Jews hold it to be insufficient? It has been said truly that the law of Moses stands very much on the law of nature; for that it has not prescribed any formal ceremony of marriage. It is clear, however, that there are legal institutions to which the Jews adhere in practice, and which I must consider as having the force and effect of laws, materially bearing upon the present question, and those are the laws derived from the institutions of the Rabbies.

Now it appears that, under those institutions, a distinction exists between betrothment and marriage; nearly the same as between the *sponsalia* and *nuptiæ* in the Christian canon law; and that the ceremony, alleged to have passed in this case, is called the betrothment, and not the marriage. A distinction, however, of that sort will not decide the question, because it may be little more than nominal, and not of substance; and it does not follow that because there is such a distinction in terms, it may not possess the very essence of matrimony. The opinion of the learned men who have said "that it is only a betrothment," will not decide this question negatively; and I must, in order to find out its real character, look to the effect produced on the parties by this act of betrothing, [234] and from thence I must judge as well as I can in what degree it has the essential features and character of real matrimony.

I have already stated the difference of opinion, in the depositions of these persons, on the necessity of a full ceremony to constitute a valid marriage. There is also, and I make the observation without any disrespect to their judgment, on any supposition that they could mean to mislead the Court, some apparent difference of opinion on the effects of *Kedushim*—that is, of the solemn and mutual declarations made, in Hebrew terms, at the delivery of the ring. Mr. Julian says, "that the delivery of the ring is part of the ceremony of the marriage, which is necessary to make it

* Hockmannus de *Benedictione Nuptiarum*, c. 2, s. 3. "Non minor fuit Paganorum circa conjugia religio, &c."

complete, and without which there can be no marriage." According to him then it is a necessary part of the marriage. Mr. Almosnino says, "that such Kedushim or delivery of the ring does not constitute an effectual or valid marriage among the Jews, although it is now customary that the ceremony of marriage follows that of the Kedushim immediately, if it had not previously been done." The third witness consulted, Mr. Delgado, concurs with the first, and says, "that it is an essential ceremony; for that the delivery of the ring implies that the Jewess has accepted the same as her price for which she had sold or dedicated herself." So that it is an actual sale and transfer, and that which gives the husband a property in her person. They all, however, agree in this at least, that without Kedushim and the ring the contract, and the nuptial benediction of the seven blessings, amount to nothing. Then the matter stands thus, according to the opinion of all the witnesses, who say in effect that Kedushim is an essential and in-[235]-dispensable ceremony, and that the rest without it will not constitute marriage: since they all say that the contract and benediction without that will not entitle the parties to live together; that a divorce is not necessary to separate them, and is never granted; and therefore, undoubtedly, we have got so far—that it is an essential part of marriage. I collect this, I think, from the opinions of all these persons, from two, absolutely expressed, and by implication from the other.

What are the effects of Kedushim then? In the first place, the woman cannot marry any other man—she is separated from all mankind as the property of one individual; that is one feature of the matrimonial contract, and it is impossible to describe it in stronger terms. In the next place, the consequence accrues that she may be guilty of adultery, and is liable even to infamy and punishment, if she has intercourse with any other man; that also is a pretty strong feature of marriage: the guilt of adultery can arise only on a supposition of a marriage having been completed. In the third place, she cannot be separated but by legal divorce, in the same manner as if an actual marriage had intervened. In the fourth place, I observe in the laws of the Jews, that a person committing a rape upon a betrothed woman is liable to be punished, just as in the case of the rape of a married woman. I am enumerating now on the one side what are the circumstances in which this ceremony corresponds with marriage, and these are pretty strong recognitions of a matrimonial character. On the other side there are distinctions to the disadvantage of this character; but they are chiefly civil and temporary distinctions, and relate merely to property. It appears that a Jewess, thus betrothed, is perfect [236] and entire mistress of her own property, not only in the use of it, but also in the disposition; since she can give it to whom she pleases by testament. In the next place, the husband is not obliged to maintain the betrothed out of his property. In the third place, she is not entitled to dower from the property of the man; and he is not entitled to any part of her property in case of her dying intestate. These are the imperfections of the contract as to civil effects.

I observe, in the deposition of Mr. Solomon Lyon, a circumstance which is not noticed by the other witnesses, and which may be material. He says, "that where a Jew obliges himself to give his daughter a marriage portion, and she should receive the Kedushim; the man, from whom she so takes it, could not recover the portion from the father, though he might from any other person, if the father was dead and the Jewess was of age, which is thirteen years." Therefore if this opinion is correct, on the death of the father, where a portion was left, the person giving Kedushim would be entitled to recover, as he would have a vested right in the effects of the woman.

Now, looking at the ceremony which has passed, in these different views, with reference to the circumstances that are favourable and unfavourable, I see, on the one hand, strong recognitions of the vinculum matrimonii; on the other, certain disabilities as to property: but rights of property have nothing to do with marriage considered as to the vinculum; and then the question arises, is this contract, so qualified, a marriage, or is it not? I think I may infer from all the witnesses on both sides that if consummation had actually passed, at least with the ceremony of Hupa (which is the [237] declaration, in the presence of witnesses, that he was going to retire for the purpose of consummating his marriage, and had so retired), it would be a complete and perfect marriage. I collect this from the depositions of all the gentlemen, and from an opinion given by Mr. Azevedo, in a former cause which had

occurred among the Jews; and therefore the question is, whether it can be presumed that consummation has taken place? There are some reasons which would incline one to suppose that it had. For it appears that this was an engagement entirely agreeable to the inclinations of the young woman, who writes in language of affection, and in the character of a wife. It appears, also, that the parties had frequent opportunities after the ceremony, and that for some time he continued to have access to her. Considering these circumstances, and particularly the age of the parties, the man being twenty-nine and the woman sixteen, it might naturally be presumed that consummation had passed. But it is a strong fact on the other side that he has not pleaded the consummation, being aware that it would be of great consequence that it should be pleaded; and I lay great stress on that omission. No application has been made to the Court to rescind the conclusion in order to admit the pleading of that fact, and therefore the legal inference is, notwithstanding the general probabilities to which I have adverted, that consummation has not passed.

Then the question is reduced to this, is the ceremony without consummation a complete marriage? I have already stated, that by the law of nature, this would not be essential; but it may be so by special civil and religious institutions, and there are different systems of matrimonial laws in the [238] world by which it is rendered necessary. Whether it is so by the law of the Jews, is not sufficiently established by any evidence which is before me. There does not appear any distinct proof, from the opinions of the Bethdin negatively, that consummation is absolutely necessary. They admit that Kedushim is betrothment, but that may be a nominal and verbal distinction only; and they say, that though there ought to be a written contract and benedictions, yet consummation after Kedushim, without a written contract, would be a perfect marriage; but they do not go so far as to say that a solemn engagement, not followed by consummation, may not be a complete and valid marriage. There are persons who are examined on the other side, and amongst others, Mr. Lyon, who says "that Kedushim alone is sufficient without consummation."

Observations have been made on the credit of these persons, as being in low situations of life; but it is the habit of the Jews to mix the pursuit of religious studies with secular employments, and they have not a numerous body of men secluded from the business of the world as we have. Some of their priests, without any degradation, follow likewise other occupations; this is the case also with some members of the Bethdin; there is no call upon them, and no expectation to the contrary, and therefore the weight of their opinions is to be considered, without much disparagement arising from this circumstance. The opinion of these persons is, that "without consummation there may be a valid marriage," although some intimation is conveyed, though not clearly and distinctly expressed, of the opinion of the Bethdin to the contrary. If their opinions were clear and [239] consistent on this point, they would be acted upon by this Court; but I have considerable doubts on the effect of the answers given by the witnesses on the question—Who are the Rabbies whose opinions are mostly followed by the Jews of the Portuguese community? I think I shall not transgress the limits of my duty, if I look beyond the evidence, but not farther than the evidence fairly leads, as this evidence is not clear and positive on the interrogatory—what are the Rabbinical authorities most attended to by the Portuguese Jews? The answer is, Maimonides and Beth Joseph.

To the character of Beth Joseph* I must acknowledge myself to be an entire stranger. The name of Maimonides is familiar enough to all literate persons as the name of a very learned and eminent scholar, who digested and abridged the Talmud. I understand that his Commentary is considered by many as almost of equal authority with the text. Of Beth Joseph, also, I am informed that the book is an authority of great weight, and that the author is above all exception, in respect to his integrity and erudition. These therefore are opinions which it would be highly desirable to obtain; for those who give them were persons who have delivered their doctrines on general principles, without looking to particular cases, and without influence of any personal nature. They would therefore be witnesses of the highest character, whose fame has diffused itself among Christian scholars, also, as well as

* Beth Joseph appears to be a commentary upon the Jewish law, composed by a writer of the name of Raburn Ashur, *infra*, p. 255. The terms of the evidence have been retained, though they may seem rather to describe a person.

Jews, and towards whom the Court would, upon every consideration, be disposed [240] to join in the general respect which is paid to them upon every question of this kind. A passage has been quoted from Maimonides, according to the translation of Mr. Selden, "*quamprimum puella acquisita est et sponsa facta, citrà coitum, citràque deductionem verè uxor esset, adeoque etiam ut quisquis præter sponsum, cum ea rem haberet, is ultimo supplicio, ut adulter, esset puniendus. Nec sine libello repudii, post matrimonium seu-sponsalia ejusmodi potuit ejici*" (lib. 2, c. 1). Selden says that this was the general doctrine, and refers to the Talmud, Misna, Gemara, and to the ancient and modern doctors.†

As to the other authority, that of Beth Joseph, I find that opinion quoted by Mr. Lyon in these words, "that a marriage by Kedushim alone cannot be invalidated;" from which I conclude, that if the ceremony of Kedushim has passed, and that only, it is a complete and perfect marriage. I will mention also what I find in Brower, that Philo, from whom Christians take very much their notions respecting the rites and ceremonies of the Jews, has a passage to the following effect:—"Sponsaliorum eadem quæ nuptiarum vis est, cum viri et uxoris nomina, atque alia quædam in conventu et frequentia propinquorum perscripta sunt." It is true that he adds, "Sponsalia nuptiæ non erant, sed nuptiarum promissiones;" but he adds further, "earundem virium quatenus conjugii vinculum, fides conjugii servanda, amor, dilectio conjugalis spectantur" (Brower, *De Jure Connubiorum*, lib. 1, c. 24, s. 2). Now, if one could depend on these opinions of Maimonides, as [241] delivered by Mr. Selden,* and of Beth Joseph, stated on oath by Mr. Lyon, I think they would be sufficient to decide this question, and ought to be received with perfect acquiescence.

I must here observe that another consideration occurs on this state of the evidence, which may be material: whether, in consequence of the Kedushim, supposing the consummation not to have passed, the man may not acquire the right to that consummation? It is stated by Brower, who may perhaps not be perfect authority on this subject, being himself not a person of that nation, that either party may be compelled to cohabitation, "*ad perfectionem matrimonii cogi sponus, sponsaque potuit*" (Brower, *ut supra*); but it has been said, that this Court cannot enforce that obligation, and that it will not attempt to exercise such authority. It is asserted, also, that there is no such authority among the Jews; but if, according to the ecclesiastical law of the Jews, a wife is obliged to comply with such a demand, I conceive there must be power in the Jewish Communion, by spiritual censures, or by some other mode, to compel due submission to it. I do not think that it is open to the supposition that such is not the law of the Jews, merely because it is not aided by the civil authority of this country, and that it may, on that account, be prevented from being carried into complete effect. On all views of probability, one is led to suppose that there must be such obligation, if the husband insists upon it. There is sufficient proof of the vinculum matrimonii; and what can the force of that be, unless it binds the parties at least to that cohabitation which pre-[242]-sumes the mutual use of each other's persons. For what inferior binding can there be?

It appears that a public celebration is not necessary, since the Hupa is as private as any ceremony can be. It is a mere declaration before witnesses, that the man is intending to consummate; and if he retires with his wife for that purpose, it is a completion of the marriage. There is then, on this state of the parties, more than the mere contract "*per verba de præsentì*" in the Christian Church,* which was a perfect

† For a summary account of these writings, and the general character of the writers, see Appendix, No. 3.

* In *La Costa and Villa Real* (25th June, 1733) there was a case of considerable notoriety at the time, brought before the Court of Arches, to enforce a contract of marriage between two opulent persons of the Jewish religion, from which it might be inferred that such a principle was not inconsistent with their own law.

It was a case of marriage contract *per verba de præsentì*, in which Dr. Bettesworth observes on some argument of counsel relating to the authority of the Court: "An objection has been made, which is new in my opinion, that this is an irregular application, because the case was between persons of a different religion, and therefore not to be done and solemnized in *foro ecclesiæ*, that is, as I apprehend, it could not be done in their way. It would be very extraordinary indeed if the Court was persuaded that it had full proof that the parties had contracted, or bound themselves to

contract [243] of marriage law, though public celebration was afterwards required by the rules and ordinances of the canon law. In the Jewish law it is not so, as the man appears to have had a vested right to call on the woman to submit, and no public ceremony was required for that purpose of consummation. Then here the man had the vested right, and there is no reason to suppose that there would be opposition to it; since it is stated, in the application to the Court of Chancery, that it was the apprehension of the guardians that it would be carried into effect.

This, then, is the footing on which these parties stand. If the opinion of Maimonides can be relied on, they are actually man and wife; and, according to the other opinions, it is to be presumed, that if the injunction of the Lord Chancellor was relaxed, they would be man and wife, without any further celebration. The man has the moral right, and I should presume also, according to the Jewish Church, a legal right to call on her to submit.

Having to decide on this question, which is perfectly new, and which may affect the rights of a great body of British subjects; feeling myself to be on novel ground, on which doubts ought to be entertained, and questions sifted with great caution, and being unwilling to proceed to the decision of this question without fuller information on this important part of it, I shall adopt the prudent measure of framing a few particular questions, which I shall address to the Bethdin, [244] and on which I shall request the assistance of the counsel in drawing up, giving either party the opportunity of taking any other opinion upon them. The substance of these questions will be First, whether, as stated by Mr. Lyon, it is the interpretation of Beth Joseph that the Kedushim alone constitutes valid marriage? Secondly, whether the Bethdin will declare if the opinion of Maimonides, as cited by Mr. Selden, is erroneous? Thirdly, whether, by the law of the Jews, a person who has entered into Kedushim has a right to demand from the wife that she shall submit to perform the duties of a wife in the way of matrimony? There may be others which I may find it necessary also to add to these, to satisfy my judgment more fully on this important question. When I have received the result of these inquiries, I shall endeavour to discharge the remainder of my duty towards the Court of Chancery, and to the parties.

4th Aug. 1795, 16th Sept. 1795.—On a subsequent day, this cause came on again, on the answers of the Bethdin, to the questions proposed by the Court; viz.:

1st. Whether it is admitted that Beth Joseph, who is proved in this cause to be of the principal guides of the Jewish Portuguese Church, has laid it down that the Kedushim alone cannot be invalidated?

2d. Whether the assertion of Maimonides, as cited by Mr. Selden, *Uxor Ebraica*, l. 2, c. 1, in which it is declared that the woman who has received Kedushim is verè uxor, truly a wife, although consummation hath not passed, is an assertion without foundation?

[245] 3d. Whether the passages in the Misna and the Gemara, referred to by Mr. Selden, in confirmation of this assertion, do or do not support the same?

4th. Whether a man, who has given Kedushim, has not a right acquired thereby to call upon the woman, who has accepted it, to submit to conjugal embraces? and whether the woman, who has received the same, is not bound in conscience, and in law, to submit thereto when duly called upon?

each other in marriage, and that, at the expiration of the time agreed on, he demands, and she refuses to perform. I say this would be fruitless, if the Ecclesiastical Court was not possessed of an authority to decide therein. But I think this Court is possessed of that authority; and I know not where else persons could have any remedy except here." That case is described in the libel to have been brought originally in the Court of Arches—on the part of *Jacob Mendes de Costa, of the Parish of St. Peter le Poor* against *Catherine de Costa Villa Real, of the Parish of St. Michael Hostis in Royola, London*. The question appears to have been discussed on the effect of the lady's promises to marry "at the end of the year from her husband's death, if her father should consent." The judgment of the Court decided that it was not an absolute promise, but conditional, and dismissed the cause.

The case was also the subject of an action at common law on the contract of marriage; when the Court held the sentence of the Ecclesiastical Court conclusive against the contract, 2 Strange, p. 661. See also *The Duchess of Kingston's case*, State Trials, 20th vol. p. 397.

5th. Whether a woman can be dismissed after Kedushim except for such reasons as are legitimate causes of divorce after marriage?

6th. Whether a man, who has married a wife by the ceremony of the Hupa but without a Ketuba or marriage contract, is entitled to demand the marriage fortune from the father or family of the wife?

7th. Whether a wife so married is entitled to dower?

Judgment—Sir William Scott. In the application of the principles of the Jewish law, and Jewish forms, to a question like this, which has been sent to this Court to be decided, it is not matter of surprise that some misapprehension or some apparent inconsistency should intervene. And I think there has been some confusion of this kind, which I am now enabled to explain. It was pleaded in the first article of Mr. Belisario's allegation, which was given in an early stage of this cause, that the ceremony, which constitutes a valid and legal marriage amongst the Jews, is performed in a manner which is there described. But, in a sub-[246]-sequent allegation, on the part of the wife, it is pleaded that the ceremony so described is not a valid marriage, but only "a betrothing;" yet, in the following article of the same allegation it is pleaded, that the factum, as pleaded by the husband, according to such ceremony, does not constitute a complete betrothment.

I think I find the solution of that apparent inconsistency in an allegation, which was afterwards introduced but rejected; and, I still think, properly rejected by the Court. It was there pleaded "that the Bethdin, a domestic forum of the Jews amongst themselves on matters of this sort, had pronounced the ceremony in this case to be a doubtful betrothment; which I now apprehend is to be explained by what was pleaded in the article of the allegation to which I have alluded—that it was not a complete betrothment. In the form in which this sentence of the Bethdin was pleaded, it was impossible to understand any thing more than that they had enquired into the proofs, and could not satisfy themselves as to the fact, and that it had been in that sense pronounced a doubtful betrothment. It was not stated that there was a distinction on this point, in the Jewish law, or that there was a particular species of betrothment known to the Jewish law under this description. It was merely stated as a doubtful fact, without any information to the Court, as to the rules of law, by which it was so determined. They said only "that they had examined into the case, and found it doubtful." That sort of information appeared to the Court to be perfectly useless, and on that account that allegation was rejected.

[247] But it appears now, when we have the evidence before us, and have drawn the business nearly to its proper point, that the plea, on the part of Miss Lindo, ought to have been framed in this manner. It should have alleged, not the law of marriage, as it was there * described, and which their own witnesses have disproved, by saying that the marriage may be good and valid though not regular and formal; but it should have alleged, "that a contract like that into which Miss Lindo had entered with Mr. Belisario, was not a valid marriage; that it was at most only a betrothment, and a betrothment of a doubtful nature, which was a description of betrothment known to the Jewish law, and defective in legal validity."

If a plea of that sort had been set up, and witnesses examined upon it, I should have seen the bearing of the question, and the party would have had the benefit of the principles and rules of the Jewish law on that point; whereas, by pleading a law which is erroneously stated, and a ceremony which is described by their own witnesses to be a doubtful [248] betrothment, without explaining in what that doubt consists, the plea left the Court without the necessary information, and it found itself under an impossibility of giving a definitive sentence upon it.

* "That the ceremony essential to and which constitutes an effectual valid and legal marriage among Jews is as follows, to wit, that a formal contract in the Hebrew language must be entered into by the bridegroom with the bride, according to the rites and ceremonies of the Jews, and the rules of the Jewish congregation to which the parties belong, and such contract must be drawn up by the priest or minister who marries them, and be signed by the bridegroom and two witnesses, and must be also entered and registered in a certain book or books kept for that purpose in the synagogue, or by the priests or ministers of such congregation, and the entry thereof must be signed by the bridegroom and two witnesses, which being done, the original contract is always delivered to the bride," *ut supra*, p. 225.

The law set up by Miss Lindo had been disavowed. It was necessary therefore to be informed what the law actually was, on which the party meant to rely. It appeared, after the argument upon the subject, and on due consideration of the evidence, that the main point in the case was narrowed to one or two questions—whether a nudum pactum, of the kind described, without consummation, was a complete marriage—and further, whether upon a nudum pactum of this kind the party had a right to compel the woman, by the Jewish law, to a surrender of her person in the way of matrimonial rights? because if this right attached to the husband by the Jewish law, I should be inclined to hold what has passed in this case to have constituted a valid marriage. These I consider to be the real questions between the parties. For I think it was proved very satisfactorily, that if the ceremony had been accompanied by consummation, it would have been, according to the laws of the Jews, a valid marriage. In order to obtain the necessary information on these points, I directed questions to be addressed to the tribunal of the Bethdin; and the answers to these questions have now been received. It is no objection to the free use of these answers that they are not upon oath; because I receive this as information on foreign law, upon which the Court is to determine, furnished by persons professing that law; and it is in the experience of all of us that such informa-[249]-tion is usually received in this form; and I learn on enquiry, from those who are well versed in the practice of the Court of Chancery, that it is the usual practice of that Court to receive information on foreign law in the same manner—not on oath—but on a reliance in the honour and integrity of the professors of that law. If there is any doubt, or intention to raise a doubt on this point, I could wish that it might be intimated before I proceed further; because the consequence would only be that the cause must be opened, and the opinions of these persons must be taken at great expence and under great delay, in the form of depositions. Finding that no objection is made, I shall proceed without reserve to use the answers which have been communicated to me.

The first question, on which I required further information, arose out of the deposition of Mr. Lyon, who had stated “that Beth Joseph was a guide of the Jewish Church of the highest authority in such cases:” and on the fifth interrogatory he says, “that according to the Jewish law given by Moses, the only ceremony necessary to constitute marriage, is that of the Kedushim, but that, since that time, the Rabbies have added the Ketuba; that in Beth Joseph it is said, that a marriage by Kedushim alone, that is without consummation, may be so far good that it cannot be invalidated.”

The answers which I have received come from the Bethdin of the Jews, and from two Rabbies. The Bethdin say, “that when Kedushim is given, with all the circumstances necessary for the performance of the ceremony, and the parties [250] labour under no disability of age, consanguinity, affinity, mental disability, or pre-contract in the female—and the ceremony was then performed in the presence of two competent witnesses—that ceremony is termed by the Hebrews positive and complete betrothment; but when any one of the circumstances, which are absolutely essential, is wanting, it is then no Kedushim at all, and is null and void. If, from the evidence of the witnesses, it cannot be inferred, whether all the circumstances necessary for the perfection of the ceremony, as where there is ground to suspect the qualification of the witnesses, or the ability of the parties; it is pronounced a doubtful betrothment, for it hath peculiar effects; and such a decision is a complete and excellent judgment from a Jewish tribunal, it being conformable to the Jewish laws. In each of these instances, respectively, the tribunal neither renders valid nor invalid, nor doubtful, but merely applies the law to the fact. In a fourth instance, it may be said that the Kedushim can be invalidated, and that is when the betrothment has been effected with all requisites, both in perfection of act, ability of parties, and qualification of witnesses; but if the parties, in the performance of that act, have trespassed on some Rabbinical injunction, and transgressed some bye-law instituted for the good order of society, those Kedushim are voidable, and can be invalidated by the Bethdin for there is an established rule in the Talmud that says, ‘Whoever gives Kedushim it is with the approbation and consent of the Rabbies:’ [251] the Bethdin can render the Kedushim invalid by alienating, ab origine, that property whereby the man effected the betrothment; or even if it were effected by carnal intercourse, by constituting that act an act of prostitution. Every Bethdin, of whatsoever time and place, may exercise that discretionary power; but we never assumed that authority because we do not find upon record any precedent, wherein our predecessors exercise

that power, though warranted by law. All that we have said here is not only the opinion of the author of Beth Joseph, but of every learned Jew."

It is then asserted by these gentlemen, as I understand them, that wherever there is a defect of ceremony, which the rules of the Rabbinical law prescribes, it is in the power of the Bethdin to set aside a marriage deficient in any of those particulars. One of the private persons who has been examined, Mr. Lyon, answers: "I know well that Beth Joseph says, 'that the Kedushim, if properly given, cannot be invalidated; and the woman is called Eshet-ish, which means the wife of him who gave her Kedushim for every legitimate point of marriage.'"

Mr. Ish Yemene also says on this subject, "that any man of knowledge will understand, that his opinion must be, that when any woman has taken Kedushim, in the presence of two witnesses, with her free will, it is perfect Kedushim, and she is called Eshet-ish." He cites certain passages in which it is laid down, in Beth Joseph and in others, "that what constitutes marriage is the Kedushim." The witness concludes, "that from all this it is proved that, according to the [252] opinion of Beth Joseph, no Kedushim properly given can be invalidated."

The second question, or rather the second and third, which may be considered together, arose out of the depositions of Mr. Ish Yemene, who refers to Maimonides as an author of very high authority; and the Court was much impressed with a passage from his works, said to be found in Mr. Selden, in which is described the particular position, on which I wished to be informed—"Whether a woman, having received Kedushim, was a complete wife, notwithstanding matrimonial intercourse had not passed?" Mr. Selden refers to certain passages as well in the Misna as in the Gemara. The answer to that question is in these terms: "The assertion made by Mr. Selden that the woman, who has received Kedushim, is verè uxor, is unfounded; for the faithful translation of the Hebrew words is an appellation applicable both to a woman who is simply betrothed, as also to a married woman, wife or uxor. But the special name for a married woman is, in the Rabbinical style, Nessua, taken, nupta; and in the Scripture style, Behulah Behal, Lorded of or by a Lord. Mr. Selden is right in what he asserts, 'that if any man, except the betrother, should have connexion with a woman, though but simply betrothed, he would incur the punishment of death. And also that to be released she must have a divorce; for in this respect she is like a married woman.' It is merely as to the punishment of death that Mr. Selden refers to the Misna and Gemara, and not to the assertion of verè uxor; for, on that very passage of the Talmud, as in every other passage of the same, the Talmud calls the woman, who has accepted [253] Kedushim, Mehorassa, or Arussa, betrothed, but not Nessua, taken, as corresponding with the English word married."

I understand then from this representation that there is a word applicable both to a betrothed woman and to a married woman; but that there is also another term peculiar to a married woman; and that Mr. Selden is understood to say that a woman so betrothed is verè uxor, to the effect that she cannot be separated but by divorce, and that a person having intercourse with her commits adultery, and becomes liable to the penalties and punishments attending it; but it is not understood to convey a general assertion that she is verè uxor to all intents and purposes.

The private persons who have been examined on this question give rather a different account. Mr. Lyon is unacquainted with the Latin tongue, and all that he can say is "that Eshet-ish means wife of him that gave the Kedushim, and she is prohibited to all the world." Mr. Ish Yemene is ignorant of the Latin tongue likewise, and confines his answer upon this question to his belief of the authenticity of the citations of Selden, so far as he collected them.

The next question which appears to go to the point in issue was "whether a man, who had solemnly given Kedushim, has not a right to call on the woman to submit to conjugal embraces, and whether she is not guilty of a breach of marriage if she refuses to submit?" The answer of the Bethdin is that "a man who has given Kedushim is so far from having a right to call upon the woman, who has accepted it, to conjugal embraces, that, on the contrary, the parties [254] are forbidden to have connubial intercourse in the state of betrothment, and would commit a sin, and would incur corporal punishment by so doing; that the right which the man acquires in the betrothed woman is that he can demand of her to prepare for being admitted to the matrimonial state within a convenient time; and when that period is expired, it is expected that she will surrender herself to enter the Hupa, which constitutes marriage;

but she is not bound in conscience and in law to submit thereto. The consequence of non-compliance are that she will be called before the tribunal, and interrogated why she did not fulfil the marriage promise? If she says that her non-compliance proceeds from aversion, and that she detests the man, then he is ordered immediately to give her divorce, and would be legally compelled so to do in case of refusal. But if she alleges frivolous excuses only, the tribunal will admonish her, and if that proves ineffectual, she is to be called out daily in the seminaries and synagogues for four successive weeks, and if she continues intractable, at the expiration of twelve months the man will be compelled to divorce her."

According to this explanation, notwithstanding she has received Kedushim in the most solemn form, she may assert her dislike, and the man will be compelled to divorce her. If this be the case, undoubtedly it is impossible to say that there is a vinculum conjugale existing between the parties: it is a contract which binds to nothing, and is determinable at her own pleasure.

[255] It is stated, indeed, that there is a difference of opinion amongst some of their ancient doctors on this point; but the authorities on which they principally rely warrant the construction which is here given of the Kedushim and its legal effects. This is the opinion of Rabbi Isaac Alphassi, the first of the three chief guides on whose authority all religious matters are determined. Maimonides, who is the second authority, says the same, and also the Jewish doctors, some contemporary, and others subsequent to the said Alphassi and Maimonides. But Raburn Ashur, who is the third of the chief authorities, and the author of Beth Joseph, with some others differ and say "that when a woman will not comply the man cannot be compelled to divorce her, but merely requested thereto; but that no coercive measures can be used to compel her to enter the matrimonial state; for even a married woman who should recede from conjugal rights would incur no punishment as for a transgression, but she would lose only her maintenance, and the dower with which she had been endowed."

The Bethdin describe the opinion of the leading doctors to be that the man may be compelled to divorce her, and I understand them to concur so far as to state their own opinion to be that the man cannot compel the betrothed woman to surrender her person; but, on the contrary, that she may disavow the engagement, and, on making a public disclaimer, will be released under the authority of the Bethdin.

Most certainly this is a very different account from that which we have received from others, particularly from Mr. Lyon and Mr. Ish Yemene, [256] who both say "that he has a right to demand his wife, and call on her to come to his house to be at his command."

These persons refer to authorities, and so do the Bethdin; and I must suppose them fairly cited, though, I confess, these opposite authorities do not much enlighten me. Mr. Ish Yemene goes on to state "that the woman who rebels against her husband in conjugal points is to be proclaimed on Saturdays in the synagogue, and the Bethdin ought to admonish her that if she does not, within four weeks, submit to her husband's commands, though her dower be very considerable, it shall be lost, and that as well in the case of the betrothed as of the wife." Maimonides says the same, "that a betrothed, whose time has arrived, and does not submit to her husband, is under the same law which has been described respecting the wife." Rabbi Samuel says "that unto the betrothed the Bethdin give thirty days, and if the relations should prevent the woman from submitting, the like thirty days will be allowed to them, and, at the expiration of that time, if the order of the Bethdin is not obeyed the punishment of excommunication will be denounced against them."

Another question was "whether, after Kedushim, a woman can be divorced except for such causes as would be causes of divorce after marriage?" I think the answers all agree in stating that there is no assignable difference, but that great power is given with respect to divorces in one case as well as in the other.

The sixth question referred to the rights of property; upon which the Bethdin say, "This question [257] we must analyse, because it comprizes several ideas; we deem it necessary first to describe what Hupa is, lest it should be misrepresented. According to Maimonides and the author of the Beth Joseph, this ceremony is—"that the man brings the woman, whom he has previously betrothed, to his house, sets her aside for his special end, and is united with her." Which bringing home appears from the Talmud to be prescribed to be done in a public and ostensible manner. The

bringing home, however, and this setting aside and being united with her is the very essence of marriage, though it be not solemnized by the nuptial benediction nor marriage contract; but it is ordained that the solemnization and the Ketuba, or marriage contract, should precede the marriage, which is never omitted when things are done in a regular and proper manner. Some, however, describe the Hupa to be in the following manner:—The bride and bridegroom are introduced under a pavilion or canopy, attended by the relations and friends; and that the espousal and nuptial benediction being said constitute the Hupa. This is the customary mode used in this country and most other countries with which we are acquainted. We are of opinion that either this or the other mode will constitute Hupa: the latter because it is the one generally adopted, for we greatly revere customs universally and anciently established; the former because it is laid down by the great Maimonides and the author of Beth Joseph. When either of these modes of performing Hupa has been observed, though consummation has not passed, the woman is married, provided [258] she is in a fit state of receiving connubial embraces; otherwise, though she be brought home, she is but Arussa, or betrothed." In another place they say, "As to the relation that the Ketuba, or marriage contract, has with respect to the marriage fortune, we must observe that nothing is called Ketuba but what a man binds himself to give to his wife as a dowry; but what the woman brings to her husband in marriage is called Nedoniah, donation, and the right of the man in this donation entirely depends on the articles of agreement between the parties previous to their entering into the married state. These articles are either specified in the Ketuba by reference to another written document made for the purpose, or they are expressed in the very Ketuba. But if, previous to entering into the married state, no stipulation was made expressing what right the man should have in the property which the woman possesses, or becomes entitled to at her marriage, that property, whether moveable or immoveable, passes with the woman in potestatem viri, for the husband to enjoy the produce thereof during his natural life, and if he survives the wife, continuing her husband till the time of her death, he becomes then master of the principal. Now since Hupa, as above described, constitutes marriage, even without Ketuba or marriage contract, the husband obtains a right in his wife's property either according to previous stipulations made for the purpose, or in the produce thereof, if there be no such written agreement."

Upon the seventh question they say, "That having laid it down that the Hupa is the very [259] essence of marriage, consequently a woman so married, though there be no Ketuba, is entitled to a stated dowry of fifty shekels if a virgin, or twenty-five shekels if otherwise, this being one of the ten rights that she can claim of her husband, whether he bound himself to fulfil them by a written contract or not."

With respect to any question of property, I think it was proved by the general evidence that the rights of property did not necessarily follow the Ketuba. The doubt then was whether there might be a right to the person of the wife, though not to her property, which might constitute the vinculum matrimonii, and give him a right to call upon his wife to fulfil it, either by his own authority or by resort to the Jewish tribunal which has jurisdiction in matters of this kind.

Upon this important point there is a difference of opinion and great opposition between the witnesses. There is, on one side, the Bethdin positively asserting that the man has no power of his own, nor any power to call in the authority of the Bethdin for that purpose; but that he is compellable to give up the contract, if the wife persists in her aversion to it: on the other hand, there is the opinion of private Rabbies that it is otherwise. Under this difference of opinion on a point which goes to the very root of the question, how is the Court to decide, and to which authority is it to adhere?

It is to be observed that the Bethdin is the tribunal which administers the law on questions of this nature, as it exists in this country, and therefore must be presumed to understand it. It is very possible that the Jewish law may, like other [260] systems of law, receive different modifications by the particular laws of different communities. There are principles of marriage law generally prevailing in Europe; but the canon law subsists under very different modifications in different countries, according as the different institutions of the countries in which it is received operate upon it. If I am to enquire into the operation of a foreign law, I must look not to the more general ceremonies, but to those of the particular countries respectively.

It appears that Mr. Ish Yemene has been a professor of Jewish law at Hamburgh: it is possible, therefore, that he may speak according to the particular modifications of the Jewish law in that country, or it may be that there are certain modifications of the Jewish law in this country which are best known to those who are in the habit of administering it here.

Supposing, therefore, that the attainments of knowledge are equal in the individuals, I think the balance of the authority must incline to those who are the professors of the law as it is administered in this country. I must consider also that the opinion of the Bethdin is a judicial opinion, and not merely the opinion of an individual, the weight of which travels no further than the reputation of his own personal attainments. It is an authoritative opinion, which not only conveys knowledge, but is also sanctioned by the qualifications of probity, learning, judgment, and discretion, which must be presumed to have recommended the individuals to the judicial situations which are entrusted to them.

The Bethdin say, as I think I should, that this is a contract absolutely determinable at the will of [261] the woman; that, if called upon by Mr. Belisario to fulfil the engagement, she has nothing to do but to say that she detests him, and does not choose to continue his partner. If that is so, I should have great difficulty in saying that there is an absolute vinculum subsisting between them; I must therefore pronounce, if this information is correct, that he has no right to consider himself as entitled to the character of husband.

It is possible there may be an error in the determination. I am sensible of the extreme difficulty which is to be encountered upon a subject so far out of the reach of the ordinary studies of this profession. But it is my comfort that, if there is error, it is not mine. It lies with those who have given this information—who are bound to give it conscientiously, and I am bound conscientiously to receive it. If I was to determine the question of marriage on principles different from the established authorities amongst the Jews, as now certified, I should be unhinging every institution; and taking upon myself the responsibility, as Ecclesiastical Judge, in opposition to those who possess a more natural right to determine on questions of this kind. On these grounds I am of opinion that Mr. Belisario has not proved his case, and that Esther Lindo is not to be considered as his wife. The words of the decree must be simply that she is not the wife of Aaron Mendes Belisario.

Affirmed on appeal, by the judgment of the Court of Arches, which is printed in the Appendix, with some additional papers, as further elucidatory of the general subject of this case.

[262] HODGKINSON, FALSELY CALLED WILKIE v. WILKIE. 4th Aug., 1795.—In nullity, by reason of minority, and want of consent—what consent required. Consent, once given, how to be retracted.

This was a case of nullity of marriage, on the part of the wife, by reason of her minority, and the want of consent of her mother.

Judgment—Sir William Scott. This is a case in which there has been a very considerable quantity of evidence adduced and much argument bestowed, and that on the authority of parents to give consent, which is not very applicable to the case. Looking only at the bulk of the depositions, it might be considered as a case of difficulty; but the real point is very clear and lies within a very narrow compass. The suit is brought by Miss Hodgkinson to annul her own marriage, under the provisions of the Marriage Act, which is made, I will not say in derogation of the liberty of marriage, but as a restriction upon it. As such, it has always been held right that it should be strictly construed. It is enacted that the marriage of minors, celebrated without consent of parents or guardians, as specified in the Act, should be invalid.*

* The consent of parents to the marriage of children, in patria potestate, was required by the Roman law. "Nuptiæ consistere non possunt nisi consentiant omnes id est qui coeunt—quorumque in potestate sunt. Dig. lib. 23, tit. 2, § 2. Cod. 5 tit. 8, § 2, 5." The early councils and canons of the Church of Rome strongly upheld the same principle. But it was relaxed by the Council of Trent, sess. 24, and no considered to constitute nullity. Pothier, tit. Mar. part 4, ch. 1, sec. 2. See also Bishop Taylor on the Power of Fathers, 14 vol. 201.

The *Reformatio Legum*, art. 4, de Matrimonio, adopted the principle of nullity

All the circumstances, however, on [263] which that conclusion depends, must be fully proved. The onus probandi lies on the party suing to annul the marriage, who must prove clearly not only the minority, but also the want of the requisite consent. In the present case both questions arise. It appears that the husband is an apothecary of the dispensary at Newcastle, and that the wife is the daughter of an exciseman of that place. It is clearly shewn that Wilkie was very intimate with the father during his life, and, after his death, with the widow and her daughter, who received many kindnesses and much assistance from him. This fact derogates in no inconsiderable degree from the testimony of the mother, who has taken on herself to deny it, though it is incontestibly proved to the perfect satisfaction of the Court. It is admitted, because it could not be denied, that the connexion commenced with the entire approbation of the mother; that Mr. Wilkie was considered as her intended son-in-law; and that she expressed not only approbation but anxiety that it should take place at an early period. At last it did take place, by virtue of a licence obtained on the oath of the husband, in which he swears that the young woman is of age; there is no appearance of any consent on the face of that instrument. It is admitted that she wanted only seventeen days of being of full age, and there is [264] nothing that shews whether that fact was known to the husband or not; though it may reasonably be presumed that, as the time of full age was so nearly approaching when the licence was taken out, he would not have incurred the guilt of perjury for any such object, when he knew or had reason to think that he had the full consent of the mother. It is not contended that any particular dissent was then signified; and it is proved that the mother was in the habit of throwing out in conversation that her daughter was of age: there is therefore reason to suppose that he really thought so.

It is true, however, that, if the fact is clearly proved, the Court can make no exception on that account, as it is merely ministerial in declaring the result. In a case so clearly proved, I shall abstain from going through all the evidence on that point, since I shall consider the question of consent first; if that is established, all other considerations will be superfluous. On that part of the case I think the evidence is sufficient. The mother has been examined; it appears that she is a reluctant witness, and has deposed nearly in the terms of the allegation "that she did not give consent to this marriage." That the parent is a material witness is not to be denied; and the Court will always pay due attention to such evidence; but it must attend, at the same time, to all circumstances relating to the credibility of the evidence; to the probability of the circumstances stated, the credit of the person, and the degree of support or confirmation that it may receive from the testimony of others.

As to the conduct of the party, if the question depended merely on that, there is strong evidence [265] that her heart and mind went along with this connexion. The man lived on terms of intimacy and friendship with her; was admitted into her family, with every encouragement to his addresses; so that, if there was any dissatisfaction entertained, it must have been upon a very sudden change. It is undoubtedly true that consent may be retracted; since the parental authority continues up to the time of marriage. This principle, however, must be taken with reasonable limitations; for it cannot be maintained that this power can be arbitrarily resumed at any moment: that if a parent gives consent on Monday for a marriage the next day, and it is deferred, it would be necessary to renew that consent, or that it would be considered as wearing out or expiring by mere lapse of a short time. When consent has actually been given, it will be necessary that dissent afterwards should be distinctly expressed, and that it should be proved so to have been in the clearest manner; for it would be a most alarming circumstance if, from mere brooding dissatisfaction in the mind, not expressed, the validity of a marriage to which consent had once been given could be attacked.

These are the observations which I think myself justified in making on the probability of the transaction. On the credit of the witness herself, I feel the weight of the observations which have been made; for I am satisfied that she has not deposed with that regard to impartiality and truth which are necessary to place her before the Court in the character of a pure witness. Then taking the evidence in this view of its own improbability, and the credit of the witness, I am next to inquire

But it was never actually established in this country till the st. 26 Geo. 2, c. 33, according to the restrictions therein contained.

how it is affected by the other evidence in the cause. There [266] is a great concurrence of evidence, which proves not only her approbation, but the anxiety which she expressed on the subject, and that up to the very moment of the fact of marriage. These witnesses prove the expressions of satisfaction by the mother, both immediately before and immediately after the ceremony.

The witness Scape says, "that about a fortnight before the marriage, the mother requested himself and his wife to intercede with the daughter to marry Wilkie, and expressed her disapprobation of her conduct in giving encouragement to another person; that about three or four days before the marriage he informed her that it was to take place, and that she expressed her satisfaction at it, and said 'that it ought to have taken place long before.'" It appears, therefore, [that she was informed of the place, of the time, and of the person by whom the ceremony was to be performed, and that she signified her approbation at the approaching event. Then what was her conduct immediately after the ceremony? She drank to her son and daughter, wished them health and happiness, and thanked the witness and his wife for the trouble which they had had. Mrs. Scape, if her testimony is to be credited, and I see no ground of imputation, confirms her husband. She deposes that "about a week before the marriage, the mother said that Mr. Wilkie was ill, and that she believed he was made worse by the encouragement which her daughter gave to another person; that she desired her to go to her daughter and hear what she had to say for herself, for she was desirous that she should be married, and the sooner the better. She said, [267] that her daughter would not be married at Newcastle, but at some distant place; and added that if it could not be at Newcastle, it could not be any where better than at Ovingham; that the mother asked when the marriage was to be? and that the daughter told her the day."

By what sophistry the mother has imposed on her own mind is to be collected, I think, in another part of the evidence. She seems to have thought that the requisite consent was a formal act, and that it must be in writing; since she told her eldest son that, though she had given her consent, it was not in writing, and no one could prove it. She told Dr. Clarke, also, that neither Wilkie nor her daughter had ever asked her consent, meaning clearly a formal consent; but that if they had asked she should have given it. Then how can the Court adopt the suggestion of any change of purpose? I feel that it would be perfectly unnecessary, and that it would be oppressing and encumbering a single fact by an unmerciful accumulation of evidence if I was to go through the depositions of other witnesses, who prove a conduct totally contradictory to the case set up. I think there was clearly such consent as is sufficient to establish the marriage; and that if I was to pronounce otherwise, I should invalidate every marriage in which there had not been a formal and written consent.

It will be unnecessary to consider whether the young woman was a minor or not; I will therefore content myself with saying that if the consent is proved, as I think it is, the minority is not proved on the evidence adduced—opposed, as it is, to the [268] contrary declarations as to the time of birth. On every part of the case, then, I am of opinion that there is a fatal defect, on the point of consent, by opposite evidence, and on the minority, in the insufficiency of proof, which would restrain the Court from pronouncing a sentence of nullity on such evidence.

The Court is bound, I think, to say a word or two on the conduct of the cause, which it would not be decorous to pass over. There has been a most unwarrantable attempt to obtain evidence by purchase, which calls for more than mere censure. I hold it to be my duty to reserve it for further consideration whether an application should not be made to some other Court to correct an attempt of this nature, which is highly derogatory to the administration of justice, and what, if passed over with even verbal censure, may draw upon this Court imputations unfavourable to the purity of its proceedings.

I think the wife has failed in her proof, and likewise in her duty; and I can only hope that it has been by some unhappy mistake alone that she has been led to attack a marriage bond, which the laws and the religion of the country hold to be perfectly valid; and that she will see the necessity of returning to her duty under the connexion which she has formed.

[269] *ELWES v. ELWES.* July 13th, 1796.—Divorce by reason of adultery of the wife decreed. Objections to the evidence overruled.

This was a case of divorce, by reason of the adultery of the wife, in which the merits of the case, and the objections arising on the evidence, are discussed at length by the Court.

Judgment—Sir William Scott. This is a proceeding for a separation, by reason of adultery, instituted by John Elwes, Esq., against his wife. The marriage took place in 1789, the parties cohabited together, as it should appear, upon terms of matrimonial affection, at least during the latter part of their joint residence, until September, 1793, when cohabitation ceased. It was some time after that the cause commenced in this Court. Various pleas have been given in—a libel on the part of the complainant: a defensive plea on the part of Mrs. Elwes, a plea stating a verdict which has been obtained in an action at common law, two pleas exceptive to the credit of witnesses on each side, and one allegation restrictive of the credit of one witness, examined on the part of Mrs. Elwes, whose credit had been impeached.

The pleas have been thus numerous; many witnesses have been examined; and the cause has been argued with much zeal and industry. The Court has been called upon, by more than one admonition, to apply much caution in the determination of this cause. I hope and trust that the opinions which I have occasion to deliver in cases of this kind are in general formed with due deliberation [270] and a sufficient attention to the obligations of that office which I happen to fill. Having said this, I must add that in very few cases have I had less hesitation and fluctuation of opinion than in the present. It appears to me that the real merits of the question reside in few particulars, and that these particulars are not liable to much serious doubt or nice observation, and that they lead to a conclusion which resides at no great distance from such premises. There are many parts of the case which unquestionably are pretty remote, but those parts, perhaps, I shall not find it necessary to travel into with any minute exactness. The persons with whom Mrs. Elwes stands charged are two, a Mr. Egerton and a Mr. Harvey, persons, it should seem, bred to the law, living in different law societies. There are several articles of the libel, given on the part of Mr. Elwes, which state the commencement and progress of the acquaintance which this lady had with these two persons from the year 1791, and which lasted with much general, and it is contended with much suspicious, familiarity till the time when he separated from his wife. The latter parts of the libel state what in our technical language are called approximate facts, or facts from which the legal conclusion of adultery is immediately deducible.

Upon this libel four persons have been examined, and the whole support of the accusation is comprized within their testimony; for if they do not prove sufficient, there is an end of the charge, nothing farther arises; on the other hand, if they prove sufficient, they will establish the legal conclusion, unless the legal effect of their testimony is taken off by something which either destroys it [271] directly by contradiction, or which depreciates it by diminution of the credit of these witnesses, or defeats it indirectly by the opposition of other facts, consistent with these in point of truth, but leading to a different legal conclusion; such as a connivance, and still more an active seduction on the part of the husband, before the injury was committed, or a condonation of it, after it came to his knowledge. Three of the witnesses are examined to general familiarities and specific facts; one to general familiarity only.

It has been truly observed that the libel goes a considerable way beyond the proofs; facts are charged which can hardly be said to be proved at all in the manner they are stated in the libel; and there are other facts which, upon the evidence, turn out to be slight and insignificant. Having said this, I may add it is no more than may be said in almost every case of this nature. The complainant states his case from information and report, and in these matters of mere general circumstance and habit there is much room for misapprehension, and for over-coloured description. It is a matter of daily observation in such cases that circumstances find their way into the libel, which, upon further examination do not carry with them much serious importance; but it is a different question whether there is not sufficient proved upon this head, to excite the alarm of the Court, and to prepare it for the reception of evidence that may be more directly demonstrative of guilt. The general evidence, I think, has that effect; and I state the result of it without exaggeration when I say that, to my mind, the following particulars seem to be sufficiently established. That Mrs. Elwes, a

married [272] lady, did admit these two young men to her society in a manner that is not free from suspicion and censure. They were not absolutely unknown to her husband, but they had no intimate acquaintance with him; they were rarely in his company; their society was never cultivated in any degree by him, nor was it in any manner recommended by him to his wife. However, in his absence, they visited her with great frequency and familiarity: it appears that they were each of them separate and alone with her in the absence of the husband; that they breakfasted and dined with her alone; that she occasionally called upon them in their chambers; and that, when she met them in the street, she got out of her carriage, and ordered it to wait, or dismissed it entirely, and continued to walk with them; that she rode out with them, and they waited for her at the end of the street, and that she ordered her servants to conceal from her husband their having been in her society; that she paid the turnpikes herself, or ordered them to be paid, in order to carry on the deception; in short, that she passed much of her time with them, not only unknown to her husband, but with an anxiety that it should continue unknown to him, and with a degree of secrecy and clandestinity respecting him, which, if it is not criminal in itself, is so closely connected with such habits as to give a high degree of credibility to any thing more grossly criminal that is stated to be the result.

Having taken this general view of the evidence of the sort of familiarity which subsisted between these gentlemen and this lady, I cannot but think that it goes much beyond those limits which even the forms of the world allow in such cases; and [273] if a wife will form connections of this nature, and will cultivate them in this manner, I cannot think she has much right to complain of the want of candour in her husband, or in the world, if suspicions are entertained extremely to her disadvantage. With respect to the freedom regarding these gentlemen, which I think no man can state to be consistent with the duties of sincerity towards the husband, and with those duties of caution and prudence with respect to other men, which the character of a wife, even in the most relaxed apprehensions, impose upon a married woman—enough is proved, in this stage of the case, to render highly credible any evidence of a more substantive nature which I may find in the progress of the cause. Some contradictions have been attempted to be pointed out in the evidence; but they are not of that nature which in any degree destroy the proper harmony of the witnesses.

The evidence is comprised in the examinations taken upon five articles of the libel: I shall only state particularly those which are supported by concurrent testimony. The eleventh, which stands upon the single evidence of Collicott, and in which an anachronism has been pointed out, is to this effect: "That one evening, about seven o'clock towards the end of the year 1792, as he was over the stables belonging to his master's house, he looked through the window into the back parlour, and he then saw, by the light of a candle, Sarah Elwes and Mr. Egerton alone together in the said room; that he saw Mr. Egerton kiss his mistress several times, and take other indecent familiarities with her; that he continued looking at them for about five minutes, and then [274] went away." The next article stands likewise upon his single testimony; for he says, "about five in the evening of the 18th of August, 1794, he went up into the same room over the stables, and that he very plainly saw Mr. Harvey sitting upon a sofa in the room, and his mistress sitting in a chair close to him, leaning her head towards him, and that apparently she kissed him several times: he mentions several other acts of gross familiarity; that he continued his observations, and saw Mr. Harvey and his mistress close together on the sofa; that she kissed him several times, and that they continued upon the sofa for some minutes." I suppose, on this evidence, I need say no more than that, if it is credited, the facts are of a nature from whence the legal presumption of adultery may be inferred.

My observation, however, ought particularly to be directed to those facts on which I have the benefit of concurrent testimony, viz., on the thirteenth, fourteenth, and fifteenth articles of the libel. Upon the thirteenth article Collicott deposes that "on the 21st of August, 1793, in the morning, as he thinks, suspecting that there was somebody with his mistress, he went up into the room over the stables and saw Mr. Harvey and his mistress sitting close together on the sofa; he saw them kiss each other several times, and his mistress sit on Mr. Harvey's knee; that he continued looking at them for about twenty minutes; and after quitting the place for some minutes, he returned again, and saw them still in the same room alone together, when he saw a great deal more familiarity, which it is not necessary for me to repeat

This witness is sup-[275]-ported by the testimony of John Taylor upon this article, and he deposes that "on that day of the month of August, as he was in the stables, he was called up stairs by the groom," a circumstance which is adverted to by the other witness; "that he then saw Mr. Harvey and Mrs. Elwes together alone in the drawing-room, and Mr. Harvey lying on the sofa therein, and Mrs. Elwes sitting in a chair close to him; that he saw them kiss each other, and Mr. Harvey laid his hand upon her neck; that being under the necessity of getting his carriage ready, he went away."

Now, with respect to the contradictions that counsel have endeavoured to point out in this evidence, it has been urged that one of the witnesses states that it was, as he best recollects, in the morning; the other, that it was in the evening; but I think both these witnesses may speak true, speaking at this distance of time, and with a want of precision which they both avow. The difference in that respect will not materially affect the substance of their testimony. It is said that Taylor was not there on the second occasion. Taylor is certainly not examined upon that article of the libel, though he is vouched as being present; whether there is a mistake in that respect I do not know; but I am satisfied upon the evidence that they were present at one of the times stated in one of these articles in society together, and that they did see what they jointly depose.

The 14th article states a subsequent fact to have passed when Collicott and Taylor were together, to which the former deposes that "on the 2d of September, being in the stables, he went up stairs, [276] and plainly saw his mistress sitting upon a gentleman's knee on a sofa, and saw him kiss her several times, and pull her about, and take other freedoms with her; that he called up his fellow witness, John Taylor, and a Mr. Wild, and that they all saw the familiarities described." John Taylor is examined upon this article, and deposes, "that he looked into the same room, which is the back drawing-room, that he there saw them alone together, that he saw them kiss each other several times, and Mr. Egerton take Mrs. Elwes round the waist, and that after being some minutes together, they went out of the room."

It was observed that the facts to which these witnesses depose are not precisely and identically the same; that the situation and attitudes of the parties, as related by one of the witnesses, are different as related by the other. It seems a sufficient answer to that to observe that the parties were a considerable time together; that the observations were made at different intervals, and that all the attitudes spoken of are ejusdem generis, and such as lead to a conclusion that the facts followed to which such gross familiarities are natural preludes: the variations are no other than may be expected to take place in such an interview. The last criminal fact is stated on the fifteenth article, which is deposed to by Collicott, supported by another witness of the name of Lings. He says "that, on the 15th of September, Mr. Elwes set off in his carriage for his country house, leaving his wife then ill in bed; that about ten minutes after his master was gone, Elizabeth Plumb went out, and remained for about ten minutes, and that half an hour afterwards, he [277] being in the street, saw Mr. Harvey come to the door, who was let in by some person, without either ringing the bell or knocking; that he went to the room over the stables, and from this station his observations were of a similar nature to those already noticed by the Court." In corroboration of this, Ann Lings is examined, and deposes, "that between twelve and one o'clock on Sunday the 15th of September, her master set off from his house in London; that Williams went out of the house and returned; that witness went into the stables, being called by Collicott; that she saw very plainly Mr. Harvey and her mistress sitting alone in the room close to each other, Mr. Harvey having his hand either round her waist or neck, and saw those familiarities pass between them repeatedly."

Now, looking at this evidence of Collicott and Taylor, and admitting the possibility of a mistake, in one of those witnesses, with respect to the time of day and evidence, I should surely carry that caution, which has been so strongly recommended to me, to a degree of absurd and unreasonable scrupulosity, if I did not conceive that they necessarily drew with them the conclusion that these parties were living in a criminal intercourse with each other. I suppose no man who hears this evidence stated, and gives credit to it, can think that I ought to stop short where the witnesses stop and not go the length of supposing that something passed which the witnesses have not literally described. Upon the effect of the evidence no sufficient question can be

raised. Two exceptions, however, have been taken to its sufficiency: [278] first, that the witnesses themselves do not go the length of venturing to state that the criminal fact did take place. Secondly, that a witness is vouched as having been present upon several of these occasions, a Mr. Wild, who has not been examined in the cause.

With respect to the first objection, I take it to be a position perfectly new that the Court is bound by the defective apprehension of the witnesses. It is the business of the witnesses to relate facts and not to draw inferences: that is the business of the Court; and it would be a monstrous proposition indeed to assert that the merits of a case of this nature are to depend, not upon the narrative, but upon the logic of the witnesses. Undoubtedly the libel must plead the conclusion of adultery, because unless it is pleaded non constat that it may not be an action for mere solicitation of chastity. But if the party does aver it, and he proves only proximate acts, he proves unquestionably the whole of his averment in the libel. If a witness stops short, and declines or omits to state his belief of the ultimate consummation of the act, it is very true that the Court is put upon its guard to see whether there is any ground for a scepticism of that nature: but if the Court sees that the facts are of such a nature as will justifiably, and almost necessarily, lead to the conclusion; the scepticism of the witness, even if it really exists, signifies nothing. The Court representing the law draws that inference which the proximate acts unavoidably lead to; and therefore if the witnesses, even in this case, hesitated and paused about drawing that conclusion, I should not conceive myself in any degree limited by their [279] hesitation upon that subject.* The fact however is this, the witnesses are not examined at all as to their belief: an interrogatory is simply put to them, whether they will take upon themselves to swear positively that the fact of adultery has been committed? They conceiving, I presume, that they were bound to speak to their observation and not to their belief have, in answer to that question, simply deposed that they cannot take upon themselves positively to swear that the fact of adultery had been committed; meaning thereby nothing [280] more than this, that no fact of that kind had passed under the observations that they had the opportunity of making.

The other objection is that a third witness is vouched, who is not produced and examined in the cause. In the first place, it is by no means necessary that every person, who was present at a transaction, should be produced by the party who prefers the charge: even the cautious jealousy of our law establishes facts of this kind by the testimony of two witnesses at the utmost. That there could be any intention to dissemble the presence of this witness, or to withdraw him from the knowledge of the Court, cannot be suggested; because he is vouched by name by the witnesses who are examined; and I cannot help thinking that it is an observation which does not merit to be treated with that degree of slight which was thrown upon it, that it

* The nature of the evidence, on which cases of this description have been universally considered, is stated by commentators in the following terms:—*Et ratio est, quia, cum adulterium sit ex illis criminibus, quæ in abdito loco & omnino occulto admittuntur, est difficillimum probare, nec vere probari potest, sed ex probationibus petitis et presumptionibus concluditur. Unde fit, ut non tam exactæ probationes petendæ sunt, ac in aliis criminibus, quæ oculis patent, palamque perpetrantur.*

Sed non sufficit quæcumque suspicio probabilis, sed desideratur suspicio violenta, quia hæc sufficit ad condemnandum. Est tamen cognitum certitudine morali, et ex urgenti præsumptione, quæ virum prudentissimum ad judicandum adulterium induceret. Sanchez, lib. x. disp. 12, p. 374.

Est siquidem fornicatio et adulterium de genere horum delictorum quæ clam et abdite solent perpetrari, ut vix de iis certo constare vel probatio eorum indubitata adduci queat—Quare in occultis ejusmodi delictis probatio conjectura pro concludenti habetur—Neque criminis certitudo alia requiritur quam quæ haberi potest. Carpzovius, Definit. Eccl. lib. ii. tit. 12, def. 209.

Non enim potest verè dici fœminam adulterii ream esse ex sola suspicione, ita ut suspicio illa pro crimine adsumatur; bene tamen pro judicio et argumento adulterii, ex quo vehementer suspecta sit, eaque suspicio violenter, arbitrio boni viri, vel indubitata existimetur. Ex his vero præsumptionibus, quandoque fertur in civilibus diffinitiva et ordinaria sententia quandoque etiam in criminalibus. Covaruvias tom. i. p. 197.

was perfectly within the power of the other party to have produced this witness, in support of their allegation of a conspiracy, seeing that this witness was present at the transaction, seeing that he is so described to be in the presence of these witnesses, seeing that if these transactions did not pass, in the manner they have described, that Mr. Wild could have given a most effectual contradiction; for although I admit that originally it was not necessary nor in any degree proper that this witness Wild should have been produced on the part of the defendant, yet in these circumstances I cannot but feel that there was every call of propriety and prudence, if they are sincere in the belief that these transactions did not pass in the way they are stated, to produce Mr. Wild for the purpose of giving that contradiction. To say that [281] it would be giving the other party the benefit of a cross examination is, in other words, in my apprehension to say only this, that there was reason to be afraid of the possible disclosure of the whole case; because, if the case was what they state, that this was mere fabrication and conspiracy, to be sure nothing which Wilde could depose, either in chief or upon interrogatories, could be attended with any considerable degree of hazard.

I am of opinion therefore that there is no ground, in point of law, to object to the sufficiency of evidence. These witnesses depose with satisfactory precision as to time; they depose with sufficient harmony with respect to circumstances, and the effect of their testimony is complete. I am of opinion, then, that unless there are objections to the sufficiency of the witnesses themselves, the evidence cannot be pronounced to be, in any view of it, deficient. Now is there or is there not any ground, in point of fact, upon which reasonable objections can be constructed to the sufficiency of these witnesses? If such objections exist, they must arise either out of their general character, or out of their depositions, or from their conduct on this particular transaction.

With respect to the general character of the witnesses in this case I must observe that they are all three of them totally unimpeached: they stand before the Court with reputations undiminished in point of general credit; and upon those grounds are entitled to a favourable reception, as any witness who appears in any Court whatever. To two of these witnesses, Taylor and Lings, nothing is imputed as affecting their general character; and nothing arises from the other two sources of possi-[282]-ble discredit, either from their depositions, or their particular conduct in this transaction; for as to the declaration, made by Collicott, respecting himself and Taylor, supposing that declaration to be established, it may be very good evidence to affect himself, but can in no degree and by no fairness of conclusion, in any manner, implicate the other.

The only person then to whom attention has been called, in the way of an unfavourable attack upon the weight of his testimony, is the witness Collicott, and to his evidence various exceptions have been taken. It is said that he deposes very strongly in chief, but that much of the force and effect of his deposition is invalidated by concessions and retractions upon the interrogatories. Now, looking at the evidence which he has given in these two different forms, I am not by any means prepared to say that he has deposed in a malignant and an uncandid manner. It is very true that upon the libel he omits some circumstances which are stated upon the interrogatories; but this is no more than happens, and usually happens, according to the mode in which our examinations are taken. The attention of the witness is naturally elicited by the circumstances stated in the allegation; to these he adverts, and frequently neglects or declines travelling into other occurrences than those particularly stated—but that these circumstances were dissembled with any malignant intent, I cannot believe; because he expressly disclaims, in the history which he gives of the behaviour of the parties towards each other, upon these occasions, observations of any thing indecent or immodest. He says that he did not, at these particular times, see any thing inconsistent with the duty of Mrs. Elwes.

[283] The second objection is undoubtedly of a more forcible nature, that he has made declarations of a very alarming sort; that he has declared that he would bear testimony against his mistress for the purpose of ruining her; that he had received, or been promised to receive, a considerable bribe for this purpose; that he was actuated by motives of malignity, as well as interest, nay, that he complained of her want of generosity; that if she had acted in a different manner towards him, he would have been ready to give a very different testimony. Now I cannot, in my place, but

notice that this evidence has been very unfairly introduced. The allegation was admitted upon the express ground that these declarations had been made subsequent to the institution of this suit. If they had not been so made, unquestionably they ought to have been pleaded before, because they are matters not so directly arising out of his deposition as they are destructive of his general credit. It was perfectly within the knowledge of one of the parties that this man was to be produced, and to what articles he was to be examined; and if he made these declarations within the knowledge of the person proceeded against, surely the consequence ought to have been that she should have pleaded these facts before, and not have waited till after publication of this matter; it being of that nature, which, in its general effect, is constantly and properly so pleaded.

It was more incumbent in this case that this allegation should have been given at that time, because it connects itself with the suggestion of a conspiracy. It is pleaded, in the defensive allegation [284] of Mrs. Elwes, that the whole of this charge is a malignant fabrication; it would then again have corresponded with her general course of defence, and fortified and proved, in the strongest manner, the general plea, that the whole of the evidence was the fruit and result of this wicked combination. However, the fact is that it is not produced until long after the publication of the evidence. When I look at the witnesses, who are examined in support of it, I find that Plumb and another witness expressly state that the fact was known to them, of these declarations being made, long before the institution of the suit. The declarations were made at the time they lived together in the service of the parties. The other witness, Dowling, speaks in a similar manner with respect to most of the declarations; but she says, "that she does not know whether, before the examination of Collicott, in the action at common law, or in this case he did declare, though she thinks it was since the separation, at her own lodgings that he knew no harm of his mistress, and that if she had been generous he would not have troubled his head about the matter."

Then all the declarations that are in any manner proved to have been subsequent to this suit are proved in the loosest way—merely common declarations that he said "he knew no harm of his mistress, and that if she had been generous, he would not have interfered in it." In the first place it is to be observed he has been interrogated, and he admits that he did say this, "that if his mistress had treated her servants with kindness, they would probably not have troubled their heads about the matter." Now, it is not at all unlikely [285] that this declaration, which is very far short of the other, might in the apprehension of the witness, have been mistaken for it, and that he had said, "that he should not have entered into the business at all, if his mistress had conducted herself in the usual manner towards her servants."

The next declaration, that he knew no harm of her, he positively disclaims, and swears he never did, upon any occasion, make a declaration to that effect. Then I have the oath of one witness against the oath of the other. It is credit against credit, and it is for me to determine whether, upon the single credit of this witness, I am to pronounce that this man has contradicted that deposition which he has given most solemnly upon his oath. The remaining declarations which are stated are certainly of a very malignant and of a very alarming aspect. But if I look either to the substance of the declarations, or all the conduct of the parties respecting them, it is quite incredible that such should have been made. He is first represented to have stated that he came into the service of the family without a character: the direct contrary of this is proved in the most complete manner; and that he had a character is sustained by the declaration of his former master. Why should a man discredit himself by a falsehood of this species; or why should he represent himself coming without recommendation when he came with the usual recommendation of a servant? That he should misrepresent himself, and vilify his own history, must be thought a little extraordinary and an unnatural circumstance.

Next, with respect to these declarations, let me look at the conduct of the parties, and, first, to the [286] conduct of this man; that he should, in a public and unreserved manner, relative to the history of a suit, which was at that time pending, or likely to be instituted in a court of law, state himself to be a person guilty of the most malignant and corrupt falsehoods; that he should put it in the power of every person, who heard these declarations, to counteract them; that he should do all this is, upon the face of it, not consistent with the common course of human behaviour.

On the other hand let me view the conduct of the parties to whom these conversations are addressed; and particularly of Mrs. Plumb, a person to whom I suppose I do no injury, when I state that she bears a very high degree of attachment to all the interests of her mistress; that she has all the zeal that a favourite servant may be supposed to have for the reputation of that mistress; and that she has the same regard for common justice which the human mind, not warped by any selfish interest at that time acting upon it, naturally feels. This woman and the other witnesses associated with her hear these declarations repeatedly made to the disadvantage of a lady whom they know to be innocent; and in whose cause they feel all that animation which particular attachment as well as general justice inspires. They hear all this, and yet keep it a secret totally locked up in their own breasts, and make no communication of it to the party who might have been most effectually benefited. And although it was perfectly known that this man was to be considered as the cardinal witness in support of this prosecution, no communication is made to their mistress that his testimony was capable of being effectually destroyed. It remains [287] locked up, an idle and insignificant secret, in the breasts of those three individuals, never communicated till in a very late stage of this suit. I am called on, then, to decide between the conduct of Mrs. Plumb, and the testimony of Mrs. Plumb, and I have no difficulty in deciding to which I shall adhere. I am of opinion that these declarations could not have passed in the manner in which she has described them.

But it is said that all this may be a conspiracy; and how is the innocence of persons to be protected against the danger of such a conspiracy. A conspiracy, however, is not to be presumed upon the ground of mere possibility. If witnesses come unimpeached in point of general integrity, if they depose with characters of fairness in their particular narrations, the facts must be received, or there is an end of all judicial inquiry. Human prudence has done its utmost, has done all that it is capable of doing, in giving every security that can be afforded to individuals. Still it is asserted, here is direct evidence of the fact of a conspiracy.

Now, who are the conspirators in this case? If the facts are established upon the evidence of witnesses, upon whom no such taint of conspiracy lies, it perhaps would not signify very much, even if it could be shewn, by any probability, that a conspiracy existed any where else. But what are the proofs upon which the existence of this conspiracy is affirmed? Why, it amounts to this, Mr. Elwes was dissatisfied with the conduct of his wife, and expressed his determination to dismiss her in terms strong and intemperate. Possibly this may be true to some extent, and it is not unnatural that he should have felt so, if the behaviour [288] of his wife was that which the conclusion to be deduced from the evidence in this case leads me to decide it was; it is not, I say, unnatural that he should feel a great disinclination to the society of his wife, and express it in forcible, and, perhaps, in unmeasured terms. But that he acted upon those ideas and declarations in any manner towards the corruption of his wife has not I think been seriously argued. It has been said there is some evidence of subornation of witnesses. The only witness produced to prove it stands contradicted on the evidence of Mr. Haywood, and looking at the conduct of the witness Gray, and the description he has given of himself in the business, I think I should pay a very ill compliment to the integrity of all the witnesses examined in the cause if I hesitated for a moment in deciding that his testimony is incapable of prejudicing any other individual than himself. He has, with great propriety, been abandoned by almost common consent in the discussion of this cause.

Something has been said about the verdict which took place in the court of common law, that there is reason to suppose that it was obtained by a collusion between the parties.* As the judg-[289]-ment of this Court will not be founded on that verdict,

* 5th Dec. 1795.—An allegation was given in, responsive to the first article of an allegation, admitted on the part of John Elwes, Esq., which pleaded “the verdict of the Court of Common Law,” alleging [“that the verdict was obtained on the oath of one single witness, who did not even swear to any act of adultery, and that the said witness was still in the service of the party.” Rejected under the observations of the Court, as *infra*]: “That many persons were subpoena’d by George Daniel Harvey, Esq., the defendant, who were in waiting to be examined, to falsify the evidence of the said witness, but that not one of them was called or examined, by reason that it was basely, shamefully, and clandestinely agreed on, to the great injury of the character and hurt

it is of little importance how it was obtained ; but the suggestion that it was obtained in the manner alleged seems to me again to be totally unsupported. That no witnesses were examined on the part of the defence may be, under any circumstances, a slight presumption, perfectly to be explained by different solutions which have been afforded to my satisfaction. With respect to the damages not being paid at the time when the [290] solicitor was examined, that is accounted for in a manner which takes off what little suspicion it might create. What the witness says is, "that the other solicitor applied to him for payment of these damages, and an inconsiderable sum [291] was postponed for the present." That I am to infer that these damages have not been subsequently paid would be giving an effect to the testimony of this witness much beyond what his intentions or his expressions justify, and I have likewise the evidence of the solicitors in the cause, persons perfectly acquainted with the whole course of the proceedings, who swear that they are strangers to every thing of collusion, and that they have every reason to believe that the action was carried on *bonâ fide*, with the utmost sincerity, on the part of every person who was interested in the determination.

Another defence has been resorted to by counsel, that there has been a condonation

of mind of the wife, and expressly contrary to the assurances of the party, between husband and defendant, through the means of the agents, solicitors, friends, or advisers, that if the said defendant would not call those witnesses, but would suffer the plaintiff to take a verdict, he should risque nothing by the event of the suit, as the husband would undertake for the payment of the costs and damages, or would not receive them of him, or would repay them, if received, which offer was accepted by the defendant, or by some one on his behalf: that the husband, having collusively obtained a verdict, the costs and damages have not been received from him, or, if received, they have been repaid or remitted back."

The admission of this allegation was opposed ; it was however admitted by the Court, observing, "That the object of it was to take off the effect of the verdict, as pleaded in this cause, by shewing that it had been obtained by collusive means. A verdict is admitted to be pleaded in the proceedings of the Ecclesiastical Court ; has been allowed for a considerable time, though I never distinctly understood on what legal principle it was originally introduced. It is often said that it is not direct proof, but merely a circumstance ; yet that is surely somewhat inaccurate ; if introduced as a circumstance, it can be only on the footing of a circumstance that makes proof, though of a low kind, below what the law calls a semi-probatio ; yet still of the nature of evidence or proof ; but how can that be evidence against the party, which has passed in a suit to which she was not privy ? It is said that it is introduced for the purpose of shewing there has been no collusion : collusion, or no collusion, with the alleged adulterer, is a fact which cannot, either way, legally affect the wife, who is neither party nor privy, in the remotest degree, to that litigation : nor do I understand in what view such an action against another party can, in any degree, instruct the conscience of the Court upon that issue between husband and wife. Taking, however, the verdict as stated, that it is introduced to shew there was no collusion, that alone is a sufficient reason why the party should be permitted to shew that the other suit was not carried on *bonâ fide* ; that it was a mere fiction in the other Court. It is clear, as laid down in *The Duchess of Kingston's case* (A.D. 1776 State Trials, vol. 20, p. 355), that all sentences, obtained by collusion, are mere nullities ; and all Courts may examine into facts under which a sentence has been obtained by fraud. In *Lloyd v. Maddox* (Moore's Rep. p. 917) a prohibition, prayed on that ground, was refused. It is therefore established that a party may shew another Court to be imposed on by covin of parties colluding together, and that he is at liberty to shew such collusion ; but he cannot go further—to allege the verdict to be erroneous or that evidence was improperly given. It is pleaded here that the verdict was obtained on the oath of one single witness, who did not even swear to a act of adultery. This seems to imply that the jury formed a wrong conclusion. I pleads also that the servant still continues in the service of the party : that also may seem to insinuate that the jury did not take all circumstances properly into consideration. These facts are, I think, clearly not admissible. The rest, which pleads the evidence was suppressed, and that there was an agreement not to receive the damages and that the cause was so managed as not to bring out the merits of the case, may be admitted." Admitted as reformed.

a defence, not set up by the party herself, and which, upon the face of it, is utterly inconsistent with the statement of her plea, that there was a conspiracy productive of a false and malignant accusation against this lady—that this conspiracy has been systematically pursued—that agents have been employed—that witnesses have been bribed, and that the cause has been matured to its present form by these practices. The condonation supposes that after this machine had been completely put in motion, and the whole business arrived at its ultimate maturity, and was prepared for explosion, and after the party was almost in possession of the fruits of his wicked industry, he did at this moment abandon the whole, and, by a remission or condonation to his wife, defeat the effect of all this activity, which had been employed for months before at the expence of guilt and anxiety. Now that defence appears to be so perfectly incompatible with every [292] thing which the party herself has resorted to, that no very serious consideration is due to it.

It has been said that not having been propounded by the party, it is excluded from the notice of the Court—undoubtedly, in fairness, it ought to have been stated, because, being a plea in bar, it is a plea which the plaintiff ought to have had an opportunity of contradicting; at the same time the Court is not precluded from noticing it, at least to this effect, that if the fact appeared clearly and distinctly, upon the face of the depositions, that there had been cohabitation, subsequent to the knowledge and detection of the guilt of the wife, it might, ex officio, call upon the husband to disprove it. But upon what proof does it rest in the case? Why, that, upon the night of the last fact of criminality, Mr. Elwes is proved to have been in town at his house in a considerable state of indisposition—and I am to infer that, on that very day, the witness informed the agent of what he had seen, and that the agent informed Mr. Elwes, on the same day, of the communication which had been made to him, and that Mr. Elwes did cohabit with his wife notwithstanding that information. This, besides its improbability, stands so destitute of proof that it does not require minute discussion.

Mr. Elwes had employed persons to watch the conduct of his wife, and it is probable that the result was not communicated to him until the case was completed—a circumstance which occurs in all cases where the discovery is not made at once. A husband has suspicions—he has some intimations—he has enough to convince his own mind, but not to instruct a legal case. In that dis-[293]-tressing interval his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman.

Taking the whole of this case into consideration, I am firmly of opinion that the facts of adultery are proved; that for a considerable space of time, and at different intervals, this lady shared her husband's bed with these two persons; and I am satisfied of this upon evidence which I deem to be credible, and which appears to me to be sufficiently concentrated and in no degree invalidated by any adverse testimony: I am of opinion that the imputation of connivance is totally unfounded, and that the charge of subornation is likewise unfounded; and that the party is entitled to the sentence of separation which he has prayed.

Affirmed on appeal. Arches, 2d May, 1797. Deleg. 26th June, 1798.

[294] *SINCLAIR v. SINCLAIR*. 1st March, 1798.—Protest, proceedings in a Court of Brussels, pleaded in bar to a suit here for divorce, by reason of adultery, not sustained.

[See *Ogden v. Ogden*, [1907] P. 106: affirmed 1908, P. 46.]

This was a suit of divorce, brought by the wife against the husband, by reason of cruelty and adultery; in which Mr. Sinclair appeared under protest, alleging, in bar of the proceedings, that such suit could not be entertained by the Court; for that the marriage had been celebrated at Paris, and had been since dissolved by a sentence of the Court at Brussels on proceedings instituted by him for nullity and divorce by reason of the adultery of the wife.

In reply it was alleged on the part of Mrs. Sinclair that there had been a marriage also solemnised in England in 1792, and that the pretended divorce was not for adultery but a sentence of nullity of marriage; the fact of the aforesaid English marriage being entirely suppressed. To which it was further answered on the part of the husband that although the sentence of the Court at Brussels purported to

have passed in form only as a sentence of nullity of marriage, it was really upon a proceeding for divorce by reason of nullity and adultery; and on consideration that the adultery had been fully proved, the husband had acceded to the prayer of the wife that it might be described in the sentence as a sentence of nullity only, in order to avoid the public exposure that attended such sentences at Brussels, and that the ground of adultery was omitted in the sentence at the instance of the wife, and to save her reputation.

[295] On this statement, which was set forth in act of Court, Dr. Laurence argued in support of the protest that as there had been a former suit in a competent Court in another country where the parties had resided, it was entitled to be considered universally as conclusive, on the point adjudged, in all countries, and that there would be no marriage subsisting on which these proceedings could be had. That from the nature of that suit it appeared also that the wife had been convicted of adultery, and that she could not therefore institute proceedings against her husband to pray restitution; although it had been said by some ancient authorities that the Court might take on itself to enjoin a reconciliation between them. That, with respect to the proofs required of the real nature of the suit at Brussels, the Court would make allowance for the destruction of all records which had been occasioned by the Revolution there, and permit parol evidence of the nature of those proceedings, or allow further time to supply more authentic documents on that point.

On the other side, Dr. Arnold contended that there was no sufficient foundation for any discussion of general principles; as the marriage, pleaded by the husband, was described to have been solemnized by a Swedish clergyman at Paris, and the divorce at Brussels had passed on that marriage, whereas the wife pleaded a marriage at London in 1792. That the description attempted to be given of the nature of the divorce did not agree with the tenor of the instrument exhibited, and the Court would not permit a different cha-[296]-racter to be fixed upon it by parol evidence. That the Court at Brussels was described as a Court of competent jurisdiction for strangers; but there was no proof that Mr. Sinclair was entitled to be considered as a stranger, since he describes his own residence to have been generally on the Continent, but principally at Brussels. That on these grounds the protest was untenable, and it was prayed that the Court would overrule it.

Judgment—Sir William Scott. This is a suit originally brought by Lucy Ann Sinclair against John Gordon Sinclair for separation, by reason of cruelty and adultery, to which he has appeared under protest; and I am to inquire whether this protest states any thing that should prevent the Court from investigating the facts of the complaint. Mr. Sinclair describes himself to be a native of Scotland. That circumstance will not affect the jurisdiction of this Court. He states also that the marriage was had at Paris: that, likewise, is no objection; since, wherever the marriage was celebrated, this Court may inquire into its validity, looking, as it would, to the laws of the country, and would enforce the matrimonial duties on all persons within its jurisdiction. It does not appear, even, that the affidavits support the act in the description which they give of his residence, since they do not represent him to have been a domiciled and incorporated inhabitant of Brussels, but to have been in the English army in Flanders, and on that account only subject to the laws of Brabant in matters arising out of his conduct in that country.

He describes his suit against his wife to have been for divorce, by reason of adultery, acknow-[297]-ledging, by that very charge of adultery, the marriage de facto, which is, nevertheless, now to be impeached by these proceedings as null and void.

Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation in a proper Court for adultery would be entitled to credit and attention in this Court; but I think the conclusion is carried too far when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage

alleged by the husband is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England. Had there been a sentence against the wife for adultery in Brabant, it might have prevented her from proceeding with any effect against her husband here; but no such sentence any where appears.

The only instrument which is produced as a sentence does not contain a word respecting [298] adultery: it speaks singly of nullity: and parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear. The instrument directly rebels against the allegation of the protest. That there was any proceeding for adultery is contradicted by the plain language of the authenticated instruments. It is a confusion of terms, as has been observed, and what is not often seen in a matrimonial court, to begin first with disputing the validity of the marriage, and then to go on to prove, as against an established marriage, the offence of adultery. What a strange proceeding it is, as well on the part of the Court as on that of the parties! That the cause should have gone on to sentence on proofs of adultery, and that a Court of Justice could accede to the prayer of a party, and change entirely the form and substance of the sentence by pronouncing for a divorce on the ground of nullity only. It is difficult to believe that such could have been the conduct of any Court whatever: and if it has been so, it is quite sufficient to dispose of its authority.

The paper which has been exhibited to prove the examination of witnesses, *de bene esse*, on adultery, is nothing but a licence to examine on that charge; but there is no mention of any actual proceeding or any sentence on that charge. How is it possible then to say there has been any sentence in a foreign Court for adultery, which should stop this Court from giving to the wife the benefit of the laws of this country? I must therefore declare the protest insufficient, and direct Mr. Sinclair to appear absolutely and answer the general charges of his wife's suit.

[299] WILLIAMS v. WILLIAMS. 16th May, 1798.—Divorce by reason of adultery of the wife, not decreed. Circumstances, how far sufficient. Identity not proved.

This was a case of divorce by reason of the adultery of the wife, in which the identity of the wife was not established.

Judgment—Sir William Scott. This is a proceeding instituted by Mr. Williams to obtain a divorce on a charge of adultery; and if he has laid before the Court sufficient proofs, he will no doubt be entitled to it: but if he has not established the necessary facts, either from disability or accident, or from the less laudable motive of trying the experiment of how little proof will be accepted as sufficient, or from whatever circumstance, he must fail notwithstanding any private opinion which the Court may entertain on the real merits of the case. There are some circumstances in this case which alarm the jealousy of the Court as appearing a little suspicious; there is no plea on the part of the wife, nor any interrogatories administered. The verdict which has been pleaded was obtained nearly on default and without any defence. This proves a great facility at least, and will make the Court more vigilant to see that the two main points of such cases are sufficiently proved, viz. the criminal act, and that the person against whom the proof of that act is established was the wife.

It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate [300] circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court that the criminal act has been committed. The Court will look with great satisfaction to the authority of established precedents; but where these fail, it must find its way as well as it can by its own reasoning on the particular circumstances of the case.

The libel pleads the marriage which is not denied, and is sufficiently proved in 1789. The parties cohabited several years, till September, 1797. But it is pleaded that in 1794 a particular intimacy was contracted with a Mr. Thomas, who frequently visited at the house; but no notice is taken of a circumstance which appears in evidence that he actually lodged and boarded in the house three months during the year 1796. The greatest intimacy therefore subsisted between both the parties and Mr. Thomas; and I am to presume that no improper familiarity had been observed

till this time, or Mr. Williams could not have permitted him to lodge in his house; and to suppose otherwise would be to suggest that which would surely excite the legal suspicion of the Court. I will take it however more naturally and justly, as if there was nothing improper known to Mr. Williams in 1796; but it is not explained why Mr. Thomas went away, since there was no quarrel, as he continued to visit.

I must observe that there is very little of the history of the case brought before the Court. It is alleged on the fourth article that he came clandestinely in the absence of the husband and took indecent liberties: there is however no witness examined on this article; but the maid servant who says [301] "that after he ceased to live there he called often about two o'clock when the husband was usually not at home." She mentions nothing of improper liberties, and there is nothing to convince me that he did not at that time continue the friend of the husband as of the wife. It is next pleaded that the husband began to entertain suspicions and remonstrated with his wife; but there is no evidence of this in the depositions. It is said that this would be a secret transaction; but it would be probable that the husband would mention it to some one of his own family or the friends of his wife; and unless it appears in some way as a fact in the case the Court can take no notice of it. Particular visits are likewise pleaded; and it is alleged that, on one occasion, happening on the 10th of May, the husband surprized them together, and that there was great confusion and agitation betrayed by them, and that Mr. Williams forbade Mr. Thomas to come any more to the house. This would be a fact that would make a strong impression on the mind of the Court if it was proved; but all the effect of the evidence is that Mr. Williams came and found this person with his wife, and further the witness cannot depose: there is no proof of the agitation of the parties, nor that the door was obstructed, nor of any disapprobation expressed by the husband; and the Court cannot make inferences without actual proofs to support them.

The next act pleaded is that Mr. Thomas took lodgings in Staples Inn for the purpose of carrying on the adulterous intercourse; and that the wife visited him there, and stayed a considerable time, and that they passed for husband and wife.

On this part of the allegation, Mary Johnson [302] says, "that in March, 1797, Thomas hired the lodging, consisting of a dining-room, a bed-room, and closet, saying that he lived in the country, and wanted a place in which he might write and transact business; that he should bring his wife to drink tea; and that he afterwards brought a lady, whom he called Mrs. Thomas, who stayed two or three hours, two or three times a week, and that he was not visited by any other person." This is the whole of her deposition. There are two other persons, who were employed by Williams to dodge his wife, who prove "that they often saw Mrs. Williams go to this house, and stay there, and that Thomas afterwards came out with her."

It is said that this is complete proof of adultery; and a case is alluded to of *Eliot v. Eliot* (Consist. 20th Feb., 1775. Arches, 23d Feb., 1776), in which the Court decided that a woman, going to a brothel with a man, furnished conclusive proof of adultery. And it is asked, what is the difference between that case and the present? since it cannot be presumed that Mrs. Williams went for innocent purposes to a house occupied in this manner. This, however, assumes many facts: first, that it was not his ordinary lodging, and that she knew it. It is not proved, as assumed, that she took the name of Mrs. Thomas; he called her so, and said that she was his wife; but it is not proved that she called him her husband, or that she knew that he called her his wife: he might speak of her in that name, but that will not shew her knowledge of the fact. The only circumstance of clandestinity which is proved is that Thomas attended her almost to her own house, and then left her; but that the Court should infer that this happened [303] from a clandestine intention, or that it might not be by accident, is, I think, not warranted by any rules of evidence on which this Court can safely proceed.

The question then comes to this—does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference, but the case of *Eliot v. Eliot*, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place, but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In a late case of

Ricketts v. Taylor,* in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this inquiry; and though the Court might be induced to think that such visits were highly improper, it must recollect that more is necessary, and that the Court must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty. There is nothing stated of any improper conduct in the observations that were made upon the conduct or behaviour of the parties at this lodging—no description of the bed-room, or any such circumstance; and, if there had been such appearances, it is scarcely possible that they should have been forgotten; but none are [304] brought forward that can induce a presumption of any conjugal act.

The whole amount of the evidence on this article is, that she visited at these lodgings, not calling herself Mrs. Thomas, and not knowing that they were not his ordinary lodgings—without any other proof of clandestinity than that, on two or three occasions, he did not accompany her quite to the house of her husband. In a following article it is pleaded, "that Mr. Williams, being convinced of her criminal intercourse, on the 9th September separated himself from her bed, and on the next day he charged her with it, and she eloped." The libel does not here go on, in the usual form, to say that, when he charged her with this accusation, she did not deny the same; and there is no proof as to the manner in which the charge was received: she retired—but to what place does not appear. Four days afterwards her sister received a letter from her, which the Court is required to consider as supplying that proof which might without it be incomplete. It is called a confession.

The Court, however, must remember that confession is a species of evidence which, though not inadmissible, is to be regarded with great distrust: there is a canon particularly pointed against it, which says, "*nec partium confessioni fides habeatur*" (Canon 105); and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed. The expressions are, "I am very unhappy—for God's sake, hide my faults—those who know not what I suffered, will blame my conduct very much."

[305] Am I then placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She has been detected in imprudent visits—it might allude to them. Can the Court infer the admission of adultery from these expressions, where nothing is proved but visits? The husband may presume more; but the Court, considering the weight of circumstances accurately and judicially, does not feel itself warranted to say that they amount to a confession of adultery, or that such is the necessary interpretation of them. The mention of Thom in that letter is also interpreted to mean Mr. Thomas; and though the witness says she believed it meant Mr. Thomas, it is not a natural appellation, and does not carry that part of the case further. Where she passes that interval of her elopement is not shewn. She might be living with her family, but all that is left in blank.

The next fact is what passed at Gravesend, where the officer of the Court went, by the direction of the proctor, and served the citation upon her. That there were two persons in the house at Gravesend at that time—one passing by the name of Thomas, and a woman with him, who slept and cohabited together, is proved beyond all doubt. And the Court has only to consider in this part of the case whether the identity of the party is sufficiently proved. The rule which has been laid down on this point is solid, and very necessary to be carefully observed—that the identity is to be proved, not merely by acknowledgment to the officer, and by the appearance of the party in the cause, but by extrinsic evidence. The belief of the officer is necessarily founded on various incidents in the [306] cause, before and after the citation, and is not alone sufficient. The waiter and chambermaids at the inn speak nothing to the identity, as they had no previous knowledge of the party, and can form their opinion only from this inquiry.

Then how stands the evidence on this point? It is said that she had before assumed the name—but that is not shewn—only that Thomas called her so. Is the Court then, on the mere answer to the libel, to presume identity? It is said that she

* Consist. *Ricketts v. The Right Honourable Lady Elizabeth Ricketts*. A sentence of divorce was pronounced in this case on the 20th Feb., 1799.

is gone abroad, and that it is not in the power of the husband now to identify her more particularly. The Court, however, wishes to know what prevented him from sending down some person, who had known her previously, together with the officer of the Court? It was known that the officer of the Court was not acquainted with her, nor the witnesses at Gravesend; and also that Mr. Thomas was on his way to the Cape of Good Hope. The Court is not to be left to conjecture on a point so material, and where precise and satisfactory evidence might easily have been obtained.*1

On the verdict I need not observe that it is no evidence against the woman: it is only introduced into these proceedings to satisfy the Court that the husband has honestly endeavoured to obtain all the redress that the law will afford. In this case, it appears to have passed by default. Under all these circumstances, whatever may be the private opinion impressed on my mind by some parts of the evidence, I do not feel myself to [307] be judicially warranted to pronounce that the proof of the necessary facts, which the law requires, has been established, and therefore I must dismiss the party from this suit. The case will probably be submitted to a more experienced tribunal;*2 and from which I shall be glad to receive any information, for my future guidance, that may be given. But, on my own judgment, I cannot pass this divorce.

HUBBARD v. BECKFORD. 30th June, 1798.—Dilapidation. Demand against a sequestrator. Objection thereto, "that he was not liable for more than the surplus, on rendering his account"—not sustained.

In this case a decree, to answer to a demand of dilapidations, had been taken out on the part of the rector of Shepperton, against Beckford, the person who had been receiving the profits of the living of Shepperton, under a sequestration, obtained against the late incumbent by virtue of the King's writ to the bishop of the diocese.

An allegation† was offered on the part of the sequestrator, to which Dr. Nicholl and Dr. Laurence [308] objected—That, by the admission of the libel without opposition, the principle had been allowed that the sequestrator was liable to dilapidations: that it was a charge from which the incumbent could not exonerate himself; and any other person, standing in his interests, was equally liable to it: that repairs were mentioned in instruments of sequestration as an incidental expence attending the sequestration: that the third article of the allegation, in substance, admitted such previous demands by claiming an allowance for some repairs, and for the service of the church: that the same principle was to be acted on throughout. The claim, in this case, was only £250, and the balance in the estimates was not more than £200, £50 being allowed for old materials: that it had been expected that this demand would have been amicably settled; but the expences of defending this suit and another, which ought not to have been resisted, had been now pleaded in diminution of the effects; and it was hoped that the Court, seeing that this allegation could have no legal effect, would reject it, and thereby prevent further expence.

In reply, Dr. Arnold and Dr. Swabey denied that the principle of this demand was admitted, and contended that the sequestrator was only liable to [309] pay over the surplus, after his own demand had been satisfied, as offered by him in his allega-

*1 The Court, about this time, had occasion to make similar observations, on the defect of proof of identity, in other cases in which the proceedings failed on that ground.

*2 This cause was appealed to the Court of Arches, 12th Dec., 1798, where an additional allegation was given in, pleading the identity in a fuller manner, and on which no doubt remained in the case. The divorce was accordingly decreed.

† The allegation pleaded the facts on which this sequestration had been obtained; that there had been other sequestrations issued, on which he, Beckford, prior to the death of the rector, had been called upon, by citations, as receiver of the profits of the rectory of Shepperton, to render a true account of what he had received and that he exhibited an account accordingly; that out of the tithes he had collected, he had expended considerable sums of money on the reparation of the rectory house, barn, stable, &c., and likewise for the use and service of the church, and various other perquisites, charges, &c.; that Mr. Beckford is ready and willing to exhibit his vouchers in support of this account, if required; and that he now is, and always hath declared himself, willing to pay the balance, if any, in whatever manner the Court shall direct, on being legally indemnified.

tion. The objection, therefore, was to be considered on general principles, as stated to that article of the allegation; but it could not be sustained. It is not true that dilapidations are to be claimed of the sequestrator, in preference to his own demand. The writ to the bishop is mandatory and imperative, and contains no qualification that will authorize the bishop to retain any portion of the receipts for dilapidations; nor can the bishop himself engraft any such limitation upon it. If he could, the effect of the instrument might be entirely defeated: the sequestrator is not bound to do more than account faithfully for the surplus, after his debt is satisfied.

There is no priority, in this case, in favour of dilapidations: the benefice might have been sequestered for causes growing out of the authority of the Court alone, and, in such cases, the Court might have authorized previous deductions for repairs of dilapidations. But here the dilapidations constitute only a simple debt, and there are these conflicting claims of a superior class, as on judgment debts; and the Court cannot support the former to the prejudice of the judgment creditor. It was submitted, therefore, that the sequestrator is entitled to pay himself, and to reimburse himself for all costs incurred in defending suits brought against him, as they are expences falling on the living, and incurred only in defending the possession, which the law has given to him.

[310] *Judgment*—*Sir William Scott*. This is an allegation offered on the part of a sequestrator, who has been appointed the receiver of the profits of the living of Shepperton, under the King's writ, directed to the bishop, on which this sequestration has issued. It pleads—that the sequestrator has incurred sundry charges, which he desires to be permitted to stand in his account, and to be dismissed upon paying over the surplus, after the discharge of his own debt. The objection taken is not so much to the particular items of the account, as to the general principle. Some part of the allegation is merely introductory. With respect to what has actually been done under this sequestration, it is highly necessary that the Court should have before it the account, which the sequestrator is bound to render to the ordinary, of what he has done, under the authority delegated to him. I shall therefore admit this allegation as to those parts, observing also that there ought to be stated the date of the first sequestration, an omission which must be supplied.

It may be proper, however, to say a word on the general question, and with respect to the points which have been the subject of discussion in the argument, and which may come before the Court again, at the final hearing of the cause. On the general principle, I am inclined to hold that the sequestrator will be liable for dilapidations. The King's writ issues to the bishop to levy a sum for the discharge of the debt. This writ has been truly described as mandatory to the bishop, who is, in a general sense, only ministerial.* The sequestrator is a kind of bailiff to the bishop. There

* On the duty of the Court to carry such writ into immediate execution, the following case has occurred:—In *Campbell v. Whitehead*, Consist. 6th December, 1820, an application was made to the Court, on the part of Sir Alexander Campbell, for a sequestration of the vicarage of Little Clackton, Essex, on a writ of *levari facias* directed to the bishop. It appeared that two writs had been lodged in the registry of the Court, one by Whitehead, in November, the other, granted to the plaintiff, at a later period. A caveat had been entered against the first, on the part of the plaintiff, and it was certified that the Court of Common Pleas had superseded that writ for irregularity on the 28th Nov. On the second writ a caveat had also been entered, and on its being warned, Dr. Dodson now prayed that sequestration might issue on the second writ, and contended, that the Court was bound to act immediately in carrying it into execution; that it was in the nature of a *fieri facias*, or *levari facias* to the sheriff, who had no discretionary power, but was bound to execute the first writ when presented to him, as has been held strongly in cases of divers writs, and even when there had been a seizure on the second writ (5 Mod. 376. 1 Salk. 320. 1 T. Rep. 729); that, in this case, the Court of Common Pleas had rescinded the first writ, and the second was therefore entitled to priority, being, in fact, the only one in force; that the bishop is to be considered as an ecclesiastical sheriff, and his office was merely ministerial; that no danger however could accrue to the bishop, as bond had been given to him; that if there had been any error in rescinding the first writ, the bishop should be indemnified.

On the part of Mr. Whitehead, Dr. Swabey resisted this prayer, upon the ground

is no mention of any purpose, but the payment of the particular debt: it is, however, a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expences for which the sequestrator is bound to provide.

The instrument issued under the authority of the bishop, and contains a clause of allowance for all necessary charges; and I do not know on what principle it can be maintained that the repairs of [312] the chancel, and of the parsonage, are not necessary charges. The clergyman is, by law, equally required to provide such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties, more than from the other. The creditor is the person to whom the sequestration is usually granted; but that is only for the convenience of the proceeding under it, and by the authority of the bishop. The sequestration might have been granted to the churchwardens, or to others; and the creditor is to act as any other person would be bound to act in that character—he is not to give to himself that preference which a third person could not be compellable to allow.

I throw out this observation, as the substance of my opinion, on the general question, when it [313] shall hereafter be brought fully before the Court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice—and that they could not be disjoined from the duties of the sequestration, even by the authority of the bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension.

6th Dec., 1798.—On a subsequent day, a further allegation was given in, pleading in substance, that since Mr. Beckford had exhibited, on oath, the account of the tithes, profits and emoluments of the rectory of Shepperton, as by him collected and received, he had expended the sum of £112 upon the two barns, and their appurtenances, and had caused them to be effectually reinstated and repaired. To the admission of this additional plea, it was objected that it was no answer to the general demand; that the sum, stated to be expended, was more than the estimate on that part of the premises, and had therefore been improvidently expended; that, as it had been done since the commencement of these proceedings, it was an act of the sequestrator in his own wrong, and could not be set against the general demand which had been made upon him.

The Court said—If I understand the nature of this allegation, it means to plead, in answer to the libel, claiming £74 for one part of the dilapidations, that Mr. Beckford wishes to shew that he has expended £112. It is quite impossible that I should permit such an averment, in opposition to the claim made upon him, for that part of the dilapidations: that, being charged with dilapidations, on one item, to a particular amount, he has laid out more than the sum required. It is an irregularity, perhaps, that he should have done any [314] thing to the barns, since the time of giving in the libel in these proceedings. From that time, the matter was under the protection of the Court; and perhaps the Court would not exceed its legal power, if it was to refuse to take any notice of such an expenditure. Equity may suggest, however, that he should be entitled to some allowance, but only to the amount of the sum claimed in the libel.

that the first writ had been repealed in error by the Court of Common Pleas, and stated that, on the first day of next term, that Court would be moved to rescind the order so made; and relied on the opinions of Mr. Sergeant Pell and Mr. Chitty, which had been given to this effect. He therefore prayed the Court to defer to make any order, on this application, till the next Court day: and submitted, that the Court must have such discretionary power, as otherwise the opposite party could not have been justified in stopping the progress of the first writ?

Judgment—Sir W. Scott. It would have been my duty to have proceeded upon the first writ if granted and unrevoked; because I am of opinion that the Court is bound not to delay the immediate execution of a writ, but to give the party all the benefit of priority. It is however shewn, by a notice which has been left in the registry, that the first writ has been revoked as irregular and informal, and that is not denied—though it is said to have been so superseded by error. There is nothing before the Court which shews that the first writ was revoked, in error, except the professional opinions of two gentlemen at the bar: but whatever respect I may pay to those individuals, I cannot put their opinions in opposition to the judicial decree of a court of justice. The Court is therefore bound to direct sequestration to proceed immediately to Sir Alexander Campbell.

The Court will therefore give him the opportunity of pleading simply—that he has repaired the barns; but it will not permit him to enter into a specification of the expenditure, beyond the estimate of it in the article of the libel. I must here observe also that suits for dilapidations are necessarily attended with great expence; and they ought not therefore to be instituted here, except upon great occasions. I strongly recommend to the parties to come to some accommodation. If however they go on, and it may be necessary to act on my directions on the matter now pleaded, I admit the article, subject to the alteration, which has been before sufficiently explained.

WALTER v. GUNNER AND DRURY. 30th June, 1798.—Right of parishioner to a seat in the parish church. Insufficiency of the return of churchwardens to an application for that purpose: rule of construction as to custom and the extent of a faculty.

[Distinguished, *Taylor v. Timson*, 1888, 20 Q. B. D. 677. Referred to, *Phillips v. Halliday*, [1891] A. C. 228.]

This was a proceeding against the churchwardens of Teddington, calling on them to shew cause why they had not seated, or caused to be seated, the plaintiff and his family in the parish church, according to his situation and condition, he being a principal inhabitant and parishioner, and having duly applied to them to be so seated.

An appearance was given for the churchwardens under protest, admitting the averment set forth in [315] the citation, "that he is a principal inhabitant, and that he had applied to them," at the same time alleging, "that this was not sufficient in law to entitle Mr. Walter to cite them in this form;" and further, "that the church was so small, and the number of inhabitants so much increased, that many persons were obliged to submit to considerable inconvenience, some in sitting with others, some in having no seats; that many seats were held by custom, attached to houses in such a manner that, though the owners did not use them, they were occupied by their tenants; that the churchwardens have not interfered with such customary possession; that the house, which Mr. Walter occupies, was built by a Jew, who never applied for a seat; that in 1796 Mr. Walter applied for a seat, and a vestry was called, at which it was determined that persons should have permission to erect pews in a gallery, on payment of £5 to the parish; that this offer had not been accepted; that the plaintiff had refused to pay the church-rate, unless he was seated: that it was then proposed that a vacant place should be enclosed; and notice was given to him that a vestry would be held for that purpose; but he did not attend: that the churchwardens are desirous of accommodating all persons as well as they can without disturbing the possession of others; that they had no right to dispossess them, but were ready to submit to any order which the Court might make upon them."

On the other side it was alleged, "that, by law and usage, all pews, except those held by faculty or other legal title, ought to be distributed [316] amongst actual parishioners; that many of the largest were assigned to persons not living or having lands in the parish; that others were annexed to houses, and let out by the owners to persons not living in the parish; that it was in the power of the churchwardens, by a legal exercise of their authority, to seat the complainant; that his house was one of the largest in the parish, and though he had applied in 1796, and the following years, nothing effectual had been done." It was replied, "that the pew held by Seton is reputed to be annexed to the house of Mr. Retford, and that part of his family used to sit there; and the other occupied by Lady Murray was annexed to another house, called Comb House, which was now a school; and that the pew being too small for the boys, they were allowed to occupy seats in the gallery at a certain rent; that the churchwardens did not consider themselves to be authorized, by virtue of their office, to disturb the possession of these parties."

Judgment—*Sir W. Scott*. I think the process has issued very properly in this case, and that this is a convenient mode of proceeding, by citing the churchwardens, in a civil suit, to shew cause, &c., as in this citation. I do not think that it was necessary to allege that any particular pew was vacant, as it would be a sufficient return, on the part of the churchwardens, to aver that they were unable to comply with the request, on account that there were no such vacancies. If that return was made and duly established, I fear it might be entitled to much consideration, as in the [317] enlarged population of parishes in the vicinity of this town it may really not be in the power of the churchwardens to make immediate additions to the fabric, or to

build chapels at once for the accommodation of the inhabitants. The return, in this case, is not of that kind. It consisted of two parts; that notice was given of a vestry, and that an offer was made that the party might erect a pew, on a condition which is not strictly legal—that he should pay the parish for it. It is clearly the law on this subject that a parishioner has a right to a seat in the church without such payment: but I think the return is bad on another ground; for, although it might be sufficient, if there was no pew vacant, yet if there are existing pews improperly occupied, the mere offer of a permission to erect a pew is not a good return.

The other part of the return is bad also, since it pleads a custom, which is evidently illegal, and cannot be supported—that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish. All private rights in pews must be held under a faculty, or by prescription, which presumes a faculty, and no faculty was ever granted to that effect; for the ordinary must have exercised his discretion to depopulate the church of its own proper inhabitants, if he could have granted such a faculty. The plea goes on to state “that the churchwardens have not ventured to disturb such occupiers;” to which it is answered justly, that they have not done their duty, for they ought to have prevented an occupancy of that kind.

There is something stated also of a custom, that others, who have not pews appurtenant, pay a rent for seats, which is applied in easement of the parish [318] rate—a practice which has been constantly reprehended by the Ecclesiastical Courts, and discouraged as often as it has been set up.* Then [319] the return is, I think, insufficient; and the party has shewn that there are pews occupied by persons not living in the parish, and that a particular individual has obtained a large portion of the church, and let his own pew to a non-resident person. There is one pew appurtenant to the house of Mr. Retford, who does not live in the parish, and who covenants with his tenant that he shall not occupy it, in order that he may let it out to others. This is clearly illegal. If a pew is rightly appurtenant, the occupancy of it must

* In *Stevens v. Woodhouse and Buller*, Arches, 25th Feb., 1792, on appeal from the Decanal Court of Wells, as to the grant of a faculty for the erection of seats, the Judge of the Court of Arches observed, there is one clause in the faculty which is illegal—a permission to the parties erecting seats to sell the same. This is a practice which may have prevailed frequently; but whenever it had appeared before the Court, it has been constantly discountenanced. The Court then referred to the following cases:—*The Churchwardens of Kensington v. Tryer*, Consist. 1721: “In which the churchwardens and vicar in order to pay the expences of new pews had assigned pews to certain persons, their heirs, executors, &c., for sums specified. The Court held this to be illegal and that the churchwardens might seat the parishioners in those pews as if no such order had been made.”

In *Harford v. Jones*, Consist. 1724: “The vestry had granted for £10 a pew to R. and his assigns, appropriated to such house as he should build. He assigned to Jones—Jones applied for a faculty—the Court disallowed the claim of Jones to a pew, and ordered him to be placed in the common part of the church.” In *Hole v. Burnet*, Consist. 1740: Suit of perturbation—the party pleaded purchase and the custom of parish. The Court rejected the libel and held the custom illegal. In *Astley v. Biddle*, Peculiars, 1774: Astley took a house to which a pew had belonged forty years, the churchwardens demanded money, on refusal they placed another person with him. The Court “admonished them not to disturb, and to desist from the practice of selling.”

Having stated these precedents the Court further observed, “These cases all shew that even where the order has been made to defray expences it has always been held illegal. It is said, however, that former cases had been instances of old pews, but that the agreement here is for building new pews. This cannot influence the Court or make the act legal. It may be true, as it has been remarked in the argument, that this is frequently done, particularly in chapels. But they are private property; this is an old parish church; and I am of opinion that neither the parishioners by their consent nor the ordinary or any power but the Legislature can deprive the inhabitants of a parish of their general right, and that such acts are contrary to the law of the land.” The faculty was therefore pronounced illegal and the sentence of the Court below reversed.

pass with the house; and the individuals cannot, by contract between themselves, defeat the general right of the parish. It appears that the house has been built only eighty years, which is not sufficient to establish a prescriptive right; because it might be presumed that evidence of the grant of a faculty was not extinct in that time; but even if there was a prescriptive right, it could not be exercised by transferring it to persons, not inhabitants of the house, or of the parish. Such possession cannot be maintained. There is also another instance, in which the parish has given way to the partial convenience of one person, who holds a house to which a pew may be appurtenant: when, however, he was indulged with a gallery, the parish ought to have required him to exchange his own pew for that accommodation. He ought to be required to go back to his own proper pew, or give it up to the parish; as it is now used in the same improper manner by inhabitants of another parish.

The Court, therefore, is bound to overrule the protest; but I shall not do more, or give any costs against the churchwardens: for they have been acting under the general sense of the parish, and [320] it is difficult for such persons to bear up against it. It is possible that the parties, whose rights are asserted, may have something more to allege in defence of them, and they must not be precluded. But I shall overrule the protest, giving such parties an opportunity to intervene.

10th July.—On a subsequent day this cause came on again, on the prayer of the plaintiff, that one of the churchwardens might be directed to seat him in the pew occupied by Mr. Seton, by the 22d of the present month. The Court asked, whether any notice had been given to Mrs. Griffiths? It was replied that there had been notice.

Judgment—Sir William Scott. I think Mr. Retford is sufficiently before the Court by the affidavit which he has made; and that it is therefore at liberty to proceed to make a specific order in this case. The general principles on this subject have been already laid down; and the parties, having had an opportunity of intervening to assert, and support their claims, I am now to inquire what has been set forth that should prevent the Court from applying those principles to the case before it. Mrs. Griffiths has made no application to the Court on the part of Mr. Retford, but his own affidavit has been introduced; and I am now to decide on the prayer that the plaintiff may be seated where Mr. Seton is at present placed, being the seat claimed by Mr. Retford. The seat, claimed by Mrs. Griffiths, is said to be appurtenant to an ancient messuage, which she occupies in the parish; but it does not appear whether as owner or tenant; [321] nor is it material; because, if it is really appurtenant, it will go to the tenant.

It seems that Mrs. Griffiths has kept a school some years, and applied to the churchwarden for an allotment of room in the gallery, which was given, she retaining her pew; and that she has since let out her pew to some ladies of another parish. The churchwardens of that time did wrong; for they ought, if the pew was really appurtenant, which does not appear, either to have granted additional space with the old pew, or to have insisted that it should be given up to some parishioner; but that she should take sufficient room for her accommodation elsewhere, and be allowed to let out her pew to persons not resident in the parish, is an abuse which cannot be maintained; for it is a wild conceit that there can be such use made of pews as of villas or other common property. These are possessions of more qualified property, to be used in a certain and prescribed manner. It is a sufficient indulgence, which is usually given by faculties, in granting the exclusive use; but no faculty was ever granted for purposes like this.

It has been held that a faculty to a man and his heirs would be bad; because his heirs may reside out of the parish, and it would be an unjust usurpation, in the parishioner, to detain such a privilege for the use of others. If the Court does not proceed therefore to disturb Mrs. Griffiths, it must be understood to be on this consideration, that there is another pew more proper to be used; and with this intimation, that if any other person should apply to be seated, the Court will consider itself [322] at liberty to make such order with respect to her pew.

Mr. Retford says that his house has been built upwards of eighty years, and that the pew has been exclusively used by him, and that he has covenanted with his tenant that he shall not sit in it—which is an unjust attempt and an illegal exercise of his exclusive right if he ever possessed such. From the affidavit, however, I am inclined to doubt whether he ever did. To exclude the jurisdiction of the ordinary

from the disposal of a pew, it is necessary not merely that possession should be shewn for many years, but that the pew should have been built and repaired time out of mind (*Stocks v. Booth*, 1 T. R. 428). Six years' possession is not sufficient against a mere disturber, much less against the ordinary.

A person claiming a pew must shew either a faculty or prescription which will suppose a faculty. But mere presumption is not sufficient without some evidence on which a faculty may reasonably be presumed. The strongest evidence of that kind is the building and repairing time out of mind; for mere repairing for 30 or 40 years will not exclude the ordinary. In this case the person was offered a particular space and if he had built on it, it would not be sufficient to supersede the authority of the ordinary. The possession must be ancient and going beyond memory; and though on this subject I do not mean the high legal memory, it must be larger than appears in the circumstances of this case.

[323] It is alleged that the house has been built eighty years, but it is not said that the seat was built and maintained by the owner of the house. The time of sixty years has been held not sufficient against a wrong doer. The law does not favor claims against the ordinary, and no ground is stated here on which such a right can be established against him. By Mr. Retford's own affidavit it appears that, whatever his claim might be, it ceased when he went out of the parish and has since been used improperly. I have no hesitation in saying that this is to be considered as a vacant pew, which the ordinary has a right to confer for present possession on any inhabitant.

It is my duty, therefore, to decree a monition to issue to the churchwarden to seat Mr. Walter in this pew. At the same time, as the parties have been acting under a mistake which has been general in the parish, this must not be done with precipitation, but with all reasonable attention to the convenience of parties. I do not therefore grant this part of the prayer, which relates to the injunction of complying with this monition, before the 22d instant; but I direct the monition to be returned by the first session of next term with the proper certificate.

[324] GOLDSMID, BY HER GUARDIAN v. BROMER. 17th Dec., 1798.—Jewish marriage invalid under that law, by reason of the incompetency of witnesses, required as an essential part of the ceremony.

This was a suit of jactitation of marriage, instituted on behalf of Miss Goldsmid against Bromer, both parties being of the Jewish religion, on suggestion that the asserted marriage was not valid, by reason of non-conformity of the ceremony to the Jewish law.

Judgment—*Sir William Scott*. This is a suit brought by Maria Goldsmid by her guardian for jactitation of marriage against David Bromer, who confesses the jactitation, and justifies by pleading a marriage to have been celebrated, and the same to be valid, according to the law of the Jews. The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided, for on the mere fact there is no question. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies; and the marriage act acknowledges this privilege, by excepting them out of its provisions: to deny them the benefit of their own law, upon such subjects, would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled.

This being a question of Jewish law then, the Court must be content to learn that law as well as it can from the professors of it. It is not denied that some ceremony has been performed, but it is alleged "that the celebration was not conformable to the law of the Jews." It is not alleged [325] that the ceremony was defective in any other particulars, except "that it is essentially necessary that it should be performed in the presence of two witnesses, competent and credible, and subject to no disqualification imposed by the Jewish laws; which disqualifications may proceed from certain degrees of consanguinity to either of the parties who marry or from non-conformity to the ceremonies of the Jewish religion;" and it is alleged "that the ceremony in this case was not attested by competent witnesses according to these rules."

The allegation of Mr. Bromer refers to the present general law of the Jews; it is therefore now too late to refer the Court back to the law of Moses alone, as it existed in the earliest times of Judaism. He admits the objection of consanguinity as affecting the competency of witnesses; but the distinction of which he avails himself

s, that it must be relation *ex parte paternâ*, whereas the witnesses objected to were related *ex parte maternâ* only; and that fact is not denied. He admits also the necessity of conformity; but with four limitations. First, that any irregularity or breach of the Jewish laws or ordinances as pleaded, must be deliberate and designed, and not the mere effect of human infirmity, or negligence, or mistake. Secondly, that it must be unrepented of: as otherwise it might have been absolved and done away by due penitence. Thirdly, that it must be proved by witnesses who are themselves unimpeachable. Fourthly, that it must be a disqualification arising before the ceremony, and not subsequent to it. He does not, however, allege expressly that the nonconformity imputed to the witnesses in this in-[326]-stance is within the exceptions which he has laid down, but takes the chance of what may arise on that point upon the interrogatories. It is to be observed also that the third limitation, which has been assigned, may be put out of consideration; for the only witness who has been examined with regard to it says that it would not be necessary to ascertain the fact by positive testimony in favor of credit, for the law would presume that the attesting witnesses were good and sufficient, if nothing was shewn to the contrary. To the fourth ground of objection the different answers in the interrogatories allow the utmost latitude of advantage, if the state of fact is in any degree dubious; but, if no such doubt exists, the objection is peremptory; the imputed criminal act must not be an act resolvable into mere infirmity, negligence, or mistake. The limitation, which has been assigned on the alleged disabilities, must be proved by those who mean to rehabilitate; because, if a person does a criminal act, it must be presumed to be with a criminal intention, and that presumption will remain till the contrary is shewn. This will be more necessary if it appears that the acts were accompanied with circumstances which shew no repentance, but a fixed and continued purpose of evil. There is also this further observation to be made, which is supported by Mr. Ish Yemene, "that if one witness only is disqualified it entirely invalidates the ceremony," because there is then only one competent witness; and in this construction all the witnesses agree.

It appears, then, that the fact of marriage must be attested according to the Jewish law, and that this attestation is a constituent part of the validity [327] of the ceremony. It is deposed to be essentially necessary that both the witnesses must be competent; and I understand that if there was the clearest proof of the actual ceremony it would not be sufficient, unless it was performed in the presence of such two attesting witnesses of perfect competency. All the witnesses agree in this representation; I have therefore only to apply the law so certified to the facts; and, in doing this, I shall dismiss from my consideration much irrelevant matter, which has been introduced, particularly with respect to the conduct of the parties; because, if I understand the Rabbies correctly, if Miss Goldsmid was claiming the benefit of marriage, and the attesting witnesses were not competent at the time, the ceremony would signify nothing. Something has been said also of the undue interference of Mr. Goldsmid the father, for the purpose of setting aside this matrimonial union. But every parent is deeply interested in the welfare of his children, as affected by such connexions; and has a right to question a matrimonial contract entered into in the minority of his child; and I do not see that this right has been exercised on this occasion with any impropriety.

The young lady appears to have been of the tender age of sixteen, with all the inexperience and susceptibility of hasty impressions that are incident to that age; and it is the order of God, and the daily practice of society, that the experience of the father shall protect the inexperience of the child. It is said that he is chargeable with inconsistency in his manner of behaviour to this young man, as he had received Bromer into his family with great familiarity; but it never can be supposed that [328] every man who receives a person into his family on a footing of civility means that he should marry his daughter. It has been observed, also, that it would be to the disadvantage of the young lady that the marriage should now be set aside; but the father has only to choose between calamities; he has a right to determine as he considers to be best for the interest and happiness of his family, and we must presume that he has so done. On the conduct of the young lady I am unwilling to make any observation unfavourable to her in consideration of her tender age. But as to Mr. Bromer, though much has been said of the honourable state of matrimony, it must not be forgotten that it may be pursued on dishonourable motives; and though

I do not say that it is so here, yet when a man, who is hospitably received into a family, avails himself of the opportunity of engaging, with clandestinity, the affections of a young lady, I do not think that he is a proper subject of lofty panegyric on that account.

I throw out of the case, also, all discussion on the reasonableness of the Jewish law, since I must take that as I find it. I must observe, however, that it does not seem to be without apology or reason, as I take the intention to be to render clandestine marriages almost impossible. Clandestine marriages are considered as evils in all civilized societies. In England, they are discountenanced by the marriage act, and generally among Protestants. In many Catholic countries, also, the law interposes to prevent them. The law of the Jews, by its original incapacity of repeal, is out of the protection of the law of the countries in which they dwell, and it seems, there-[329]-fore, to have done reasonably in providing that if such contracts cannot be rendered null and void by positive enactment; they shall be clogged with ceremonies, which render it almost impossible, that they should be effectually performed.

With these observations, I proceed to examine the facts of this case. On the 22d November, 1795, it appears that the parties met by appointment, and Mr. Bromer took the lady in a coach to the Shakespeare Tavern, in Covent Garden, where two persons were stationed by him to be in readiness to be witnesses, though one appears also to have had other business there. In the presence of these persons he gave the ring, and pronounced the words in Hebrew which constitute the ceremony of Kedushim.

On this part of the case it has been contended that the principal ceremony itself is not proved to have been rightly performed. But it is simple in its form, requiring only a few Hebrew words with the delivery of the ring; and it is to be presumed that a person, intending to effect such a purpose, would take care to instruct himself in what was necessary to be done; and it is not material that the words should be understood by either party. This part of the case, therefore, is sufficiently proved by the witnesses, by the certificates of the Jewish tribunals, by the answers, and by the very form of pleading which lays the invalidity in the disqualification of the witnesses alone. There is also the conduct of the parties in cohabiting, which may be taken as strong proof that some such ceremony has passed as would justify such cohabitation; if it had not been for the objections that are now alleged to the competency of these two witnesses, whose attestation-[330]-tion is an essential part of this ceremony. I say two, because if one is disqualified, there is an end of the business, as two are stated to be indispensably necessary.* The question then is reduced to this: Is either of these persons, before whom the ceremony is stated to have been performed, shewn to have been incompetent, not merely to attest, but to supply a constituent part of the ceremony? Mr. Hesse is accused of non-conformity. It is stated that he had profaned the Sabbath, by riding in coaches, and snuffing lighted candles, stirring the fire, and eating forbidden meats; acts trifling to us, perhaps, who have no law applying to them, but not so according to the rites and ordinances of the Jewish religion. One witness, Levi, says, "that he had seen him repeatedly, within these ten years, do these acts, and that he remonstrated with him on such occasions, but he replied, 'that he was no Jew, but considered himself as bound only

* In the treatise of Maimonides, de connubiis Hebræorum, c. 4, s. 6, it is laid down on the effect of witnesses, "Si quis sibi mulierem dicaverit, uno duntaxat adhibito teste, nihil nos ejus dicatio moveat, cum ambo rem profiteantur; multo etiam minus si quis dicaret, nullis adhibitis testibus. Si quis mulierem sibi dicarit, adhibitis ejusmodi testibus, quibus lege non est testimonii dictio, dicatio nulla fuerit; sin eos adhibet, quibus sapientum autoritate non est testimonii dictio, aut quibus lege sit testimonii dictio, necne, non liquet, is, si velit eam uxorem ducere, rursus coram idoneis testibus dicabit: Si nolit, repudii libellus ab eo mulieri opus est, vel propter incertam legem, vel propter sapientum certa vetita. Immo vero si dicationem mulier factam esse neget, aut arguat mendacii testes, nihilominus repudii libellum invita cogitur accipere. Atque eadem est omnium dicationum incertarum ratio. Si velit eam uxorem ducere, de integro firma dicatio fiet; si nolit, propter dubium mulieri ab eo repudii libellus opus est."

to the ex-[331]-terior observances of the religion, in compliance with the wishes of his father." * *

There cannot be a stronger instance of disclaimer of all observance of the regulations and ordinances of that religion, or, if I may so express it, of an uncircumcised heart. This then is suffi-[332]-cient, unless, as it has been contended by Dr. Arnold, a conviction is required to establish the incompetency. According to our own notions, founded on the principles of our law, an antecedent conviction might be necessary in the case of some criminal charges; but it is not alleged to be so in the Jewish law. So much for Mr. Hesse, whose disqualification is completely proved on the ground of non-conformity; and it disposes of the whole case, since, as before observed, two competent witnesses are required: it may be unneces-[333]-sary therefore to enquire minutely into the ground of objection to the other witness—his relation to either of the parties.

* In the responsive allegation, given in and admitted on the part of Maria Goldsmid, the 9th article pleaded, "That, by the Jewish law, a person is incompetent and disqualified to give validity, as a witness, to any Kedushim or marriage contract between Jews, or persons professing the Jewish religion, by being related to either of the parties in the first and second degree of consanguinity, and that, according to the Jewish computation of the degrees of consanguinity, cousins german, or persons descended from the same grandfather or grandmother, are considered as related in the second degree of consanguinity, and that, in order to be a competent witness to the ceremony of Kedushim, the person must not only be a Jew, but not be guilty of violating the religion and religious ceremonies of the Jews; and a Jew, who is a non-conformist to the duties and precepts of the Jewish religion, particularly in profaning the Sabbath-day, and so proved to be by two credible witnesses, is not a competent witness before whom Kedushim can be legally given."

10th. "That Michael Abraham Levy, one of the persons in whose presence the aforesaid pretended Kedushim is alleged and pleaded in the said allegation given in on the part and behalf of David Bromer, to have passed between him and the said Maria Goldsmid, is not, according to the laws and customs of the Jews, a competent witness to give validity to any such Kedushim or Jewish marriage contract between them the said David Bromer and Maria Goldsmid, but, on the contrary, is incompetent and disqualified, by reason that he, the said Michael Abraham Levy, is first cousin to David Bromer, related to him in the second degree of consanguinity, the mother of David Bromer and the mother of Michael Abraham Levy being natural and lawful sisters."

11th. "That Emanuel Hesse, the other person in whose presence the pretended Kedushim is alleged to have passed, is not, according to the laws and customs of the Jews, a competent witness to give validity to any Kedushim or marriage contract, but, on the contrary, is incompetent and disqualified by reason that he the said Emanuel Hesse hath manifested himself to be a non-conformist to the duties and precepts of the Jewish religion, particularly in profaning the Sabbath-day in the presence of divers credible witnesses."

The nature of the evidence upon the 11th article of this allegation may be collected from the depositions and answers of the following witnesses:—

Michael Abraham Levy, a witness examined on behalf of Mr. Bromer, to the 24th interrogatory, answers "that he hath a slight knowledge of his fellow witness Emanuel Hesse; that the said Emanuel Hesse is not a strict observer of his religion as a Jew; that he knows not, but hath heard, that the said Emanuel Hesse has in divers instances and on several occasions profaned the Sabbath-day, and eat forbidden food in contravention of the laws and precepts of the Jewish religion: that the respondent once saw him eat meat and butter together, which is in contravention of the laws and precepts of the Jewish religion."

David Joseph Wertheimer, to the 11th article of the said allegation, this deponent saith "that he hath known the articulate Emanuel Hesse, one of the persons in whose presence he hath understood and believes the Kedushim or marriage passed between the said David Bromer and Maria Goldsmid, parties in this cause, for eleven or twelve years last past; that about the time the deponent first knew the said Emanuel Hesse, he saw him eating meat in a tavern at Frankfort, known by the sign of the Mulberry Tree, which is a tavern where the meat is not prepared according to the laws of the Jews; that about two years ago the deponent saw the said Emanuel Hesse eating

On that point, Mr. Ish Yemene is the only witness produced by Mr. Bromer, and he is complimented for his learning. I cannot presume to judge upon the justness of that eulogium; but I think I may venture to say that a want of learning does not appear to be the principal defect imputable to him in this cause; since he appears to be a doctor of rather a loose school. I think I perceive some-[334]-thing of Sadducean laxity in his opinions, both in this and in the former cause; which detracts a little from the respect which might otherwise be given to his erudition; for I cannot forgive that in the former case he had said that Kedushim, without consummation, was a perfect marriage—now he [335] says otherwise. The Talmud, according to Mr. Ish Yemene, is an overruling authority, to which the authority of Maimonides and other expositors must bend. In the ninth interrogatory he is pressed by passages from the Talmud which he admits go to disqualify the mother's relations—the question is put, “whether relation *ex parte maternâ* is not as much a disqualification as *ex parte*

meat among Christians in the Hercules Tavern behind the Royal Exchange, London, which is also a tavern where meat is not prepared according to the laws of the Jews; that about a year and a half ago the deponent saw the said Emanuel Hesse profane the Sabbath-day at the house of Mr. de Fries, Basinghall Street, by snuffing the lighted candles on the evening of the Sabbath; that the foregoing actions are contrary to the laws of the Jews, and the said Emanuel Hesse hath thereby manifested himself a non-conformist to the duties and precepts of the Jewish religion, and a profaner of the Sabbath; that, by being guilty of such actions, he hath rendered himself, according to the laws and customs of the Jews, a witness incompetent and disqualified to give validity to any Kedushim or Jewish marriage contract.”

To the 6th interrogatory he says, “That committing murder, blasphemy, eating forbidden food, and profaning the Sabbath, by kindling, extinguishing, or stirring a fire, or snuffing candles, or riding out on horseback, or in a carriage, on the Sabbath-day, are the principal acts by which a person becomes disqualified according to the laws and customs of the Jews to be a competent witness to give validity to any Kedushim or Jewish marriage contract.”

To the 10th, “that he was subpoena'd, and did attend as a witness at the trial at Guildhall, in an action for seduction, brought in the Court of Common Pleas, by Mr. Goldsmid against Mr. Bromer; that he stood at some distance, and there was so great a crowd that he could not distinctly hear all that was said; that he recollects one ground of objection, but whether the only one or not he cannot say, there taken to the competency of Emanuel Hesse, was on account of his having, as well before as after his being a witness to the marriage in question, eaten pork.”

Henry Leo says to the 11th article of the allegation, “that he well knew Emanuel Hesse about fifteen years ago at Frankfort, and that he, at that time, heard him publicly declare that he, Emanuel Hesse, did not consider himself as a Jew, and if it were not for his father, that he would renounce that religion; that for about these last ten years he hath been well acquainted with said Emanuel Hesse in London, and hath repeatedly seen him profane the Sabbath-day by riding in coaches on that day, and hath seen him repeatedly, on the Sabbath-day, at the Antigallican Coffee-house, stir the fire, and snuff the lighted candles; that by such acts he hath manifested himself to be a non-conformist, &c.”

To the 4th interrogatory this respondent answers, “that he hath, times without number, remonstrated with the said Emanuel Hesse when he saw him do any act which he considered inconsistent with the laws and customs of the Jewish religion; that he does not recollect in whose presence he so remonstrated with him; that the answer the said Emanuel Hesse returned usually to such remonstrance was, that he did not profess himself to be a Jew; that he hath known him, after such remonstrance repeat the wrong-doing.”

Gabriel Cohen and Jacob Hart say to the 11th article of the allegation, “that, on the 9th day of December, 1795, as he went into the Stock Exchange Coffee-house, near the Royal Exchange, which is a public coffee-house, and eating-house, where food is not prepared according to the laws and customs of the Jews, he saw the said Emanuel Hesse eating part of a round of beef with sauce, appearing to be melted butter, in the public coffee-room, in the presence of divers persons; that, by so doing, he, Emanuel Hesse, manifested himself a non-conformist to the duties and precepts of the Jewish religion, which forbids his eating in such manner.”

paternâ?" and I understand it to be a direct declaration of the Talmud, that father's father is to be applied, on this disqualification, in the corresponding style of mother's mother.

There is also an extract from Tur, a book of high authority, to the same effect, that sister's sons are under the same disqualification as brother's sons. But Mr. Ish Yemene goes on to say "that Maimonides has stated a different opinion." To this I must reply, what Mr. Ish Yemene said before, that where the Talmud is plain, the authority of Maimonides must yield to it. I must therefore remember that if Maimonides expresses a doubt, and the Talmud none; where the Talmud is on one side, and Maimonides on the other, although I will not say that so eminent a scholar as Maimonides was in error, I am bound to prefer the authority of the Talmud. On these grounds, therefore, I am of opinion that the other witness, is incompetent, on account of his relations *ex parte maternâ*.

The case however does not rest here. I have also the judgment of the College of German Jews, to which community the party particularly belongs—the sentence of the Bethdin, their chief tribunal—and this judgment has been submitted also to the College of Portuguese Jews, who concur in it. Here then are Courts of great authority on [336] this point, and on matter of Jewish law, entitled to the greatest respect, as they are tribunals, whose certificate of the foreign law must be received as most satisfactory, though perhaps their judgment is not equally satisfactory in matters of fact. Here is a question compounded of law and fact, and though the decision may not bind the Court, which has to try the fact for itself, it conveys the best information which it can obtain of the principles of law that are to be applied to it. They certify that they have found the marriage null, according to the law of Moses, without giving specific reasons for it. This defect however is, in some measure, made up by the information which they have given in their examinations. I there find the grounds assigned, on which I form the same opinion.

This is the opinion that is to be collected on the legal merits of the case; and I see nothing in the moral estimate of the conduct of the parties which inclines me to entertain a different sentiment. It therefore pronounce against the validity of the marriage, pleaded by Mr. Bromer; that he has failed in proof of the allegation in justification, and that Mary Goldsmid is not his wife—but I give no costs.

The counsel prayed the Court, in addition to its sentence, to enforce perpetual silence, meaning to pray the same monition to the party as was prayed in the case of *The Duchess of Kingston* (Consist., *Chudleigh v. Hervey*, 10th Feb., 1769). The Court said it would decree it if prayed. Sentence accordingly.

Affirmed, on appeal, Arches, 25th June, 1799. Delegates, 19th November, 1800.

[337] *HORNER v. LIDDIARD, OTHERWISE WHITELOCK, FALSELY CALLING HERSELF HORNER*. 24th May, 1799.—Consent of parents, under 26 Geo. 2, c. 33, s. 11, not applicable to the marriage of illegitimate minors.

This was a case of nullity of marriage, brought by the husband against the wife, by reason of the minority of the wife, who was illegitimate; and the want of consent, as required by the Marriage Act.

These facts appeared: Harriet Liddiard, otherwise Whitelock, was the natural daughter of Sarah Liddiard, by John Whitelock, Esquire, and was born on the 12th day of September, 1777. Mr. Whitelock died in the year 1788, and by his last will, bearing date the 30th of April, 1787, in which he appointed Sarah Liddiard, and George Ashley, since deceased, his executors, he acknowledged Harriet Liddiard, otherwise Whitelock, as his natural child; and bequeathed certain parts of his personal property to his executors upon trust, to put the same out at interest, until Harriet Whitelock should attain the age of twenty-one years, or be married, with the consent and approbation of the said Sarah Liddiard and George Ashley, or the survivor of them; the interest, meantime, to be laid out in her board, maintenance, clothes, and education; and to pay her the whole when she should so attain the age of twenty-one years, or be married with such consent; and it was his will and desire that all possible care should be taken of the said Harriet Whitelock; and he gave the tuition and care of her to Sarah Liddiard and George Ashley, during her minority.

[338] On the 7th day of March, 1796, a marriage was solemnized between Thomas Strangways Horner, Esquire, and the said Harriet Liddiard, otherwise Whitelock, by virtue of a licence, under seal of the Consistory Court of the Lord Archbishop of

Canterbury, wherein Harriet Liddiard, otherwise Whitelock, is described as a minor; and wherein it is stated that the marriage was solemnized by and with the consent of Sarah Liddiard, there stiled Sarah Whitelock, widow, her mother and guardian, and which consent was in fact obtained.

In February, 1799, a suit was instituted by Mr. Horner, in the Consistorial Court of London, against Harriet Liddiard, otherwise Whitelock, falsely calling herself Horner, spinster, and pretending to be the wife of the said Thomas Strangeway Horner, to obtain a sentence, pronouncing and declaring the said marriage to have been null and void, pursuant to the act of the twenty-sixth year of King George the Second, chapter the thirty-third, usually called the Marriage Act, which enacts, in section the eleventh, "that all marriages, solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties, so under age (if then living), first had and obtained, or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried), or if there shall be no mother living and unmarried, then of a guardian or guardians [339] of the person appointed by the Court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever."

After the usual proceedings, the cause came on for hearing, upon the fourth session of Easter Term, the 8th of May, 1799.

On the part of Mr. Horner, it was contended by the King's Advocate and Dr. Swabey that some consent is necessary to the marriage of minors; and the question is, who are the persons competent, by the act, to give that consent? Illegitimate fathers and mothers are not within that part of the statute of the 26 Geo. II. c. 33, s. 11, which requires the consent of parents to the marriage of their children under age; and therefore no person can give a valid consent, in the case of illegitimate minors, but a guardian appointed by the Court of Chancery, under the last clause of that section of the act. Illegitimate persons are said, by our laws, to be nullius filii; illegitimate parentage constitutes no civil character, and there is no instance in which natural consanguinity is considered in matters of mere positive institution. The moral relation may have its effect in prohibiting incestuous marriages between persons so connected; as a man cannot marry his natural sister: but it does not extend itself to consequences merely civil. It is a perfect nullity with respect to inheritances both real and personal, which devolve to the Crown by reason of the incapacity of natural children to succeed to them. It has been decided that a natural father cannot appoint a guardian to his children, though in such cases it is the usual practice for the Court of Chancery to appoint the same person who has [340] been nominated by the parent (*Ward v. St. Paul*, 2 Brown, 583). This was done in the case of *Harford v. Morris* (Arches, 2 December, 1776. Deleg. 1778). Before the statute of the 18 Eliz. the natural father was not bound to maintain an illegitimate child. There is no instance in which the words "father" or "mother," simply used in any statute, are applied to any other than legitimate parents. In 2 Bulstrode, 344, on the act of 43 Eliz. c. 2, s. 7, the words "father and grandfather" have been held not to extend to illegitimate fathers and grandfathers: and in those statutes which expressly relate to them, the qualifications of putative, or reputed, father or grandfather, are usually added.

The consent of parents to marriage being of mere positive institution, and not a moral but a civil act, the terms must have the same interpretation here as in other statutes: and the word father must be referred to the general phraseology of the law. A different rule would lead to great difficulties and absurdities. How was the father to be ascertained? Different persons might claim. If the mother was dead, who could decide the dispute? It might be observed also, that on the contrary interpretation, if the father was dead, the illegitimate mother would have a greater authority than a lawful mother; because the father could not appoint a guardian to displace her. If the rule of *partus sequitur ventrem* were to be adopted, the mother would be preferred to the father. It appears, from the terms of the act of parliament, that the legitimate father only is meant by the order in which it is arranged. For after the father, the act mentions the guardian lawfully appointed; whereas it had been decided that an [341] illegitimate father cannot appoint. This interpretation is universally adopted in practice. If illegitimate parents should attempt to forbid the

banns, they cannot stand up in the church to acknowledge an offence, for which they are liable to punishment. No suit is ever brought here by the illegitimate father for nullity of marriage; though the legitimate father is considered as having such an interest in his child as entitles him to institute a suit for that purpose in his own right. In granting licences also the consent of the natural father is never required. The Court of Chancery, in such cases, appoints guardians to consent. The affidavit, upon which licences are obtained, mentions only the lawful father, and these forms were settled by the authority of persons high in the profession.

It may be said that there are cases in the temporal courts which have adopted a different construction; but, if they are examined, they will not warrant that conclusion. In the case of *The King v. Edmonton*, 2 Bott, 85, Mr. Justice Buller observed, "that it was not necessary to give a decisive opinion upon the construction of the marriage act." Mr. Justice Willes, who thought otherwise, says "as to the construction of the marriage act, it ought in this case to be liberal. We are warranted in considering a putative father as within it, by the case of *The King v. Cornforth*, 1 Bott, 459 (2 Strange, p. 1162), where the expression in the statute of Philip and Mary is similar to that in the marriage act." So Mr. Justice Ashhurst. "The case of *The King v. Cornforth* is stronger than the present, and authorizes us to put that construction on the marriage act." This [342] judgment therefore stands upon the former case of *The King v. Cornforth*; but if that case is accurately considered, it will not support that construction.

It was a motion for an information upon the statute of the 4th & 5th of Philip and Mary, c. 8, for taking away and marrying a natural daughter of one Bohun, who was but fifteen years old. The information was granted upon the third section, which forbids taking away any woman child from the possession, not only of the father or mother, but of any person who shall happen to have, by any lawful ways or means, the order, keeping, education, or government of such child. It is clear that the information was granted, not upon the second section, which relates to parents only, but upon the third section. For Chief Justice Lee says, "It is not necessary for the Court in this case to give any judgment upon the fact, whether legitimate or not, neither is that the point in issue, but the taking her from the possession of a person having by lawful means the possession of her." And Mr. Justice Chapple said: "If it had rested singly on the second section, I should have had some difficulty; but it is plain from the second and third taken together that they intended to take in different cases, so that they are quite distinct, and whether legitimate or not, will not be material." And Mr. Justice Wright to the same effect.

It is submitted, therefore, that there is no case in which the Temporal Courts have decided contrary to the judgment of this Court in the case of *Foster v. Lawrence* (Consist. 26th January, 1793): if they had, the question [343] of the validity of marriages is of the peculiar and exclusive jurisdiction of the Ecclesiastical Courts. The authorities, however, all concur. There is that decision of the Ecclesiastical Court, and the opinion of Mr. Justice Blackstone in his Commentaries, and the practice of the ecclesiastical offices, which is material to shew the opinion of these Courts at the time. If it were otherwise the Court of Chancery could not appoint a guardian till the mother was dead. And if it should be established that the mother is competent to give the consent required by the statute, every marriage had under a guardianship appointed by Chancery, whilst the mother was living, would be null.

On the other side Dr. Arnold and Dr. Lawrence, in support of the marriage, submitted that the marriage act requires the consent, first of the father, next of a guardian by him appointed; thirdly, of the mother. In this case there were no persons answering to either of the two former descriptions. There was, however, a mother, and her consent was obtained in the most formal manner. But it was objected that she is not a person who is competent to consent; and the question is, whether the terms father and mother in the statute, which are used without any words to limit their meaning, extend to illegitimate, as well as to legitimate, parents.

It is said that in other statutes, especially those relating to the poor, the terms are restrained to the lawful father and mother: but those statutes respect only matters of property or police, which are of positive institution and municipal regulation. In laws relating to such points, the names of consanguinity may include only such relation as is [344] contracted according to the regulations of the country. But marriage is

not merely of positive institution; and, with respect to it, consanguinity is always considered as it exists by nature, and connections are forbidden between those related by blood and nature, as well as those who are so likewise by law. The terms used in any law are to be interpreted in the same sense in which they are used, on other occasions, on the same subject. In a statute therefore relating to marriage the terms of consanguinity must include natural as well as legal relations.

Illegitimate minors are equally within the policy and intention of the act. They are as much in want of the care and protection of their parents as other children. It has been decided that they are within the provisions of the statute, so far as to make consent necessary for their marriage. In the case of *The King v. The Inhabitants of Hodnett* (T. R. vol. i. p. 96), Mr. Justice Buller says, "The words of the marriage act are very general. It speaks of all persons, except under particular circumstances. Then do illegitimate parents come within any of these exceptions? If they do not, they fall under the general regulations established by the act." If this point had been determined by this Court in the case of *Foster v. Lawrence*, it would have been presumptuous to argue it again; but the Court itself has intimated that it was not decided. That judgment went on another ground—that there was no consent whatever. This point however has been expressly decided in the case of *The King v. The Inhabitants of Edmonton*, a settlement case, in which the whole cause depended [345] upon it. *The King v. Cornforth* shews that the natural father has the lawful custody of his children. The opinion of the Court of King's Bench in these cases is entitled to the greatest attention. For though the Ecclesiastical Courts have the sole cognizance of the validity of marriages, yet it is generally held that if statutes are made upon such points of exclusive jurisdiction, the Courts of Common Law have a right of issuing a prohibition, if this Court varies from those Courts, in the interpretation which it puts upon them.

An illegitimate parent must be presumed to pay more regard to the interests of the child than a mere stranger, to whom the power of consent must otherwise be given by appointment of the Court of Chancery. It is said to be the practice of the Court of Chancery to appoint guardians in such cases. But they usually are appointed on application ex parte; and no case is mentioned in which the circumstances have been brought fully to the notice of the Court. It is said likewise to be the practice of the Ecclesiastical Courts not to require the consent of an illegitimate parent, on granting licences. But these licences also pass on the application and representation of the party; and no instance is mentioned in which the circumstances of such a case were brought to the notice of the judge of any of these Courts. In the present case the mother was appointed guardian by the will of the father; he expressly authorized her to consent, and a considerable part of the fortune of the daughter was made to depend upon that consent.

[346] *Judgment*—Sir William Scott. This is a proceeding by *Thomas Strangeways Horner, Esquire v. Harriet Liddiard, otherwise Whitelock*, described as spinster, to obtain a sentence of nullity of marriage by reason of minority; the party against whom the proceedings are had being illegitimate, a minor, and having been married by licence, with no other consent than that of her natural mother.

The facts undertaken to be proved are—first, the date of the birth of the party—secondly, the illegitimacy of the birth—thirdly, the date of the marriage—fourthly, that the marriage was had by licence, not by banns, and on the consent of the mother only—and, fifthly, that no guardian had been appointed previous thereto—from whence it is inferred that the marriage is null and void, as not being supported by a legal and effectual consent.

It has been admitted that the facts, from which this legal conclusion is to be deduced, are sufficiently established. The date of the birth, and the illegitimacy, are proved by the natural mother. They are proved likewise by Anne Ashley, who was present at the birth of Harriet Liddiard, otherwise Whitelock, and afterwards at her baptism; and by another person of the name of Charlotte Mildenhams, who is the natural sister of the party. There is also an entry of baptism upon the 12th of November, 1777, in which she is described as being base-born. The third and fourth facts, namely, the date of the marriage, and that it was a marriage by licence (with the consent of the natural mother only), are proved by the mother herself, and by Robert Walker; and it appears to have been solemnized upon the seventh of March, [347] 1796. These facts are proved likewise by the affidavit to obtain the licence, and by the entry of the

marriage. The fifth fact, which is undertaken to be proved, that there was no appointment of a guardian, is established by Mr. Stevenson, who is a solicitor in the Court of Chancery, and Aaron Collingbourn, who have searched the records of the Court of Chancery from Hilary Term, 1777, to Trinity Term, 1796, in which period no appointment of a guardian occurs, and if it existed at all, it must have been found amongst these records.

The facts, therefore, upon which the parties rely, are fully established, and the only question is whether the conclusion of law is rightly deduced. That question arises upon the act of parliament, which has made certain other consents necessary, besides the consents of the contracting parties themselves. These additional consents are those of the parents or guardians, according to the different circumstances of the case. First, the consent of the father. Secondly, of the guardian appointed by the father. Thirdly, if the father is dead and no guardian is appointed by him, the consent is in the surviving parent, if she is unmarried. And lastly, the consent of a guardian appointed by the Court of Chancery.

So far as the consent of parents or guardians is absolutely required the act of parliament has introduced a new rule. The consent of parents was not required de necessitate to the marriage contract, in its own nature, as understood by the law of this country, or by its religion, which mixed itself much in the consideration of this subject. It was indeed a consent highly desirable to be procured, from motives of piety and filial reverence, [348] from motives of prudence and of family convenience and propriety; but the obtaining it was a duty, though of high, yet of imperfect obligation only. The want of such consent was, as the ecclesiastical lawyers expressed it, an *impedimentum impeditivum*, an impediment which threw an obstruction in the way of the celebration of the marriage, but not an *impedimentum dirimens*, an impediment which at all affected the validity of the marriage if it was once solemnized. As to the consent of guardians, it does not appear to have been much thought of, except in certain feudal relations, where the power of guardians was carried to a very extravagant length, and for purposes pointing almost entirely to the interest of the guardians themselves.

The marriage act extends its regulations to the marriages by licence of all persons whatever, with the exception of a few cases, amongst which the case of bastards is not included; at least not nominatim. They are therefore necessarily included under the regulations of the act, unless they are out of the reason and policy upon which it is founded. But they are clearly within the reason and policy of that act; illegitimate minors may have property which requires to be defended; in all cases, they have their persons and their personal happiness in life; and it is fit that their personal happiness should be protected by experience and prudence greater than their own.

Accordingly, the Court of King's Bench has decided, in the case of *The King v. The Inhabitants of Hodnett* (vid. ante, p. 344), that illegitimate children fall [349] under the general regulations established by the act. The opinion of the Ecclesiastical Court was expressed in the case of *Foster v. Lawrence* (vid. ante, p. 342), and the marriage was declared void upon one or both of these grounds, either that the additional consent was not proved to have been given, or, if it was, that it was not the proper additional consent. It is so considered, likewise, by the Court of Chancery, in the appointment of guardians to consent to the marriages of bastards.

The necessity, therefore, of an additional consent is universally recognized by all the Courts in the kingdom. The only question is, what is the proper additional consent in the case of such persons? Now it appears to me that the Court of Chancery has answered that question, ever since the passing of the act, by its uniformly appointing guardians to bastards, although the father and mother were living. This universal practice certainly expresses the opinion of that Court, not only that bastards are within the act, but that the reputed parents cannot give the consent required; for, if they could give that consent, the Court of Chancery would only have appointed a guardian, when the father had died without nominating a guardian, and when the mother was dead or married again. But it is not so. The Court, therefore, considers these persons as included in the act; but that it has placed them under the last description only of those who have neither father, nor guardian lawfully appointed, nor mother. It applies the first regulations only to legitimate children, as they only can have a father, a mother, or a testamentary guardian. And

the Court of [350] Chancery has constantly, as I have understood, acted upon this construction.

The Ecclesiastical Court has followed the Court of Chancery in adopting that construction; and it has always refused to grant licences upon the mere consent of the natural father or mother, and unless it is stated that they are likewise the lawful father or mother. I have always understood that the form of the affidavit, upon which licences are now granted, was originally settled at the time of passing the act, upon great advisement and consideration, by eminent lawyers of both professions.

In the case of illegitimate minors, during the lives of their parents, the constant course has been for guardians to be appointed by the Court of Chancery, whose consent has been supposed to render their marriage valid. Many marriages exist in this country which have taken place in this manner, and they are all void if this is not the true construction of the act; because they have been had without that consent of the parents which the act otherwise would make necessary to sustain their validity. If it is argued, however, that this is an improper construction; the objections, independent of all authority upon the subject, must arise, either, in the first place, from general principles shewing that another construction is necessary or expedient to be adopted; or secondly, from the context of the act itself; or thirdly, from a different construction of the same expressions in other statutes in *pari materiâ*. In the first place, I presume that it is to be admitted that the father and mother intended by the act are to be the father and mother *ejusdem generis*, they must be both parents of the same description; not a legal father and an illegal [351] mother. Now, on all general principles, it is perfectly clear that the only father whom the law of the country has armed with the *patria potestas* is the father "*quem nuptiæ demonstrant*." He only is the guardian of his child by law, and he only may delegate that trust to another at his death.

The only cases in which the natural parent is acknowledged are cases to his disadvantage, in cases of civil concern, or by way of restriction, in such as are of a moral nature. He is compelled by later statutes to maintain the child, for the relief of the parish, to ease it of the charge to which it is primarily liable, because before these statutes the parish alone was bound to maintain it. It is laid down in 2 Bulstrode, 344, and Bott, 460, that before the statute of the 18th Eliz. c. 3, the parish where the child was born must maintain it till it gained a settlement. The custody of the child, therefore, must have been at that time in the hands of the parish, he was *filius populi*, and there was no ground upon which the possession of the child could have been assumed by the father. Even since the enactment of that statute it continued for some time a matter of no inconsiderable doubt whether the parent had a right to take the child out of the possession of the parish. In the case of *Newland v. Osman*, Bott, 460, there was the opinion of three judges of the Court, that the father, under such circumstances, agreeing to maintain the child, had a right to the possession, and they referred to Saunders's Reports (*Richards v. Hodges*, vol. 2, p. 83). But I find that Mr. Justice Foster says, "I am not so clear in these points. I think the case of educating bastard children is not to be con-[352]-sidered as a burden to the parish but as a trust; and that it should not be easy for fathers to take them out of such care and custody; the statute is express that the justices shall order the father to contribute to the parish for the maintenance of the child. Though it is not to be supposed that fathers will destroy their bastard children, yet they may look upon them as a burden and a shame, and therefore either neglect them or put them in improper hands. The resolutions and orders of justices of the peace have been grounded upon this, not for requiring security till the child come to a certain age, but because the order extended the age too far; therefore I am not so clear. The case in Saunders was only his own opinion." Certainly if so eminent a person expressed himself in such a way, it is enough to warrant a conclusion that it continued to be a matter of some doubt long after the passing of that statute, whether the natural father had a right to the custody and possession of his child against the parish.

Though this may now be settled, still he can appoint no guardian; and, I presume, that he cannot legally take the child out of the custody of the mother, in which it is deposited by nature at its birth; though I speak with all necessary caution on a point belonging to the learning of another profession. All this is sufficient to shew that he has the principal burden of maintenance, with a very small degree (if any) of parental authority.

According to the general policy of the law in matters merely moral, a person is said to be restrained from marriage with illegitimate relations, as much as with legitimate ones; because the rules of pro-[353]-hibition of marriage arise out of natural relations; and though these rules (as received by our law) are perhaps carried further than might seem necessary, on mere moral and natural grounds, so far as they can be exactly ascertained by mere reason, yet, as they are taken from the law of God, and have one common origin therein, they are all considered as of the same moral nature and obligation. It is however to be observed that even this matter does not appear to have yet received a final decision; because I see that in the case of *Hains v. Jeffel* (1 Ld. Ray. p. 68) the cause was adjourned, and therefore no decision was given upon the question; although undoubtedly the Ecclesiastical Court, the proper forum on questions of that nature, conceived that that marriage came within the reach of the prohibition.

But taking it to be sufficiently settled, as I conceive it is, that moral restraints do attach upon natural consanguinity, yet certainly it is not to be asserted that the absolute necessity of parental consent to the validity of the marriage contract is considered, in law, as of more than of positive and civil institution. Nothing belongs to the validity of that contract naturally (as far as it has usually been considered and treated by most human laws), but the consent of the parties themselves, if they are of an age capable of executing the duties of that contract. I desire to be understood as advancing nothing upon the question whether human laws have considered this matter rightly: I only assert the fact that they have so considered it. For nothing can be more clear than that, by the universal matrimonial law of Europe before the [354] Reformation, the consent of parents was not required de necessitate to the validity of the contract. Upon this footing the matter continues in every country of Europe holding communion with the Church of Rome, except where regulations merely civil have, in later times, introduced a novel and peculiar law upon the subject. Upon this footing the matter remained in many Protestant States after the Reformation; it so remained amongst ourselves till the time of the marriage act; and nothing can more clearly shew than that very act how much human law is in the habit of considering the interposition of the parent's consent as of civil institution only. The power is given to one parent exclusively; upon his death it does not survive to the other parent, but it is given preferably to any stranger whom the deceased parent has thought fit to nominate, and it devolves to the surviving parent only in defect of such nomination. If it does so devolve to her it continues with her only during widowhood; for her second marriage, though it does not at all affect her natural character of parent, puts an entire end to her legal right of consent to the marriage of her child, and transfers it to the public magistrate. Nothing can more satisfactorily prove how much the matter has been treated and moulded as under the entire dominion of mere civil prudence. As to the necessity of the consent of any guardian, it is sufficient to observe that the office itself is a mere creature of civil institution.

So much then as to the general analogies of the law, with respect to the rights it has vested in parents and the capacity which it has given to children.

[355] Let us next look at the context of the act to see what is to be deduced from thence.

First, the marriage of minors is to be had with the consent of the father. Of what father? I take it clearly to mean of the legitimate father and him only; for it follows, secondly, the consent of a guardian lawfully appointed. But how appointed? I presume by the father, under the act of parliament which gives him that power. For there are only two modes of appointment known to the laws of this country; by the father, under the statute, and by the Lord Chancellor. Now the guardian, appointed by the Court of Chancery, is not introduced till a later stage where he is particularly described. Consequently the guardian here spoken of must be the guardian appointed by the father; and the father who is mentioned must be he who can appoint a guardian; but it is admitted that that power belongs only to the lawful father. The father therefore spoken of before must be that father, and that father only. In the third place, the consent of the mother. If the natural mother is to be understood she would have more authority than a legal mother, because the right of giving consent does not devolve upon the legal mother till in the third instance, viz. in case of a defect of appointment of a guardian by the father. But the natural

mother would be entitled to give a valid consent in the second instance, as the natural father can appoint no guardian.

If the illegitimate father is to be considered as capable of giving a valid consent, is it every illegitimate father? certainly not; because in many cases no satisfactory evidence can be given of paternity. What evidence is to be required to [356] establish that point? Not his own testimony; because a man cannot be allowed upon his own claim and assertion only, to make his consent necessary to the marriage of another person. Or is it to be proved by the filiation, in the manner directed by the act of parliament, for the special purpose of ascertaining the settlement of the child?

Supposing that this evidence which the law has provided for the special purpose of exonerating the parish, and for that purpose only, as far as appears, is to be borrowed and applied to this purpose, it will not answer the exigencies of many cases; it would not in the present case, where no such filiation has been proved, or, I presume, can be proved. But, supposing such filiation, what sort of paternity is acquired by it? In the language of the statutes he is stiled the putative father, he is still recognized only as a father by mere reputation? Is it then to be asserted that this right of giving consent belongs to every father who is so merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to serve as the foundation of a right of this nature? In what manner, and on what proof is the licence to be granted, if it is not to be granted to every such father? In what way is it to be shewn at the time of granting that licence that he has that popular repute in the requisite degree? Is the acknowledgement of the party, the maintenance and education of the child, to be called in aid? If the mere affidavit of the father is not sufficient for the purpose, in what way is that evidence to be obtained? Or is a licence to be granted, leaving the question of the validity of the marriage open to future discussion, and to the [357] chance that if any dispute arises, evidence may be obtained to prove the acknowledgement, the maintenance and education, and the general reputation? Can such a licence with propriety be granted?

Now let us see what are the rules of law upon the construction of statutes *in pari materia*.

I take it to be universally true, almost without any exception, that, in all other acts of parliament, the title of father belongs only to him who becomes so in the manner known to and approved of by the law. Every other father, in the language of the law, is only a father by repute, of an illegal and disreputable character; a character not of honour and reverence, but of discredit and shame. In all other statutes, relating to the civil rights of father and child, they are the father and child known to and recognized by the law. When it is considered that this is a statute which gives strong privileges to parents, privileges unknown to the ancient law of the country, what reason is there to presume that, in this single statute, the words should have a larger construction, in order to communicate such important rights to persons to whom the law does not, in other cases, give any? and who bear the title of parents, not as a title of honour and privilege, but of discredit and disability? Nor is it necessary on account of the minors themselves, since they cannot fail to find that protection, which it has been the wisdom of the law to provide, in the appointment of a guardian, by the authority of the Court of Chancery.

Attending thus to the universal policy and morality of the laws, to their language in general, and to that which is especially used in this act, I cannot but be of opinion that it was the intention of the legislature, *dare jura maritis* only, to [358] give a power to lawful parents alone; and that natural parents, though parents *de facto*, are not the parents intended by the act. So much for the question upon principles; how stands authority upon the matter? In the first place, private authority speaks negatively at least to this effect. Mr. Justice Blackstone, it is observable, where he treats of the peculiar powers of legal parents, expressly mentions this consent as belonging to them (vol. 1, c. 16, p. 452); when he speaks of the power of natural parents it is not then enumerated, though it must have occurred to him; and therefore it is to be inferred that, according to his judgment, it is a power which belongs to one description of parents only.

I observe that the learned editor of the last edition of the Commentaries has laid it down that it has been decided, "that if a bastard marries under age by licence, he must have the consent of his putative father, guardian, or mother, according to

the statute" (vol. 1, p. 458, n. 11). If the observation is to be understood according to this arrangement, I cannot agree that it has been so decided. For what guardian can be so interposed between the natural father and mother?

As to public authority, there has undoubtedly been a decision of a very high Court, which has treated the only difficulty presented to my mind upon the subject; I mean the case of *The King v. The Inhabitants of Edmonton* (vid. ante, p. 341); for the case of *The King v. The Inhabitants of Hodnett* established no more than that natural children are within the provisions of the act. But in the case of *The King v. Edmonton* I cannot deny that the present question did arise; and I am as little disposed to [359] deny that the express decisions of the Court of King's Bench, in the interpretations of statutes, even in re ecclesiastica, are authorities of a very binding nature. But I hope I may, without violating that reverence which I owe to such an authority, permit myself to observe that it is a case which stands single—that it is in that class of cases which are usually considered as most open to the revision of the Court; I mean the class of settlement cases; and that a question of the validity of marriage is in that Court a question of incident merely; and what has still more importance with me, high as the authority of such a decision must be, even with all these deductions, it is opposed by the uniform interpretation of the statute, given by the Court of Chancery since the passing of the act; a practical interpretation which has been constantly, as I understand, acted upon by the interposition of its authority, in the appointment of guardians in such cases. Under this opposition of authorities it will not, I hope, be deemed too much for me to remark that this Court is rather left more to its own views of the subject than if such a decision had stood without any opposition at all.

If then I am called upon to decide this case, I have already intimated that attending to the general policy and morality of the law, to the principles of interpretation, and to the language of the legislature in this and other similar statutes, I am led to conclude that the consent of the natural parent is not that consent which this act requires to be given, as essentially necessary to the valid marriages of illegitimate children. At the same time it is proper for the party to recollect that a different opinion has been delivered upon this point. [360] It is likewise proper that he should be apprised that in the case of *Thoroton v. Thoroton*, in the Court of Arches (26th January, 1797), and afterwards in the Delegates (21st February, 1799), a separation for adultery was founded upon a marriage of this description. And although that matter of the marriage passed sub silentio, no objections to its validity having been pointed out to observation, yet, as it was not, and could not be, dissembled in the libel, I cannot take upon myself to assert that it did in no degree fall under the consideration of the Court in the decision of that case. It will be for the party to apply these suggestions to the security of his own future conduct as he may be best advised. But my opinion on the question brought before me is that the marriage is not conformable to the statute, and that it is my duty to pronounce that it is null and void.†

[361] OLIVER v. OLIVER. 25th June, 1801.—Restitution of conjugal rights. Counter allegation of cruelty in menacing and insulting treatment, and prayer for divorce thereon, not sustained on the facts. Restitution decreed.

[Referred to, *Russell v. Russell*, [1895] P. 325: affirmed [1897] A. C. 395.]

This was a suit brought for restitution of conjugal rights by the husband, in which

† In the case of *Priestly v. Hughes*, April 20th, 1809, on an issue directed by the Master of the Rolls to the Court of King's Bench, respecting the validity of a marriage of this description, that Court certified in the following terms:—"This case has been twice argued before us by counsel; we have considered it, and are of opinion that all marriages, whether of legitimate or illegitimate persons, are within the general provision of the statute 26th Geo. 2d, chap. 33, which requires all marriages to be by banns or licence; and that the consent of the natural mother to the marriage by licence of an illegitimate minor is not a sufficient consent within the 11th section of that act: consequently that the marriage had and solemnized between the said John Wynne Hughes and Jane the mother, on the 9th September, 1792, in manner aforesaid, was not a good and lawful marriage, but was void by force of the said statute of the 26th Geo. 2, chap. 33.

"ELLENBOROUGH, S. LE BLANC, J. BAILEY."

Mr. Justice Grose, dissentient for reasons assigned by him. Vid. East's Rep. vol. 11, p. 1.

a plea of cruelty set up on the part of the wife and a prayer for separation, were not established.

Judgment—Sir William Scott. This is a suit brought by Thomas Oliver against Francis Oliver, his wife, for restitution of conjugal rights. The marriage is proved; the husband therefore is entitled to what he prays unless some circumstance has deprived him of it. Mrs. Oliver has given in an allegation, in which she pleads that Mr. Oliver had been guilty of cruelty, and prays to be divorced from him. She has examined seventeen witnesses to that plea, and upon their evidence I am to determine the cause. If he has treated her in the manner pleaded, it will undoubtedly be a sufficient bar to the action, and she will be entitled to a sentence of separation; on the contrary, if there is not that sufficient proof which the law requires, it will be her duty to return to her husband, and endeavour to spend the remainder of her days in peace and mutual kindness.

The marriage took place in June, 1798, when her former husband had been dead about a year. The annus luctûs was passed; but during that interval it appears she had entangled herself with some connection tending to a matrimonial union with Mr. Bond: and it is stated in the evidence that there had been an action brought by that gentle-[362]-man for a breach of promise of marriage which failed. It appears, however, that she expressed great agitation of mind about it during its dependance; it therefore may be presumed to have been an action instituted not without some foundation. It appears, by the evidence of Dr. Lake, that this lady is not always very well founded in her complaints, and that she is rather apt to view things in erroneous and unfavourable lights. Mr. Burchell says, "that an action was brought by a gentleman of the name of Bond against Mrs. Oliver for a breach of promise of marriage; that though he has never heard Mrs. Oliver abuse or insult her husband, he has heard her charge him with having involved her in that action, by his precipitating her into this marriage; adding at the same time, that if she had not been hurried into it, she should never have suffered what she did."

This really appears very like a habit of shifting off very much from herself the consequences of her own act on a person who is not at all answerable for it. The lady was arrived at those years of discretion when she must be supposed to have been capable of judging of her own conduct and her own interests. I can consider it only as her own act and deed, done with her eyes open, and with the perfect knowledge of all other engagements which she might have entered into; I think therefore this was a complaint very improperly brought against her husband.

Dr. Lake says "she was very apprehensive of the consequences of the trial, and spoke with considerable warmth and vehemence against Mr. Bond, and against Mr. Oliver, in general terms of reproach; and that she considered the object [363] of each of them was to make a prey of her and to get what they could of her property." This sort of language strongly leads one to presume that the complaints made by this lady against other persons are not always founded in justice or truth. It appears that Mr. Oliver followed the business of a watchmaker, and likewise that of a dissenting preacher; what his profits were, arising from these two occupations, I have no means of knowing; but it is reasonable to suppose they were of decent amount, such as two such employments might be expected to produce. Some imputations have been thrown out that he was in a very inferior situation of life; it is clear, however, that he was not in circumstances of necessity, and that the union of two such persons was not unsuited to produce mutual comfort, so far as property could secure it.

Upon the marriage, the lady, having very considerable property of her own, kept it in her own grasp, transferring to her husband only a very small proportion of it. Mr. Oliver on becoming her husband was at least her equal, if not her superior. It is the law of religion, and the law of this country, that the husband is entrusted with authority over his wife. He is to practise tenderness and affection, and obedience is her duty; and in taking the character of wife, she is to take upon herself, at the same time, the duties attached to it.

It may, perhaps, be apprehended with some reason that where there is much disproportion of fortune, so placed originally and so tenaciously retained, much harmony is not likely to be a lasting result. No situation is more calculated to produce the controversies that belong to meum [364] and tuum. Arrangements may be made sufficiently consistent with mutual affection and convenience; but none such appear to have been resorted to in the present case. Here the husband was

scarcely on a proper footing: the carriage was always considered by the servants, as exclusively belonging to their mistress; they looked up to her alone; and the husband is placed in a situation of degradation, which must give both considerable uneasiness—on her part to maintain, and on his part to suffer it.

The charges brought by the wife against the husband consist partly of words of abuse and reproach, and partly of acts of a harsh and oppressive nature. Of words, it is sufficient to say that, if they are words of mere present irritation, however reproachful, they will not enable this Court to pronounce a sentence of separation. She must try to disarm them by the weapons of civility and kindness; and if they fail (as unfortunately they often will), the law of this country requires that she should submit to the misfortune as one of the consequences of her own injudicious choice. Passionate words do not, according to the vulgar observation, break bones; and it is better that they should be borne with than that domestic society should be broken up, and a husband and a wife thrown, in loose characters, upon the world. Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done. But the most innocent and deserving woman will sue, in vain, for its interference for words of mere insult, however galling; and still less will that interference be given, if the [365] wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation. That the husband did, in various instances, insult his wife by words of abuse is, I think, sufficiently established in this case; and it will be his duty to reform such habits if his wife should return to his society. The words used by him are certainly sufficiently rude; but the feelings of disappointment and dissatisfaction in the breasts of persons of coarse education naturally enough find their way from their mouths in no very refined language and sometimes with more violence of sound than meaning. And I am not convinced that I am to impute to this person a real desire of making his wife miserable. He is said to have threatened "to horsewhip her." On another occasion, "that he would send her to Bedlam." Only one act of real violence is imputed, but in what manner proved? The witnesses are hardly worthy of the confidence of the Court. One of them is her niece; the incorrectness of whose deposition, I am willing to impute to mere want of recollection; but still I must consider it on that account alone (if I restrict it to that) as unsatisfactory. Another witness is a child of fourteen years of age, who may have taken a wrong impression of what passed.

The third is the cook who, from her situation in the kitchen, could know little but what she received from report; and she is likewise subject to an observation that materially affects her credit. On her examination in chief she confines her description of all the foul language that passed to the mouth of the husband; but when pressed by the interrogatories, she admits that the wife's mouth was equally gifted; that there was much wrangling between [366] the parties, and that the one was as much in fault as the other. Another witness, a servant, Henry Dean, seems throughout to have looked to his mistress as a femme sole, instead of looking up to Oliver as his master. In fact, the account of all the servants in this family seems to have been enlisted to their mistress, in a degree that calls for much jealousy, in the Court's estimation of their credit. This very person, a very young man, is proved to have declared, in direct terms, to another witness that if he had such a wife he would do to her what Oliver had only threatened to do.

A material witness, materially discredited, is, I think, the party herself, on whose complaints the whole of the present application to the Court is founded. Here is a woman, at an advanced time of life, making a charge against her husband that he was the author of her own precipitate marriage. When I see such absurd complaints brought forward, I feel that strong deductions are to be made from the testimony of the other witnesses, even if no contradictions of their own were opposed. The testimony in support of such a case must be extravagant and high coloured. But the fact is that there are contradictions of their own. Margaret Thomas "admits that she does not know whose fault it was; that it appeared to be as much of one as the other." Dean tells Mary Owen, one of the most credible witnesses of the whole set, that he would use correction and restraint if he had such a wife. To look to witnesses of higher station, Dr. Lake, who visited the family, and who does not appear to have any bias upon his mind that inclines him to either party, speaks of her as a person of asperity of temper, and as cheerful when not [367] provoked; "and he thinks he

must say that she has not a very bad temper." Such is the doubtful and moderate panegyric which he has to give her. He says that when he visited them after their marriage he cannot say that Mr. Oliver treated her with disdain; but there was a good deal of wrangling and jarring between them. There was an unhappy want of accommodation, very much increased, undoubtedly, by the unequal circumstances in which the parties were placed, which could only be removed by tempers happily formed. There is, however, nothing in the evidence to charge Mr. Oliver with being the sole cause of these quarrels; which, owing to the situation in which he was placed, unless with a very mild and amiable temper, could hardly have been avoided.

A second witness says "that he visited them, and this very shortly after their marriage: Mr. Oliver began to treat his wife with the greatest disdain and contempt, &c. &c." But when I find this witness, in answer to an interrogatory, speaking of a transaction happening in his own presence, I cannot think that all the inflammable matter was on the side of the husband. He says "that he was in company with the parties about January, 1799, when Mrs. Oliver flew into a passion because Mr. Oliver smiled at deponent's calling some elderly ladies, who lived at Kensington, old tabbies; and she then proceeded to reproach her husband with their inequality of situation, and imputed to him the unworthy motive of having married her for the sake of her money." That she should be in a passion at his smiling at a thing so perfectly inoffensive as that was to-[368]-wards herself is behaviour of an extremely improper kind; and there cannot be a doubt but that the expressions made use of by Mr. Oliver, on that occasion, at least, were the consequences of that behaviour. I will not apologise for this indecent language nor defend the propriety of those expressions. I cannot, however, but advert to the manner in which they arose, in answer to an imputation cast on him of a very opprobrious nature: and with respect to the offence against the delicacy of this lady, I cannot help thinking that is much lessened when I see it in evidence that she relates something that passed between herself and husband in the privacy of the marriage bed.

This is the general effect of the evidence as applied to words of reproach: and I do not think there is that entire balance of ill conduct on the part of the husband that would induce me to pronounce that this lady has been causelessly insulted in the manner pleaded. The utmost that I can allow is that there are faults on both sides; and that the lady's temper has incurred some degree of blame in using expressions which it would have been much better to have omitted; "that of having married a beggar, and raised him to a coach," and such other language as a husband cannot but feel great resentment on its being applied to him.

The next charge is that of having used words of menace; from which the Court is to infer bodily injury; "that he would lock her up in a room, and horsewhip her, and that he would send her to Bedlam." I have already observed upon the credit due to Dean, who has spoken to this part of the plea; and I cannot but think that the story he [369] has delivered in his deposition is highly incredible in its own nature. He says "he came into the room while the family were at Brighton, and he observed his mistress in tears, and Mr. Oliver in a violent passion with her, which he discovered to have arisen from some dispute about politics, and that Mr. Oliver said if she used that language again he would horsewhip her." How is that confirmed? Mrs. Burchell speaks of no such behaviour; she thinks it arose out of the unhappy temper of Mrs. Oliver. Another witness gives a very candid opinion; she imputes the blame to both, and in the strongest terms denies that she heard any language of this sort. The other words of menace are that Mr. Oliver said sometimes "that she was mad; that he told the servants to take notice of her at the full of the moon, and that they would observe a change in her." Possibly this might be the impression on the mind of the man: if it was, am I to consider it as the language of mere invective and abuse? As to the threat of sending her to Bedlam, there are no witnesses who speak to the use of such words; but supposing them to have passed, and to be sufficiently proved, they do not prove malice; for they might be the expression of a real opinion, even though erroneously formed.

I come now to acts of violence; and I think there is only one described—"that, in a coach in Piccadilly, he held up a knobbed stick, and, with the greatest fury, threatened to strike her?" but he did not actually strike her. It is a blind account of the matter that is given by the coachman, the only witness produced; the transaction passed after it was dark, and could therefore be [370] very indistinctly seen

by the coachman on the outside, sitting as those persons usually do. Of the commencement he knows nothing. The allegation states "that she alarmed the coachman, and got out of the coach, and went to Mr. Pollock's house for assistance." To him she gave an alarming account of what had happened to her in the coach, but it does not seem to have alarmed that gentleman very seriously; for his advice to her was to return into the coach and go home, which, after some repugnance, she does, and home she goes. No person is produced whom these cries of murder must have summoned to her assistance; for every body knows that, in this great town, a prompt assistance would be given to a wife calling upon their humanity for protection from a husband's attempt to murder. In short, there is nothing but her own account of the matter given in the allegation. Much of that account may be imputed to nervous agitation, arising upon a contest which began in the dark and passed in the dark; and what its real character was must remain in the dark; for seeing how little the allegation is in general supported by evidence, I cannot confidently presume that the unsupported representation of this occurrence is perfectly correct.

The next fact charged is that she, being kept in a constant state of irritation, and her illness occasioned thereby increasing upon her, she requested him to join with her and Dr. Lake in prayer, which he refused to do, and abused her for sending for Dr. Lake; but the whole that appears in the evidence is that when Dr. Lake came into the room, and asked him to [371] pray with her, he declined doing so; and this he might certainly do without any impropriety for several reasons that might possibly dispose him to decline such an office at such a moment.

The last act of violence, and one upon which considerable stress has been laid, is that in which she is described as having received much bodily hurt; and if satisfactory proof was given of that, the Court would, with great alacrity, interpose to protect her against its recurrence. But it must not be said that a slight inattention or carelessness on the part of the husband, though it may accidentally, and contrary to his intention, produce mischief, will warrant the Court to pronounce a sentence of separation by reason of cruelty. Affection may exist though accidents may happen in petty quarrels. What is the fact? One morning, when Mrs. Oliver was going out for the whole day, or a considerable part of it, there was a quarrel about the keys belonging to the wine and ale cellars, which Mr. Oliver required. Am I to be informed that she had a right to refuse them? and that her husband was to be deprived of those accommodations if he required them? Where does she find the law for the refusal if she does not shew any special agreement to such a strange effect? If not, surely this was conduct enough to exasperate a husband, to the extent at least of an endeavour to obtain possession of them. In the course of that endeavour, a struggle or scuffle takes place; and in that scuffle the weakest goes to the wall, and she is unfortunately bruised in her arm and breast against the garden-steps. But is such an accident, produced by the vexatious and unjust refusal of the wife to deliver the keys, suffi-[372]-cient to justify in law her refusal to cohabit with her husband. There is no reason to impute any malignant intention, or any other intention than that of obtaining what he had a right to possess, and which was illegally withheld. A husband is not to be deprived of his marital rights because a wife pertinaciously resists them; and, in the course of that resistance, encounters accidental injuries which never were meant to be inflicted.

A good deal has been said with respect to a separation by articles of agreement: it does appear that, after this act of mutual violence, she applied to a respectable magistrate, and put herself under his protection. The advice which he gave her was perhaps more salutary than legal—to proceed to such articles of agreement; the fact being that the parties had pledged themselves at the altar to live together till death did them part. They pursued, however, a negotiation which finally became ineffectual, and they resort to this Court.

The only question remaining for my consideration is whether such a case is proved on the part of the wife as will entitle her to a separation from her husband. I am of opinion that it is not; and that she is under the legal obligation of returning to her husband, and that it is her duty to improve her mind by what has passed; and to recollect that, having assumed the relation of a wife, she is bound to execute the duties that that relation imposes; and particularly to abstain in future from inordinate pretensions and exaggerated complaints.

[373] SOILLEUX v. SOILLEUX. 13th July, 1802.—Divorce by reason of the adultery of the husband: defence that the charge amounted only to a solicitation of chastity overruled.

This was a case of divorce instituted by the wife, in which the defence set up that the facts only amounted to a solicitation of chastity was overruled.

Judgment—*Sir William Scott*. This is a suit brought by Mrs. Soilleux against her husband for cruelty and adultery. The parties were married on the 5th January 1786, and they cohabited together until that separation took place upon which the present application is founded.

It appears that this lady kept a boarding-school for young ladies at Kensington, and, by a very honourable industry, supported herself and six children. There are different accounts as to the contribution of the husband towards the support of his family; but it is clear that his contribution formed a very small proportion, and that his industry was frequently of a very mischievous tendency. The general propriety of his conduct has been entirely given up; his counsel have admitted him to be deserving of every reprehension, and have found it necessary to stand upon a strict specific principle of law.

The libel charges both cruelty and adultery, though the former is not insisted upon. The witnesses are all of them acquainted with both the parties. One of them, living in the house, has proved that Mr. Soilleux's usual conduct towards [374] his wife was extremely rude and oppressive: that he grossly abused her in the presence of this deponent and of two scholars, and otherwise treated her with great harshness; and, at that time, took possession of her keys. In short, he endeavoured to make her life truly uncomfortable. The principal question however is whether his conduct, as founded on the imputation of adultery, is so proved that the Court can found any sentence upon it.

I need not remark that, in a house like the one in question, where there are five daughters and a great number of female scholars, the purest manners ought to be observed by every person in it; particularly by him, whose example was likely to have so much influence, from the situation he held in it. I am compelled to say that his general conduct was as inconsistent with this obligation as possible.

It is proved by several of the witnesses that he, as it has been termed, solicited their chastity. Solicitation of their chastity is a very gentle description of the facts; for here are acts of bodily violence which go far beyond the bounds of mere solicitation, particularly in the case of Theresa Tiellier, who was assaulted by him in the earlier part of the history, in the year 1797; and nothing but a very obstinate resistance on her part could then have prevented her ruin. It appears that this witness was absolutely under the necessity of quitting the family, on account of the immodest and brutal behaviour and attempts of this unprincipled man; and I think she acted with all necessary prudence on the occasion. There is nothing of malice or resentment by which her deposition can be considered to be at all discoloured; on the [375] contrary, she positively consults with a lady who was a parlour boarder in the house, and who advised her not to make any representation to her mistress. She at length retires in silence in consequence of this molestation. There is another witness who speaks to the same effect.

These witnesses are stated to be merely evidence to character; but I think their evidence is stronger, because they prove that Mr. Soilleux was perfectly disposed to commit the crime with which he is charged, and that he took the most active and violent measures for effecting his purpose, and that nothing but the consent of the other party was wanting. Such consent appears in one instance to have been given. It is this that makes the conduct of Mary Wiltshire, the person charged, extremely material, and the evidence which she supplies stringent in the extreme; because, when the criminal disposition of the man has been most satisfactorily proved, and when it is also proved that the conduct of this female was so different on former occasions, when she had withstood his attacks—if, after such a situation as is described in the evidence, she ceases to complain, her silence and submission furnish the strongest presumption that his attempt here had been more successful. Mary Cromwell speaks "to going up stairs, and finding Mr. Soilleux and Mary Wiltshire in her mistress's bed-room together." I shall not, however, enter into a description of the situation of the parties; but the state and condition were such as authorize the Court to draw the inference that the act of adultery had been committed.

It is said there is an inconsistency between the account given by this witness at the time and [376] that which is now stated in her deposition. It does not appear to me that any such inconsistency exists. The different statements are such as any man's understanding may reconcile. How then stands the fact? The witness, on the discovery to which I have just adverted, goes away under the impression in her own mind that an act of adultery had passed. It is said that it is only an inference, but unless there is reason to presume that the inference is incorrectly drawn, it is almost conclusive. She immediately communicates the circumstance to Crouse, the other witness. Mr. Soilleux presently afterwards comes into the kitchen, nearly in the dress in which the witness had just seen him. He calls her away, and bids Mary Crouse stay in the kitchen, which a man, conscious of what was going forward, would naturally do. What is the character of the other party? I admit that the declaration of a particeps criminis would be but weak evidence in a common case; but in such a case as the present, where the criminal intention was so fully established, and nothing but the consent of the other party was wanting—I say, the conduct of such a person is evidence of the most stringent kind, that the act, which he was always attempting to accomplish, had actually taken place.

Now, what is there in the behaviour of this person to induce a belief that she had, in the act in question, given any opposition, and that he had been equally unsuccessful in this as on other occasions. Before this period her master had persecuted her with the same odious addresses, and she had complained of them; but after this discovery she makes no complaint, nor expresses any uneasiness [377] whatever. Is that the conduct of a person who is averse to the gross importunities of such a man? What is the conduct of the other witnesses? Of a very different nature—that of resistance at the time. It is said if any persons had gone into the room, when any of the other attempts were made, they would have found exactly the same appearance and nothing more; and that the crime was not more likely to have been committed in this particular instance than it would have appeared in the other. But would they not, in such case, have heard the complaints of the party? Would she not have cried out? Would she have submitted afterwards? If she had been under similar circumstances, would it not have been known? But in this instance there was no representation to the other witnesses of the manner in which she had been treated. If the fact had been perpetrated, and without her consent, would she not have remonstrated against her master? That is the natural and necessary conduct of an innocent woman in such a situation; but when all complaints had subsided, what am I to presume but that the resistance had been totally subdued.

Under these circumstances I am satisfied that this is no case of solicitation of chastity, but that it is an act of adultery, as sufficiently proved as the law of evidence in this Court requires. Here is a person continually exerting his wicked industry in order to accomplish his purpose, who did not succeed in every instance, because there was a firm opposition; but I think it is impossible for any man, reading this evidence and looking at the different parties examined, to entertain any doubt, either in his private or his legal conscience, that in [378] this particular instance he had triumphed over the weak resistance of this woman, and had actually committed the fact.

Here has been no defensive plea: the interrogatories, however, administered on the part of Mr. Soilleux, insinuate calumnies of the grossest and most unfounded nature against his wife, and against another person equally innocent of the charge. I cannot but consider this as a great aggravation of his misconduct. It appeared that he had charged his wife with improper behaviour with Mr. Tomkins: but afterwards, by his letters to Mrs. Soilleux, he attributes it to the effect of jealousy, and speaks of her in terms of the greatest esteem and approbation. If he felt himself bound in justice to retract in this matter, why were these interrogatories administered, tending to throw aspersions upon the conduct of innocent persons? This is a continuation of the atrocious conduct which has marked the character of this man throughout. The Court, under these circumstances, cannot entertain the least doubt that the wife is entitled to the remedy which she prays; and it therefore pronounces for the divorce.

With respect to the costs—the only ground on which it is possible to say that Mrs. Soilleux would not be entitled to her whole costs is that she pleaded matter which she has not proved. If it could be shewn that she had done so wantonly, it would affect a part of the costs, though there is no reason to say that it would affect the whole. But I am far from thinking that there was no reason for such inquiry,

although it may not have been in her power to find the necessary proof; I think therefore no *mala fides* has been shewn.

[379] As to her having an independent income, and he being destitute, that is no reason why she, having applied for redress to the Court, and having established her case, should not be entitled to her costs. The insufficiency of the fortune of Mr. Soilleux must be left to his own consideration, as it is his own misconduct that has made him liable to this judgment. I shall therefore condemn him in costs.

STEPHENSON v. LANGSTON. 10th Feb., 1804.—Parochial offices. Non-resident partner in a house of trade, not exempted from serving the office of churchwarden.

This was a suit to compel John Langston, Esquire, to serve the office of churchwarden in the parish of Saint Edmund the King, London. The question came before the Court on act on petition, which stated, on behalf of Mr. Langston, "That he was a partner in a banking-house, to which he resorts only for the purposes of business; that he neither sleeps nor eats there; but that he lives at Sarsden House, Sarsden, Oxon, and in Clifford Street, in the parish of Saint James, Westminster, in both of which he is liable to serve parochial offices; that he is a justice of the peace, and deputy lieutenant for the county of Oxford; that there was a partner residing in the banking-house, and that the house stood in two parishes."

On the part of the parish it was replied, "that great inconvenience would ensue, if such persons were not compellable to take the office when duly elected, as several mercantile houses are made by throwing two or three houses into one; and that [380] would make the offices come round more frequently; that the house is rated to the firm, and that Mr. Langston, in virtue of the house, would have a right to vote in vestry, and exercise any parish privilege."*

Judgment—*Sir William Scott*.—As this case is brought before me in order to establish a general rule, I will state the result of my researches, as far at least as the authority of the adjudged case (*Brook v. Owen*, 1717) in the Court of Peculiars extends. That case is nearly the same as the one before me: and it was there determined that a partner in a house of trade, though not living in the house, is obliged to serve the office of churchwarden. In that case the act stated "that the suit was unduly brought by Brook; that Owen lived in Saint Swithin's Lane, in the parish of St. Swithin, and at Lestley, in the parish of Hackney, and had never been an inhabitant of the parish of Saint Michael Royal."

On the part of Brook, it was alleged "that notwithstanding he, Owen, never lived in the parish of Saint Michael Royal, he was a partner in the [381] house of Edmonds a sugar baker, and held a lease of a warehouse and workhouse for the purposes of his trade; that upon the choice of a lecturer, he lately had voted separately from his partner, and lastly, that in London it was customary for persons to serve the office of churchwarden in the parish in which their house of trade stands." To which Owen replied, "that he did hold part of a lease of some premises; but that by a separate instrument the dwelling house was assigned to the use of the other partner; that with respect to voting, he was in the church; and standing amongst other person was accidentally reckoned, though his vote could not have been admitted if there had been a scrutiny demanded."

The cause came on for hearing upon the act; and it must have been considered to be the principal circumstance stated in it, and not on the presence of Owen in the church and voting at the choice of a lecturer; for an erroneous claim cannot make eligible a person who had no right to vote. The judgment, therefore, could not have turned upon that ground alone. Here then is the decision of the Judge of the Arches, as we as of the Peculiars; for Dr. Andrew held both offices. That judgment, therefore,

* After the argument on the act on petition, an affidavit was exhibited on behalf of Mr. Langston, stating that he had been appointed High Sheriff of Oxfordshire. The King's Advocate observed that Mr. Langston had been invested with this office only since the beginning of February, which was long after the institution of the suit; he therefore prayed the Court to pronounce him liable to serve the office of churchwarden. The Court said that this was a mere civil proceeding, calling upon Mr. Langston to serve a parochial office, and that it therefore could not but think that his being invested with the custody of a county by the King's writ would exonerate him. Party dismissed.

binding on this Court ; and if it is thought not founded on law, must be set right by the superior court.* If Mr. Langston had not been [382] exonerated by his appointment as Sheriff of Oxfordshire, I should have decreed that he was bound to serve the office assigned to him by the parish. The suit has been properly brought, and the churchwardens are entitled to their expenses. I understand, from those who are well

* 19th June, 1805.—This sentence was accordingly brought before the Court of Arches—on appeal—when Sir William Wynne, in the course of his judgment, referred to other authorities to the same effect ; observing on the form in which the appeal was brought, as being only from the decree of costs, and for the purpose of establishing the principle of law, said—I have no objection to state my opinion upon it, though I do not think it would have the binding effect of complete authority, from the way in which this appeal has been conducted.

Here is a banker at the head of a company of bankers, in a parish in the city of London—occupying a house in which the business is carried on ; and where Mr. Langston regularly attends : but he says “that he has a house in the country, and one also in another part of the town, where he takes his meals and sleeps.” He is at this house however in the city for business, and pays parochial taxes. Can it then be said that he shall not be liable to serve burdensome parochial offices ? It would be hard indeed on the other parishioners if he were exempted merely because, for his own convenience or amusement, he has a house elsewhere. What has been alleged in objection to this ? “That the office of churchwarden is an office which requires personal attendance ; that the churchwarden manages the concerns of the parish, is overseer, &c.” I do not however see why he cannot manage the temporal concerns of this office, as well as his own business, or why he cannot conveniently attend service in the church on Sundays. There are many persons who attend business six days in the week, and go into the country for the Sunday ; and if they should be chosen churchwardens, and think that the duty of their oath calls upon them to attend the service of the church in the parish where they have been elected, they can attend as conveniently on that day as they do on the others for their own affairs.

In addition to the case which has been cited, I will mention also the case of *Ford v. Chauncy* (1715, Archdeaconry of London), which was a well argued case, in which it appeared that the party exercised the trade of linen draper—the father occupied the house and kept it—the son lived as boarder with the father, and was a partner, the rent was paid out of the profits of the business : the son was chosen churchwarden, and the Court held that though he would not have been liable as an inmate, he was as a partner.

In *Bolton and Gill v. Zachary and Stevens* (1748), Zachary and Stevens were elected churchwardens. Zachary pleaded “that he was an inhabitant of another parish in London.” Stevens set forth “that he was of the parish of Camberwell, and therefore that neither of them were of the parish, for which they had been chosen ; that in their house of trade, as silkmen, a servant only slept.” They were both however held liable. In a note of that decision by Dr. Paul, it is said to be a similar judgment to one given in *Cook v. Sir John Ferrars*, in 1733 ; but of which there is no further mention : they seem to be concurrent cases.

In the case of *Gilchrist v. Bracebridge* (commissary of London, 1756), the party was serving a parochial office in another parish in London. This was a very strong circumstance, as much perhaps as if he was churchwarden there ; and no Court would say that the same person should serve the same office in two places at once.

These then are the cases which occur to me as bearing upon the present question. In the course of the argument upon the case now before the Court, the statute respecting constables (13 & 14 Ch. 2, c. 12, s. 15) was alluded to, and some analogy has been attempted to be drawn from that office to shew that personal duties cannot be imposed when there is not personal residence ; and that a new constable is chosen when the one who has been appointed goes out of the parish. So far indeed the analogy is correct, that if a churchwarden quits the parish where he is serving, his place must be supplied. But this is not such a case. On the consideration of all the authorities which seem one way, I should be of the same opinion with the Judge of the Consistory, if the cause had come before me, on the question of eligibility ; but it has not been so brought. I therefore affirm that part of the sentence “condemning Mr. Langston in costs.”

acquainted with the customs of the city of London, that persons [383] are eligible to civil offices, who are not personally resident in the parish, but are partners of a house of trade situate within it. On the authority to which I have referred, this must be understood to be the rule in future; and if it is proper to be reversed, must, as I have before observed, be reversed elsewhere by a superior court.

[384] THE OFFICE OF THE JUDGE PROHIBITED BY BURGESS v. BURGESS. 21st Feb., 1804.—Incest. Office of the Judge against parties living in incestuous cohabitation. Separation. Penance.

[Referred to, *Martin v. Mackonochie*, 1879, 4 Q. B. D. 716; *Mackonochie v. Lord Penzance*, 1881, 6 A. C. 435; *Combe v. Edwards*, 1879, 3 P. D. 133.]

This was a suit of office, promoted by John Burgess, the nephew, against William Burgess, for incest, by reason of cohabitation with his niece Ann Lyde. The articles set forth their genealogy, and that they had lived and cohabited together, as man and wife, for several years.

Judgment—*Sir William Scott*. This is a cause of office promoted by John Burgess against William Burgess, for an incestuous cohabitation with Ann Lyde his niece. The first point to be established is the cohabitation of the parties. It is not denied that they live together in the same house, and that she has assumed and bears his name, while her own original name is not concealed; but whether they live together upon the footing of uncle and niece, or husband and wife, is the principal question to be decided; and the nature of their cohabitation is, I think, sufficiently explained by the evidence of one of the witnesses. Mary Etches says, 'that on the 24th Dec., 1800, she went to live as servant with Mr. and Mrs. Burgess, who at such time resided at No. 27 Great Portland Street, Oxford Road.' It is proved by several witnesses that these parties went there to reside in 1795, and that they have continued there from that time to the present; there cannot, therefore, be any doubt of the identity of these persons. The [385] same witness goes on to say "that she continued in their service one week; that in the apartments occupied by Mr. and Mrs. Burgess, there were only two beds, the one which the deponent slept in, and the other for her master and mistress; and that they lived and cohabited together as lawful husband and wife, and owned and acknowledged each other as such; and that the deponent, whilst in their service, never saw them actually in bed together, but she has at two or three times, whilst warming the bed, seen the said Mr. and Mrs. Burgess undressing by the side of it; and in the morning there were evident signs of two persons having slept in the said bed: she therefore does verily, and in her conscience, believe that they, during that week, occupied one and the same bed."

There are other witnesses who speak to circumstances which strongly support this account of the cohabitation. Sarah Fletcher says "that about four or five years ago she heard William Burgess declare he was married to her sister Ann Lyde; and that she was present when Ann Lyde was, by a visiting acquaintance, called Mrs. Burgess." It is true that this witness says "she does not believe that the parties cohabited together;" but she is evidently desirous of putting a favourable construction upon it. There is another witness, Ann Lewis, who says "that one morning, about two years ago, William Burgess called at the deponent's house for some taxes for the parish, when the deponent inquired of him how Mrs. Lyde did? He replied she was no longer Mrs. Lyde, but Mrs. Burgess." Mr. George Burgess and Mr. Hugh Burgess the younger both speak to [386] conversations which strongly mark the same intercourse. Mr. Hugh Burgess, a gentleman in an advanced stage of life, to whose testimony I give great credit, says "that having reason to believe there was an incestuous connection between his brother and his niece, he discontinued his acquaintance with them, and did not visit his brother for some years; but hearing he was dangerously ill, and wishing to fulfil the office of a brother, he went to see him." Mr. George Burgess says "he went, by the desire of the promoter in this cause, to William Burgess at his residence in Great Portland Street, for the purpose of talking with him, on the impropriety of his conduct, and that he expostulated with him upon the indecency in which his sister and he were living." Of the nature of this cohabitation, I think that on this evidence no doubt can be entertained.

The prosecution is commenced for a two-fold purpose, one civil, as to the interests of the party promoting, the other penal, to compel the abatement of a nuisance extremely offensive to the laws and manners of society. It is of great importance

that such an improper intercourse should not be allowed to grow out of the relations of persons closely connected by blood: it would tend to endless confusion, and the sanctity of private life would be polluted, and the proper freedom of intercourse in families would be destroyed if such practices were not discountenanced in the strongest manner. Something has been said upon the motives which may have led to this prosecution; it is not, however, very material to inquire into them, since a man may bring a proper suit on motives that might not be commended, and the public have an [387] interest in such prosecution: I see nothing, however, in the general nature, or in the particular circumstances of this case which justly attributes any imputation to the party who promotes this suit. That his uncle should live in this manner might operate as a stigma upon the family generally; and what the promoter has avowed honestly is, that it may affect himself in procuring a maintenance by the practice of his profession. In the terms, also, which have been proposed for putting an end to this suit, I see nothing but a fair solicitude to have the nuisance removed: there is no attempt at an extortion of money; and the declaration of one of the witnesses that he offered to drop the suit for a money consideration would not avail, even if it were brought home to him, which I think it is not, by any credible evidence. The family feelings which would naturally dwell in the mind of Mr. Hugh Burgess the elder are sufficient to call the attention of the Court to such intercourse subsisting between the parties. Laying, however, these considerations aside, I shall proceed to inquire farther into the particular features of this case.

The nature of the cohabitation is proved; and the great fact of the case then is whether William Burgess, the party proceeded against, is or is not the legitimate son of William and Joan Burgess, from whom Ann Lyde is undoubtedly descended. No register of baptism is produced; and it is said that this being a criminal charge, it cannot be proved by circumstantial evidence, and that this want of a register is a fatal defect. If that be true, that it cannot be proved by circumstantial evidence, it is perfectly unlike all other criminal cases. The highest crimes are so substantiated. The register, [388] even if it was produced, is only circumstantial evidence; for it contains nothing but the recorded acknowledgment of the parents. When cases are called for, it should be remembered that they are not necessary to prove the general principles of law, but the exceptions to them. I am therefore of opinion, that the absence of proof by the register is not a fatal defect.

There is a great body of evidence, both of the positive and negative kind, to shew that he was the son of William and Joan Burgess: a number of witnesses have been examined on the allegation given in by the promoter; and certainly it is no small recommendation to the evidence, that it chiefly comes out of his own family; and that some of the witnesses have known him from his earliest infancy. To be sure, it is impossible to have stronger affirmative evidence, or to entertain a moment's doubt, that this man was the son of the persons who are described as his parents. The evidence is all in one constant tenor—his education in early life, the acknowledgments of parents, brothers and sisters—at all periods of his life are spoken to; and there is not an occurrence which bears a different aspect: he describes himself as their son, he is treated as their son, and there is nothing of surmise proceeding either from himself or them that he was otherwise considered. Mr. Hugh Burgess, who is his younger brother and who was domesticated with him at an early period, and who, if there had been any doubt in the family, must have known it, speaks to the full acknowledgment of his parents: as do all the other members of the family. He shews no animosity towards his brother, and must therefore be considered as a strong witness of this fact.

[389] The case, however, does not rest entirely upon this positive evidence: there are some circumstances of a nature merely negative, which would weigh considerably with me if they were wanted. An allegation has been given in by the party for the purpose of establishing that he is not the son of William and Joan Burgess. If he is not the son of those persons, in whose family he resided from the earliest period and under whose care and management he is brought up, the first thing which the Court expects is that it should be distinctly alleged whose son he really is. But there is no such averment. It only ventures to allege "that, on several occasions, William and Joan Burgess declared him to be the illegitimate son of some other person, and that he was so reputed." It does not aver that he was so. It then pleads "that there was a person in the neighbourhood of the name of Trott." It does not say he was his issue, but of some person of that family, although that person never appears to

have existed. Nor do I see any allusion made to the supposed mother of the party; and if he was illegitimate, his mother is as capable of being pointed out as the father. Every body knows that in an obscure parish, if an illegitimate child comes into the world, it is always pointed out, and is a thing eagerly caught up and proclaimed, to what mother that child belongs. There is, however, no suggestion of that kind; here neither father or mother are assigned to this person; who all at once is found in the family of William and Joan Burgess, without any reference to his birth.

Several witnesses have been examined, upon interrogatories, as to his going by the name of [390] Trott, but none of his family are among them. The examiner, who has taken this evidence very carefully, had the same general interrogatories to put to Mr. Hugh Burgess; but he appears to have been directed to withhold these particular ones from him, who indeed was the most likely person to have given an account of this material circumstance. This alone is enough to satisfy the Court that the party distrusts the honesty of his own plea. Up to the age of seventy-five, this person has always conducted himself as the son of William and Joan Burgess; if it was otherwise, on the remonstrance made to him by the brother of the promoter of this suit, would he not have replied, "I stand in no such relation, in point of consanguinity, for I was introduced into the family, and you know my name is Trott." But there is no suggestion, on his part, that he was not a member of the family, he merely says "he had treated her as his wife and would continue to do it." Would he not rather have taken that opportunity to justify himself from the accusation? On this affirmative, as well as negative evidence, it is impossible not to construct a perfect conviction or to raise any doubt that this man is the son of the parents alleged, and that he is the uncle of Ann Lyde.

The counter-allegation assigns him no parent; but there are three grounds on which it rests the case: first, that there is no register of his baptism. This, though it certainly is not a fatal objection to the proof of legitimacy, is an objection and requires to be helped out by some kind of subsidiary evidence. The Court, however, will consider that, in former times, registers were, in [391] different parts of the kingdom, kept with different degrees of accuracy; and that this is particularly alleged to have been carelessly kept; there being an instance of inaccuracy as to this very family, in the omission of another child, Jane, whose legitimacy is not doubted.

The second objection is that, in the early part of his life, he went by the name of Little Trott, while he lived with his father and mother; that he afterwards went to live with his uncle Rodd to learn farming, but being dissatisfied he returned to his father's house, when he was about the age of fifteen. At this period of his life there does appear to be evidence that he was familiarly called among his play-fellows by the name of Trott, a name that generally appears in conjunction with the epithet of Little. The witnesses, however, do not venture to draw the inference that he was the son of a person of that name. Nick-names are easily acquired among boys, and it is admitted that he was not held to be the reputed son of any Mr. Trott. One witness, an old woman, says "she heard the mother once call him a bastard;" and it appears he had at that time been under the chastisement of his father; and that Joan Burgess was heard to declare "that unless he was taken out of the way, she was sure William Burgess would do that bastard an injury." This witness it must be observed is above seventy years of age and is bold enough to speak to what happened when she was only six years old, which is deposing in a manner that cannot much be depended upon. The word bastard is often used in the language of common people not very discriminately, and is applied without [392] meaning that a child is illegitimate, and it is clear that this party had no connexion with any person of the name of Trott. It must also be considered, I think, that the name was only one which he had acquired among the children of the parish.

The third ground is that he was treated differently from the other children. This is also supported only by several old women, who differ very much from each other in their representations. Some say the father was a very religious and moral man; others that he treated this child with great severity. This evidence is much weakened by the want of consistency; and what weighs most strongly is that Mr. Hugh Burgess, the brother, positively denies this assertion of partiality; and deposes that he was treated as the rest of the children in the family. One distinction does appear—that he had not the same benefit of schooling with the other children, and that is in some degree accounted for, as he had been absent with his uncle during the greatest part

of the period in which the other branches of the family received their education. What does all this come to? that he had been treated with some harshness by his father, whom he had obstructed in his views of settling him in life. Upon the whole view of the case, I find it impossible to entertain a doubt; the proof of legitimacy stands clear of any objections to which the Court can attend. A surmise to the contrary was never set up till this suit was brought: it was an after-thought of the party.

The consanguinity then being established by full evidence, the sole question that remains is, what is to be the result of these facts, and of the [393] criminal cohabitation, proved between this person and his niece? In considering that, I must look a little to the situation of the man who is of a very advanced age. The principal effect of this prosecution is not so much penal as remedial; and the usual punishment for such an offence is that of public penance. In the older canons (Archbp. Peckham, A.D. 1288. Vid. Gibs. Cod. p. 1043), which, perhaps, can hardly be considered as carrying with them all their first authority, a solennis poenitentia is enjoined before the bishop of the diocese. This, however, as I have just remarked, is now softened down. Attending then to what I think is the most material point, the removing of such a scandal; and looking to the age and infirmity of the party and what might be the consequence of such a punishment—the Court will not think it necessary to inflict the public penance; but condemns him in the full costs of this prosecution; accompanying this with the injunction that the same intercourse must not continue, but must be bona fide and substantially removed.

To persons who have lived as these persons have done, it will not be sufficient for them to have separate beds in the same house; but they must live, in future, separate and apart; and if obedience be not given to this order, excommunication and other consequences will necessarily follow.†

[394] WAKEFIELD v. MACKAY, FALSELY CALLING HERSELF WAKEFIELD. 17th Nov., 1807.—Suit of nullity of marriage, by reason of publication of banns in a false name, not sustained by the facts.

This was a case of nullity of marriage, brought by the husband on the ground that the banns were not published in the true name, as required by the 26 G. 2, c. 33.

Judgment—*Sir William Scott*. This is a suit for the nullity of a marriage, instituted by Daniel Wakefield, Esquire, against Isabella, described in the libel as Isabella Mackay, falsely calling herself Wakefield.

The parties were married in the Church of St. James, Clerkenwell, on the 29th of May, 1805, after a proclamation of banns in the name of Isabella Jackson. It was observed that this was not a new connection, and it certainly was not, either with relation to the time of their acquaintance, which preceded this marriage, or to the nature and description of their intimacy.

Mr. Baster, who was examined, and who appears to be a fellow student of Mr. Wakefield, at one of the Inns of Court, deposes, upon the fifth interrogatory, "that he had understood from the said Daniel Wakefield, the producent, that he, the producent, first became acquainted with the ministrant six or seven years ago." This brings it to about the year 1800. It appears that she and Mr. Wakefield cohabited together during the former and latter part of that period, and that she lived with him under the name of Isabella Lascelles. Who is the seducer, and who is the seduced in this [395] case, does not at all appear by this evidence, neither is the age of Mr. Wakefield disclosed; but the woman appears to have been of extreme youth at this time—by the dates assigned, not more than fifteen years of age, which lays some ground of probability that she did not take the active lead in forming this connection. What name she bore at the time Mr. Wakefield was introduced to her, or under what circumstances she was living, does not at all appear. In 1802 she took the name of Lascelles, Mr. Wakefield, at the same time, assuming the same name, and passing as Mr. Lascelles,

† In this case it did not appear that there had been a marriage celebrated between the parties, and no such fact was pleaded in the articles. In the case of *Blackmore and Thorp v. Brider*, Arches, 29th April, 1816, on articles for incestuous cohabitation between a father-in-law, and the daughter of his first wife, a marriage was pleaded; and the articles prayed the Judge to pronounce such marriage null and void. The sentence passed in that form, enjoining also separation and penance.

the husband of Mrs. Lascelles: he introduced her, as his wife, to a boarding school, where he visited her, he passing under that name. In 1803 she took the name of Thorpe—the manner in which that was done is thus described in her answers, “that upon going to Salisbury and other places in the character of an actress, Mr. Wakefield tendered to her a list of names for her acceptance, recommending the name of Baddeley; that she disapproved of that name, and chose, in preference, the name of Thorpe. In 1804 she returned to London—they then cohabited together; he under the name of Mr. Thorpe, and she under the name of Mrs. Thorpe; he taking a house and keeping a house, paying bills, and carrying on other transactions in that name.”

In the month of September in that year a Roman Catholic marriage was celebrated between them, and she assumed his proper name of Wakefield with his full approbation and consent. After this ceremony, solemnly though not validly performed, she attracted the affections of this witness, Mr. Baster. He admits, upon an interrogatory, “that [396] after the said marriage, according to the rites of the Roman Catholic Church, he himself made professions of love and affection to the ministrant, and endeavoured to prevail upon her to leave Mr. Wakefield, and marry him, the respondent; and in or about the month of April, 1805, he caused banns to be published in the Parish Church of Iver, for the marriage of himself with the said Isabella Wakefield, by the name of Isabella Jackson.”

That this offer on the part of Mr. Baster, was produced by any effort of her own, is, I think, repelled by the account which Mr. Baster gives—“that he was the person who endeavoured to prevail upon her.” He describes her as a woman of an engaging person and interesting manners. The only unfair practice imputed to her is, that she fraudulently concealed the circumstance of her birth and parentage, and pretended a connection with divers noble and illustrious families. To that fact Mr. Baster is the only witness, and he proves “that she did state herself to be the daughter of the Honourable Mrs. Sandford, and that she was connected with the Marquis of Thomond, and other considerable persons.” That this was done for the purpose of effecting any marriage, or the particular marriage upon which I have now to decide, does not appear. It might be the gratification of an idle vanity, the purchase of a little present importance among the persons with whom she was living; and not at all with any view to the effectuating of any marriage; for, upon the whole of the evidence, I see no anxiety on her part to procure the marriage: she had been content to live upon lower [397] terms with Mr. Wakefield. Mr. Baster’s admission upon the eighth interrogatory proves, I think, that her ambition was not very active in procuring this marriage; for he answers “that he believes Mr. Wakefield frequently entreated, and endeavoured to prevail upon the ministrant to consent to be married to him, and that it was in consequence of such entreaties they were afterwards married to each other;” and when she is married she does not use the name of Sandford, whose daughter she had represented herself to be, but the name of Jackson.

I see no reason, therefore, to think that this fraud was practised with the intention imputed in the libel—“that she falsely pretended that her real name was Jackson, and that she was related to divers noble and illustrious families, and to a person who had married an opulent West India planter of the name of Wells, stated to be her aunt; and that she, having completely gained the affections, prevailed upon the said Daniel Wakefield to consent to be married to her, and she accordingly was so married.” The representation being that, on the contrary, it was he who endeavoured to prevail upon her, and that she consented to this marriage in consequence of his solicitation.

I see no reason to think that this fraud had that effect upon Mr. Wakefield; because, from his answers, I collect it to have been his general persuasion, that she was the daughter of this person—the same as she is described to have been in the libel. But taking the fact to be otherwise, that a fraud had been practised with this view, and that it had been successful—that Mr. Wakefield had [398] been captivated by this pedigree, which she had assumed to herself—still that will not, in the least, of itself, affect the validity of this marriage. Error about the fortune or family of the individual, though produced by disingenuous representations, do not at all affect the validity of the marriage. A man who means to act upon such representations should verify them by his own inquiries; the law presumes that he uses due caution in a matter in which his happiness for life is so materially involved; and it makes no provision for the relief of a blind credulity, however it may have been produced. I must, I think, lay all that matter, both in point of fact and in point of law, out of the question; and

must consider this case, as confined to the legal question, arising upon the fact of her being married, under the name of Jackson, by proclamation of banns, when she had borne the several names that I have recited. To prove a nullity of marriage, it must be shewn to the satisfaction of the Court that Jackson is an untrue name.

The libel pleaded that she was the natural and the lawful daughter of John and Ann Mackay, with whom she is proved to have lived much, and whom she is proved to have treated with great filial affection, as she did likewise a brother and a sister with much sisterly affection. The fact established, however, by the evidence of her mother, and of two other persons who are examined, is clearly what I am bound to take as the real fact of the case upon this evidence—that she was the daughter of Ann Mackay, whilst a spinster, under the original name of Jackson. There is no evidence who was the father of [399] this child; but, at any rate, she is not to be considered as the natural and lawful daughter of John and Ann Mackay.

It was said by the counsel that the party, having set up a legitimacy, had no right to avail himself of what turned out to be the fact—the contrary evidence of illegitimacy. I am of opinion, however, that Mr. Wakefield has a right to use any evidence introduced into the cause by either party, if he can arrive at the conclusion that Jackson was not the true name by any other means, and that he has a right to avail himself of the benefit of that conclusion, however obtained.

It occurs to me that there are three possible ways in which this case may be put, on the one side and on the other. First, that any one of these names was a sufficiently true name, so long as she continued to go by it. Secondly, that none of these names can be considered as a true name; for that the circumstances of her birth and fortune were such that she never acquired what the law can consider as a true name; and, thirdly, that only one of these several names can be deemed the true name of the party, and that the Court is bound to ascertain that name in order to determine upon the validity of this marriage. That any one of these names is a sufficient name for the purpose was asserted upon an authority entitled to great respect, namely, that of the Master of the Rolls, Sir Joseph Jekyll, who, in the case of *Barlow v. Bateman* (3 Peere Williams, 65), lays down, certainly in very unequivocal terms, that any one may take upon him what surname, and as many surnames, as he pleases; and for the term during which he uses [400] such a surname, if he has a right to use it, it is what cannot be denominated an untrue name. I am far from meaning to trench upon the reverence due to any assertion of that great man when I say that the solid grounds, upon which this proposition of law is stated, do not appear to have occurred to him just at the moment of the delivery of that judgment—because the reasons stated in that report can hardly, I think, be deemed satisfactory to produce such a conclusion.

It is stated that the reasons are, first, that surnames are not of very great antiquity. It is pretty well now established that surnames were fully in use, even among the common people, by the reign of Edward the Second, which is now five hundred years ago, a pretty reasonable period for the establishment of any legal usage. It is likewise observed that, in ancient times, the appellation was by the christian name, and place of habitation—as Thomas of Dale, but which of Dale is of itself merely a surname, a local surname certainly, but not less a surname on that account; for surnames were local, either taken from places of habitation, or descriptive from other circumstances, that belonged to the individuals, to distinguish men who were not at all distinguished by Christian names: they are, many of them, general appellatives. Christian names are scattered about among the mass of the people with such profusion that convey little or no distinction, and the very introduction of the surname was to discriminate that which was not before discriminated. It is observed too by Sir Joseph Jekyll that the usage of an act of parliament for a name is but modern. Certainly it is; [401] and so are Acts for many other private family concerns: they are of modern introduction. But there has been a practice of great antiquity, that is, the grant of a licence, for the assumption of a name by the Crown, passing through one of its public offices: certainly, the ancient style of the ancient offices of the Crown is of great authority upon such a subject. However, I would observe likewise upon the confusion that must be produced, to a degree that would compel a legislative correction; if the practice at all followed this rule, that every one might take what surnames he pleased and when he pleased: the whole world would be at hide and seek about identity in the concerns of almost every individual.

However, I am content, as perhaps I ought to be, to take the mere assertion

coming from so venerable a person, confirmed, as it may be, by other authorities of the like kind. But, taking it as generally true, I think that the particular case of the marriage act might be admitted to form an exception. The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights. It therefore requires that the true name should be given to them, evidently considering that a name, assumed for the occasion, is a name that will not answer the purposes of the provisions. Accordingly this Court has conceived itself to be carrying the intention of the law into effect when it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended; upon the ground that such proclamation was no proclamation referring to that marriage, [402] but to another transaction; the marriage therefore was without proclamation of banns, and consequently illegal. There was a fraud, a want of fidelity and truth, in the application of the banns to the marriage, though there might be no fraud in the original intention. It is therefore, I think, clear that if there is a true name, that true name must be used; it may be a name less notorious to the world than some name which the party has thought fit to assume, but is not less the true name on that account; it is the name which, it is presumed, her relations, her parents, her guardians are the best acquainted with, and therefore the name which ought to be applied upon such an occasion, provided she is possessed of such name.

But it may be said in the second place that, under the circumstances of this person's birth and fortune, she never did become possessed of that which the law would consider as a true name. It is, I think, a possible case that there may be no true name ascertainable as belonging to a particular individual. Suppose the illegitimate child of a person of vague and erratic habits, who has been tossed about the world in a variety of obscure fortunes and situations, who has, at different places, been passing under different names—the child of such a person, at a marriageable age (and that, in the female sex, is a very early age) may not be possessed of any name, so clearly established. She has none from her birth, and there may be none so clear as to be depended upon for so serious a purpose as that of invalidating the marriage.

What would be the rule of law in such a case? In my opinion it would be that such a person would be out of the statute. The law presumes, [403] as is generally true, that every person has a name; but the law which presumes that, and calls for that name, does not compel parties to impossibilities; and if the party is not possessed of that which can be considered as a true name, it would not be unfair to judge of the marriage of such a person, upon the old footing of the canon law, which requires banns as matter of regularity, but not as matter necessary to the validity of the marriage. Perhaps those who have attended to the evidence, and the long and elaborate arguments, which, in this case, have been constructed upon them, may be disposed to entertain an opinion that this very case approaches something towards that description. Here is an illegitimate child, with very little history applying to the early periods of her life, assuming a succession of five different names before she marries—certainly it must be admitted that it is no easy matter to ascertain, what has a right to be considered as the true name of this individual, under all these circumstances.

It may, however, be said that the legislature has held out that every person has a true name, and that it is the duty of the Court, in this case, for the determination of this suit, to decide which of these several names is that which is best entitled to that character.

Five names have been stated—three of those, I think, have been very much dismissed out of the argument; the names of Lascelles, Thorpe, and Wakefield, though she used them for a considerable time; they were all of them presents from Mr. Wakefield, the last of them in consequence of the ceremony of the Roman Catholic marriage, which had taken place between them. But the question, [404] has turned, as I think, it ought to turn, upon the competition between the claims of the name of Mackay, and the name of Jackson, which of them is to be considered in the character of the true name of this individual.

I will state the evidence which applies to these names. Six witnesses have been examined, two only of these six witnesses speak of her under the name of Mackay.

Of the other four, Pudderphat and Garnett knew her only under the name of Lascelles during the years 1801 and 1802. She lodged with Pudderphat during the year 1801 and with Garnett, during part of the year 1802, by that name. Mr. Baster appears to have known her only by the name of Thorpe till she took the name of Wakefield, upon the Roman Catholic marriage, on the 6th of September, 1801. Turner, who was a porter at the Inn of Court, carried messages to her from Mr. Wakefield; but under what name or names she then passed, or where she was living, this witness does not describe. There are only two witnesses who speak to the name of Mackay; the one is a Miss Gray, then an assistant to Mrs. Bayley, who kept a Roman Catholic female boarding school at Hammersmith, who proves that she was a boarder for an entire year, under the name of Mackay, till January, 1794, being then a child of about eight years of age. The other witness is Mr. Andrews, a perfect stranger to the family, but who was introduced to the knowledge of her by a memorable transaction of her life. He is the surgeon of the police office in Bow Street, and was brought in to attend a child who had been forcibly violated by a person of the name of Murphy, who was afterwards convicted of the [405] crime. This was in August, 1794, and he identified this person to be the child that he had attended, bearing the name of Mackay. Copies of affidavits which were then made, in which she describes herself as Isabella Mackay, and her mother describes her under the same name, are produced to the Court.

It was observed very justly by the counsel for Mr. Wakefield that this was a very serious transaction; but the name of the party injured was certainly not the most material part of this serious transaction; for the crime was the having deflowered a child of that tender age—be it Mackay or be it Jackson, it made no sort of difference in the offence of the party, or the punishment he was subjected to in consequence of it. These are the only witnesses who speak to the name of Mackay, one during the whole course of the year 1793, the other, in a detached transaction, in the summer of 1794. It is a possible thing that this defect of evidence may have arisen from the course of the cause; for, having pleaded, as I presume the counsel supposed at the time, that she was a legitimate child, they might perhaps have relied upon the presumption of law, necessarily arising from thence, that she must be of the name of her father and mother; but the fact failing, the inference fails, and that fact is as necessary to be proved, and directly proved, as any other fact in the case.

Now there is no evidence whatever arising from the depositions that are produced, before the year 1793, when she was a child of eight years of age; and this transaction, which I have just noticed in August, 1794, that applies the name of Mackay to her. There is an entire blank in the history from [406] that time till she emerges as Mrs. Lascelles in the year 1801. It is true that there is, upon her answer, an admission to this effect, that she did at times during her childhood pass by the name of Mackay. In the first place, I must observe that this admission is that which the Court has hardly a right to notice, because it is perfectly extra-articulate and gratuitous, there being no allegation in the libel that requires any answer to such a proposition, and therefore the admission finds its way there without any effect. Next, I must observe that the admission is pregnant with a contradiction; for when she admits that in her childhood she passed by the name of Mackay, she insinuates that she passed, at other times, by some other name; but that name does not appear. It goes no further than this—supposing that to be an admission which I could notice, that at times, she, as was natural, living in their family, did pass by the name of Mackay: such is the whole amount of the evidence that applies to this name.

Now, what is the evidence that applies to the name of Jackson? She is born an illegitimate daughter, the mother gives her the name of Jackson, naturally and properly; because, though, in point of law, she is nullius filia, yet in fact and in nature she is of the blood of the mother who produced her, and therefore properly and usually designated by the name which the mother bore. The mother swears that at her birth she was described as Isabella Jackson; not, I presume, in the baptismal rite itself, where only the Christian name is conferred, but in some register, some record, some formulary or other that was applied to that ceremony. The mother [407] swears that at the other sacrament for adult Christians she took it under the name of Isabella Jackson; it being the practice of the Roman Catholic Church to receive the confession of the party in the preparation for it, and to make herself known by her name as a person duly prepared: she went through the ceremonials of that holy

rite under the name of Isabella Jackson. She did other acts likewise of a solemn nature under the same name. In 1804 she is married by a Roman Catholic marriage to Mr. Wakefield, as Jackson, without any adequate motive for a fraudulent use of that name, as far as appears, or without any reason for it than her own apprehension that it was the name that properly belonged to her, her mother attending at that ceremony, sanctioning the use of that name, and meaning, most certainly, not to destroy the validity of that marriage afterwards by the use of an improper name upon the occasion. The mother swears that it was generally understood afterwards that her real name was Jackson. How that may be I cannot say, but this clearly appears that Mr. Baster understood it to be so, because when he gave in the banns, to be published at Iver the year following, he described her as Isabella Jackson; therefore he certainly understood, at that time, that the name of this person was Jackson. Lastly, when near a year after the Roman Catholic marriage she comes to this marriage, she again appears by the name of Jackson; she is proclaimed in the banns, and married under that name.

Then taking all this evidence together, that it was the name of her mother; that it was the name [408] impressed upon her at her birth; that she has used that name in the most solemn acts of her life, civil and religious, and at various periods of her life, which has not been a long one; I say, taking that evidence, and comparing it with the evidence on the other side, which embraces only a very short period of her eventful life; the Court would not be warranted to say upon this evidence that Jackson is so clearly demonstrated to be the untrue name of this person, if she did possess a true name, as to destroy the validity of the marriage.

I am the less disposed to sustain the objection to the validity, because Mr. Wakefield has his remedy. If it is a nullity upon this ground, it is a nullity ipso facto and ipso jure under the statute, and which may be pleaded, upon any occasion, in which she claims to be considered as his wife. It is a matter which may be put in issue, and may be established upon other evidence to the satisfaction of a jury, under the direction of the Judge, if he is able to produce such evidence. But upon this evidence I am clearly of opinion that the name of Jackson is not demonstrated to be other than the true name of the party, and therefore I dismiss the party from all other observance of justice in this cause.

[409] KIRKMAN v. KIRKMAN. 9th Feb., 1807.—Divorce, by reason of cruelty, inflicted by the wife on the husband, sustained.

[Referred to, *Goodden v. Goodden*, [1892] P. 4.]

This was a case of divorce by reason of cruelty, brought by the husband against the wife, "for violent and outrageous treatment," as set forth in the libel.

Judgment—*Sir William Scott*. This is a suit instituted by the husband for separation, by reason of cruelty and harsh and violent treatment, alleged against the wife. The Ecclesiastical Court is, in general, averse to relax, in any degree, the duties of the contract of marriage; and particularly to release married parties from the obligation of cohabiting together. It will not do so for mere words of abuse, however reproachful. The persons of both parties, however, must be protected from violence, and I cannot accede to what has been said in argument, that the Court should wait till there has been actual violence of such a nature as may endanger life. It is not to pause till a tragical event has taken place. Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity, and threaten pain. It will be the duty of the Court to say that the suffering party is not obliged to continue in cohabitation under such treatment.

I am unwilling to go through all the depositions which describe the unhappy scenes in this family. It will not be necessary—as it is perfectly clear that there have been words of menace, with acts [410] of violence accompanying them. It is said that they were caused by jealousy. All the evidence tends to establish that there was no foundation, in the conduct of the husband, for feelings of that nature. If such feelings were entertained, with or without reason, jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone; it cannot be necessary that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity. The

evidence establishes that these parties had gone on in this unhappy way for a considerable time; and that after some short separation they had been reconciled—but the same unjustifiable conduct ensues again; though he conducted himself with the same forbearance which he had uniformly shewn under the atrocious treatment to which he was exposed.

The sister of the wife states that, on a former occasion, she saw the husband striking the wife, and that the deponent desired her to withdraw, and not stay to be killed. But what follows—the wife (the injured party, according to that account) applies to the husband for reconciliation, promising amendment, and that the same scenes shall not be renewed. The account given by the sister, therefore, is not very consistent with what is the substance of all the evidence which we have just heard read. The parties were separated, however, and came together again; and if the wife had fulfilled her promise, due care would have been taken [411] of the peace of a numerous family, to whose education and advancement the attention of both parents is equally necessary. But the same behaviour is repeated in the grossest reproaches, attacks on his person, and forcible exclusion of him from his own house. If this insulting and outrageous treatment has proved too strong for his forbearance, and may have extorted forcible expressions from him, it is not matter of surprise. I do not remember ever to have seen a case of grosser misconduct, though I abstain from enumerating all the particular facts that are described in the evidence. A few instances may suffice. Mary Asseter, a servant in the family, says “that she lived with Mr. and Mrs. Kirkman about six or seven months; that they appeared to be very unhappy with each other; that Mrs. Kirkman very frequently insulted her said husband, and called him rogue, villain, blackguard, dirty dog, and other still more opprobrious names, and told him he was too familiar with the deponent, who, she said was his bunter, &c.; that he would, in a kind and indulgent manner, endeavour to convince his wife of her impropriety of conduct; but, notwithstanding all he could say, she continued to behave as before; that a short time before she quitted the family she well remembers her seeing her strike him a blow in the face, and tear his cheeks with her nails, and she was only prevented from committing further personal violence upon him by an uncle of Mr. Kirkman coming in, and holding her by the shoulders by force; that the said Joseph Kirkman since had told the deponent he would not live with his said wife, but for the sake of his children, for he was really afraid of his wife; [412] that on another occasion she tore either his coat or waistcoat, and she verily believes he lived in a constant state of fear and apprehension, from the violent and outrageous conduct of his said wife.”

Edward Wileke, his foreman, in his business of a harpsichord-maker, says, “that he was present when the said Mary Kirkman, without any just cause whatever, abused her husband most grossly, and used very bad language towards him, and accused him of being improperly connected with his female servant, who was a woman of a very disgusting appearance, and she called him all the blackguard names she could think of, and that she prevented the servants from opening the door to him when he was out;” and deponent further says, “he was once present when she held a poker in her hand, being then in a violent passion, and threatened to strike her husband therewith, but she did not; that he also once saw her scratch her said husband’s face with her finger nails, which made his face bleed; that on another occasion he went into the parlour, where he found Mr. and Mrs. Kirkman alone together, she being in a great rage, and a pewter quart pot was then lying on the floor, which the said Kirkman told him that Mrs. Kirkman had struck him upon the head with; and deponent further says that in a few minutes after he saw her go up to her husband, without saying a word, and with her finger nails tore and scratched his face, which put him to great pain; that one evening some time in December, 1793, he perfectly recollects Mr. Kirkman shewed a place, which afterwards became sore, under one [413] of his eyes, which appeared burnt, and had some tallow grease upon it, which he said Mrs. Kirkman had burnt by thrusting a lighted candle into his face.”

Joseph Kirkman, the son of these parties, sixteen years of age, is also produced as a witness to the unhappy state of his family, and speaks with a very credible degree of impartiality respecting his mother’s conduct; for he bears testimony to her extreme kindness to her children when he says, “that no woman can behave with greater tenderness to a child, in its infancy, than she has done to all of them;” but he deposes “that his mother was in the constant habit of insulting his father, without any

provocation, frequently accusing him of improper conduct, and calling him white-faced villain, French villain, scoundrel; and that when his father had endeavoured to remonstrate upon the impropriety of her behaviour, she has continued her abusive language, adding, 'Do you want to teach me? I shall do as I like.' *¹

[414] This evidence most clearly establishes that the wife is not mistress of her own passions; and the Court would be wanting in due attention to the safety of the injured party, in this case, if it did not pronounce for a separation as absolutely necessary for that purpose.

TURNER v. MEYERS, FALSELY CALLING HERSELF TURNER. 6th May, 1808.—

Nullity of marriage, by reason of insanity of the husband, brought by himself after his recovery, sustained. Former proceedings on the part of the father not admitted; the son being of age at the time of marriage.

This was a case of proceeding to annul a marriage, on the plea of insanity, instituted on the part of the husband, after his recovery.

Judgment—*Sir William Scott*. This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though, at other times, he is pleaded to have been capable. The suit *² was first brought by the father,

*¹ Other witnesses depose to a similar effect: Ann Connor says, "that one evening she saw Mary Kirkman strike her husband a strong blow on the face with her clenched fist, and that, a night or two after, she saw her again strike him in anger, and with violence."

Elizabeth Tilser says, "that Mrs. Kirkman's temper was a most terrible one, and that she was constantly abusing her husband violently, and calling him a German brute, and that, one afternoon, she heard a great noise in the parlour, and that Mary Kirkman called out to her eldest son, 'Joe, Joe, come and see what your pretty father has done, he has scratched his face, and says I've done it.' That the said Mary Kirkman afterwards confessed to deponent that she had so done." The witness further says, "that Mrs. Kirkman locked her husband out of his own house for three successive nights."

Caroline Kirkman, one of the daughters, says, "that her said mother behaved in an outrageous and violent manner to her said father, and greatly abused him, that she has often seen scuffles between them, and once saw her mother fling a spoonful of child's pap into her father's face."

The libel had pleaded "that she had damaged a valuable grand pianoforte, by striking it repeatedly upon the keys." But the Court rejected the article, observing "that such conduct might not unfairly be considered as cruelty to her husband, being a wanton abuse of his property; but that it did not think it quite sufficient to plead a single act of that kind, done in a moment of passion."

*² 16th Nov., 1804.—In a suit instituted by Samuel Turner, the father of the present plaintiff, to annul this marriage on the same grounds that were now proposed, it was objected, on the part of the wife, that the father had no right to bring such a suit, the son being, at the time of marriage, of age, and *sui juris*, unless appointed committee of his person. The Court having taken time to deliberate, observed—that the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time; the fact being pleadable, the only question is whether the person before the Court is the proper person to plead it. It is not alleged that the son is now insane, and though under the care of his father, that may be only for weakness, as it is allowed a commission of lunacy cannot be obtained, he is then to be presumed sane, and, as such, capable of bringing suits *proprio jure*: no man can be plaintiff for him—he must complain; no man can be defendant for him, he must defend himself; no one can be attorney or procurator for him, but by his own appointment.

On what ground, then, is the interference of the father to be supported? An analogy to other cases has been relied on, where a *concursum actionum* is allowed. In cases of minority there is a concurrent right, the law gives the father a right of consent, and to the minor a right of protection under his father's judgment. Cases of consanguinity have been also mentioned; but in those the public has an interest—to abate a scandal. The criminal suit is open to every one, the civil suit to every one shewing an interest; but, in that respect, the father is by no means privileged; as he

but the [415] son being of age, and there being no means of making the father guardian, or curator ad litem, the Court was of opinion that the suit could not proceed in that form. It has therefore since assumed its present shape.

It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past [416] incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true that there are some obscure dicta, in the earlier commentators on the law (*Sanchez*, lib. 1, disp. 8, num. 15, et seq.), that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of [417] marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times it has been considered, in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates (*Morison v. Stewart*, falsely called *Morison*, Delegates, 1745); when the effect of all these dicta were brought before the Court, and it has been since acted upon in various cases (*Cloudesley v. Evans*, Prerog. 1763. *Parker v. Parker*, 1757) in this Court; which it is unnecessary to review. I take it to be as clear a principle of law therefore, at this day, as any can be, and as incapable of being affected by any general dicta, which may be found in writers of earlier periods, as any fundamental maxim, on which the Courts are in the habit of proceeding.

When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute (15 G. 2, c. 30); where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases the Court will require it to be shewn by strong evidence that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, [418] even in a sound state. In disease, where it has pleased the Almighty to envelope the subject matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist

must shew a specific interest as well as any other person—in that case there is a reason for the interference of others, as the marriage can only be affected inter vivos; for if the death of either of the contracted parties takes place, the marriage cannot be set aside—here there will be no such consequence, as the remedy may be pursued at any time, only with a little less convenience perhaps than when the whole matter is recent. To this asserted convenience of the parties, many considerations of inconvenience might be opposed.

It may indeed be questioned what degree of evidence that could be now produced would satisfy the Court that the act was the act of an insane moment, when the man, as I have before observed, is not alleged to be insane, and who must therefore be presumed to be himself, has taken no step to annul the act, but rather adheres to it.

In cases of most inveterate malady there are lucid intervals, on which legal acts may be founded. The case of *Cartwright v. Cartwright* (1st Phillimore's Rep. p. 90) was a strong case of this kind, in which the will was made in one of these lucid intervals, and was established. There, indeed, the sanity of the moment was, in a great measure, to be inferred from the internal character of the wisdom of the act itself. This act undoubtedly has no such character of wisdom, being the act of a man connecting himself, in marriage, with a common prostitute, without any rational prospect of happiness. But it will not be conclusive, certainly, against the sanity of the act that it was an unwise act. The man, in the best exercise of his reason, might not be a wise man; and the question here is as to the sanity of the act, not the wisdom of the party; and I am of opinion that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act, to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved. On the whole, therefore, I think the father has not a *persona standi* before the Court, and that his suit must be dismissed.

in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind. Under these observations, I shall proceed to examine the evidence, which, in substance, I think I may now say is sufficient to establish that this gentleman was a person liable to accessions of lunacy.

He appears to have lived with his father, who was a grazier in Lincolnshire, and, about thirteen or fourteen years ago, to have been visited with insanity, which became more frequent in its visitations, more especially in the spring and autumn; which is not unusual. The general fact is fully established by the witnesses, particularly those of his own family, his father, his two sisters, and a brother, who was a medical person, and attended him in that capacity at different times. His father did not trust him with any business; he was at liberty, but entirely unfit to be employed. His peculiar humour of madness was that of passion for a mili-[419]-tary life, for which he had no disposition at other times; but, at the periodical returns of his malady, he exhibited such flights of heroism, and such general expressions of ideas on that subject, as strongly marked a disordered imagination. His father once offered to procure for him a commission in the army, which he declined, and said that he would prefer to follow his father's business.

This is the description of several witnesses, who have known him from his infancy, and which brings down this account of him till 1803. It is sufficient, therefore, I think, to throw on the other party, who sets up his act as the foundation of any right, the burthen of proving that it was done at the time of sanity; more especially, as it appears that it was done in September, at one of those periods of the year when he was habitually most subject to his disorder. This brings me to examine the facts attending the marriage. It appears that his father,* who has been produced as a witness, had given him leave to go to a show of cattle, in order to amuse him; that he took that opportunity of eloping to town without money and without preparation; that he told his friend he was going into the neighbourhood of Nottingham, [420] and should return; but he did not: he went to Newark, and on to London, without any other purpose than that of indulging the military notions, which he usually entertained in his fits of insanity. He is described, by one of the passengers in the same carriage, to have been giddy and flighty, very communicative about his family as persons of property, but frequently contradicting himself; speaking to every person whom he met, and particularly to women, and calling to any person that he saw at the window. This witness deposes that at first he supposed him only to be wild and thoughtless, but afterwards he considered him to be deranged. This is a description of very extravagant behaviour. On his coming to town, on the 9th of September he met this lady for the first time, as it is admitted by Mrs. Turner in her answers who was then Sarah Meyers, but passing by the name of Mrs. Lee. He first became acquainted with this woman, by accidentally meeting her in the street, somewhere near one of the Theatres Royal.

Her servant, Susannah Squire, says "that on Friday, the 9th of September, he came with her mistress, who lived in Ann Street East, and that almost immediately she heard him say to her mistress—'he could not live without her.' That her mistress then proposed 'that she should go to church with them,' and on the Monday following Mr. Turner obtained a licence, and on Wednesday they were married." Here is an offer of marriage at once to a perfect stranger. One has heard of the extravagant

* Consist. 27th June, 1817. In the case of *Sumerfield v. Mackintire*, as to the competency of a father, to be a witness, who had originally instituted proceedings (to annul the marriage of his son) which were continued by the son, on his coming of age: an objection to the competency of the father to be a witness was overruled by the Court, observing, "that the son's intervention in the suit was a supercession of the father, and that by taking up the suit, where he found it, he had adopted and sanctioned all that had been done. For the sake of greater regularity, however, the conclusion of the cause was rescinded, to enable the father formally to withdraw himself from the suit, and then, with his wife, to be repeated to their depositions."

effects of love at first sight. This is conduct which, if it stood alone, might be only an act of a very weak person, and might not be sufficient to proclaim a man absolutely [421] mad or lunatic : it is certainly, however, symptomatic ; and if fortified by other acts, may lead to a different conclusion.

The next witness on whose evidence I shall observe is Mr. Parry, a banker in Birchin Lane. He says "that on the 9th of September Mr. Turner called on him and obtained some money, £15, on the very morning of his coming to town. On the 10th he came again dressed in an officer's regimentals, and told him that he had come to town to purchase regimentals for a troop of horse, on which he had expended £400, and wanted more money. That not suspecting him to be deranged he gave him £50. That his interview was short, and he cannot take on himself to say that he was insane." Mr. Parry, junior, speaks nearly to the same effect—"that he did not think him mad ; that he was not acquainted with the manner in which he was usually affected with military ideas ; and though it might surprise him, it did not occur to him that such behaviour proceeded from madness. The next day he called again and said he was going to be introduced to the King ; but still he did not think him mad." This opinion of the witness does not weigh much with the Court, knowing that insane persons are frequently affected with such notions of connection with great personages when no such connection exists.

It is alleged on the part of Mrs. Turner "that she was the cause of this inclination, on his discovering that she was particularly fond of the military profession from seeing the locket of a military officer in her possession ; and that he affected their habits from a wish to recommend himself to her." But this could not have been [422] the cause of them, since they appeared in his first conversation with Parry before he had seen her, and with his fellow-traveller on the road. Mr. Parry, junior, says that the next day a young woman came to enquire about his character with a card of reference of a description very wild : "Royal Army of France, Captain Jonathan Turner, of the Royal Guards."

Mr. Nicholls also gives an account of a visit to him—"that he dined with him, and talked of orders for military clothing, and took leave very abruptly ; that two or three days afterwards he dined with him again in a cavalry uniform, and said that he had orders to provide clothing for the whole regiment, and that he wished to be recommended to an army tailor ; that he got up in a hurry and in a low voice said that he had been a lucky fellow, as he had met with a young lady of fortune, who had fallen in love with him, and that he was going to be married to her ; that he went away abruptly, and he then concluded that he was insane."

Oakley, the sister of the woman, says "that on the Monday he was very desirous to marry her sister ; that he went for the licence and was married ; and that during the ceremony there was perfect propriety of behaviour ; and that he was perfectly rational, and that it was his own free act." The clergyman and the clerk also depose to the propriety of his behaviour. Much stress, however, is not to be laid on that circumstance ; as persons in that state will nevertheless often pursue a favourite purpose with the composure and regularity of apparently sound minds. It is in the extravagance of the act itself rather than in the manner of pursuing it that the [423] proof of madness is to be discovered. There is then a letter exhibited which was written by him to a friend of his father, which has been called for by the wife and has been produced ; but it breathes madness in every line : it describes the lady as the daughter of an officer in the Prince of Hesse Cassel's Regiment ; and says "that if his family renounce her, he had engaged to give him a commission in a regiment of dragoons ; and that, as soon as he should receive their answer, he should take a captain's commission in the Prince of Conde's Body Guards," &c. The same disordered idea prevails throughout.

Other persons are examined on the part of the wife who never saw much of him. There is the hairdresser who dressed his hair once or twice ; and the victualler who supplied him with dinners ; and a person discharged by the wife from debt ; and others whose information is much too slight to weigh against the rest of the evidence, which so strongly proves the influence of disorder on his mind.

Mr. Leadbeater, the friend of his father, describes his conduct when he prevailed on him with difficulty to come to his house till his father could arrive to take care of him. When the father comes he is separated, but undoubtedly expresses a great affection for his wife. When he goes into the country the same history

proceeds. He was put under the care of Mr. Fawcitt, who proves that he was deranged for three weeks after, and that he was so again the next year at the same period.

On this evidence I am of opinion that it is sufficiently proved that he was deranged at the time of the marriage, and that I am bound to pronounce the marriage null and void.

[424] THE OFFICE OF THE JUDGE PROMOTED BY BISHOP, H.M. Procurator General v. STONE. 13th May, 1808.—Proceedings under the stat. 13th Eliz. c. 12, against a clergyman for preaching doctrines contrary to the Articles of Religion. Deprivation.

[Adopted, *Voysey v. Noble*, 1871, L. R. 3 P. C. 385; 7 Moore, P. C. (N. S.) 207. *Sheppard v. Bennett*, 1872, L. R. 4 P. C. 403. Referred to, *Reg. v. Bishop of Oxford*, 1879, 4 Q. B. D. 267.]

This was a case of criminal proceeding against the Reverend Francis Stone under the statute 13th Elizabeth, c. 12, and for maintaining and affirming doctrines contrary to the Articles of Religion, as by law established.*¹

The case was argued by the King's Advocate, Dr. Laurence and Dr. Swabey, in support of the proceedings, and by Mr. Stone, who appeared in person to conduct his own defence.

[425] *Judgment*—*Sir William Scott*. This is a prosecution against the Reverend Francis Stone, rector of Cold Norton, originating in a citation in the name of the Bishop of London, though the bishop might be personally ignorant of the existence of such suit. It is the constant style of the Court, and it is not in the power of the bishop, by any intervention on his part, to refuse the process of the Court to any one who is desirous to avail himself of it in a proper case. The suit is promoted by the Procurator General of his Majesty; and certainly he is not an unfit person to superintend the management of a suit which has for its object the maintenance of the established religion of the State. It is not peculiar to this Court, but is common to other Courts, and familiar to every day's experience, that suits for public interest are in the name and under the directions of the law officers of the Crown. Mr. Stone appeared under protest, and the grounds of that protest, as set forth in objection to the citation, [426] have been argued by his counsel,*² whose fidelity and ability he

*¹ The citation was in the following words:—Beilby, by Divine permission, Bishop of London, to all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole diocese of London, greeting: We do hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite, or cause to be cited, the Reverend Francis Stone, clerk, rector of the rectory and parish church of Norton, otherwise Cold Norton, in the county of Essex and diocese of London, personally to appear before the Right Honourable Sir William Scott, Knight, Doctor of Laws, our vicar general and official principal of our Consistorial and Episcopal Court of London, lawfully constituted his surrogate, or other competent judge in this behalf, in the common hall in Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, and place of judicature there, on the third day after he shall have been served herewith, if it be a Court-day, otherwise on the Court-day then next following, at the usual and accustomed hours for hearing of causes and doing justice, then and there to answer to certain positions or articles to be objected against him for the health of his soul, and the lawful correction and reformation of his manners and excesses, and more especially for advisedly maintaining or affirming doctrine directly contrary or repugnant to the Articles of Religion as by law established, or some or one of them, and against the act or statute made in the Parliament holden at Westminster, in the 13th year of the reign of her late Majesty Elizabeth, Queen of England, and so forth, entitled "An Act for the Ministers of the Church to be of sound Religion," and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the voluntary promotion of Charles Bishop, Esquire, His Majesty's Procurator General. And what you shall do or cause to be done in the premises, you shall duly certify our vicar general and official principal aforesaid, his surrogate, or other competent judge in this behalf together with these presents.

*² Drs. Arnold and Adams were employed in that part of the proceeding. Mr. Stone afterwards conducted his own defence in a written vindication of the opinion

has himself fully acknowledged. That protest was overruled; † and it was open to the party to have appealed against that decision or to have prayed a prohibition; but he has done neither. He has confined himself in his defence to a loose verbal protestation, of which it is impossible that any notice can be taken. The Court, therefore, is under the necessity of administering the law, according to the nature and extent of its jurisdiction, on the offence alleged and proved. This offence is laid under the statute 13th Elizabeth, "for advisedly maintaining or affirming doctrines directly contrary or repugnant to the Articles of Religion." These articles are not the works of a dark age (as it has been represented); they are the production of men eminent [427] for their erudition and attachment to the purity of true religion. They were framed by the chief luminaries of the Reformed Church with great care in Convocation, as containing fundamental truths deducible, in their judgment, from Scripture; and the legislature has adopted and established them as the doctrines of our Church down to the present time.

The purpose for which these articles were designed is stated to be "the avoiding the diversities of opinions, and the establishing of consent touching true religion." It is quite repugnant, therefore, to this intention and to all rational interpretation to contend, as we have heard this day, that the construction of the articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those which the wisdom of the State, aided and instructed by the wisdom of the Church, had adopted. It is the idlest of all conceits that this is an obsolete act; it is in daily use, "viridi observantiâ," and as much in force as any in the whole statute book, and repeatedly recommended to our attention by the injunctions of almost every Sovereign who has held the sceptre of these realms. It is no business of mine, in this place, to vindicate the policy of any legislative act, but to enforce the observance of it. I cannot omit, however, to observe that it is essential to the nature of every establishment, and necessary for the preservation of the interests of the laity, as well as of the clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the Established Church; since the Church itself would otherwise be overwhelmed with the variety [428] of opinion which must in the great mass of human character arise out of the infirmity of our common nature. For this purpose it has been deemed expedient to the best interests of Christianity that there should be an appointed Liturgy to which the offices of public worship should conform; and as to preaching, that it should be according to those doctrines which the State has adopted as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For what would be the state and condition of public worship if every man was at liberty to preach from the pulpit of the church whatever doctrines he may think proper to hold? Miserable would be the condition of the laity if any such pretension could be maintained by the clergy.

It is said that Scripture alone is sufficient. But though the clergy of the Church of England have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak and imprudent and fanciful individuals. And what would be the condition of the Church if such person might preach whatever doctrine he thinks proper to maintain? As the law now is, every one goes to his parochial church with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration which has prevailed in modern times, and which allows that he

with which he was charged. The substance of his defence was "that he had done no more than fulfilled his engagements with his ordaining bishop; that he had conformed to the Church of England, as by law established, and that he had not offended against the statute; and that the prosecution was unjust and oppressive."

† The protest objected "that the citation was irregular and insufficient in calling on Mr. Stone to appear before the judge instead of the bishop in person; and, secondly, that the nature of the cause and the quality of the promoter were not sufficiently explained." The Court overruled these objections, holding "that the citation was in the usual form; that it might have issued independently of the statute; and that the words of the statute 'before the bishop of the diocese or the ordinary' were to be interpreted according to the usual style and form of judicial proceeding in this Court;" and on the second point—"that there was no want of due specification."

should join himself to persons of persuasions similar to his own. But that any clergyman should assume the liberty of inculcating his own private opinions in direct opposition to the doctrines of the Established Church in a place set apart for its own public worship is not [429] more contrary to the nature of a National Church than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it directed but to ensure in the Established Church that uniformity which tends to edification; leaving individuals to go elsewhere according to the private persuasions they may entertain. It is therefore a restraint essential to the security of the Church, and it would be a gross contradiction to its fundamental purpose to say that it is liable to the reproach of persecution if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound at the same time to declare that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature, and that if any article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the articles is totally eluded; and the party deliberately declares the intention of teaching doctrines contrary to them. With these observations on the law I have only to enquire whether the doctrine which this gentleman has preached is contrary to the articles? That will be a very short discussion on the evidence which has been laid before the Court.

The first article states the doctrine of the Trinity; the second the divinity of our Saviour, and the atonement by His death and sacrifice. It is alleged that Mr. Stone has, in a sermon, publicly impugned these doctrines, and that he has since committed these sentiments to the press. It is not [430] necessary that I should state the particular terms in which these fundamental tenets have been impugned: the Court has heard those observations repeated more frequently than it wished, and more than could be agreeable, it hopes, to many of the auditors. Mr. Stone himself has admitted, and is ready to admit, more so perhaps than those who had the management of his defence would have advised, the total opposition of his doctrines to the articles in question. I have listened, with patient attention, to what he has offered this day, but I find it little more than a repetition of his sermon. It is not necessary for me to go through the rest of the evidence, or to state the facts in detail. The preaching and the publishing are both abundantly proved.

Then what is the duty of the Court? It cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the King's Advocate, after the persisting in those doctrines, which we have heard this day, to pronounce the sentence of the law. But the Court is disposed to act with the greatest indulgence to the party, and will now content itself with admonishing him, though not encouraged to expect any effect from this admonition, to appear the next Court-day to revoke his errors, with an intimation that if he does not obey this admonition, the Court will feel itself under the necessity of proceeding to inflict the particular penalty, which the statute directs.

[431] On the next Court-day Mr. Stone tendered a paper,* which he described, on being interrogated as to its contents by the Court, as a revocation of his errors: but the Judge declared, after some observations by Mr. Stone, that he could not so consider it, and proceeded to the following effect:—

The only question which I have now to determine is, whether Mr. Stone has, by his declarations this day, either verbally or in writing, satisfied the assignation made upon him—to revoke his error? It is not in my power to accept the written paper as a revocation; it is not really so intended; it would be a want of good faith to the public, and of private integrity, if I were to declare that paper to be a revocation, which is directly the reverse. There is no difficulty in framing what the statute

* I, Francis Stone, rector of Cold Norton, in the county of Essex, do declare that I was not aware that, by preaching my sermon before the archdeacon, I was offending against an Act of Parliament passed in the reign of Queen Elizabeth: and, further, I was persuaded that my solemn engagements with the bishop, at my ordination as priest, authorized me to preach as I did. But as the Act of Parliament affirms that I should preach only what is consistent with the 39 Articles, I do promise not to offend again in like manner.

Signed, FRANCIS STONE.

requires, as it is plainly an assurance that the party, who has offended against the statute, revokes his error. Of what has fallen from Mr. Stone verbally, it is not necessary for me to take any notice. He has been heard by all around ; and I might leave it to the judgment of those persons whether, what he has now declared, is not of the same tenor with what he said on the last Court-day ? In my judgment it is clearly so. I am very certain that the indulgence of another week would be productive of no alteration in his sentiments. It is only a [432] total abandonment of his errors that can satisfy the law. He declares that he was not sensible, that, by preaching his sermon before the archdeacon, he was offending against the statute of Elizabeth. With all respect to the personal veracity of Mr. Stone, I find great difficulty in reconciling my mind to the truth of that statement. It does appear to me very extraordinary that a gentleman, liberally educated, who has been forty years in holy orders, should be so ignorant of the fundamental law of the Church of England as not to know the provisions of that statute. But ignorance of the law is no defence whatever. It is not that which can be pleaded by an individual, in defence of any violation of the laws of the land. The second clause of this paper is, that he was well persuaded that the ordaining bishop authorized him to preach as he did. It appears to me that this is an affirmation of his doctrines. When he says that his solemn engagements authorize him to preach those doctrines, that is so far from a retractation, that it is tantamount to a declaration that the doctrines for which he is proceeded against are agreeable to his notions of Christian faith.

The concluding part is, "I do promise and engage not to offend again in like manner." Who can say otherwise than that this is a mere promise of future silence, but no revocation of past error ? It is no revocation ; and that is the demand of the statute. It might be satisfied, if mere future silence was all that is required ; but it is no revocation of the past.

I am, therefore, under the painful necessity of considering Mr. Stone as having declined to revoke his error, and to comply with the requisition of the [433] statute ; and I must direct the registrar to record that the party has not revoked his error. It is only necessary to observe further that, by the canons of the church (Can. 122), it is prescribed, that when sentence of deprivation is to be passed, which I must declare to have been incurred by this offence, it must be pronounced by the bishop.†

† In 1714 there was a suit of a similar kind before the Delegates, promoted by Dr. Pelling against Whiston for heresy, in publishing doctrines contrary to the Articles of Religion. The statute of Elizabeth was not mentioned. In that case after the Convocation had passed a censure upon the book, Dr. Pelling applied to Dr. Harward, the commissary of the dean and chapter of St. Paul's, to be permitted to promote articles against Whiston in that Court. Dr. Harward thought, on consideration of the crime and its legal punishment—degradation from the ministerial functions—that as he had not his commission from any bishop, it was not in his power to degrade a clergyman ; and therefore that he had not authority to judge of heresy, whereto that degradation belonged. He therefore refused the cause, and intimated that he thought it belonged to the Court of Arches. The Dean of the Arches, Dr. Bettesworth, on application being made to that Court, gave it as his opinion and determination that the matter not coming before him by appeal as causes ought to do in his Court, and the cause having been already under the cognizance of Convocation, and belonging properly to the Bishop of London, he could not receive it in the first instance. Application was then made in the way of appeal from the refusal of the Dean of the Arches to the Chancellor for a commission of Delegates : and a special commission was granted, consisting of "the Bishops of Winchester, Bath and Wells, Chester, Hereford, and Bangor ; Lord Chief Justice Trevor, Sir Robert Tracy, Knight, one of the Judges in the Court of King's Bench ; Sir Robert Price, a Baron of the Exchequer, with Drs. Wood, Pinfold, Pask, Phipps, and Strahan." The Court of Delegates held that the Dean of the Arches had done wrong in rejecting the petition, and that the cause did lie before him, and that he ought to have entertained it. They further retained the cause, and thereon issued a citation to Whiston to appear before them, &c. on a certain day, when articles were exhibited against him at the office of the Delegates, nominatim. The cause proceeded, and there appears to have been a full argument on the merits of the case : but the suit was afterwards dropt. Vid. *Whiston's case*, published by himself, p. 147.

[434] The Bishop of London was then introduced, attended by the Dean of St. Paul's, and two of the prebendaries; when, having taken the Judge's chair, he was informed by the Judge of the nature of the offence, and the proceedings instituted against Mr. Stone. The bishop then stated that he had read the depositions, and was clearly satisfied that the offence was proved; and proceeded to read and sign the sentence of deprivation, which the Judge directed the registrar to record.

Affirmed upon appeal, 24th April, 1809.

COPE v. BURT, FALSELY CALLING HERSELF COPE. 27th June, 1809.—Suit of nullity of marriage by licence, by reason of the false description of names, not sustained.

[See further, 1 Phill. 224.]

This was a case of nullity of marriage, brought by John Cope of the Temple, Esq. against Sarah Burt, spinster, falsely calling herself Cope, of the parish of Saint George Hanover Square, by reason of the false description of her name in the licence, under which the marriage was celebrated.

The libel "pleaded the real name of the wife to have been Sarah Burt, spinster and that she was described in the licence under the assumed name of Elizabeth Melville, widow; that both parties were of age; but that the licence was obtained by the husband, who had been imposed upon with regard to the name and description of [435] the wife; * and that the marriage had in false names was null and void."

The admission of the libel was opposed by Dr. Jenner and Dr. Edwards, who submitted that the identity of the person was in no manner questioned; and as both parties were majors, no right had been impugned: that this point had been decided in the case of *Cockburn v. Garnault*, before the Commissary of Surrey, on the 4th of May 1792, and afterwards in the Court of Arches, on the 4th December, 1793.

Court. I wish to hear how this case is distinguished; for, when I read the libel it appeared to me that this was a decided point; and I was rather surprised to see it raised again.

[436] In support of the libel Dr. Arnold and Dr. Swabey contended that the case cited was one of peculiar circumstances, and had been directed to be so recorded that the father was present at the marriage, and, on that account, the Court dismissed the suit. The general features of that case were that the man whose true name was Gerald Garnault, a widower, had obtained a licence under the assumed name of George Garnet, bachelor; and a suit of nullity was instituted by the father of the wife who was a minor, and afterwards carried on by the woman on her coming of age. The difference of the name was supposed to be not satisfactorily proved; and the Court, observing on the special circumstance that the father was present at the marriage, dismissed the cause on that ground. That the impression which that case had left was, that the general point had not been decided; that on the principle of the marriage act, to which marriages under licence must conform, the true description of persons was necessary. In banns it is specifically required, and the licence, being a dispensation of the ordinary law, was to be considered a personal grant to the parties founded on a faithful description of their state and condition; and it expressly contained a clause, that if fraud was suggested, or truth suppressed, the instrument should be null and void.

In reply, it was said that the true name was required in banns, because the father rights were precluded by the fact of marriage in that form; and it was therefore necessary that sufficient notice should be afforded to him, by a true and accurate proclamation of banns. But in marriages by licence, the father not consenting might annul the marriage, and therefore there was not the same reason for holding the licence vitiated by an inaccurate description of the parties; that it was a general

* The libel pleaded that, in 1781, Sarah Burt quitted her father's house, and went to reside with her sister Mary Monypenny in different parts of London, and "that upon her going to reside with her said sister, she, the said Sarah Burt falsely calling herself Cope, did assume, without any legal authority whatever, the surname of Melville, and dropped her true name of Burt, and during the time she so resided with her said sister, used and passed by the surname of Melville, but continued to use and pass by her true Christian name of Sarah, until about the year 1787, when she dropped her said Christian name of Sarah, and from that time used and passed by the assumed

rule of the law of contract, "quod nihil facit error in nomine cum de corpore constat," * and (Dig. 50, 17, 19), "qui cum alio contrahit, vel est, vel debet esse, non ignarus conditionis ejus." In the canons respecting licences, 101, 102, 103, there was no restriction as to names; that in this case, where there was not any imposition in the person, there was no solid objection to the validity of the marriage.

Judgment—Sir William Scott. This is a libel offered in proceedings, instituted for the purpose of invalidating a marriage, which has been celebrated between John Cope and Sarah Burt, calling herself Elizabeth Melville. The cause of nullity suggested is that the marriage was had under the wrong name of Melville for Burt, according to the description given of her in the licence, which was obtained by the husband, on his oath, swearing that all the requisites of law had been duly observed. I must confess that I had considered this point to be so much *res adjudicata*, under the authority of the case which has been cited, that it was not without surprise that I received this libel. I was of counsel in that case, and remember to [438] have urged the very argument which has been repeated on this day; and I conceive that the judgment then given went to the whole extent of the present question, and would be binding on the Court, even if it entertained any private doubts on the subject.

In that case two questions were raised, on which it was attempted to set aside the marriage—the want of consent of the father, and the false description of the licence. The particularity in that case of which so much has been said was founded on the presence of the father, which might well cure any defect from want of his consent, if no dissent was at that time signified; though if the other point was material, and the validity of the marriage depended on the description of the persons in the licence, any defect of that kind would not be cured by the mere attendance of the father. That case, therefore, is a clear decision upon this very point, which it is not in the power of this Court to disturb if it was so inclined. The Judge took the distinction between banns and licence, which has been noticed in the argument—that, in publication by banns, it is essentially necessary that the publication should be in the true name, as it would otherwise be defective in substance, and no one would be put on their guard by such publication; whilst a licence is not of the same notoriety, but is granted by the ordinary on the evidence which he is content to receive—the oath of the party, as required by the canons of the church.

If there is no deception as to the identity, it may be asked, what is the fraud that is imputed in this case? There was no imposition on the ordinary or on the minister or on either of the [439] parties, as the name had actually been used for a considerable time. There is no averment that a licence, obtained in one name, was transferred to another person. If that case should occur, and it should appear that a licence procured for one person was transferred to another, it might be a fraud which the Court would be bound to notice. But there is no such ingredient here.

I am of opinion that this case is governed by that which has been referred to, and that I am bound to hold that the mere circumstance that the licence has been obtained in the name of the person, which she has actually borne, though not the true name, will not authorize the Ecclesiastical Court to pronounce such marriage null and void.

Affirmed on appeal. Arches, 5th February, 1810. Delegates, 8th May, 1811. (1st Phillimore's Rep. p. 224.)

names of Elizabeth Melville until her pretended marriage with John Cope, &c. &c." In the fifth article it was pleaded, "that in the year 1791, the said John Cope, Esquire, was introduced to her the said Sarah Burt, now falsely calling herself Cope, under the assumed names and character of Elizabeth Melville, widow, and as such paid his addresses in courtship to her in the way of marriage, and that the said Sarah Burt, falsely calling herself Cope, fraudulently concealing from the said John Cope her real names and character, and representing herself to be Elizabeth Melville, a widow, did receive his addresses and courtship and consent to be married to him, and that accordingly, &c. &c."

* Dig. 18, 1, 9. See also *ib.* § 11, 14, as to error in *materia*, in *sexu*; in *qualitate*. The presumption of law on the subject of marriage is thus expressed, as to accidental quality in the Jewish law: "Ut enim putatur neminem à cyathò potare, quin eum probè perlustravit; sic et hominem istum existimandum est vitium novisse, et uxorem voluisse tamen." Maimonides, c. 25, sec. 6.

CHAMBERS v. CHAMBERS. 26th Jan., 1810.—Divorce by reason of adultery.

Recrimination of cruelty, as alleged on the part of the wife, not sustained.

[Discussed, *Dillon v. Dillon*, 1841. Curt. 86; *Otway v. Otway*, 1888, 13 P. D. 151.]

This was a suit of divorce, instituted by George Chambers, Esq., against the Honourable Jane Chambers, his wife, by reason of adultery.

Judgment—*Sir William Scott*. The citation in this cause issued in Michaelmas Term, 1804, against the Honourable Jane Chambers for adultery; to which no appearance was given till Hilary Term, 1805, after excommunication. A marriage had taken place in 1784 at Gretna Green; and the consent of parents being afterwards obtained, the parties were married again in Yorkshire for confirmation of the [440] former marriage: they cohabited till 1799; but not without occasional disagreements and separations. In 1798 the wife absented herself from her husband, and took refuge with her brother, Lord Rodney: articles of permanent separation were entered into, which have not been exhibited; but described to the Court as providing that "on the first instance of ill treatment after her return, of which she was to be the sole judge, she should be at liberty to separate; taking with her their two children, without forfeiting an annuity which had been left her by Sir William Chambers, the father of her husband, on condition that she should be constantly living with him."

In 1799 fresh feuds arose: she went away, as it is said, irrevocably; but consented to return to his house for the purpose of taking care of the children during his absence on military service; and as she says, with a condition that she should have previous notice of his return. This, however, is denied in his answers on oath. The husband returned without notice; and the libel pleads that she eloped; but whether that is a term properly used, may depend on the agreement under which she claims a right to retire. Till that time, or shortly before, the character of Mrs. Chambers was unimpeached; but the libel charges a departure from that character as having commenced with Mr. Caulfield, at Hartford, near Huntingdon, during the husband's absence, and afterwards at other places till 1809, when an action was brought against Mr. Caulfield, on which a verdict was obtained of damages to the amount of £2000. A counterplea has been given in this suit on the part of Mrs. Chambers, nearly a year after the libel, [441] averring many things, some insignificant, some important; and reciting the article of the libel, charging elopement, it explains and justifies that fact under the articles of separation.

This plea describes the situation of Mr. Chambers to be one of much pecuniary embarrassment. In it she charges the husband with the profligate design of getting rid of her by a charge of adultery, with a constant and causeless jealousy of her conduct with persons whom he himself had introduced; and concludes with charges of adultery against him with several persons, and particularly in one instance, that must be regretted that it should be dragged into this suit. It states, also, that he had made a proposition to her for a separation to be collusively obtained. This is denied in a further allegation on the part of Mr. Chambers; and it is there alleged that she wrote a letter to him proposing that he should give up the demand of damages against Mr. Caulfield and she would abandon all opposition to his suit. There have also been three exceptive allegations. Mr. Chambers' libel ends with the usual prayer for divorce. The allegation of Mrs. Chambers contains no prayer: but at the hearing of the cause, a prayer is made for separation on her part and on supposition, as I must presume, that her innocence and his guilt should be established. On that prayer, and indeed on every other view of the cause, the first point which the Court has to establish is the innocence of her conduct.

Nine witnesses have been examined who, if they are believed, amply prove the charge of adultery against her. It is proved by three or four witnesses that Mrs. Chambers came to Hartford soon after her husband had left England for the Helder; [442] and that Mr. Caulfield visited her there and dined and supped there almost every day; and their account fully proves to what a degree of intimacy their acquaintance had ripened at that time. They were seen walking in retired places. He came familiarly to her dressing-room before she had finished dressing under pretence of washing his hands, when she sent the witness away. She was not attended at night by her maid-servant as usual. The door was locked in the morning. His boots were observed to be clean in dirty weather when he came to breakfast; it was believed that he had then been secreted in the house; and on one occasion he was seen getting over the paling of the garden, when he must have come from the house.

One of the servants says, "he saw conduct which he should have thought very improper in his own wife." If the witnesses are not discredited, how is this answered? By mere negative evidence of other persons, who say they were present and saw nothing improper. But of these, one is the maid-servant, usually employed in the kitchen, who cannot be supposed to have had many opportunities of making observations. Two others are the sisters of the defendant in this cause, whose evidence the Court would be unwilling to examine minutely, as they may be presumed to be biassed by their affection to her and by an excusable tenderness for their own characters. When, however, these witnesses say, "that they were always with her, and never left her for five minutes;" which are the words of the plea, they must be understood with some latitude. If such watching did really exist, it could be only in consequence of some previous suspicion; but in truth it did not exist. They do not [443] say that they slept with her, which would allow an interval of eight hours at least, and at a time that might be most material. There is also evidence from other persons that she was seen walking with him to Huntingdon, and without them. The sisters must be understood, therefore, as only expressing that they were much with her, but in such a way as might allow opportunities for every thing which is stated to have passed by other witnesses. As to the object of his visits, it could not be equivocal, or supposed to be directed towards one of them, as an honourable purpose of that kind would be soon declared, or he would be speedily dismissed.

The subsequent history is carried on in various places to which she removed, and with no great accuracy either in the plea or in the proof as to dates. When she quitted the house of her husband, she is described to have gone off in great exasperation; and, as I think, it appears from some dispute on account of Caulfield. One witness says, "that the husband was particular in his inquiries respecting her conduct when he came home;" and though this was a stormy period between the parties, as no other cause of jealousy appears, I think she must have been aware that Caulfield was the object of his jealousy, as she could not but know the sentiments of her husband respecting him. She knew that he was subject to fits of jealousy and that it was excited by her intimacy with this individual. What would have been the conduct of a virtuous woman under such circumstances? The dictates of common discretion would have led her to avoid all private communication with him. On the con-[444]-trary, he is continually with her even up to the time of the verdict in 1809.

It is said that there was the same intimacy with other persons who were the friends of her family. But in what sense can Captain Caulfield be considered in any such character? He was a young officer, casually introduced to her acquaintance by her medical attendant in the country, totally unknown to her brother, and only known to her husband as an object of disgust and a cause of uneasiness. In what sense was such a person the friend of her family? In her own allegation it is stated, "that on one occasion Caulfield was sitting with her and her sister at twelve o'clock at night." The husband called and she desired Caulfield would go into another room whilst he was there. Why should this have been done if it was a matter of indifference to the husband? It is admitted that he continued there after the husband was gone, and after the sister had left the house. The sister says that he staid till she had finished a letter which he was to send by the coach. It is proved that the letter was not so sent; and I cannot but think that the sister might have staid that short time. Indeed, there could not be a more flimsy pretence for detaining him; and the servant maid says he staid all night. Then it is said that this might be mere imprudence and nothing more; and that the Court does not judge on such grounds, but on clear proof of guilt.

There may be, I must observe, imprudence of different kinds and degrees, and there are degrees of imprudence from which a Court of Justice will infer guilt. Here are visits which are described by her confidential servant, Sarah Cal-[445]-derwood, as made in such a manner that did not deceive her. At Farnham, near Bury, the same witness says, "that he had a bed in the house constantly for three-quarters of a year." Another witness says, "he lived there." For a long time, wherever she is, he is there also; and there is one consideration which extends over the whole history, which is, that here is a young woman, separated from her husband, and a young officer constantly together. They are living in the same house though under the bare appearance of separate beds. What is this state of cohabitation? I am not afraid to say that separation might justly follow from this alone, and that this might be the

legal proof from which the Court will presume guilt; for Courts of Justice must not be duped. They will judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved before them. That a young woman, estranged from her husband, and a young officer should be living together for months and at different places, though under the flimsy disguise of separate beds, and that Courts of Justice should not put upon such intimacy the construction which every body else would put upon it would be monstrous.

What would be the condition of husbands under such restraint on legal conclusion? It, however, does not depend merely on the reason of the thing. It is the doctrine acted upon by the Court of Arches, and in the Court of Delegates, in the case of *Rutton v. Rutton* (Arches, 26th Jan., 1796. Delegates, 14th Nov., 1798), in which there were separate beds, and scarcely any proof of a fact of adultery; also, in the case of *Lord and Lady Cadogan*,* in which there were separate beds, and [446] in *Denniss v. Denniss* (Consist. 25th Jan., 1808), in all of which the same doctrine was referred to. These are authorities which sufficiently support that position, if it were necessary to act upon it. But the evidence goes further in this case.

There is an occasion stated on which she was compelled to take a house in the name of some other person, and whose name of all others does she adopt?—that of Mr. Caulfield. The history also traces them to a cohabitation at Chertsey, which I may almost say is admitted, since it is acknowledged by her own witness. The keeper of a lock-up-house, in which she was confined, says that she always slept with him there; and though some attempt has been made to discredit this witness by proving that she did not come in a chaise, or in the particular manner which he describes, the variation weighs but little against the general effect of his evidence. There is also the verdict which, though no legal demonstration of guilt against her in this suit, the Court will not lightly appreciate, more particularly as it must have led her to know that she had been dishonoured by the imputed connection with Caulfield.

What then was the natural conduct of an innocent woman under such circumstances? To avoid the man with whose name she herself was coupled in dishonour—to regain her own character; this would have been not only her sense of duty; it would have been the natural impulse. But what is her conduct? The Court might expect that it would be impossible that Caulfield could ever find admittance to her again. Yet, in her own allegation, she states that he did visit her, but only as other gentlemen, the friends of her family. I have observed on a similar conduct before. It is out [447] of all natural credibility that she could admit, on such terms merely, a man by whose imprudence and treachery she had been involved in so severe a calumny. After this admission it is almost unnecessary to examine into the credit of those witnesses who speak to cohabitation there.

The objection to the witnesses is “that they stole some articles belonging to her, and told lies respecting these imputed thefts.” This Court cannot try such charges. The only notice which the Court can take of these objections to their credit is to judge whether the accounts they give are inconsistent and irreconcilable. I think they are not, and that the character of these persons, as witnesses in this cause, is not substantially impeached. After the admission of his visits by herself, I have no doubt that the cohabitation did take place which these witnesses describe. It appears further at this period that her sisters had ceased to visit her. What could have produced that estrangement? Here was a woman of noble family, ill used by her husband, consigned to dishonour by the verdict, and in pecuniary distress! What situation could more loudly call for the support of her family? This has been her conduct out of the cause. What has it been in it? She was called upon by every motive to vindicate her honour, which had been impeached. A suit of restitution of conjugal rights would have put her innocence in issue; and if that was inconsistent with her feelings towards her husband, yet when he brought the suit, she would at least have been eager to vindicate herself. But no appearance is given for her but after excommunication.

In the subsequent pleas a letter has been introduced which, whether written in 1805 or 1806, [448] is immaterial. She had alleged that her husband had made

* Consist. 9th Feb., 1796. Vid. infra, 2 vol. p. 4, *Loveden v. Loveden*, where this case is more particularly noticed.

application to her for a collusive separation, and that she wrote to him in 1805, to which he says that it was not in 1805, but in 1806. He had erroneously considered this letter as connected with one which was said to have come from her; but that is inaccurate, as it appears rather to have been an original proposition, and weighs strongly against her. Blasted as she was by a calumnious verdict, she had now the opportunity of appearing in a Court where she might vindicate her character. But what is the letter? "If you will give up the damages against Caulfield, I will give up my defence in the Ecclesiastical Court; I have proofs against you which shall be brought forward before the Court, and before the world, unless you comply." What is this proposal? but that she will confirm the witnesses of whom she complains, and the verdict which has consigned her to disgrace; and for what? to save from damages the man coupled with her in this reproach. It is morally impossible that such a letter could have proceeded from an innocent person. Two days afterwards she retracts, indeed; but the offer had been rejected, as it had demanded an immediate answer, and none had been sent. This was equivalent to a refusal; and her object, in the second letter, could only be to take off the effect of the first. This letter states that she had been led to make the offer out of Christian compassion for an unfortunate man who was reduced to the brink of ruin by subornation of perjury, but yet she was willing to confirm this verdict.

She speaks also of his continued friendship for her, almost admitting the continued connexion, [449] and saying that no selfish consideration would weigh with her. What! not the vindication of her own character, the best and purest of motives. In the whole of this transaction I see nothing but the effect of blind passion: I have, therefore, no doubt on the nature of this cause; since these letters are admitted to have been written by her, and it is impossible that they should be the letters of an innocent woman.

It is not necessary after this that I should minutely examine the character of some of the witnesses. Sarah Calderwood admits her own infamy in coming on her second examination to contradict the first. But I am inclined to believe the first from the tenor of it. It is not a lumping deposition, but discriminative on particular points; and I cannot believe the excuse which she makes for it, "that she was a young woman reduced to such penury as to be obliged to eat the bread of perjury by swearing against her mistress;" and I advert to this evidence chiefly to make an observation which I wish to be remembered; that those who conduct suits here are answerable not only for their own delicacy, but, in some degree, for that of those whom they employ. There is another witness, Liddell, to whom the objection is more slight, as she says only that her former opinion had given way to later experience.

On the whole of the evidence I am compelled to say that the charge of adultery of the wife is fully proved, and that the contrary evidence is meagre in the extreme, except that of the two sisters, to whom many considerations of tenderness are due: and that the conduct of the wife, both in and out of the cause, can only admit of one unfavourable [450] conclusion of guilt. It is impossible, therefore, to comply with her prayer, because, her guilt being proved, she cannot obtain any thing more against her husband than a dismissal from his suit.

The question, then, which is next to be considered, is whether there is any thing proved by her which will bar him from obtaining his prayer. Different grounds are alleged; first, the profligate declarations that he wished to get rid of his wife by her adultery; that he had introduced young men to her, and knew of an improper intercourse between them, which he permitted to go on. But the only witnesses to this charge are the two sisters, and the expressions are those of violence and passion, and referable to jealousy. There is no proof of any overt act of such conduct to induce me to believe that it was ever attempted. Almost the only evidence of toleration on his part is in the lateness of the suit, which, he says, arose from pecuniary distress; and the only question could be, in which of the cases this toleration was shewn. Supposing some delay interposed, still, after seeing the evidence which has been introduced into this cause, the Court cannot but think that some parts of it, which are denied, might yet furnish grounds of prudent deliberation.

The next charge is that of collusion: on this one witness says only that a lady, whom she does not know, came with such a proposal from Mr. Chambers. But it does not appear that she was authorized by him, nor that she did so in the witness's

presence. It would be necessary that this person herself should be produced. There is then mention of an offer by his brother; but there is no proof that he was authorized by him; it is scarcely natural [451] that it should be so. If made in consequence of the one made by her, it was an insulting proposal; but yet with this difference, that hers must be considered as an offer to withdraw a defence which she maintained to be true, his only to take off the effect of what he declares to be false, and in which the Court agrees. It does not appear to have been acted upon. I do not say that this indiscretion may not be visited upon him in some other place, but I think it cannot properly have the effect of barring him from his prayer in this Court.

The third ground is that of adultery committed by him. One proof to this charge is the evidence of one of the sisters, who speaks of declarations made by him, in letters to his wife, confessing his fault, and soliciting forgiveness; which fault, if committed, was forgiven, and the letter was burnt. It is to be observed, however, that Hannah Rigby, who was the object of his supposed attachment, positively denies the fact. The second proof to this charge is one which conveys an imputation so distressing to the feelings of the family that I shall pass it over, observing only on the result of the evidence, which I have carefully examined, that it by no means proves the fact alleged against him.

A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence. But the Court holds her not innocent. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce by adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain that the wife has [452] a right to say, "You shall not have a sentence against me for adultery, if you are guilty of the same offence yourself." The received doctrine of compensation would have that effect, because both parties are in eodem delicto; but this is not so in recrimination of cruelty: the delictum is not of the same kind. If the wife was the prior petens in a suit of cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different: the Court might not oblige her to cohabitation, which would be dangerous. Here the husband is the prior petens in a suit of adultery, and I take the general doctrine to be "that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage-bed."

It is then less necessary to canvass the evidence on this point very minutely. I do not think that all vehemence was on his side only. Many witnesses disclaim all knowledge of any such misbehaviour, except from her own representation. It is not to be denied that he was an irritable husband; that there was much of violence and intemperate passion in his conduct, words, and attitudes of menace, which might produce present intimidation, and which can be excused only by the madness of intoxication. If the Court was sitting to judge of mere propriety of behaviour, it might see much to censure, though it is not unreasonable to suppose that much of this may be attributed to the effect of extreme jealousy. He makes many efforts to detain her in his society by humiliation on his part. Mr. Montagu says that he assisted in soliciting her to return, which shews that he had no notion of danger to her: there is nothing else but his return from abroad without notice; and [453] which this Court cannot consider as cruelty. There is no notice taken of such a charge, but in answer to a suit brought against her for adultery. I do not say that the facts are so antiquated that they might not be deserving of attention if the suit had been brought against her for restitution of conjugal rights; but I think they can have no place as a bar to a suit for adultery, which is fully and satisfactorily proved against her. I feel myself bound, therefore, to pronounce that Mr. Chambers has proved adultery against her, and that nothing is proved against him which should have the effect of barring him from the usual sentence of separation.

HOLDEN v. HOLDEN. 22nd June, 1810.—Divorce, by reason of cruelty of the husband, sustained on the facts.

This was a suit of separation and divorce, by reason of cruelty, brought by the wife.

Judgment—Sir William Scott. This is a suit for separation by reason of cruelty on the part of Mrs. Holden. The marriage appears to have taken place in 1790; and it is alleged that after a cohabitation of eighteen years she is under the necessity of

praying the relief of this Court for protection, as it is unsafe to continue any longer in the society of her husband.

The libel is very diffuse in the matter set forth to sustain this prayer; and many facts, which are there introduced, have been abandoned on proof, as is not uncommon in suits of this nature, from [454] want of evidence, owing to the private nature of such injuries, or the inflamed state of the feelings in which these complaints are usually made. But the question is not what is unproved, but what is proved, in the depositions which I now proceed to examine. I must observe, however, in the first place, that the examination of the witnesses appears to have been much lumped, and without sufficient distinction in particular parts, which lays the Court under great inconvenience in considering the weight and force of the evidence. And on this intimation the Court expects that this mode of taking evidence will not be continued.

The husband has given no plea and has not even administered interrogatories, to which he might have required the answers of the complainant, and have obliged her to speak to circumstances of secret aggression if he has any such to allege in his defence. The case rests entirely on the evidence of the wife, and, amongst other witnesses, there are the two sisters of the wife, Miss Allcocke and Mrs. Mawer. The latter has not seen much, and states only, "that she was dissatisfied with the general conduct and behaviour of the husband." The other sister was frequently with them. She describes the husband "as a man of violent passion, with others as well as with the wife, on various occasions;" and speaks particularly to a scene which passed between them three or four years after the marriage, which excited great terror. On that occasion she says, "she heard high words between them;" on which it is to be observed that they might begin with the wife. But nothing of that kind is proved [455] or alleged, and the husband has lost the benefit of that suggestion by not pleading in his own defence, or calling for the answer of his wife, as perhaps he might have done with effect; since it is observable that some of the servants speak in a manner not wholly unfavourable to him.

This witness goes on to describe what passed on that occasion in the following terms: she says on the fifth and sixth articles of the libel, "that she had gone to her own room about ten minutes on retiring for the night, before the parties, that she heard high words, and the voice of William Holden speaking in a violent passion, and that the wife came and knocked violently at her door, and was much agitated, and said that Mr. Holden was sitting in his shirt, with a pistol on each side, and desired her to go to him; that she did so and found him as described; that he said he was writing to her father, and she at last prevailed on him to let her take the pistols away, and found that they were charged; that she retired again to her own room; that the husband came and took from her the child who had usually slept with her, and said his wife would sleep with her that night, but shortly after came again and gave her the child, saying the wife would catch cold if she slept in that room." It appears also that the wife had a peculiar dread of fire-arms; so that the general character of this behaviour, if not legal cruelty, is yet such violence of temper as is adapted to create great fears as to the probable consequences.

The next fact that is spoken to is that pleaded on the seventh article of the libel, on [456] which the same witness says, "that on the 2d February, 1808, having gone up stairs, leaving the parties and the child in the front dining-room, she soon afterwards heard the husband call out to her to take the child, which she did from him on the staircase, and in a few minutes heard her sister cry out for help; that she went down and found her sister lying on the floor, and her husband standing over her, having hold of her arms as if he would break the same from off the shoulders, apparently in great agony, and screaming; and on her remonstrating, he said if she attempted to interfere he would put her out of the window; and that the next day her sister was much bruised, and was obliged to send for a surgeon, and could not put on her night-gown for a week."

Mrs. Hancock speaks to the same effect as to the bruises. Now, whatever the origin or occasion of this quarrel may have been, there is nothing to shew that it proceeded from the wife; and there is enough to satisfy the Court that very unlawful violence was used upon the wife from which she has an undoubted right to be protected.

There is another instance in 1800, which, though it is insignificant in itself, does, I think, begin in an act of very froward behaviour on the part of the wife, and which

lays the foundation for a suggestion that all the violence was not on the side of Mr. Holden alone. Mrs. Turner says, "the wife came to her house on the day mentioned, and said that her husband wished her to dine at home as he was going to have a [457] friend, but she thought there was no necessity for dining there, and wished to dine with the deponent, and did so, although the deponent's husband was engaged to dine with Mr. Holden. That at night she went home with Mrs. Holden, and on going into the house Mr. Holden was greatly displeased and told her she might go from whence she came, and after some altercation she did return and sleep at her house that night."

It is pleaded also that a separation took place for a short time in 1808; that the husband used urgent entreaties with her to return, promising her that he would not, by words or blows, ill-treat his wife again. These terms convey the admission of the fact that he had given her blows; and it appears also sufficiently from another instance, to which I am going to advert, that this gentleman laboured under that infirmity of temper which would not permit him to adhere to the promise which he had made. This instance of ill treatment happened in July, 1808, and is spoken to by Mrs. Hancock, who says "that Mrs. Holden called on her, and shewed her her arms, and said she would not return to cohabit with her husband." The sister confirms this account, and says, "that Mr. Holden came to her and acknowledged that he was much shocked at the sight of his wife's arm the morning after this had happened." There is also the evidence of Mr. Foster, the surgeon, on this part of the charge, who describes her arm at that time to have been very black and of an alarming appearance, and that it continued so for six weeks. There have been also two servants examined whose evidence is not very material.

[458] On these facts the Court has to decide whether the conduct of the husband amounts to that *sævitia* which authorizes a separation. On this point the Court has had frequent occasion to observe that every thing is, in legal construction, *sævitia*, which tends to bodily harm and, in that manner renders cohabitation unsafe; whenever there is a tendency only to bodily mischief it is a peril from which the wife must be protected; because it is unsafe for her to continue in the discharge of her conjugal duties; and to enforce that obligation upon her might endanger her security and perhaps her life. It is not necessary, in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are indeed often connected with it as the passion of jealousy. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.

Secondly, the law does not require that there should be many acts. The Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears [459] to interpose its protection, even in the case of a single act; because, if one act should be of that description which should induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference. Here there are repeated acts diffused over many years, which put the wife in danger and expose her to great bodily harm. Thirdly, it is not necessary that the conduct of the wife should be entirely without blame. For the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband.

On examining the facts of this case by these rules I think the conclusion which the Court is bound to draw is that, under the defects which may be left on the case by the absence of all defence, by plea or interrogatory on the part of the husband, the complaint must be considered to be substantiated. The facts are not numerous nor without intermixture of affection on the part of the husband, and not without some provocation on the part of the wife. Yet I think there is sufficient to entitle the wife to the protection of the law, and that the Court is bound to pronounce for the separation as prayed in the libel. Separation granted.

[460] *1 CROMPTON v. BUTLER. 27th Feb., 1790.—Defamation, the testimony of two witnesses required, but not necessary that they should speak to the same fact.

This was a cause of defamation instituted by Mrs. Crompton against Mrs. Butler. The libel pleaded to the following effect:—"That during several months of the year 1789, the defendant Butler, speaking of, meaning, and intending Mrs. Crompton, said and affirmed several times, these or the like words, 'that she was a whore;' with many other scandalous and defamatory words of the same import and meaning, thereby charging the complainant with infidelity to her husband."

In support of the libel Dr. Nicholl submitted that the words were spoken by Mrs. Butler at breakfast, without any previous conversation. She began by saying to one of the witnesses, "Do you know what has passed? Mrs. Crompton has lived with as a common woman." That any words amounting to the charge of incontinence were of ecclesiastical cognizance, and would be deemed sufficient to support proceedings of this nature, without evidence of the word "whore" being used; that the crime was aggravated by the witness reminding the defendant that the person of whom she so spoke was married; upon which she said, "She would go and tell the husband of it, and would give half a guinea to have it propagated amongst her friends." It was proved by Aire, another witness, that she went voluntarily into a shop kept by Crompton, the husband, and that putting her head into the passage, she there abused [461] Mrs. Crompton, and said, "she had been a whore for several years." It might be objected there were not two concurrent witnesses to one and the same act; but it could not be maintained that two witnesses, speaking to two different acts of the same species, did not supply sufficient proofs of the charge. This has been long held to satisfy the demand of the law on this head. The general principle upon which two *2 witnesses are required was that, in regard to the commission of a crime, the presumption in favour of innocence is considered as nearly equal to the oath of one. The Court here had the confirmation of a second witness to [462] a repetition of the same act; and there was the presumption that two persons would not be perjured or mistaken. In such a case, one unimpeached witness to each particular fact would be sufficient; for credit cannot be more strongly supported than by different witnesses to separate acts of the same species. In cases of adultery, proof by two witnesses to distinct facts is held sufficient to found a sentence of divorce. In high treason itself, though two witnesses are required by statute, different witnesses to several overt acts, concurring to the same treason, are sufficient. If it were necessary to have two witnesses to the same defamatory act, reputation might be

*1 The following cases are introduced out of the order of date; as accurate notes had not then been obtained.

*2 The inconvenience attending the rule of requiring a certain number of witnesses, or a defined amount of evidence, to make full proof, has produced great departures from that principle, in many systems of law, in which it had been adopted.

The difficulty of obtaining full proof of offences, according to the civil law, is noticed amongst the causes for altering the criminal jurisdiction of the Court of Admiralty, 27th Hen. 8, c. 4. The following passages shew how the rule has been modified in other countries; and, in one particular, in a manner repugnant to humanity and common reason:—"Regulariter tamen in criminalibus causis duo testes plenam faciunt probationem; nec unicus testis sufficit; quod fallit, quando de crimine levi et modico agitur præjudicio, atque cum unico teste præsumptiones concurrunt. Sed si unicus testis plenam probationem non faciat, sufficit tamen ad semiplenam probationem; et ut reo, vel juramentum purgationis, vel tortura adjudicari queat, pro ratione criminum, & qualitate præsumptionem concurrentium."—Carpzovius *Prac: Crim: Sax: part 3, x. 114, § 4.* So also as to crimes, in genere, distinguished from specific crimes, an exception as to several witnesses, to several acts, was admitted.—"Secundó, Quando agitur de probando delicto in genere, quod sub se comprehendit species differentes, et actus particulares, seu successivos—qualia sunt hæresis, sortilegium, seu maleficium, adulterium et similia. Quo casu testimonium testium singularium, quorum unus de hoc, alius de alio, tertius de illo indicio deponit, conjungenda sunt, ad effectum torquendi reum super delicto, de quo suspectus est."—*Ibid. Q. 123, § 53, 54.*

destroyed with impunity; the defamer using the precaution merely of spreading a malignant report, but to one person only at a time.

On the other side it was contended that, though two concurring witnesses to one specific fact might not be required, there was but one witness, in this case, to the general charge; as the evidence of Aire must be put out of the question. The substance of his evidence was only, "that a woman, who was a stranger to the witness, put her head into the shop, and, addressing Mrs. Crompton," used the word above mentioned; and that Mrs. Crompton told him it was Mrs. Butler; that he afterwards went with Crompton, the husband, to a house, apparently not the house where Mrs. Butler resided, and he there saw this same person standing in the passage of the house; that this was no proof of the identity of the party, as the mere seeing, in this manner, the same woman who had used the defamatory words, though she might answer to the name of Butler, could not be deemed sufficient for that purpose.

[463] *Judgment—Sir William Scott.* It has always been considered as good proof of defamation, and as satisfying the demands of the law, in point of evidence, if there are two witnesses speaking separately to facts of defamation committed at different times. Upon this point, the oldest case that the Court is possessed of is in a note of Dr. Paul of *Hawknell v. Lumner* (23d January, 1746); since which it has ever been held sufficient, if the two witnesses, whom the law requires to contest, should speak severally to different facts of defamation. The rules of law, which have governed the proceedings of the Ecclesiastical Courts in cases of this kind,† do not require that

† The general principles, on this subject, are summarily stated in the following case, decided by Sir William Wynne, in the case of *Harris v. Buller*, Arches, 1st Dec., 1798, in which the defamation charged was for calling the person a common swearer.

Judgment—Sir William Wynne. This is a suit instituted in the Consistory Court of Salisbury, by William Buller against Thomas Harris for defamation, alleged to have been uttered at the times and places libellate. It appears that on the 29th Nov., 1794, the proctor for Harris alleged the libel was inadmissible, as founded on matter not cognizable in the Ecclesiastical Court. The Judge admitted the libel, however, holding that it did contain matter of spiritual cognizance, and that nothing had been alleged to the contrary. There was then a protestation of appeal; but no appeal was prosecuted as of a grievance; and the cause went on for three years and an half, when the final sentence was pronounced, that Harris did utter the words charged in the libel, and ought to be punished; and decreed a suitable penance and condemned the party in costs. Though the Judge so proceeded to sentence, and there was no appeal in the process on that point in the case, I am clearly of opinion that, if it appears to this Court that a sentence would not be warranted by law, the Court may and must reverse it, though the party suffered the cause to proceed, and the objection might have been taken earlier. For it would be strange that this Court should affirm the sentence, if there was no law by which any punishment legally attached. There will therefore be a previous question, whether the party has been guilty of any offence for which he is liable to penance.

I do not remember any case, nor find a note of any, in which there has been a proceeding by articles against a person for being a common swearer; and I hold it to be an incontrovertible principle that only such defamatory words are cognizable here, which impute an offence which would be punishable here. Can a party then be punished, in the Ecclesiastical Court, for swearing, or being a swearer? The only authority which is relied on is the 109th Canon, and it is very truly said that the canons are, in many instances, only declaratory of the law, as what shall be its execution, and not always introductory of the offence. Repulsion from the communion is mentioned in the canon; that, however, is not applicable to judicial proceedings, but rather directory to the minister, who may refuse to administer the sacrament, under the responsibility, that if he does it improperly, he will be liable to an action. The meaning of the canon is only to bring forward the offence in its proper character; but will not furnish ground for a suit in the Ecclesiastical Court, as authority for such proceeding. There are other offences mentioned afterwards, as sowers of sedition and faction, which certainly do not import ecclesiastical offences, but such as must be prosecuted before the justices of the peace. There is nothing clearer than that there is no law or usage which authorizes proceedings on such offences in the Ecclesiastical Court. But if the jurisdiction did exist, it is not sufficient merely that the words

the term "whore" [464] should be the specific word used ; for what would, in common and popular acceptation, imply the crime of incontinence will amount to the same thing; and there are a variety of cases in which the particular word has not been employed, but some periphrasis, implying the same import : yet it has been held good proof of defamation.

[465] The only question then is, whether there is sufficient proof of such defamatory words, spoken by Mrs. Butler, at different times. The first witness says, "that on the 23d of April, the day on which the king went to St. Paul's, by which she marks the time more particularly, she went to work at Butler's, a haberdasher ; that, while at breakfast, Mrs. Butler asked her if she knew [466] Mrs. Crompton, and how long she had known her ; and added, 'do you know what has passed between her and _____, when her house was sold ? he bought it for her : she was a common woman to him.' The witness replied that it was a pity to say so of a married woman ; to which she answered she would tell her husband the same, and offered the deponent half a guinea to acquaint the friends of the party defamed with what she said." No defamation can be more atrocious than what is here deposed to. The fact, spoken to by Aire, is this, "that he knows Crompton and his wife ; that he is a shoemaker at Tower Hill, and went to sell some shoes there ; that Crompton was not at home, when a woman put her head into the passage and used words that have been already recited, and that Mrs. Crompton told him it was Mrs. Butler."

That, certainly, would not be evidence of the identity, as coming through Mrs. Crompton, in a cause in which she herself is the party. It appears, however, that about a fortnight before his examination, he went with Mr. Crompton to Dockhead, and inquired for Mrs. Butler. Some conversation then passed between them. Mrs. Butler said to Crompton, "what do you want with me?" to which he replied, "that he wanted his rent," she having formerly lodged at his house. The witness swears that she was the same person who defamed Mrs. Crompton in his presence, as before deposed. This, I think, is sufficient proof of the identity ; and nothing remains but to pronounce the sentence of the law. I am of opinion that the defamation, proved in this case, proceeds from a very malignant mind. I shall therefore enjoin the usual penance, and condemn the defendant in costs.

impute an ecclesiastical offence, it must be an offence also which will not be punishable at common law. If the words are "that such a person is a bawd," suit lies in the Ecclesiastical Court ; but if they are, "that such a person keeps a bawdy-house," they are out of the jurisdiction of the Court ; because it may be the subject of indictment : and though the latter cannot be charged, without charging the other also by inference, it has always been held a ground of prohibition ; as the courts of common law have determined that there can be no suit for defamation in the Ecclesiastical Court when an action would lie at common law. Several statutes (21 Jac. 1, c. 20, 6 & 7 W. 3, c. 11, 19 G. 2, c. 21) inflict penalties for swearing. There is also a statute, 4th James 1, c. 5, against drunkenness, but with an express saving of the ecclesiastical jurisdiction. So in the statute, 13th Eliz. c. 8, against usury. There is no such saving in the statutes against swearing ; and though it may not be necessary in matters of ancient ecclesiastical cognizance, and the authority of the Ecclesiastical Court may not be destroyed by a subsequent statute inflicting temporal penalty, the reservation, in these statutes of the same time, being not introduced in that relating to swearing, strongly implies that swearing was not then considered as a matter punishable in the Ecclesiastical Court. For the word drunkard, there have been frequent suits in the Ecclesiastical Courts, and prohibition had often been granted, which was the ground of that reservation. Dr. Andrew rejected a libel of that nature, which was a stronger case. The Court will not seek to extend its jurisdiction in cases of this kind ; and as there is no instance of a suit here for the crime of swearing, for which a punishment has been provided in the courts of Common Law, and restrained to a period of ten days, I am of opinion, that the original proceedings in this case were not warranted, certainly not by practice, and, I think, not by law. I shall, therefore, reverse the sentence ; and I should have given costs if the appeal had been properly prosecuted against the rejection of the libel.

[467] SMITH v. WATKINS. 26th Nov., 1792.—Defamation. Words amounting thereto in legal construction; direct terms not necessary.

This was a suit of defamation, brought by Smith, a married woman, against Watkins. The words laid in the libel were, "What do you live with that fellow for?" meaning William Smith, the husband of the plaintiff. "He has a wife in the country, that he was married to before he was married to you, and she is now living in the county of York; and how can you be his wife; and what must you be to live with another woman's husband?"

It was objected by Dr. Nicholl that these words did not imply a direct charge of incontinence; that she might not know the fact of Smith's first marriage, and that, if so, nothing criminal was done; that the words used seemed to acquit her of any such knowledge, and in that sense, they would not be within the meaning contended for; and that if the inference was false, the charge was not supportable.

On the other side, Dr. Swabey contended that words tantamount, though expressed by circumlocution, had always been held sufficient; and that, whether spoken affirmatively, or hypothetically, or by way of interrogation, or even ironically, if with a defamatory effect, may be the subject of proceedings of this kind; that words, which are really ambiguous and will fairly admit of a milder interpretation, shall be received in their best sense; but the rule of construing words of an injurious [468] tendency in mitiori sensu was now held to have been anciently carried too far; and it is doubtful whether many of the earlier determinations, in that respect, would be law at this day. The true rule was that words, which are ambiguous, must also be of indifferent sense, to be indifferently taken; and that it was so held in *Fleetwood v. Curley* (Hobart, p. 268), that when there is a pregnant, violent, and certain sense that may lead the Court and hearers to take it one way, that shall be taken, and not another imagined, of which there is no appearance; as slander consists in the apprehension of the hearers. That the words here were laid to have been reproachfully and invidiously spoken; and to ask a woman, cohabiting with a man, in a reproachful manner, as pleaded, "How she can live with another woman's husband, and what she must be to do it;" raised an inference which, in the common and popular acceptance of the words, would be as certain as if an express term of infamy had been directly used; that they must be strained to give them a different construction; and that the law knows not the distinction of favourable and unfavourable causes.

Judgment—Sir William Scott. The Court has no inclination, more or less favourable, to causes of this, any more than to those of any other kind; in point of judicial favour they stand equal, it being equally its legal duty to entertain them. Certainly there are a variety of cases where the word of infamy has not itself been used: but circumlocutions, implying the same import, have been always held to be sufficient: the [469] meaning of the words, however, must be clear and definite, and the Court must be satisfied that they are not fairly capable of another interpretation. It appears to me that these words had not that clear and precise meaning which will be necessary to make them the subject of a criminal charge. If there had been any thing expressed to shew that the plaintiff was affected with the knowledge of there being any other person living in the character of a former wife, it would amount to a charge of incontinence; but, otherwise, they will not come within the scope and meaning of defamatory terms to such an effect. The words acquaint her—not with her crime, but with her misfortune—"under such circumstances, how can you be his wife?" The man might not speak invidiously; and I repeat that the words do not necessarily import a crime. "And what must you be to live with another woman's husband?" are expressions which may apply to future cohabitation, if it should take place.

If there was any thing to prove that these words necessarily implied that she was apprized of the fact of there being another wife, it would bring the case within the authorities referred to; but without you can fix that knowledge, the charge of incontinence is not necessarily implied. I, therefore, reject this libel; but without costs.

[470] BREITHWAITE v. HOLLINGSHEAD. 16th June, 1797.—Tithes, how far a debt discharged by a certificate of bankruptcy.

This was originally a suit for subtraction of tithes in the years 1792-3-4, of wheat, beans, and grass land, of the parish of Saint Dunstan, Stepney, in which the party had given an affirmative issue in January, 1797—a few days after a certificate of bankruptcy had been granted to him, and he had been decreed and admonished to pay

the same as charged. A decree of excommunication was now porrected for non-compliance with that monition on the part of the defendant. It was alleged that he had become a bankrupt in January, 1796, since the tithes became due, and had obtained his certificate of bankruptcy in January, 1797, under which it was submitted that he was discharged from this demand among other antecedent debts.

The Court having intimated that it would be proper that the question should be argued, the party was admitted a pauper for that purpose. On his behalf Dr. Sewell contended that the tithes had become due in 1792-3-4, and the act of bankruptcy had been committed in 1796, and the certificate obtained in January, 1797, a few days before the affirmative issue had been given to the libel. That the statute 5 G. 2, c. 30, § 7, gave the bankrupt "a discharge from all debts owing at the time when he became a bankrupt." That in [471] *Baker's case*, 2 Strange, p. 1152, on attachment for not performing an award, a demand of that kind was held to be discharged. That in 1 Atk. 149, it was held that no preference was due for apprentice fees; but that such a demand was to be proved. It lays on the other side, therefore, to shew that tithes were not included under the same principle. It was said, 3 P. Wms. 24, in a note to the case of *Horsey*, that if there are separate and joint creditors, a certificate on a commission taken out by one concludes all others. As to the time—it had been intimated that because the debt was in contest at the time, it could not be proved. But the question would not be whether the particular demand could actually be proved; but whether it was in its nature proveable. If a creditor was out of the country, he might be physically unable to prove, yet the demand was concluded; or, if it was said that he was prevented by the debt being in contest, it would still be liable to this observation that if such excuse was admitted, a creditor might purposely delay. In Cowper's Rep. p. 25, where judgment on a bail bond was not given till after the certificate had been allowed, the Court held that the penalty had accrued, though execution could not be taken.

In the present case, Dr. Breithwaite might have gone before the Commissioners, whereas he has suffered the dividend to be made: that he might have appeared to prevent the certificate, though he could not prove and prosecute at the same time. He might have opposed the certificate before the Lord Chancellor, and, in that form, the defendant would have been certain of having the full benefit of his privilege; but now, if he [472] was taken under an excommunicato capiendo, the party could have no relief from the bankrupt laws.

On the other side, Dr. Nicholl and Dr. Swabey submitted that this was a suit for tithes accruing in 1792, 3, 4, in which all possible delay had been used by the party declining to answer, or to appear, till after the bankruptcy: and the question was not whether the party was a solvent or insolvent debtor, but whether the debt was of such a nature as to be proveable under the commission. No statute describes particularly what debts may be so proved. In awards, annuities, apprentices' fees, or penalties, they had actually accrued before; and all questions as to separate commissions depended only on preference. That in the present case it could not be said the debt had accrued in any manner; and therefore it could not be proved. Subtraction of tithes was not a debt, but damage, on which only a cause of action arose; but the party could not be held to bail, or have an action of debt brought against him. 3 Bl. Com. 88. That a mere cause of action cannot be proved under a commission of bankruptcy, for damages only contingent (*Cooke's Bank. L. 235. 3 Wilson, 270*). In ejectment, in which there were nominal damages given, the defendant became a bankrupt before judgment; and in the next term judgment was given, and costs were then taxed; and they were held not to accrue till after the judgment. In the present [473] case, there was a mere right of action for taking away the tithes which could not be recovered in specie. The party, therefore, could not have gone before the commissioners, as he could not have ascertained the amount of his demand: as it must be a sum certain to be so proved. The decree did not pass till after the certificate had been obtained. The party, therefore, should have pleaded this discharge, if any, when the Court was pronouncing that decree. Having not done so, it was a fresh assumption or allowance of debt, which could not be included under a former certificate. It depended on the bankrupt to make this demand proveable by his plea, when assigned to answer, and not on Dr. Breithwaite. The defendant might have denied that he was rector; and it could not be foreseen what plea he might offer.

It was scarcely necessary to cite cases to shew that such a demand was not proveable in the shape of a debt. But there was a case which had happened in the Court of Adm. 1739—in the case of *Russell and Others* in the “Adventure,” in which the Court had pronounced for, and had decreed an attachment against the principal and bail. Martin appeared for one of the sureties, and alleged that he had become a bankrupt, and prayed that attachment might not go. Sir H. Penrice, after argument by counsel of the common law bar, overruled the objection. From which it is to be inferred that demands of this nature, dependent on further proceeding or judgment in these Courts, are not proveable before the commissioners, and are not discharged by the certificate.

[474] *Judgment*—*Sir William Scott*. This is a suit for subtraction of tithes for the years 1792-3 and 4, in which the humanity of the clergyman is sufficiently proved by his forbearance, and the justice of the demand is equally proved by the decree of the Court which has been pronounced on the admission of the facts by the party himself.

The only question, therefore, is whether he is discharged as a certificated bankrupt from an obligation of this nature; or whether the Court will be justified in proceeding to follow up its decree by excommunication, according to the usual process of the Court, and as it is prayed to do, for non-payment of the sums pronounced to be due under the former judgment?

The bankrupt laws are well known to be framed with humane attention to the protection of individuals; and though they are very familiar to the experience of other Courts, they do not frequently come under the observation of these Courts, so as to warrant me to proceed on the mere suggestion of the party, on motion, to entail on a person, who has obtained the benefit of a certificate under a commission of bankruptcy, imprisonment, and all the consequences that may attend a sentence of excommunication. The Court, therefore, desired to have the assistance of counsel. The question having been very fully argued, it appears to be simply this, whether a demand of this nature can be considered as a debt proveable under the commission? If so, the debtor is undoubtedly discharged. If not, the certificate will not avail him to this effect.

[475] The words of the statute are very comprehensive—“All debts,” which are large and unlimited; and I think the burthen of proof lies on the party who would put a restrictive construction upon them, and maintain that the bankrupt is not entitled to the benefit of his certificate against a demand of this nature: for the Court must be satisfied that he is not entitled. It will not become me, otherwise, to narrow the beneficial effects of laws, affording this protection and relief from the consequences of misfortune or imprudence without the most clear and decided conviction that the Court is bound to act in that manner. It must be shewn by decided authority or on admitted principles; and it would have been satisfactory to the Court if Dr. Breithwaite had claimed to be allowed to prove this demand before the commissioners. As it is, the Court is left to consider for itself; and I will only say that the reasonings, which I have heard, do not fully convince my mind that he might not have proved it.

It has been said that tithes, as recovered under these proceedings, are not a debt; but in the nature of pecuniary damages. I, however, have not understood that a debt under the bankrupt laws is to be taken in the narrowest construction of the term, and that nothing can be proved which may not be the subject of an action of debt or assumpsit.

There is a class of cases, indeed, which shew that wherever there is a mere right of action, such a demand cannot be proved, but the question is whether the demand for tithes under these proceedings is merely a right of action?

It is said by Blackstone and others that the cases alluded to are not to be considered as cases [476] of debt, but of right of action by which damage accrues. But when the demand is not contingent, I see no reason to infer that the commissioners would be excluded from the consideration of such a claim, or that the rector would be debarred from proving it. Whenever damages are truly contingent, or costs to be taxed, requiring the intervention of a jury or of an officer of the Court to ascertain the precise amount, they may not be proveable; because there is no certain quantum which can be proved; that is contingent on the discretion of others, which the commissioners have no power to ascertain. But on a claim of this nature non constat

that the amount might not be fixed by the commissioners, and then the legal maxim will be applicable, "Certum est quod certum reddi potest." If they have the means of ascertaining the amount I do not see that the demand might not be recovered before the commissioners; and it would not be without great reluctance that the Court could be induced to lay down a position of that extent, that the clergy of England and all lay impropiators are excluded; and have no right to come before the commissioners and partake in the benefit of the bankrupt laws.

It has been said that it is impossible to prove because the creditor must swear to the amount. But I do not see the ground of impossibility on that account, or that Dr. Breithwaite might not swear to such a debt. He has already stated the number of acres and the cattle depastured and the grain sown, and he might have the answers of the party. And I do not apprehend that he would be deprived of the benefit of those answers before the commissioners. I am not satisfied at least that there is [477] that want of certainty, and of the means of actual liquidation, that would exclude him from proving before them.

In this state of doubt it is natural that the Court should feel a strong disinclination to excommunicate a sworn pauper from whom nothing can be obtained; and who might be led to resist the writ at law with great accumulation of expence, which might be the cause of further inconvenience; and that after he has been restored to society and to credit by the humane provision of the laws, he may be again involved in a suit for which he may again be imprisoned: for I will not say decidedly that this demand is so clearly within the bankrupt laws as to make my mind easy on that point. In granting the effect of this prayer, I should, in reality, do no benefit to the one party, whilst I might inflict incalculable inconvenience and hardship on the other.

Considering the humane forbearance which has been already shewn in these proceedings, I am unwilling to depart so entirely from that spirit in the duty which the Court has to discharge between the parties, as to say that the defendant is liable to all the consequences that may follow excommunication, if the Court should grant this petition. I am not satisfied that he is not entitled to his discharge under the bankrupt laws, and on that ground I shall decline to decree the excommunication.

[478] *FILEWOOD v. MARSH.* 27th June, 1797.—Subtraction of tithes. Notice as to setting out small tithes, how far required. Custom of the particular parish.

This was a suit for the subtraction of tithes, instituted by the Rev. James Filewood, rector of Sible Hedingham, Essex, against Isaac Marsh. The libel pleaded that the defendant, either by himself or his agent, did in the months of July, August or September, in the year 1794, carry away some barley of which tithe was due, before the tithe had been duly set forth, or did willingly withdraw the tithe of the same, and converted the same to his own use without compensation or composition with the said rector. On the other side it was alleged, "that the tithe was duly and fairly set forth, but that the said James Filewood neglected to carry it away, by reason whereof the same became totally spoiled."

Judgment—Sir William Scott. This is a suit brought by the Rev. James Filewood against Isaac Marsh for tithe due in the year 1794. Several circumstances are admitted, viz. the title of the incumbent, the liability of the land, and the occupation of the party sued. The main fact averred is that the tithes were not received. To this it is answered that, although the tithes had not been received they had been paid, for they had been set out, and that such setting out amounted to legal payment; as it was not the fault of the defendant that they had not been received and he was therefore no further liable to this demand. The plea, on the other side, is that, [479] though they might have been set out, they were not duly set out, as not accompanied with that notice which the law requires. The whole question, therefore, is reduced to the simple point, whether the tithes were set out with proper notice? This question may be considered with reference to three species of law: first, the general law of the land; secondly, the peculiar law of the district, if there is any such; for if there be such local custom, the general law will accept that as the rule in the particular case; thirdly, the law which parties may impose on themselves in their own transactions: since the benefit of the general or the local law may be waived by the act of the parties themselves. In the present case, the parties appear to have waived the benefit of the general law.

It is, I conceive, perfectly settled by the authority of the common law that notice

is not necessary respecting the setting out of great tithes. I am not aware of any decision that has gone so far as to include the case of small tithes, which may admit of a reasonable distinction on the matter of notice. In great tithes the rector has the means of knowing the produce without notice; but in small tithes there may be a great difficulty or impossibility of obtaining that information. And if the law which gives the right gives also, as is usually said, the necessary means of securing that right, it is not impossible that a distinction to this effect may be admitted in its construction.

It is said that by the Ecclesiastical law notice is required; but it may be a question which has never received determination, whether this rule may not be superseded by the rule of the common law; and whether the occupier of lands can be [480] bound by any rule which the common law has not acknowledged. On this question I am not called upon to decide. There seems to be something of a local custom admitted in the evidence and in the arguments of counsel. The rector pleads the practice, though not with the strictness of a legal custom, "that the parishioners or occupiers of land within the parish do in general give notice of tithing on the night preceding their drawing or carting away the produce of their respective farms;" and the result of the evidence, and the observations which the Court has heard upon it, is that the practice of the parish requires that notice should be given at some time. The question, however, still remains, what shall be deemed the proper notice which parties are bound to give and in which the rector is bound to acquiesce? It must be a reasonable notice, undoubtedly, so as to afford the rector an opportunity of taking a view; and that must depend in some measure on distance and other circumstances by which that opportunity may be affected.

It is pleaded, "that the parish is large and extensive, being nearly 30 miles in circumference; that the rectory house is situate nearly in the centre, and that the rector keeps two men during harvest-time for the purpose of tithing or viewing the tithes set out for him as rector." On the face of this statement, which is not contradicted, the custom set up by the parish to give notice only "a very short time previous to their carrying away the corn from off the ground," is untenable and would oblige the rector to keep a host of tithing men. If the notice is such that the party cannot act upon it, it amounts to nothing. [481] It will not be sufficient, however, to say only that it must be reasonable. For who shall judge on this point? The parishioners will be inclined to hold less notice sufficient than may appear to be so to the rector. It is therefore desirable to see if the custom of the parish may not be traced out with more precision, so as to afford a plain and just rule for all parties. It is pleaded that they do in general give notice; which is an admission, contrary to the result of a great deal of the evidence, which has been given in this cause. Many witnesses say that it is given in the morning; others at noon. Some, that it is accepted as a favour and as an accommodation; others say that where lands are near the rectory house the practice is not observed. From all this it may be inferred that much irregularity has prevailed on this point and even since the commencement of this suit. The only result which I can draw from the evidence is that the practice has not been exactly that for which either party contends. The parish maintain in their plea that no notice is due; yet the whole evidence clearly proves the universal sense of an obligation of giving notice.

The rector pleads, "that notice should be given over night;" but when I look back to the evidence of persons speaking to a considerable distance of time, I find from the deposition of Bullard, who lived fifty years ago as servant to the Reverend Dr. Sneyd, who was at that time rector of this parish; "that at that time it was the general custom of the parishioners or occupiers of land within this parish to give notice of tithing on the night preceding their drawing or carrying away the produce of their respective land, when they intended to draw and carry the same in the morn-[482]-ing, and to give such notice in the morning when they intended to carry and draw the said produce in the evening." There are many witnesses who confirm this statement. On the whole, I am led to this conclusion, that notice ought to be given in this manner; and if there should be any other suit brought from this parish the Court will consider this to be the notice which is required to be given.

If the question rested here I should be bound to hold that sufficient notice had not been given, and to condemn the defendant in the payment of the tithes and the costs. There are, however, two considerations which weigh much with me. If the custom

as by the indulgence of the incumbent been suffered to sleep and go into disuse; if he has accepted notice in the morning for noon, and at noon for evening; when it is deemed expedient to renew the ancient practice of the parish it is proper that a warning should be given also of this, that such irregular notices would not in future be accepted. Such an intimation appears to have been very properly given by the rector in 1796, and is undoubtedly a more preferable course than that a suit should be commenced immediately. Considering, therefore, the general indulgence which seems to have obtained, it does not necessarily follow that the party in this case having given the usual notice, according to the then subsisting practice at the fixed period, would be liable to the payment of the tithes and the costs; for it may be fit to consider the effect of the third species of law to which I have alluded—the law which the parties have imposed on themselves. The farmer may have submitted to the obligation of giving longer notice, and the rector, by his own [483] acts or that of his agent, may have bound himself to be content with shorter. The Court then must consider the conversation which passed on this subject, as it affects both the giving and the acceptance. Mr. Filewood pleads, “that the field is at the distance of three or four miles from the rectory-house, and that the defendant, in order to deprive him of the opportunity of viewing, did not give notice until between nine and ten o’clock in the morning that the barley was tithed or ready for tithing, and would be carted or drawn from off the field that day; at which time the said Isaac Marsh or his servant was informed that the tithing-man who attended on that part of the parish went from home at six o’clock in the morning, and as the fact was, that he was towards that part of the parish where the said field of barley was situate; that the servant of the said Isaac Marsh undertook to enquire for him (the said tithing-man), which he did not.”

Here then is an imputation of neglect in having engaged to give notice to the tithing-man, which was not done. This account is supported in some degree by Mary Farrow, who says, “that she is servant to Mr. Filewood, and that in her presence and hearing John Stanning told Mr. Filewood that Shelley had been there to desire him to come to view Marsh’s barley; that he had told him he could not go himself, but that Francis Palmer, another tithing-man, was then at that part of the parish where the barley lay, and that Shelley had replied he would go and look for him and get him to view the tithe.” But the material fact is not proved, that there was [484] any real contract or engagement, either that one undertook to look for the tithing-man, or, on the other side, that the tithing-man was in that part of the parish in which was this field of barley. On the averment of the engagement it is not proved that the servant was actually in that part of the parish. If this had been proved and the point had rested on the depositions of Farrow alone, I should have held that the contract had not been fulfilled. But there is much contradictory evidence on this fact, as Shelley deposes, “that he was sent to give notice about seven o’clock that the barley would be ready at ten.”

Some objection has been made to the nature of the notice to the tithing-man at the parsonage-house, which must be laid out of the case, because I think that is to be considered as legal notice to the party himself. Shelley says, “that he gave notice to Stanning, who replied that he would tell his master; and then added, that Palmer, the tithing-man usually employed for the side of the parish where the field lay, was not then at home, but that he would be at home at breakfast-time, and he would then inform him of such notice; but the deponent denies that he ever said he would undertake to inquire for him.” The evidence of Stanning is, “that he remembers one morning, about the middle of August, 1794, whilst he was at breakfast at the parsonage-house, about seven o’clock, a man of the name of Shelley came and told the deponent that Mr. Marsh had a field which would be ready for tithing about ten o’clock on that day, and requested the deponent to go down about that time to view the tithe; to which he replied that he could not possibly come himself, but he [485] would take care to send a man; that Shelley then requested the deponent not to fail to do so, to which he replied that he would not fail.” This is the substance of the accounts of the conversation that passed, and I think that they are not inconsistent; though it is less necessary to consider this more minutely, after what has been stated in the plea, and deposed to in the evidence of Farrow.

In what follows I do not see any appearance of mala fides in the conduct of the defendant. Much has been said about a combination against the rector, and it is pleaded, “that this was done for the purpose of rendering the taking of tithes as

inconvenient as possible." But there is no proof that Marsh was a party to any agreement with others; much less to any such combination as has been pleaded. I cannot, I think, be inferred from the mere shortness of the notice alone; since it appears that Mr. Filewood had been in the habit of taking shorter notice by indulgence and accommodation to the farmer. It appears also that some inquiry was actually made for Mr. Filewood or for the tithing-man when the barley was ready and that some time was lost in waiting for the tithing-man. Application was also made to a servant of Mr. Filewood to view the tithes that were set out; and the barley was left till the afternoon. It has been said that it was the duty of Marsh to send again, as there must have been some mistake; but I cannot say that there was any such legal obligation. Notice had been given and accepted and communicated to Mr. Filewood. It was at least as incumbent on him to send to say that he did not accept the no-[486]-tice, and to warn them not to cart away, as it could be on the farmer to send again.

Another ground has been taken, and it has been said that as the corn was not ready at the time fixed in the notice, the notice was void. The rule of law is fairly laid down that notice for a time when the corn is not ready is void; but the variation must be material, and not merely arising out of a small delay which will occur in all business of a quarter or half an hour. I do not see any such deviation here. The notice was given for ten o'clock, and it is proved that the corn was ready before eleven. It would be going too far to say that the time was so distant as to vitiate the notice which had been given. The only remaining question then is as to costs. If I had reason to think that the prosecution was vexatiously begun by Mr. Filewood, and continued notwithstanding better advice, it would have great weight in this part of the case; but I do not draw any such conclusion from the facts which have appeared in evidence. It appears that messages were sent through servants which might, very naturally, lead to some mistake; and it may have been owing to mistake that the facts necessary to support Mr. Filewood's plea to the full extent have not been proved. It may have been of service to the parish to lay down a rule for their future guidance which may prevent litigation in other cases; I shall content myself, therefore, with having done this and I shall not give costs.

[487] *FILEWOOD v. KEMP*. 7th May, 1805.—Subtraction of tithes. Composition not proved. See particulars, as to tithes of crops sold, whether due from the vendor; also as to barley-rakings, mills, etc.

This suit was brought by the Reverend James Filewood, rector of Sible Hedingham in the county of Essex, against John Kemp, a parishioner of the said parish, "for taking, withholding, subtracting, and converting to his own use and profit, the tithes and tenths of milk, calves, pigs, carrot-seed cut and rubbed out into bags, barley-rakings, two mills for grinding corn, and for clover and grass mowed and used green, &c.; "without compensation or composition to or with the said James Filewood."

An article in the libel also set forth a demand for after-pasture of fields, for which tithe of hay had already been paid; which article was rejected by the Court.*

On the part of Mr. Kemp an allegation was admitted, pleading, "an agreement entered into with the said rector for a composition in lieu of tithes of milk and calves after the rate of eight shillings for every cow fed and depastured, and also one shilling for each pig farrowed, as a composition for the tithe of all pigs; and the sum of four pounds ten shillings in lieu of all mills in his possession, whether worked by wind or water, and also for tithe of all poultry, and for Easter offerings; as well as one pound one shilling as a composition for the tithe of an orchard garden." "That as to the carrot-seed, it was sold standing, and before the same had been cut or rubbed out."

The case was argued by Dr. Nicholl and Dr. Swabey for Mr. Filewood, and by Dr. Arnold and Dr. Adams contra.

[488] *Judgment*—*Sir William Scott*. The first point that it is necessary for the Court to decide in this case respects the averment of an agreement between the parties; and, undoubtedly, the burthen of proof on that fact lies on the person setting up the agreement, that is, the defendant in this case. The clergyman stands on the general law. The agreement, therefore, is matter of special ground of defence, which must be minutely and specially set forth and proved. What, then, is the proof offered

* See also the case of *Batchellor v. Smallcombe*, 3 Mad. Rep. 20.

A fact respecting which Burleigh, who describes himself as Kemp's clerk, speaks, bears strongly against any such agreement. What is there besides? Only the declaration of Kemp on one side and of Mr. Filewood on the other. Taking it at the lowest, that they are of equal credit, the result of their declaration is contrary one to the other, and the burthen of proof, I have already said, lies on the defendant. There is no principle on which I can say that the agreement was proved. It is said that a verbal agreement would be sufficient, and perhaps it might; but still means should be used to ascertain it more particularly, when it is an agreement between persons who appear not to have been on such terms as would lead to any agreement.

On these different representations, it is impossible for me to pronounce for the effect of any agreement: and I think the fact that Burleigh was employed by Kemp to go and put the matter on a different footing is a direct disclaimer, an *evidentia rei*, which disproves the allegation of an agreement. The witness says, "that he was authorized by his master, John Kemp, to pay or [489] make satisfaction to the said James Filewood for all the small tithes due to him, and to make a tender of ten guineas in gold for a compensation; but that the said James Filewood would not see the deponent upon the business." I, therefore, proceed to consider the several particulars in detail of which the demand is composed. The first article is a demand of ten shillings for the milk of two cows and six shillings for one calf. There are different accounts of the value of the calf, arising, perhaps, according to the purposes for which it may be bred; but I think, when rated at the value of three pounds, that cannot be called an unreasonable estimate, particularly in Essex, where more than usual attention is paid in the management of that animal. The next is a sum of eight shillings for twenty-five pigs, which I am to suppose not overvalued, at the time when they are titheable.

The next article relates to carrot-seed,*1 on which a preliminary question is raised, whether the tithe is to be demanded of the occupier, or of the persons to whom the produce may have been sold. Some old cases have been cited to shew that the clergyman must look to the person to whom the crop is sold; but unless the authority of decisions of the common law is very explicit, and likewise recent, I should be disposed to hold the principle, which was adopted by my predecessor, that such a rule is not a correct measure of justice. The inconvenience must obviously be great, and the multiplicity of suits in which the [490] clergyman may be involved would inflict a great hardship upon him, if that rule was to be supported, as the tithe might be sold to a number of different persons, to obscure strangers, who might not be easily discovered, and who might be less solvent than the person from whom they were purchased. Unless, therefore, I am restrained by the authority of modern cases I shall adhere to a different rule and hold the occupier to be liable.*2

We well know that in different periods of our history, in the conflicts between the civil and ecclesiastical jurisdictions, there has been a strong current of opinions in opposition to the doctrines of the Ecclesiastical Court as being too favourable to the clergy. Prejudices are now worn away, and such questions would only be viewed at this time upon the sober principles of justice and equity. If then there is not the authority of modern decisions, the older cases alone would hardly controul my judgment. But in the present case the party has renounced the benefit of such an objection by the tender which has been made, and without any reservation of the question on the way of protest.

Another material question also relates to the point, whether the clergyman is concluded by the actual price obtained by the sale of the crop? I think that he is not, since there are many inducements that might concur to make the price fair and reasonable between the parties, though it might not be a just criterion of value as to the tithes; and the parties being different, it cannot be maintained [491] that the clergyman is bound and concluded by a contract between other persons.

A third question is, whether it should be tithed as rubbed out? On that point

*1 Authorities referred to in this part of the case were—*Moyle v. Ewer*, Cro. Jac. 362, and 2 Bulstr. 183. *Lockin v. Davenport*, 2 Gwillim, 472. *Grant v. Hedding and Ball*, Hardress, 380. 2 Gw. 515. 3 Burn, 490.

*2 In the case of *Filewood v. Burleigh*, Consist. 16th Feb., 1813, on tithe of hops, on lands still continuing in the occupation of Kemp, claimed against the purchaser of the crop: it was held that the vendee also is liable at the option of the clergyman.

I think it should not be so taken; as that is a subsequent process after removal. The clergyman has to look to the value at the time when the crop is cut; and therefore the expence of rubbing must be deducted. Under this observation, I think the value may be taken by the evidence at about two pounds, two shillings per hundred weight, deducting the charge of rubbing and bagging and carrying to market.

The next article is that of barley-rakings, on which I have no hesitation in saying that I conceive the law to be that the clergyman, being entitled to one-tenth, entitled also to the rakings of every tenth cock, as composing part of the proportion belonging to him; this raking ought, undoubtedly, to be done by the farmer's servant. If the clergyman has paid for it, it is an expence for which he is entitled to an allowance.

The next article is for mills, on which a compensation is offered, as the one-tenth of the clear profit upon the average of the whole year. It has been said that this being a demand for profits during particular months, it is impossible that it should be estimated in any other way, as it is proved that no profit was actually made during those months. It is contended that the profit must be the clear profit. I am not however, aware on what authority that principle is attempted to be substantiated. I have always entertained the notion that the mode of tithing on this article is by the tenth toll-dish; as the general management of a mill may be very improvident in the employment of servants, and in [492] other particulars by which the clergyman ought not to be affected. It would be necessary on such a principle that he should keep an account of the whole concern, which is no part of his duty. The owner is to look to other considerations to see that the result shall be advantageous to himself. There being in this instance no opposition as to the amount, and having no other criterion but the admission of the party himself, I shall adopt that and pronounce for the sum, £4, 10s. The composition for poultry and Easter offerings, which are alleged to be included in that sum, must be paid for separately, and taken out of the article.

The next demand is for clover and grass, respecting which it is said that some was cut for the horses which were used in agriculture. It is admitted, however, there were many horses kept for other purposes. As to horses kept for agriculture, I understand the rule of law to be that no exception is allowed for such horses unless where there is no other food for them (4 Gwillim, 1411. 1 Roll's Abridg. 605). It is no sufficient that the horses are kept for agriculture, unless it is proved that the clover and grass so cut was their only fodder; notwithstanding the objection that has been stated by Dr. Arnold, that horses employed in producing the crop are to have their feeding allowed out of the general crop, as the farmer would otherwise be obliged to account to the clergyman as to his manner of feeding his cattle. I think, however, the authority of the case which has been cited is decisive, though I accede to the observation on the equity of the principle that where horses are fed on hay and the [493] hay has paid tithe, tithe is due also for the clover, if the farmer makes that substitute for hay. There may perhaps be some inconvenience in acting upon this principle, but here is a broad principle of justice; and there is also what I am perhaps fully as much bound to adhere to, viz. the determination of a modern case in the Exchequer.

The next article sets forth that the defendant ought yearly to have paid the sum of two-pence to the rector, for himself and every person of his family above the age of sixteen years, for Easter offerings and other obventions; and that in the years 1801 and 1802 he had fifteen persons in his family above that age. This has been met by a plea of composition, which, as I have before suggested, is not established to my mind.

On the question of costs, I am under the necessity of observing that the opposition to this demand has been rather vexatiously and unconscientiously made. A composition has been set up which has totally failed, and the clergyman being put to prove his title on every article, has failed only on one. I am of opinion, therefore, that, according to the ordinary course, he is entitled to his costs.*

* On the subject of the tithe of mills, the attention of the Court was more particularly called to the authorities of the modern practice, in the Court of Exchequer, this point, in a subsequent suit between these same parties, in which the Court held that the mode of tithing by the tenth dish was not now in force, vide the next case.

494] FILEWOOD v. KEMP. 9th Feb., 1807.—Tithe of corn mills, by the tenth toll-dish, not sustained. The net profit now held to be the rate of tithing.

This was a suit between the same parties as in the preceding case, in which a libel was given in on behalf of Mr. Filewood, setting forth a demand for the tithe of mills, in the occupation of the defendant, by the tenth toll-dish.

Judgment—*Sir William Scott*. The present question arises on a libel given by the rector against a parishioner in a suit for tithes in respect to the tithe of mills. The Court has intimated an opinion in a former suit (vid. preceding case) that the tithe of corn mills was payable by the tenth toll-dish, as the demand in that case rested originally on an agreement; and the Court pronounced for the sum demanded, though the agreement itself was not established; and no objection being made to the amount of the demand for tithe, and the whole subject having been now laboriously argued again, the Court does not hold itself bound by a judgment formed, in great part, upon another consideration.

The erection of mills in many parts of Europe was originally made by persons possessed of feudal rights, as an act of charity; and those who were subject to feudal tenure were permitted to grind at them gratuitously. It is on that footing that ancient mills are exempted from the payment of tithe: as there was no profit made, they could not be justly liable to tithe. Sometimes the tenant made to his lord the acknowledgment of a toll-dish. The quantity might vary, as feudal services [495] were very various in their nature and amount. When, however, mills began to be constructed for profit, there was a great struggle between the spiritual and temporal jurisdictions whether mills were titheable at all or not? The statute of Articuli Cleri 9 Edw. 2, st. 1, c. 1) settled that point, and ever since they have been held titheable. Afterwards discussions arose, whether this tithe was prædial or personal? I accede to the argument of the defendant's counsel that they are not merely prædial in their nature. Tithes are considered prædial, by reason of the natural increase of vegetable substance in the earth, that is, in prædio. The plaintiff's counsel contend that, in a corn mill, there is a change produced, which may be compared to a sort of renovation of the corn, by the action of the elements, producing a profit. The action of the elements, however, is not upon the corn, but ab externo: the elements infuse nothing into the corn; there is no renovation of the corn; no increase of its substance.

The case of *Newte and Chamberlayne* (7 Bro. P. C. 3) in 1706 is the foundation of the modern law upon the subject. That case was first determined in the Exchequer; and that Court held the same doctrine as the Ecclesiastical Courts, that a mill was titheable by the tenth toll-dish, as being a tenth of the miller's gross profits. That case went, however, to the House of Lords, where seven Judges gave their opinions against that decision, Mr. Justice Powell being absent, and the Barons of the Exchequer adhering to the opinion they had already given. On the opinions of the seven Judges, the [496] decision in the Court of Exchequer was reversed. That was the case of a horse malt-mill; but I cannot find any thing, in the reasoning of the parties themselves, as annexed to their cases, or in the reasoning of the Judges, which limits the principles of that case to such a mill only.

In all mills there must be animal force of some sort, either brute's force or man's force. Even where the elements are the principal cause of motion, still there must be animal force to put the machinery into such a state, as that the elements can act upon it. Subsequent to *Chamberlayne and Newte* other cases occurred, in which some of the Judges considered the principles of that case to be confined to the particular sort of mill, as in *Dodson and Oliver* in 1720 (Bunb. Rep. 73), and *Chapman and Barlow* Bunb. Rep. 184, 1724; and it is possible that there may be some history belonging to those cases which we are not acquainted with.

The case of *Carleton and Brightwell* (2 Peere Will. 462), which happened in 1728, was great weight with me. It was decided on the authority of Sir Joseph Jekyll, the most eminent person, and is a decision of the Court of Chancery. But the dictum of Lord Hardwicke (*Talbot v. May*, 1743. 3 Atkyns, 17) "that fulling-mills can only pay a personal tithe, because it is only in the nature of a trade; but where there are corn mills, each is to pay a tenth dish," is embarrassing, if accurately reported. Lord Hardwicke was not only eminent as a general lawyer, but as a tithe lawyer. Very few unconsidered dicta, upon any subject, fell from that person, and he must have known the principle of decision [497] in *Chamberlayne and Newte*. It certainly increases the perplexity of this matter very much. *Thomas and Price* (3 Gwill. 871), which was

decided in the Court of Exchequer in 1759, is in favour of tithing by the clear profit; and *Wilson and Mason*, in 1770 (ib. 974). In the last case there is much learning applied to the subject of mills. There has been a difference of opinion amongst the Judges whether the tithe of a corn mill is prædial or personal. In *Gaches and Haynes* (ib. 1256), and *Hall and Machet* (3 Anstruther, p. 915), the arguments of counsel, on both sides, admit it to be a personal tithe. In the latter case the Chief Baron holds it is prædial in respect to the person to whom payable, but personal as to the measure of payment, that is, by the clear profit.

Now, under such authorities, what is it proper for the Court to do? It would be a great satisfaction to me to have the matter set at rest by a direct decision of that Court upon the point. But I shall, on the authorities which have been referred to, consider the tithe as personal. The subjects of this kingdom cannot, conveniently, be liable to two methods of tithing, creating different measures of obligation. The decisions of the Court of Exchequer, and of this Court, should be uniform on the same matter. I shall, therefore, direct the libel to be reformed, in respect to demanding the tenth toll-dish as the tithe of the corn mill.

[498] BEAURAINÉ v. BEAURAINÉ. 25th Nov., 1808.—Appointment of the father of a minor, as curator ad litem, on election of the minor; but without the consent of the father, in order to substantiate proceedings against the son in a suit of cruelty and adultery, not sustained.

[Referred to, *Mordaunt v. Mordaunt*, 1870, L. R. 2 P. & D. 136; *Mordaunt v. Moncreiffe*, 1874, 2 Sc. & D. 380.]

This was a question on the power of the Court to compel a father to appear as curator ad litem of his son, being a minor, who was cited to answer to his wife, in a suit of divorce, by reason of cruelty and adultery.

Judgment—*Sir William Scott*. This is a proceeding for divorce against a minor; and it is laid down in our books of practice (Oughton, tit. 20) that a minor cannot appear in person, but must appear by his guardian or curator ad litem, lawfully assigned.

If a minor has no guardian or curator ad litem, and none can be assigned for the purpose of substantiating proceedings against him; it must amount to a total denial of justice towards the other party, who complains of his conduct, and who is, in this case, his wife, complaining of brutal and barbarous treatment, and praying the protection of the Court to be given to her, by a sentence releasing her from the necessity of cohabitation. Though he has no guardian, he has a father who is his natural guardian by the law of the land, who can bring actions on his behalf for injuries done to him, and is bound to maintain his child—who may bring in this Court suits, on his behalf, against the wife, of exactly the same nature with that which is now brought against his son. The minor [499] has elected him his curator ad litem, and the father has refused, upon repeated applications, to accept the office, though offered to be protected from any expence that might be incurred in the discharge of a paternal duty corresponding to the paternal privileges he enjoys; and the son alleges that there is no other person who will accept the office. In this state of things, unless he can be assigned curator, this consequence must follow, that minority shall protect a man in the most outrageous treatment of his wife. His marriage, as a minor, does not take him out of his minority, nor out of the incapacities of suing, or being sued, that belong to that state of minority. I have a right to suppose this to be a case of extreme oppression that cries loudly for relief; and if this Court cannot appoint the natural guardian to be the curator ad litem, this most dreadful of all doctrines inevitably follows, that the unfortunate woman who marries a minor is doomed to continue under the most intolerable tyranny that can be exercised over a wife. Minority is to give total impunity. Other Courts exercise a power of nominating officers of their own, or other proper persons to be guardians for this purpose. But this Court neither has nor claims such power, and unless it can compel the natural guardian to perform his personal duty, there is a complete defeasance of all remedial justice.

Under this necessity, and to prevent that failure, I shall hold the father to be curator ad litem, and enforce the process for that purpose. It may be a new case because fathers have been willing to stand forward in aid of justice, and in vindication of their sons. But it appears to be a case for which an urgent necessity calls upon the Court to provide, [500] in the best manner that it can; and I trust that I do no

exceed the limits of my duty when I adopt the course which I propose: but if it should appear otherwise, I trust it will be pointed out in what better mode this Court could, more regularly, as well as more effectually, have reached the justice of such a case.

The Court assigned the father accordingly to give an appearance, as guardian to his son, by the next Court day. The order not being complied with, on the 7th of December, 1808, the Court, on the prayer of the wife, pronounced the father contumacious, and signed the schedule of excommunication.

From that sentence an appeal was prosecuted to the Court of Arches, which affirmed that decree; and on 7th December, 1809, another schedule of excommunication was corrected and signed, when the party was accordingly excommunicated. In the meantime application was made to the Court of Chancery for a writ of assolver and deliverance to the bishop to absolve him. That writ was decreed on 12th February, 1810 (16 Ves. jun. 346), and on 9th April the party was absolved.†

501] LAGDEN v. ROBINSON AND GREEN. 7th Dec., 1810.—Subtraction of tithes: endowment of the vicarage, though not in simple and positive terms, held sufficient. Matters of deduction and account, &c.

This was a suit instituted by the Reverend Henry Allen Lagden, vicar of Ware, with the vicarage of Thundridge annexed, in the county of Hertford, against Jacob Symms Robinson and James Green, parishioners of the same, “for having received and possessed, either by themselves or some other person or persons, all the tithes, rents, and ecclesiastical rights and emoluments of a certain mill for grinding corn; and having subtracted, taken, and converted the same to their own use, without compensation or composition, during the several years 1801, 1802, 1803, 1804, 1805.”

Judgment—*Sir William Scott*. This is a suit brought by the vicar of Ware, for tithes of a mill, against the defendant, as occupier of such mill in the parish of Ware. There is no doubt that modern mills are liable to the payment of tithes to some person, as there is no plea *de non decimando* in their favour; and the tithes must be due either to the rector, or to the vicar by endowment. The only question that can be raised is, to which they are to be paid; since to one or the other, by the general law of the country, they must unquestionably be due. It appears that the tithe of this mill has not been claimed for a considerable time; it is doubtful, indeed, whether it was ever claimed; certainly not by the present vicar. The vicar has proved his endowment; it is also necessary that his endow-[502]-ment should be proved in some form; for that obligation always lies on the vicar.

The original endowment is not exhibited; but an authenticated copy of an instrument is produced, which is equivalent to the endowment; but it is of rather difficult construction. I have, however, thought it my duty to examine the original, which is of great antiquity, of the date of 1231. The instrument recites in the first part of it some contested claims and disputes which existed between the prior of Ware and the vicar, and which the then Bishop of London, and the then Dean of St. Paul's are empowered by Pope Gregory the Ninth to settle. By the commencement of the instrument it would appear that the prior had exacted an annual pension of ten marks of silver from the vicar, and also had seized the tithe of mills, and of several acres of arable land. The parties are called, and an award is made, by which the vicar is relieved from the pension, and it is then directed, “that for the greater security of the vicar, and for the putting an end to disputes, if the prior of Ware, or any of his successors, should demand or claim (which it is hoped they will not) any right or title in the aforesaid pension of ten marks, that thenceforwards the vicar shall have the tithe of mills of the whole vill of Ware and Thundrych.”

How this arose, it may not be easy now to say; but on the face of it, it looks like a conditional grant; and the connecting reason of the agreement, which was perhaps dependent on the history of that time, may be lost. There follows another part, however, which contains an actual and positive conveyance of the tithe of mills, amongst **503]** other tithes, in the most full and unequivocal terms; that the vicar, and all future vicars, “shall have the tithes of mills, merchandize,” and a variety of other articles there enumerated. This affirms the conveyance to the vicar without limitation.

† The use of excommunication was discontinued *sub modo* by statute 53 G. 3, c. 127. Vid. Appendix, No. 5, p. 25.

In the entry of this composition in the original instrument, preserved in the registry of the diocese of London, are these entries as marginal notes, applied to the different parts of the subject matter. "Remissio pensionum, penalis conditio, dotatio vicarii de Ware," which are clear illustrations of the meaning of the instrument. The title of the vicar, therefore, appears to me to be sufficiently established. The remainder of the case is simply matter of account,* and relates only to the quantity [504] of corn ground at the mill during this period of years, and the tithe that is stated to be due: certain deductions are claimed, but on which there is now no dispute.

[505] The only question on which it is further necessary that the Court should give any opinion, is the matter of costs. These are subject to the discretion [506] of the Court, to be exercised on the nature of the suit, and the conduct of the parties in it. The general rule is, that such a party is entitled to costs, unless they are forfeited by his misconduct. At the same time, there are other circumstances which are fit to be taken into consideration, which might render it a matter of peculiar delicacy, in the present case, to make any tender. Tithes had not been demanded, as it is presumed, within the memory of man; they certainly had not been by the present vicar, which led, almost unavoidably, to the suit. Secondly, there is the obscurity in the endowment, which must have contributed to the determination of the party to take the judgment of the Court. These circumstances would render the ordinary obligation of making a tender peculiarly difficult; and though the Court is of opinion that the

* In this case an allegation had been given in, pleading some matters of deduction on behalf of the defendant, when an objection was taken to the plea, on the ground that some articles set forth in the allegation were contradictory to admissions that had been made in the answers of the defendant.

14th Feb., 1809.—*Judgment*—*Sir William Scott*. This is a defensive allegation, in a suit for tithe demanded for several years past: on that account some indulgence is required, in consideration of the difficulty of making as exact a return in his answers as might otherwise be expected to be given by the party himself, who now offers this allegation. There would be equity in that mode of reasoning, if the delay had not originated in similar conduct imputable to the defendant, and there is, I think, ground for that imputation. The defendant had stood for many years, and still stands now before the Court asserting, that no profit whatever was made of the mill. If that was so, there would be no ground for imputing laches to the clergyman, that he did not sooner agitate the question, as it could not be expected that he would sue for nothing. It has been said that no demand was made before 1805. It is not probable that the mill should not produce some profit. Looking at the opposition now made, the Court cannot but suppose that it was owing to some intimation of the same sort that there had been so long a forbearance of the former demand. It is true that causes of this description are usually determined on the libel and the answers of the parties, as the demands are usually for tithes of small value, and it is desirable to discourage expensive proceedings as to the proof. If the party had stood on his answers they would have been decisive, but he has not so done. An allegation is offered, and the Court is certainly disposed to hold that any variation from the answers is not admissible, unless some very satisfactory reason can be given for it, that may convince the Court that the matter had escaped the recollection of the party, and for reasonable cause. In the present case, which must necessarily depend on a recurrence to several years past, there may be reason for the indulgence which is prayed. But the Court will exercise it, keeping at the same time strict watch on the other part of the proceedings, that they may not run into more length and expence than is necessary.

As to the causes assigned why in a mill, consisting of six pair of stones, four only are worked, they are unnecessary to be pleaded, and may lead to an oppressive quantity of evidence; and the fact that a larger capital would be required than is employed on account of the decline of the meal business is, as far as regards the quantum of capital, a fact entirely within their own knowledge. If the fact appears that no more than four pair are worked, the Court will readily presume that it is done for a good cause, and that they use as many as they conveniently can. That article therefore, must be amended under these observations. The second article, which relates to the quantity of corn ground at the mill, during the several periods for which tithe is claimed, is not objected to. The third article states that they have other

near on the whole is entitled to the tithes, it throws out these observations, wishing that the parties would come to some amicable agreement under the advice of counsel. If that cannot be effected, I must give my opinion absolutely on this point. It will, however, be very satisfactory to the Court if this recommendation should be adopted.

On 14th December the Court gave costs generally; but directed them to be taxed moderately, taking off the expences of the defendant on the examination of witnesses in the last allegation.

APPENDIX.

1] NO. 1. THE PETITION OF THE JEWS, for the repealing of the Act of Parliament for their Banishment out of England, presented to His Excellency, and the General Council of Officers, on Friday, Jan. 5th, 1648.

A.D. 1648. To the Right Honourable Thomas Lord Fairfax, His Excellency, England's General, and the Honourable Council of Warre, convened for God's Glory, Israel's Freedom, Peace, and Safety,
The humble Petition of Johanna Cartwright, Widow, and Ebenezer Cartwright, her Son free-born of England, and now Inhabitants of the City of Amsterdam,
Humbly sheweth—That your petitioners, being conversant in that city with and

occupations as mealmen and farmers, and have not kept the accounts separate; so that it is impracticable for them to state the exact account of each. This is inadmissible in its present form. The parties must produce as exact an account as they can; if there is any difficulty, it is occasioned by themselves, and it is not sufficient for them to plead that they mix their different occupations together, so as to make it impossible to account. The next article relates to hired store-houses. This expence may be charged as common to all mills; since I presume it belongs necessarily to the trade to keep the grain of different parties distinct. I may be inclined to allow something for these sheds and barns if they can shew that they were obliged to hire them; though I observe that no amount of expence is stated in the article. The next article pleads expences of shops at Hertford, though the precise deduction is not stated. I will not reject this article in the present stage. The next relates to oil, coals, fuel, and other minor expences, which are not necessary to be pleaded as every body must know, that the mill cannot go on without them. Another article states that from the ancient structure of the mill, more men are necessary to be employed. This history is not material as the Court will give the parties credit for not employing more men than are really wanted; the Court will presume that they are men of prudent conduct in their trade. The 9th and 10th articles plead the books of accounts which will be very burdensome to the other party in taking a copy. It is usual to exhibit a schedule of the articles charged, which must be done in the present case; and I reject the books.

The next pleads that the mill is old; that it was built in 1723, and is in want of continual repairs; and that £700 had been expended upon them. In proof of this averment, an account is produced which amounts to £500. I should not limit the party to the exact sum mentioned in the answers, but give them the benefit of the expenditure for so much as may be satisfactorily proved. The 13th article pleads parochial rates and highway rates; that as to the highway rate, the service has been done by composition paid; it is described as a personal service, and that payment is made only by those who have not horses and carts to do the required work. I will not decide on this point at present, though I am not clear that such an item might not be ground of objection and deduction. I will, however, intimate an opinion that if the rate is merely a personal service, it is not to be allowed. The window tax and house tax are not connected with the profits of the mill necessarily as pleaded; they seem to refer to the dwelling-house which the parties must have, and the terms are to be taken in their usual acceptation. If this deduction is insisted on, the article should be reformed to the effect of alleging that the tax is paid for the mill. There is, lastly, a charge, that if the parties kept a foreman they should pay him £100 per annum, but that they do the business themselves. Other millers may choose to keep a foreman, but the necessity of determining upon a deduction of that kind does not exist here, as it is not an actual disbursement, the parties here doing their own work. Under these observations I admit this allegation.

amongst some of Israel's race, called Jews, and growing sensible of their heavy outeries and clamours against the intolerable cruelty of this our English nation, exercised against them by that (and other) inhumane exceeding great massacre of them, in the reign of Richard the Second, King of this land, and their banishment ever since, with the penalty of death to be inflicted upon any if they return into this land; that by discourse with them, and serious perusal of their Prophets, both they and we find that the time of the recall draweth nigh; whereby they together with us shall come to know the Emanuel, the Lord of life, light, and glory, even as we are now known of him; and that this nation of England, with the inhabitants of the Netherlands, shall be the first and readiest to transport Israel's sons and daughters, in their ships, to the land promised to their forefathers, Abraham, Israel, and Jacob, for an everlasting inheritance.

For the glorious manifestation whereof, and pious means thereunto, your petitioners humbly pray, that the inhumane cruel statute of banishment, made against them, may be repealed, and they, under the Christian banner of charity and brotherly love, may again be received and permitted to trade and dwell amongst you in this land, as now they do in the Netherlands. By which act of mercy your petitioners are assured of, the wrath of God will be much appeased towards you for their innocent bloodshed; and they thereby daily enlightened in the saving knowledge of him, for whom they look daily, and expect as their King of Eternal Glory, and both their and our Lord God of Salvation (Christ Jesus). For the glorious accomplishing whereof, your petitioners do and shall ever address themselves to the true peace, and pray, &c.

This petition was presented to the General Council of the Officers of the Army, under the command of His Excellency Thomas Lord Fairfax, at Whitehall, on January 5th, and favourably received, with a promise to take it into speedy consideration, when the present more public affairs are dispatched. Collection of Pamphlets, Bri. Mus. No. 403, art. 17.

No. 2. At the Court at Whitehall, 11th February, 1673. Present, the King's most Excellent Majesty in Council.

Upon the petition of Abraham Delivera, Jacob Franco Mendez, Abraham de Porto, and Domingo Francia, on behalf of themselves and others, the Jews trading in and about the city of London, setting forth that in the year 1664, upon their humble petition, his Majesty was pleased to declare that they might promise themselves the effects of the same favour as formerly they had, so long as they demean themselves peaceably and quietly and without scandal to the government; that although the petitioners have so behaved themselves ever since, yet they were last quarter sessions indicted of a riot at Guildhall, for meeting together for the exercise of their religion in Dukes Place; and the bill was found against them by the grand jury. And praying his Majesty would be pleased to permit them, during their stay here, to reap the fruits of his accustomed clemency, or give them a convenient time to withdraw their persons and estates into parts beyond the seas. His Majesty in council taking this matter into consideration, was this day pleased to order, and it is hereby ordered, that Mr. Attorney General do stop all proceedings at law against the petitioners, who have been indicted as aforesaid, and do provide they may receive no further trouble in this behalf.

At the Court of Whitehall, 13th November, 1685. Present, the King's most Excellent Majesty in Council.

Upon reading this day at the board the petition of Joseph Henriques, Abraham Delivera, and Aaron Pacheco, overseers of the Jewish synagogue, and the rest of the Jewish nation, setting forth that his late Majesty, of blessed memory, having found the petitioners and their nation ever faithful to the government, and ready to serve him on all occasions, was pleased, in February, 1673, to signify his royal pleasure that whilst they continued quiet, true, and faithful to the government, they should enjoy the liberty and profession of their religion, which they accordingly peaceably exercised till Michaelmas Term last; that several writs out of the King's Bench, on the statute made in the 23d year of Queen Elizabeth, had been taken out against forty-eight of the Jewish nation, by one Thomas Beaumont, and thirty-seven of them arrested thereupon, as they were following their occasions on the Royal Exchange

to the great prejudice of their reputation both here and abroad: and therefore praying his Majesty to permit and suffer them, as heretofore, to have the benefit of the free exercise of their religion, during their good behaviour towards his Majesty's government. His Majesty, having taken this matter into his royal consideration, was pleased to order, and it is hereby accordingly ordered, that his Majesty's Attorney General do stop all the said proceedings at law against the petitioners; his Majesty's intention being that they should not be troubled upon this account, but quietly enjoy the free exercise of their religion, whilst they behave themselves dutifully and obediently to his government.

W. BRIDGEMAN.

[4] No. 3. The following EXTRACTS are taken from the *Horæ Biblicæ*,

Butler's Works, vol. i. c. 1, s. 3.

"Notwithstanding the destruction of the city of Jerusalem, a large portion of the Jews remained, or established themselves in Judæa. By degrees they formed themselves into a regular system of government, or rather subordination, connected with the various bodies of Jews dispersed throughout the world. They were divided into the Western and Eastern Jews. The Western were those who inhabited Egypt, Judæa, Italy, and other parts of the Roman Empire. The Eastern were those that were settled in Babylon, Chaldæa, and Persia. The head of the Western Jews was known by the name of Patriarch; the head of the Eastern Jews was called 'Prince of the Captivity.'

"The office of Patriarch was abolished by the imperial laws about the year 429, from which time the Western Jews were solely under the rule of the chiefs of their synagogues, whom they called Primates.

"The Princes of the Captivity had a longer and a more splendid sway. They resided at Babylon or Bagdad, and exercised their authority over all the Jews who were established there or in the adjacent country, or in Assyria, Chaldæa, or Parthia. They subsisted as late as the twelfth century.

"In the midst of their depression and calamities, the Jews were attentive, in some measure, to their religion and language. With the permission of the Romans, they established academies; the most famous were those of Jabne, and Tiberias. About the reign of Antoninus Pius, Rabbi Jehuda Hakkadosch published a collection of Jewish traditions, called the Misna, the style of which seems to shew that their attempts to restore their language had not been unsuccessful. A Latin translation of it was published by Surenhusius, at Amsterdam, 1698-1713, in six parts or volumes, folio. As a supplement to this the first Gemara was written, for the use of the Jews of Judæa, whence it is called 'the Gemara of Jerusalem.' The style of it is so abrupt and barbarous that the most profound Hebraists almost confess their inability to understand it. After the death of Antoninus Pius, a fresh persecution broke against them and they were expelled from their academies within the Roman Empire. The chief part of them fled to Babylon, and the [5] neighbouring countries, and there, about the fifth century, published what is called the second or Babylonish Gemara, exceeding the former in barbarism and obscurity. A translation of it was begun in Germany by Rabe. The Misna, and the two Gemaras, formed what is called the Talmud; and the idiom of this collection is called the Talmudical. It is used by many of their writers. About the year 1038 the Jews were expelled from Babylon.

"Some of the most learned of them passed into Africa, and thence into Spain. Great bodies of them settled in that kingdom. They assisted the Saracens in their conquest of it. Upon that event an intimate connexion took place between the disciples of Moses and the disciples of Mahomet. It was cemented by their common hatred of the Christians, and subsisted till their common expulsion.

"This is one of the most brilliant epochs of Jewish literature, from the time of the destruction of Jerusalem. Even in the darkest ages of their history, they cultivated their language with assiduity, and were never without skilful grammarians, or subtle interpreters of Holy Writ. But with respect to the period we are speaking of, it was only during their union with the Saracens, and under the Caliphs of Bagdad that they ventured into general literature, or used in their writings a foreign, and, consequently, in their conceptions, a profane language."

VII. 4. The religious tenets of the Jews are thirteen in number; amongst which are, viz. :—

"8th. I believe, with a perfect faith, that all the law, which at this day is found

in our hands, was delivered by God himself to our Master Moses. (God's peace be with him.)

"9th. I believe, with a perfect faith, that the same law is never to be changed, nor any other to be given us of God (whose name be blessed).

"10th. I believe, with a perfect faith, that God (whose name be blessed) understandeth all the works and thoughts of men; as it is written in the prophets, He fashioneth their hearts alike; He understandeth all their works.

"11th. I believe, with a perfect faith, that God will recompense good to them who keep his commandments, and will punish them that transgress them.

"12th. I believe, with a perfect faith, that the Messiah is yet to come; and although he retard his coming, yet I will wait for him till he come.

[6] "13th. I believe, with a perfect faith, that the dead shall be restored to life, when it shall seem fit unto God the Creator (whose name be blessed, and memory celebrated, world without end. Amen)."

VII. 5. The doctors and teachers of the Jews have been distinguished by different appellations.

Those employed in the Talmud were, from the high authority of their works among the Jews, called Aemouroim, or Dictators. They were succeeded by the Seburoid, or Opinionists, a name given them from the respect which the Jews had for their opinions, and because they did not dictate doctrines, but inferred opinions by disputation and probable arguments. These were succeeded by the Gheonim, or the Excellent, who received their name from the very high esteem, and even veneration, in which they are held by the Jews. They subsisted till the destruction of the academies of the Jews in Babylon by the Saracens, about the year 1038. From that time the learned among the Jews have been called Rabbins, or the Masters.

It is seldom that a Jew applies himself to profane literature. Even the lawfulness of it has been generally questioned. Some have greater respect than others for the Talmudical doctrines. In consequence of using in his writings some free expressions concerning them, a violent storm was raised against Maimonides. Kimchi, and, generally speaking, all the Spanish and Narbonnese doctors took part with him; the others, led on by R. Solomon, the chief of the synagogue of Montpellier, opposed him—both parties were equally violent, and the synagogues excommunicated each other. This dispute commenced about the middle of the twelfth, and lasted till nearly the thirteenth century. But the great distinction of the Jewish Rabbins is that of the Tanaites or Rabbanists and Caraites. The first are warm advocates for the traditionary opinions, generally received among the Jews, particularly those of the Talmud, and for the observation of several of the religious ceremonies and duties, not enjoined by the law of Moses: the others absolutely reject all traditionary opinions, and hold all rites and duties not enjoined by the law of Moses to be human institutions, with which there is no obligation that a Jew should comply.

[7] NO. 4. LINDO *v.* BELISARIO.—Vid. *supra*, p. 216.—21st Nov. 1796.

Judgment in the Court of Arches.

Sir William Wynne. This is a suit of jactitation brought originally in the Consistory Court by Miss Lindo, a minor, or rather by her guardian, against Mr. Mendes Belisario.

The cause commenced by a citation which bears date the 28th of November, 1793, a libel was admitted, without opposition, pleading the jactitation. An allegation, justifying the jactitation, was admitted on the part of Mr. Belisario, and an allegation in reply, on the part of the minor, was given in. Upon these pleas and the evidence taken upon them, the cause was heard in the Consistory Court of London, on the 4th August, 1795; when the Judge of that Court, by his interlocutory decree, pronounced that Aaron Mendes Belisario had failed in the proof of his allegation, and that the said Esther Lindo, spinster, was not his wife. From that sentence the present appeal is brought.

A very singular case it most undoubtedly is, in which an Ecclesiastical Court is called upon to pronounce, and has pronounced, upon the validity of a marriage between a Jew and Jewess, celebrated according to the rights of the Jewish religion. The only instance within my memory, which goes a very considerable way back, in which a Jewish marriage was at all put in issue in any Ecclesiastical Court, was that which came before the Prerogative Court in the year 1794, in the case of *Vigevna and*

Silveira against *Alvarez*.^{*} That was an interest cause. It was a ques-[8]-tion who should be entitled to the property of the party deceased? The person, who appeared before that Court, urged himself to be the legitimate son of the person whose property was disputed, which was disputed by others: though the circumstances of that marriage were pleaded, yet it came to no sentence, because the parties agreed. No Jewish marriage has come before this Court at all, except that. I was not aware of the instance, which Dr. Swabey has mentioned to-day, of *Andreas* [9] v. *Andreas*, which passed in 1737; where, as I understand the statement, there was a suit for the restitution of conjugal rights brought by a Jewess against her husband, and the libel was opposed upon the ground that a Jewish marriage was not a matter for the jurisdiction of the Ecclesiastical Court. In that case the plea was admitted, but it does

* On admission of a libel, pleading, "a marriage between Jews, according to the rites and ceremonies of the Jewish religion," Dr. Harris and Dr. Laurence objected, that persons coming before the Ecclesiastical Court to claim any right by marriage, under that jurisdiction, must shew the marriage to have been agreeable to the rites and ceremonies of the Church Christian. That it was so decided in *Haydon v. Gould*, Prerog. and affirmed in the Delegates, 1 Salk. p. 119. That there had been another case also, *Hutchinson v. Brooksbank*, Levinz, 376, of a person sued for fornication, where there had been a marriage in a conventicle, and in which there was a motion for prohibition, on which the Court of Common Law never finally determined. That the same principle held as to Jewish marriages, and there was a clause in st. 6 & 7 Will. & Mary, ch. 6, s. 5, 7, and 8, respecting Quakers, Papists, Jews, or any other persons who shall cohabit and live together as man and wife, and be thereby liable to pay the several and respective duties payable on marriages, &c. "That nothing herein contained shall be construed to make good or effectual in law any such marriage or pretended marriage, but they shall be of the same force and virtue, and no other, as they would have been if this act had never been made." That it might have been sufficient perhaps to have pleaded the owning and acknowledgment of the parties, and the marriage might then have been taken on the ground of presumption or repute, but that if the actual marriage was pleaded, it must be such a marriage as was agreeable to the rights of the Church of England.

In support of the allegation, Sir William Scott and Dr. Nicholl submitted that this was the first time that the principle had been maintained that Jews cannot celebrate marriages otherwise than according to the rites of the Christian Church. The peculiar and fundamental tenets of their religion were adverse to their use of the rites of the Christian Church, and distinguished their case materially from Dissenters, who acknowledged the same fundamental doctrines, and did occasionally frequent the services of the church. As to Quakers, the question had never been formally decided. But as to Jews, it was unreasonable to maintain that their marriages according to their own rites should not be valid. They had existed always as a separate community, and in some respects on the footing of aliens, and were entitled to have their marriages tried by their own law. Acts of Parliament had recognized this principle in declaring that the marriage act should not extend to Jews. If no Jewish marriage could be good, in all cases of intestacy the Crown would succeed to the effects, which had never been maintained; that the very silence on this point was a recognition of the validity of such marriage; and as to the distinction that you might plead the acknowledgment, but not the fact of marriage, it was one which the Court would not sustain.

Court. *Sir William Wynne*. The objection taken is, as far as I know, perfectly novel. I do not recollect any case which I can name in which a Jewish marriage has been pleaded; and I take it there has been no case in which a Jew has been called upon to prove his marriage. If there had, I conceive that the mode of proof must have been conformable to the Jewish rites; particularly since the marriage act, which lays down the law of this country as to marriages by banns or licence, for all marriages had according to the rites of the Church of England, and with an exception for Jews and Quakers: that is a strong recognition of the validity of such marriages. As to Dissenters there is no such exception, and no one would trust to the rules of their particular dissenting congregations for the validity of marriage. The comparison, therefore, between the Jews and Dissenters does not hold, and more particularly in this, that the Jews are Antichristian, the Dissenters Christian. Dissenters marry and Papists marry in the Church of England. In *Haydon v. Gould* the marriage was

not appear to have gone any further.* The validity of the marriage, therefore, might not have come in issue at all in that case; because the person who brought that suit insisted that there had been a Jewish marriage, and pleaded the fact that the plaintiff was the wife of such a person. So far as it went, therefore, the Court was not to inquire whether it was a valid marriage or not; but taking the fact to be, as you always do, upon the admission of a plea, that she was the lawful wife, she desired she might have the aid of this Court, calling upon her husband to restore her conjugal rights. The Ecclesiastical Court was the only one they could apply to. [10] The Jews are entitled to civil rights of every kind, and particularly those of marriage; and therefore there must be a Court that shall carry those rights into effect, as well as the rights to property. It does not appear to me that the validity of the marriage would have come in question at all, so far as the pleas went.

The case of *Green v. Green* (vide note, supra, p. 9) was a case of a Quaker woman bringing a suit of restitution against her husband. The same objection was taken, that they were not persons married in such a way as this Court would recognize. I do not at present remember whether that suit ever came to a sentence.

This is the first cause, therefore, where the validity of a Jewish marriage has been put distinctly in issue in an Ecclesiastical Court. That being the case, it is very material for me to consider how the matter comes before the Court, and with what view, especially when it comes directed by the high authority which has sent it to these Courts. It appears, by instruments which are annexed to each of the allegations given in, that the proceedings in the Consistory Court were commenced, in pursuance of an order made by the Lord Chancellor, that Abraham de Mattos Mocatta should institute a suit in the Consistory Court of the Bishop of London, in behalf of Esther Lindo, to whom he is guardian, to try the validity of the marriage said to have taken place between her and Aaron Mendes Belisario. It is further pleaded that this order was obtained by the petition of the executors of the wills or the father and mother of the said Esther, and the trustees of a sum of money under her father's will, amounting to about £4000; that by the will of her mother, the interest of certain monies is to be applied to her use, until she attained the age of twenty-one, or day of her marriage,

according to their own invention, and the Prerogative Court refused to acknowledge that marriage. Here the parties are alleged to have been married "according to the rites of the Jewish Church." And I am of opinion that this allegation is very proper to be admitted.

* Consist. 4 sess. Nov. 24, 1737, before Dr. Henchman. Andreas and his wife were both Jews, and were married according to the forms of the Jewish nation: she cited him to answer to her in a cause of restitution of conjugal rights. On admission of the libel, Dr. Strahan objected that, as they had been married according to the forms of the Jewish nation, and not of the Church of England, the Court could take no notice of such marriage, and she could not institute such a cause against her husband in the Ecclesiastical Court. And the case of *Green v. Green* was cited, where a Quaker instituted such a suit, and the libel was dismissed, because they were not married according to the forms of the Church of England. The Court was of opinion, however, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel. In 1661 a marriage between Quakers, according to their own ceremonies, was held valid at the assizes at Nottingham, in a cause of ejectment, p. 492. Sewel's Hist. of Quakers. In the case of *Harford v. Morris*, Mr. Justice Willes said that he remembered a case many years ago upon the circuit, where a Quaker brought an action of crim. con. in which it was necessary to prove the marriage. The objection was taken that he was not married according to the rites of the Church of England, and the point was argued: but it was overruled; and the plaintiff recovered thereon. In *Dodgson v. Haswell*, Deleg. 1730, there was a suit between two Quakers, in which the libel pleaded a marriage had, in the manner usually observed by those of their religion, by the public declaration thereof at their monthly meetings in the form' pleaded, and that notwithstanding the defendant had refused to solemnize and consummate. The defendant admitted the contract, but alleged that it was conditional. There had been two sentences against the defendant in the Consistory of Durham, and afterwards at York. It does not appear what was the result of the proceedings in the Delegates.

provided she married with the consent of the major part of her mother's executors; but in case she married without such consent, then the money was to go to her issue, and in default of such issue, to be divided among the other daughters of the executrix. It has been further stated to the Court that Aaron Mendes Belisario was a person in low circumstances, and that it was a very improvident match, but that he insisted she was, in point of fact, his wife, and was married to him on the 26th July, 1793, and threatened to institute proceedings at law to get possession of her person and property.

Under those circumstances, it became necessary, before the Court of Chancery could stir in this business so as to make any [11] order, to know whether there had been a marriage, and whether the young woman, by whose guardian this suit was instituted, was a wife or not. That is the question to be determined; and it was of consequence, because it further would arise, supposing she had married without the consent of the executors, whether she was legally married or not? In order to determine this, it was referred, by the Lord Chancellor, to the Consistory Court of London, where the parties were domiciled. The reference must, undoubtedly, have been made upon the analogy of courts, the Court knowing, unquestionably, that by the law and constitution of this country the Ecclesiastical Court is the only Court which has cognizance of marriages; but it was without considering more particularly what the persuasion or religion of the parties was. It is sent to the Ecclesiastical Court, which is the ordinary jurisdiction with regard to marriages, but decides upon very different rules and grounds than those upon which this must be considered. In marriages between Christians, the Court is in possession of the law which it is to administer, and must be supposed to be conversant in that law; but that is not the case with respect to the law of the Jews. The Court Christian, as it is called, has no power upon that law but by analogy. It came to the Consistory Court, and the Judge, seeing in what manner it was brought, took certain rules for his guide, I think very properly, and I shall do the same. The rule of decision must necessarily be different with respect to this marriage, from that which it would be between Christians. I must attend to the ground upon which it was determined, and the reason of it being sent from the Court of Chancery, which was to know whether the ceremony, which took place, constituted a good marriage? Perhaps it may be said that it might be as well tried by a jury as by the Ecclesiastical Court; but as it comes directed by the High Court of Chancery, I must inquire as well as I can, obtain the best information I can, and make such a return to that Court, as to the best of my judgment is right, either that the party is the wife, or is not the wife of Mr. Belisario: from thence concluding, that he will be entitled to her fortune, as is directed by the will of her mother, supposing her to be the wife, and that he will not be entitled either to her person or property, supposing her not to be. That is the question I am to try, whether she is the wife of Mr. Belisario, who is the party in this cause; and if I find that he is not entitled to the rights of a husband over the person and over the property of this lady, [12] as his wife, that must be the answer which this Court is bound to return. What then is the evidence respecting that fact, and the effect that fact would have among persons of the Jewish religion, and persons best able to tell what the Jewish laws are?

It is proved, by the witnesses examined upon Mr. Belisario's allegation, that the sister of Esther Lindo was married to the brother of Aaron Mendes Belisario; that the parties in this cause often met at Jacob's house, and that an intimacy was soon contracted between them; Esther Lindo being at that time a girl of the age of sixteen, and Mr. Belisario of the age of twenty-six or twenty-seven. The two witnesses, who depose to the fact of marriage upon which Mr. Belisario rests his case, as to its being a valid marriage, are Lyon Cohen, who is described as a tailor, and Abraham Jacobs, residing in the parish of St. Mary, Whitechapel. He says, to the 6th article, "that he knows and is intimately acquainted with the articulate Aaron Mendes Belisario, party in this cause, who is a Jew of the Portuguese nation, and the deponent also knows the articulate Esther Mendes Belisario, formerly Lindo, acting by Abraham de Mattos Moccatta, her guardian, the other party, who is a Jewess of the same nation." To the 14th interrogatory he says, "that being intimate with the said articulate Aaron Mendes Belisario, he asked the deponent, about three or four days before the marriage hereinafter mentioned, to attend and be a witness to his marriage; that the deponent consented thereto; and the Friday following being

appointed for such marriage, which was the 26th day of July, he also desired the deponent to ask a friend of his to be the other witness thereto, the ceremony of such a marriage among the Jews requiring two witnesses, who must also be Jews; that the deponent accordingly, on the Thursday the 25th of the said month of July, asked his fellow-witness, Abraham Jacobs, with whom the deponent was intimate, to go with the deponent on the next morning to the house of the said Jacob Mendes Belisario in Little Bennet Street aforesaid, where it was agreed that all the parties were to meet, and the said ceremony was to be performed; and the said Abraham Jacobs having consented thereto, on the next morning, being Friday the 26th day of July, accompanied the deponent to the said Jacob Mendes Belisario's house about nine o'clock in the morning, where they met the said Aaron Mendes Belisario, and breakfasted with him; that the said Jacob Mendes Belisario and his wife were out of [13] town; and after that they, the deponent and the said Abraham Jacobs, had been about two hours or two hours and an half at the house of the said Jacob Mendes Belisario, the articulate Esther Mendes Belisario, then Lindo, came to the said house, and went up stairs into a room on the first floor, accompanied by the said Aaron Mendes Belisario, who, a short time afterwards, came down into the room where the deponent and the said Abraham Jacobs were waiting, and desired them to walk up stairs; that they accordingly went with him into the room where the said Esther Lindo then was, and they were then introduced by him to her; and after a little ceremony between all the parties the said Aaron Mendes Belisario, intending to proceed with his marriage, did, in the presence of the deponent and the said Abraham Jacobs, who are respectively Jews, say to the said Esther Mendes Belisario, then Lindo, at the same time holding a ring to her, 'Do you know that by taking this ring you become my wife?' to which she answered, she did; that the said Aaron Mendes Belisario then said to her, 'Do you take it with your free will and consent?' to which she answered, 'I do;' or they then expressed themselves in words to that effect; and thereupon the said Aaron Mendes Belisario placed the said ring on one of her fingers on her left hand, but which of her fingers the deponent does not recollect, nor is it material to the validity of such marriage which she tendered and held out for that purpose, "and freely and voluntarily accepted and received the said ring, and, at the same time that the said Aaron Mendes Belisario put the said ring on the said Esther Lindo's finger he repeated the Hebrew words," the translation of which we have in another place, "and after such ceremony had taken place they, the said Esther Mendes Belisario and the said Aaron Mendes Belisario, went out of the room, and the deponent and the said Abraham Jacobs remained there until the said Esther Mendes Belisario went away, which was soon after, and then they, accompanied by the said Aaron Mendes Belisario, went out of the house together." And he further saith, "that he looks upon and believes the said marriage, as between persons professing the Jewish religion, to be a good and valid marriage; and the deponent knows of several marriages under similar circumstances, which are held and reputed to be good and valid." This is confirmed, I think, exactly as to all circumstances that are stated by Abraham Jacobs, the other witness. Of the other [14] witnesses examined upon Belisario's allegation, some speak to the acquaintance and connexion there is between the parties, respecting which there is no doubt at all; and the other, as to the effect which such a ceremony, which is proved to have passed between them, has by the Jewish laws, and whether it is by that law, to be considered as a marriage or not.

The first of the witnesses examined is Mr. D'Azevedo: he says, "he is reader to the Portuguese Jews synagogue in the city of London, and is well acquainted with the rites and ceremonies of marriage in the Jews' religion, as handed down by his ancestors. That having read the Hebrew words written in the said first article, which he fully and perfectly understands, he cannot take upon himself to say whether such words, being repeated by a Jew, a bachelor of the age of thirteen years or upwards, to a Jewess, a spinster of the age of thirteen years or upwards, with an intent to contract matrimony, and, at the same time, delivering to the said Jewess a gold ring, in the presence of two credible witnesses, being also Jews, and the said Jewess freely and voluntarily receiving and accepting the said ring, does or does not make an effectual and valid marriage; nor can he take upon himself to depose whether or not the same is held among the Jews, or persons professing the Jews' religion, or universally deemed, reputed, and taken to be a good and valid marriage by the High Priest, Chief Rabbi or archisynagogus, and the rabbies or priests, his colleagues, and

by persons acquainted with the rites and ceremonies of marriages in the Jews' religion;" for the deponent saith, "the repeating the said words in the Hebrew language, and the delivery of the ring in the manner pleaded in the said article, forms a part of the marriage ceremony among the Jews, and is called the Kedushim, without which it is not a marriage in the Jews' religion; but the deponent cannot say whether or not such ceremony of the Kedushim alone would constitute an effectual marriage; but being incompetent to give an opinion thereon, he saith, so far is he from being satisfied of the validity of such a marriage that, if he was to be married, he should most certainly conform to the ceremony of a public marriage, lest the Kedushim might be deemed insufficient to validate a marriage among the Jews agreeably to their laws." This witness is the son of the late High Priest, and who was so a great many years, and it is allowed that he was certainly a man of great authority and experience. The witness is his son, and he is employed in the syna-[15]gogue, and expresses himself very doubtful as to it making a complete marriage, and speaking himself of it as being rather a part of the marriage only than any thing else.

The next witness is the brother of the last. He describes himself to be a watch-maker, and he says, to the fourteenth article, "that he is a total stranger to the facts pleaded therein; but saith that, if the said facts are true, as therein pleaded; if there was no compulsion used, and the articulate Esther Mendes Belisario, formerly Lindo, received and accepted the ring from the said Aaron Mendes Belisario freely and voluntarily, that such a ceremony, as is pleaded in the said article to have passed between the parties in this cause, is binding on them, and is so far good and valid, as between persons professing the Jewish religion, that they could not, according to the rites and ceremonies of the marriages in the Jews' religion, marry any other person without being first divorced from the aforesaid marriage, which is called the Kedushim;" but the deponent saith, "that such a marriage as aforesaid is not perfect or complete for want of the officiating priest to pass the nuptial benediction on the parties, and the same is liable to be called for proof before the Bethdin, or tribunal before mentioned. But if it should then appear that the parties, who had been so married by the Kedushim, were so married without any compulsion or deceit, and that the witnesses thereto were Jews, such a marriage would, as the deponent verily believes, be held to be good and valid, as binding on the parties."

The third witness, who is called on the same side, is Solomon Mordecai Ish Yemene, who is described as one of the students of the college of the Portuguese Jews. He says "that while he lived at Hamburg, he filled the office of High Priest of the Portuguese Jews for three years; that he is very well acquainted with the rites and ceremonies of marriage. That if a Jew, being a bachelor, and of the age of thirteen years and upwards, shall seriously, and with an intent to contract matrimony, deliver, in the presence of two credible witnesses who are respectively Jews, a gold ring, and repeat the words before stated in the Hebrew tongue to a Jewess, a spinster, and of the age of thirteen years and upwards, and she shall freely and voluntarily receive and accept the said ring, the same is held among the Jews an effectual and valid marriage, conformable to the law of Moses; and he saith that it is so deemed and universally reputed and taken to be by the said High Priest, Chief [16] Rabbi, or archi-synagogue, and the rabbies or priests, his colleagues, and by all the Jews or persons acquainted with the rites and ceremonies of marriage in the Jews' religion;" and he further saith, "that the before-written Hebrew words are of his, the deponent's, own hand-writing, and are the same as those written in the first article of the said allegation, the translation of which in English is, 'Behold, thou art sanctified unto me with this ring, according to the law of Moses and Israel;' that such ceremony among the Jews is called the Kedushim; that some Jews differ in the translation of the word used, which is, according to one interpretation, 'prepared,' and, according to another, 'sanctified;' but they all agree that such a ceremony is held a good marriage, so much so that Moses himself could not invalidate it, according to the Mosaic law; and further to the said article he cannot depose, save that the rabbies do require that the persons between whom such afore-mentioned ceremony of the Kedushim shall have passed, shall afterwards go through the ceremony of the Hupa and the seven blessings, which, according to the rabbinical ceremonies, is the usual way of marrying; but the omission of such latter ceremony does not invalidate the marriage by the Kedushim alone, for such persons are lawful husband and wife, according to the law of Moses,

which is the foundation of the Jewish law; and by which the Jews are ruled in all matters of religion."

The last witness examined on this head is Solomon Lyon, who describes himself to be a rabbi of the German Jewish nation. He says, "that the aforesaid ceremony of the delivery and acceptance of a ring or a piece of money, and the repeating the Hebrew words, which in English signify, 'Thou shalt be holy to me with this ring according to the law of Moses and Israel,' is, among the Jews, called the Kedushim and was instituted by Moses as a law of marriage among Jews; but that since the rabbies have appointed a further ceremony of marriage, called Hupa and the seven blessings, in addition to Kedushim, the same is mostly observed at the time of marriage of a Jew and Jewess, agreeably to the rabbinical laws, although the omission of the Hupa and the seven blessings cannot invalidate a marriage by Kedushim alone for the deponent saith that such last-mentioned marriage, notwithstanding such aforesaid omission, would, according to the law of Moses and the Jewish law, be held effectual and valid."

[17] To the fifth interrogatory the same witness says, "that according to the original Jewish law, which was given by Moses, the only ceremony which constitutes marriage is that of the Kedushim, but since that time the rabbies have added the ceremony of Hupa as necessary to a Jewish marriage; but even Beth Joseph himself lays it down that a marriage by Kedushim alone cannot be invalidated if there is no deception used." Annexed to this allegation given by Mr. Belisario there is a certificate that was addressed in the year 1778 by Moses Cohen D'Azevedo and another priest to the elders of the Portuguese nation, and to the High Priest, a man of very great learning in the Jewish law. The certificate is signed by the gentlemen who, I suppose, were the Bethdin of the time. Now it appears to me that this was a very different case from that which is now before the Court. That appears to have been a much more solemn act than this. It is called a contract; and it appears that it was signed by the parties, and signed by two witnesses who were present: therefore there was much more solemnity in that act than is proved to have passed in the present case; but that which, in my apprehension, completely distinguishes it is that the reference made to them was, whether the marriage between those two persons was valid, and whether the children born were legitimate? They give it as their opinion that it was valid; that the woman could not marry without a divorce; that they were cohabiting in venial sin, and that the children were legitimate; the fact being that those parties were cohabiting and had children. That had accordingly to all intents and purposes, the effect of the Hupa; and the certificate is that it was valid, although there had not been the Hupa, but that which supplies the place of it for there had been a cohabitation: therefore, that is a case perfectly different from that now before the Court, where there appears to be no cohabitation or consummation, but the mere declaration of parties joined together in the way which has been stated, amounting to a Kedushim, and nothing more; and it is not suggested that any other step had been taken, but that of the Kedushim.

The allegation, admitted on behalf of Esther Lindo, recites what is alleged on the part of Mr. Belisario respecting the act taking place; but it pleads that it was not an effectual marriage, and upon that allegation there have been four witnesses examined.

The first is David Henriques Julian: who says "that he is one of the rabbies of the Portuguese Jews synagogue in the city of London; that there is not a High Priest of that [18] synagogue; but that the deponent has for seven or eight years last past been one of the rabbies who fill the office of High Priest or archisynagogue and as such hath ever since formed one of the tribunal called the Bethdin, which among the Jews, is the highest authority in ecclesiastical cases; and consists at present of two Chief Rabbies who are appointed by the synagogue, and they call in a third rabbi when they have any case to determine; that, at present, the deponent and Hasday Almosnino are the Chief Rabbies so appointed by the said Portuguese synagogue, of which this deponent is the first."

He says "that if a Jew, being a bachelor of the age of thirteen years and upward shall seriously, and with an intent to contract marriage, deliver, in the presence of two credible witnesses who are Jews, a gold ring, and repeat the aforesaid Hebrew words to a Jewess, who being a spinster and of the age of thirteen years and upward and she shall freely and voluntarily receive and accept the said ring in the manner as is stated in the recital, from the first article of the said allegation given in an

mitted on the part and behalf of the said Aaron Mendes Belisario, the same would not be called a marriage amongst the Jews, but only a betrothment; the effect of which is that she cannot, by the rites and ceremonies of the Jews, marry any other man than the person to whom she is so betrothed, unless she is freed from such betrothment by his giving her a divorce, which he has power to do when he pleases; and the Jewess so betrothed by the Kedushim alone is complete mistress of her own property, and may dispose thereof in whatever manner she pleases; and the Jew to whom she is so betrothed is not obliged to maintain or provide for her till she has gone through the full ceremony of marriage with the said Jew; and if she should die after being so betrothed, or having gone through the ceremony of the Kedushim alone in manner as aforesaid, he, the said Jew, would have no right to any part of her property; neither would she, if the Jew was to die, be entitled to any dowry or other part of his property: and he further saith that the ceremony essential to, and which constitutes an effectual, valid, and legal marriage among Jews is that a formal contract in the Hebrew language must be entered into by the bridegroom with the bride according to the rites and ceremonies of the Jews, and the rules of the Jewish congregation to which the parties belong, which is drawn up by the priest or minister who marries them, and must be signed by the bridegroom and two witnesses before the ceremony of marriage, and must also be entered and registered [19] in a certain book kept for that purpose in the synagogue, or by the priest or minister of such congregation, and the said entry must also be signed by the bridegroom and two witnesses; after which the original contract is always delivered to the bride or other relations; that by such contract the Jew binds himself to maintain, cloath, honour, and behave with conjugal duty towards the Jewess his wife." But the deponent saith that if a Jew and a Jewess, after having given and received the Kedushim in manner as aforesaid, and such Jew was afterwards to say, in the presence of two witnesses, respectively Jews, that he was going to have a connexion with such Jewess in the name of marriage, and then retired and had carnal knowledge of such Jewess, the deponent believes that in such case it would be held a good and valid marriage between such Jew and Jewess, according to the rites and ceremonies of the Jews, and could be so pronounced to be by the Bethdin; but the deponent does not remember any such case, and only states the same as his opinion." He says, to the 11th interrogatory, "that the children of a Jew and Jewess, who have been by their parents declared to be their children, would, by the law of Moses, inherit the property of their parents, as well as children born under the most solemn form of marriage, if even the Kedushim, or any form of marriage, had never passed between their parents." and he further answers, "that, supposing a Jewess, who had received a ring under the Kedushim, shall carnally connect herself with any other man than him who gave her such ring, she would be considered an adulteress, according to the Jewish law; and if a man, being a Jew, should commit a rape on a Jewess who had so received a ring, he would, according to the Jewish law, be punished with death; as would a Jew who had committed a rape on his neighbour's wife."

Mr. Almosnino, the other rabbi, deposes in the same manner, "that it would not constitute a valid marriage, but only a betrothment; and the Jewess so betrothed remains mistress of her own property, and may dispose of it in any way she pleases; and that if such Jewess should die, after being so betrothed, the Jew has no right to her property or any part of it."

The third witness is Isaac Delgado, who fully confirms what the other two witnesses have said with respect to the betrothment; and Mr. Ish Yemene says to the third interrogatory, "that the property of a Jewess is heritable by her relations, and not by the man; but that the husband is heir to the married woman." And to the fourth interrogatory he says, "that the relations of a [20] woman betrothed are, by the Jewish law, bound to pay the burial expences; and by the like law, those of a married woman are to be paid by the husband."

It was mentioned by the counsel that there were considerable contradictions in the evidence given by those witnesses. I do not observe any that are material; they all say "that the Kedushim is such a betrothment, or such a contract entered into between two parties as cannot be dissolved without a divorce; that the woman, if she should connect herself with another man, would be an adulteress, and that so far it is to be considered as a marriage:" but they say "it has none of the effects by which the property is conveyed; that a man has no right to the property of the betrothed

woman; that she may do what she will with her property; and if she dies it will n go to him, but to her relations."

Thus the evidence stood upon the first hearing; and then the Judge did, after hearing the argument, not without giving an opportunity for the counsel to object but for the purpose of information, direct that certain questions should be propounded by the registrar to the Bethdin; and they being delivered to the Bethdin, were likewise delivered to the proctor for the adverse party; and he brought in answers given by two of the persons who were witnesses for his party; and before the Judge pronounced sentence they were admitted by consent on both sides; both the answers to the Bethdin and the two other persons also.

Respecting the questions put to them, the first is, "whether it is admitted that Beth Joseph, who is proved in this cause to be one of the principal guides of the Jewish Portuguese Church, has laid it down that the Kedushim alone cannot be invalidated?" That means, as I understand it, whether, if that ceremony has passed and no other, it will require a divorce to set the party at liberty? The answer that we have all given is that it cannot without a divorce. So the witnesses who were examined on the part of Miss Lindo say, because they say that it is only a betrothal and not a marriage, although it has that effect.

The next question is, "whether the assertion of Maimonides, as cited by Mr. Selden in his *Uxor Ebraica*, b. 2, c. 1, where it is declared 'that the woman who has received Kedushim is verè uxor, truly a wife, although consummation hath not passed' is an assertion without foundation?" Upon that they differ: the persons who composed the Bethdin say, "that the words that Mr. Selden has quoted are not applicable to a [21] wife only, but they are applicable to a woman also who is only betrothed, as well as married." The other two contend that it signifies a wife only. It seems to be a dispute merely about words, because Mr. Ish Yemene goes on and says, "that the Hupa, as well as the Kedushim, is necessary to make a complete man and wife for he says, 'It is afterwards required that such Jew and Jewess shall conform to the rabbinical ceremony.'" That appears to be necessary for every thing, even for the inheritance. And he further says, "If a man, being a Jew, obliges himself to give his daughter a marriage portion, and she should take Kedushim, the man to whom she becomes betrothed could not recover such portion, according to the Jewish law, unless such obligation should be given to him." And again Maimonides says, "the Hupa is necessary;" and Beth Joseph says the same. And it appears that the Hupa, after Kedushim, makes a perfect marriage. But Mr. Ish Yemene says, "the want of the Hupa does not invalidate the marriage in the least;" and it is the opinion of Solomon Lyon "that the Hupa is of no effect alone, but the Kedushim and Hupa together complete the marriage." In that respect they ultimately agree, I think, although they call Kedushim a marriage, it is not perfect without the Hupa, which is necessary to entitle the man to the property.

Another question proposed is, "Whether a man who has given Kedushim has a right acquired thereby to call upon the woman who has accepted it to submit to conjugal embraces? And whether the woman, who has received the same, is bound in conscience and in law to submit thereto when duly called upon?" To this the Bethdin answer in this manner: they say "the right the man hath acquired is that the woman he hath betrothed is that he can demand of her to prepare herself for being admitted to the matrimonial state, allowing her a certain period of time for that purpose, and when that period is expired it is expected that she will surrender herself up to enter the Hupa, which constitutes marriage, but even then she is not bound in conscience or in law to submit thereto; the measures taken in case of non-compliance are that she will be called before the tribunal, and interrogated why she doth not fulfil her marriage promise to that man? If she says that her non-compliance proceeds from aversion, saying 'she detests that man,' then he is ordered immediately to give her divorce; and were he not to conform himself to the lawful mandate of the [22]-bunal, he would be compelled to it; but if she alleges a frivolous and vexatious excuse, the tribunal administers to her salutary advice; and if that proves ineffectual she is daily called out in the seminaries and synagogues for four successive weeks; and if she remains intractable, at the expiration of a twelvemonth, he will be compelled to divorce her."

"This is the opinion of Rabbi Isaac Alphassi, the first of the three chief guides upon whose authority we determine all religious matters. Maimonides who is the

second authority of this nature, says the same with other Jewish doctors, some contemporary and others prior and subsequent to the said Alphassi and Maimonides ; but Raburn Ashur who is the third authority in rank, his son, and the author of the Beth Joseph, with some others, differ, and say that when a woman will not comply to perform what she did engage herself to, the man cannot be compelled to divorce her, but merely requested to it ; but yet none say that coercive measures can be made use of to compel her to enter the matrimonial state." To the same question, "whether a man who has given Kedushim has a right acquired thereby to call upon the woman who has accepted it to submit to conjugal embraces, and whether the woman who has received the same is not bound in conscience and in law to submit thereto, when duly called upon?" Mr. Ish Yemene says "that a man who has given Kedushim has power and force acquired by the Kedushim to call on his spouse to come to his house to be at his command ; and he has not only a right to call her to his house to be under his command, but also the man is bound by our rabbies to bring her to his house in the time above mentioned ; and if he has not brought her to his house in the time above mentioned, our learned men compel him to maintain her though she is not in his house, it being his fault." He then adds, "all the above is clear by the law, as it is declared in the Gemara treatise of Ketubot, fol. 63. The woman who rebels against her husband in conjugal points, let her be proclaimed four Saturdays in the synagogue, and the Bethdin ought to send her a message to let her know that if she does not within the four weeks submit herself to her husband's command, though her dower be very considerable she shall lose the whole as well the betrothed as the wife ;" for this he quotes Maimonides, Raburn Ashur, and Tur ; and he adds that "Beth Joseph further says, 'that even after the warning and forfeiting her whole dower, it is at the husband's option to give her Guet, but he can never be compelled.'"

[23] Solomon Lyon says in general terms, in answer to the fourth question, "he certainly has a right to demand his wife and she is obliged to comply, both in conscience and law, as is fully contained in the Gemara de Ketubot, fol. 59." This they have given as their private opinion ; for in truth it is no more. Of the other three, two are in office to execute the office of High Priest, and the other is called in by them to determine any case that comes before that tribunal. They give a contrary opinion and expressly say, "that if a woman, after Kedushim, has left her husband, and if she persists in refusing to return to her husband, whether it is for a solid or a frivolous reason, the Bethdin will order and compel the man to give a divorce."

The general result of the evidence is this ; there has been what they call, I think, a complete Kedushim between the parties ; that Kedushim, as they all prove, will, in order to dissolve it and in order to give the woman a power to marry again, need a divorce ; but it does not of itself create a perfect marriage, because it does not give the husband the rights of marriage ; for they all agree, and there is no contradiction whatever, that after the Kedushim is given the wife retains her rights, she has a power over her own property as much as before, and the husband has no power over it at all.

With respect to the other point, whether the husband can be compelled to release the woman and give her an authority to part, upon that they differ. But the Bethdin, the persons to whom the application must be made to carry it into effect, say "that if a wife persists in refusing to return to her husband, the husband may be compelled to give a divorce." In what light then does this woman appear? What is her state and condition? Is she a perfect wife? No, they all say. Has the husband acquired the civil rights of marriage? No, none of them—they all prove that. Is it possible then for this Court to make a return to the Court of Chancery, and say that this person is now the wife of Mr. Belisario as he has claimed her to be ; when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it? That if she was to die he would have no right at all.

What can the Court do then? Can the Court order the Hupa? That would be strange indeed, for the Ecclesiastical Court to be carrying into execution a marriage between two Jews. Can the Bethdin do it? The Bethdin say no. Why does he not try the Bethdin? The Kedushim was given in 1793, and more than three years has elapsed since. Has there [24] been any application to the synagogue, which they say is necessary to complete the marriage, to give him the collective rights of the husband? None. It has been thrown out by the counsel that there is an injunction which would prevent her marrying. That I cannot tell. All that the Court of

Chancery has done is to prevent this man from having access to her, or writing letters to her, to prevent him from entering into a contract of marriage. Whether it would prevent them from applying to be admitted to the Hupa I cannot tell; but certain it is upon all the evidence that without that ceremony, without the Hupa, they are not perfect man and wife. As I have already stated, the question is not whether Miss Lindo is now at liberty to marry any man she pleases, but whether she is the wife of Aaron Mendes Belisario or not? I think it is clear from the evidence that she is not; that the ceremony which has passed, although it prevents her from marrying any other man until a divorce is given, does not give him any authority over her fortune or person. A man cannot be the husband of a woman by the law of England, without having the civil rights, which he has not; and therefore, under all the circumstances, I am of opinion that the sentence given by the Judge of the Consistory Court is perfectly right, and I shall confirm it.

NO. 5. 53 GEO. 3, C. 127. AN ACT FOR THE BETTER REGULATION OF ECCLESIASTICAL COURTS IN ENGLAND; AND FOR THE MORE EASY RECOVERY OF CHURCH RATES AND TITHES. [12th July, 1813.]

Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, and that other proceedings should be substituted in lieu thereof, and that certain other regulations should be made in the proceedings of the Ecclesiastical Courts; and that more convenient modes of recovering tithes and church rates in certain cases should be provided; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, excommunication, together with all proceedings following thereupon, shall in all cases save those hereafter to be specified, be discontinued [25] throughout that part of the United Kingdom of Great Britain and Ireland called England; and that in all causes which according to the laws of this realm are cognizable in the Ecclesiastical Courts, when any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced, saving in the particular cases hereafter to be specified; but instead thereof it shall be lawful for the Judges or Judge who issued out the citation or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same in the form to this act annexed, to his Majesty in Chancery, as hath heretofore been done in signifying excommunications; and thereupon a writ de contumace capiendo, in the form to this act annexed, shall issue from the Court of Chancery, directed to the same persons to whom the writs de excommunicato capiendo have heretofore directed; and the same shall be returnable in like manner as the writ de excommunicato capiendo hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in a certain act passed in the fifth year of Queen Elizabeth intituled "An Act for the due execution of the writ de excommunicato capiendo" shall extend and be applied to the said writ de contumace capiendo, and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; and the proper officers of the said Court of Chancery are hereby authorized and required to issue such writ de contumace capiendo accordingly; and all sheriffs, gaolers, and other officers are hereby authorized and required to execute the same, taking and detaining the body of the person against whom the said writ shall be directed to be executed; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the Court, the Judges or Judge of such Ecclesiastical Court shall pronounce such party [26] absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler or other officer in whose custody he shall

be, in the form to this act annexed, for discharging such party out of custody; and such sheriff, gaoler, or other officer shall, on the said order being shewn to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him.

Provided always, and be it further enacted that nothing in this act contained shall prevent any Ecclesiastical Court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognizance, in the same manner as such Court might lawfully have pronounced or declared the same had this act not been passed.

And be it further enacted that no person, who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing or declaring such persons excommunicate shall direct; and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his Majesty in Chancery, in the same manner as excommunications have been heretofore signified, and thereupon the writ de excommunicato capiendo shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such Ecclesiastical Court.

REPORTS of CASES ARGUED and DETERMINED
in the CONSISTORY COURT of LONDON;
containing the JUDGMENTS of the Right Hon.
SIR WILLIAM SCOTT. By JOHN HAGGARD,
LL.D., Advocate. In Two Volumes. Vol. II.
London, 1822.

[1] CASES DETERMINED IN THE CONSISTORY COURT OF LONDON, &c.
LOVEDEN *v.* LOVEDEN. 13th July, 1810.—Principles of evidence in cases of divorce
by reason of adultery, &c.

[Referred to, *Allen v. Allen*, [1894] P. 252.]

This was a case of divorce by reason of adultery of the wife, in which the principles and rules of circumstantial evidence, in such cases, were much discussed to the effect appearing in the judgment.

Judgment.—*Sir William Scott*. This is a proceeding by Edward Loveden Loveden, Esq., against Ann his wife, praying for separation, by reason of adultery. Nothing arises upon the proceedings: they have been conducted, as far as they go, in the usual manner. The articles, which are many in number, plead a marriage to have taken place on the 15th of November, 1794. This marriage is admitted, and is likewise fully proved by many witnesses. Cohabitation continued between the parties till the 15th of March, 1809, when, upon the disco-[2]-very of an adulterous intercourse, as alleged, with Mr. Raymond Barker, son of a neighbouring gentleman in the country, and who is described as a lay-fellow of Merton College in Oxford, she was ordered to withdraw from her husband's house, and the cohabitation has never been renewed. She has offered no plea of any kind, but rests her defence, so far as it is preferred by her counsel, on the insufficiency of his proofs and upon the answers to the interrogatories which she has addressed to several of his witnesses. These witnesses are twenty in number, including the person who formally proves the public documents relative to the license and marriage; and they are stated to be supported by letters written and sent by herself to Mr. Barker, but intercepted by a servant and communicated to Mr. Loveden by the agency of that servant.

It is not necessary for me to state much at large the rules of evidence which this Court holds upon subjects of this nature, or the principles upon which those rules are constructed: they are principles so consonant to reason and to the exigencies of justice, and so often called for by the cases which occur in these Courts, that it is on all accounts sufficient to advert to them briefly. It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case [3] and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon

the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.

It is the consequence of this rule that it is not necessary to prove a fact of adultery in time and place. Circumstances need not be so specially [4] proved as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room; general cohabitation has been deemed enough. Parties living for months and for years together, and hoping by that means to insult the feelings of a husband, and to elude the justice of the tribunals which have to decide upon such matters, have by such contrivances supposed that they were sufficiently protected; but the courts of justice have held that that is an evasion which was perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation. This has been laid down repeatedly, and acted upon in this Court in cases such as *Cadogan v. Cadogan*,* *Rutton v. [5] Rutton*: and other cases have been confirmed by

* In the case of *Lord Cadogan v. Lady Cadogan* (9th Feb., 1796). The Court, after a full and particular examination of the effect of the evidence on the libel,^(a) and the responsive allegation, observed: My opinion is so completely founded on the view of these facts that it might not be necessary to go further: the sequel, however, calls for some observations from the Court. Lord Cadogan pleads "that the parties retired together into Wales, where they lived in domestic intimacy." In the responsive allegation it is pleaded "that they did not go by agreement; but that they met there accidentally;" though it admits that they continued in that part of the country together. The improbability of this story is so strong that even Ball, the servant maid, revolts at it, and takes it for granted that Mr. Cooper went there, in consequence of knowing that Lady Cadogan was living at that place. Something has been said in defence of such a measure, as natural to persons in their situation; that being outcasts of society, they might shut out the world, and all scandal together. Lady Cadogan in this suit stands highly on her honour, and desires her friends and the public to suspend their judgment till the cause shall be decided; and the Court is not to suppose that she was so deserted as to be under the necessity of finding an asylum only in the society of the very person who was the cause of the imputation which had been cast upon her. They do in fact, however, retire, and pursue their journey together to several places, in all of which the Court is desired to believe that all which passed was innocent, because nothing had been exposed, contrary to common decency, to the waiters and servants of the places where they have resided.

It is true that Mr. Cooper sleeps at the inn; but is, in all other respects, domesticated in Lady Cadogan's house. He is there in the morning, and till night; his clothes are at the house, his horse also—he takes his meals there—every thing is there—he himself is constantly there, except for a few hours of the night. It is then from these few hours, and from the evidence of witnesses selected by themselves, that the Court is required to suppose that all this intercourse was perfectly innocent. Abstracted from all the former facts, this might almost be considered as composing a separate and detached case. Here is the wife of another husband, and the husband of another wife, quitting all public and domestic duties in their own stations, retiring together and shutting out all witnesses, except persons chosen by themselves. Can it be necessary that the Court should require any other evidence than this, in the nature of facts of indecent behaviour? Is it for the interest of society that such a principle should be maintained? Mere cohabitation in this way must, in itself, be held sufficient to found the judgment of the Court conclusively against them. In the case of *Rutton v. Rutton* (Arches, 26th January 1796. Deleg. 14th Nov., 1798) there was a defence of the same kind: and though the gentleman slept in the house it was proved that

(a) It is to be regretted that no sufficient notes have been preserved of this long and elaborate judgment, as it is recollected to have been.

the Court of Delegates, and is the established principle of this Court. Such are the general rules and such the general principles established here; and it is with reference to those general rules the present case must be examined. It is possible that the case may not require the application of the more extended rules, because it is possible that there may be such direct proof of the fact of adultery as not to stand in need of such an application.

Of the manner in which these parties lived together before about the year 1803 I think there is no evidence adduced which shews the state of the parties one way or other; excepting that it appears, [6] indeed, that down to the very time of this alleged discovery nothing had arisen which had awakened suspicions in the mind of the husband. It is, I think, spoken to by Calcutt, who had been housekeeper in the family for some time, that in the year 1803 a connexion which had subsisted between the family of Mr. Loveden and the family of a neighbouring gentleman, Mr. Barker, who lived at Fairford in Gloucestershire, had produced something that attracted the attention of this witness in particular. Mr. Barker's family had lived upon a footing of great intimacy and friendship with the family of Mr. Loveden, which appears, in the later periods of it, to have been disturbed and interrupted in consequence of the transactions between this [7] gentleman, who was a son of that family, and Mrs. Loveden; for though it never did reach the eyes nor the ears of Mr. Loveden himself, it is alluded to in a conversation which passed between Mr. Barker and the butler Hastings, who is a capital agent in these transactions; it is alluded to that it had been known, and with feelings of great uneasiness, at his family house at Fairford: and that it was calculated to produce uneasiness there cannot be denied; because he had been received with great hospitality in this house—with great familiarity: and it is most fully admitted by the counsel on the part of Mrs. Loveden that that which had occurred certainly was not that which such treatment ought to have produced. It is admitted by them, and could not be denied without flying in the face of that mass of evidence which now lies before me, that a most improper attachment had taken place between these parties, and that acts extremely indelicate had passed between them; for they raise the question no higher than this, was this attachment accompanied by adultery? Were these acts, indelicate as we must admit them to be, attended with the crime of adultery?

These admissions, which, as I say, could not be avoided without encountering the whole of the [8] affirmative evidence which is here produced, will relieve me from the necessity of entering very minutely into the particular circumstances vouched by a great variety of witnesses. They certainly do prove a state of intimacy between these parties suspicious in the highest degree. The parties were observed to be fond of walking together separately from the rest of the family, arm-in-arm together; that she paid particular attention to his accommodation when he came to the house—was peculiarly attentive to the preparations of his room—to the ornaments of his room—even occasionally assisting to make up the fire in his room; that she addressed herself with particular attention to him at dinner and meals; that he came evidently by appointment, and when the husband was absent from Buscot, the place of his residence,

he had a separate room, and the witnesses to that part of the case declared that they had never observed any indecent familiarities between them. But in the Court of Delegates it was strongly held “that general cohabitation excluded the necessity of proof of particular facts.” It may be possible that persons of peculiar and eccentric dispositions or habits may live together in such manner without actual criminal connexion, and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground: finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of platonism for the principles of their decisions. Such would be the decision of the Court on this point alone; but the Court is not at liberty to put out of its recollection all the antecedent facts of the case, on which it has before observed. Looking to them and to the main fact—the admission of a gentleman to her bedchamber at night, under the frivolous plea of illness that has been set up, and to all the other particulars, which have been established in evidence, I feel myself compelled to pronounce that the case is fully proved, and that Lord Cadogan is entitled to the relief which he prays.

or particularly engaged; that this attracted the notice of these witnesses and convinced them that his visits must have been by appointment; because no sooner was the back of Mr. Loveden turned than this gentleman appeared: that while he was there and the husband was absent, she was ordered to be denied to all other persons who came there, and was actually so denied; that if Mr. Loveden's return was announced by the ringing of the house bell, they separated immediately, and met again in Mr. Loveden's presence as if for the first time—as if they had not been in company and held any conversation before; that they were fond, when walking in company, of separating from the rest of the company, walking together separately and in the attitudes described—that they were often seen retiring into the shrubberies and plantations in the garden; that he came very frequently on horse-back, [9] coming with his horse into these plantations and shrubberies unknown till observed by servants; and never going up to the house, but meeting this lady at these places; that they have been seen in the gardens with arms round each other's waist; that they were seen upon one particular occasion to kiss each other; that upon finding themselves observed they retired in great confusion; that at table they were in the habit of sitting close together, and, as the butler positively swears to his own observation of the fact, with their legs and feet fixed together under the table; that in London they met, and evidently upon signals and by appointment to ride together in the park; that he has been seen to lay his hand upon her hip, and upon being observed to withdraw it in confusion; that at another time he laid his hand in a most familiar manner upon her shoulder; that he was admitted alone into her dressing-room where other gentlemen were scarcely ever admitted; and that he was so admitted totally unknown to Mr. Loveden; that when parties went out coursing or hunting, these two persons always came home an hour before the rest of the company, and remained alone together: in short, that a degree of familiar intercourse took place which attracted the notice of every servant and of every visitor in the house.

These are facts spoken to by such a number of the witnesses that I must repeat great part of those depositions which have been read, and which have been commented upon much at length, if I were to refer to them: I must state them entirely over again if I were to enumerate the particular facts spoken to in the depositions which these [10] several witnesses have given; for all the servants, in various capacities which gave them opportunities of observation, concur in describing the intercourse as suspicious and as gross in a very high degree.

It has been made matter of objection among the few objections which it was possible for the ingenuity of advocates to collect upon this occasion, that this lady seems to have been living amongst spies, and that they seem all to have acted with unfavourably conceived impressions. The fact is that their observations were awakened, and could not be otherwise than awakened, by the appearances which were presented to their view. Such scenes as these going on in a decent and respectable family, and some of them passing under the eyes of such a number of persons, could not but excite observation, could not but provoke conversation among them. If the evidence had been otherwise I think it would have furnished a just ground of imputation; for such circumstances as are described by the witnesses could not pass without producing such consequences and conversation among them: they must provoke the indignation of the servants; they must have alarmed their vigilance, and have engaged them in what we find them to be engaged in—the common purpose of defeating and detecting an intercourse so disgraceful to the house and so injurious to their master. The only wonder in the case, I think, is that such an intercourse could have been possible for such a length of time, without in some way or other, by some accident, by some information, reaching the notice of Mr. Loveden. It had certainly attracted the notice of his visitors; so says Mr. Seymour who was a visitor [11] in the house, and who states that he had himself observed so much, and had heard so much from other persons who had seen the same that he found himself compelled by the duties of friendship to expostulate with her upon the intercourse, which he did not at that time suspect to be criminal, but which was at least suspicious, between her and Mr. Barker. She took it ill and declared that so long as Mr. Barker behaved well to her she should not alter her behaviour to him; a pretty strong proof of a blind attachment to this gentleman; because a woman of delicacy who had been informed by a friend that her character was suffering, in the opinion of respectable persons, on account of the footing on which she was with another gentleman, would

at least, for the protection of her good name if not of her innocence, have avoided appearances that had led to such unfavourable impressions of her character.

Mr. Pryse, who is the son of Mr. Loveden by a former wife, says that he had observed attentions, though not with the suspicions which must have been excited if he had seen more. It appears by the conversation to which I have already alluded of the butler, Hastings, with Mr. Barker, to have found its way into the general talk of the country. With all this, however, nothing appears to have attracted the notice of Mr. Loveden. That occurred in this case, though certainly in an uncommon degree, which happens in many others—that the husband is the last person who entertains a suspicion of his misfortunes. There is, I think, no reason whatever to presume any kind of connivance on his part, or any other forbearance than what arose from the most pro-[12]-found ignorance of the dishonour that was practising upon him.

There are several particular instances of the familiarities passing between these persons, which I think it may not be improper for me more particularly to advert to; and, amongst the rest, some that are spoken to by Hooper and by Chamberlain: by Hooper upon the fifth article, and by Chamberlain upon the same day. Chamberlain says “that on a Sunday morning, happening some time about a year and a half and within two years last past, Mr. Barker having either slept at Buscot House on the preceding night, or having called there on the Sunday morning, and the family being preparing to go to church and the carriage having gone for that purpose, and being about to come round to the door, he having Mr. Barker’s horse in the stable, came to the under-butler, who was then in the pantry at the bottom of the stairs and near to the billiard-room, and asked him if Mr. Barker had ordered or if he wanted his horse; and to the best of his recollection Hooper replied that Mr. Barker was gone into the green-house, and that if the deponent would stop a little he would shew him some of Mrs. Loveden’s tricks: and the bell of the room in which the family had breakfasted having just then rung, the said James Hooper desired the deponent to go into the conservatory or green-house, whether Mr. Barker came out of the said green-house or not; and that Hooper then went to answer the bell, and the deponent [13] watched as directed from the butler’s bedroom window; and that shortly afterwards he saw the family go to church, but Mrs. Loveden having a pain in her face staid at home and did not go that day: that as soon as the family were gone to church, Hooper came into the butler’s bedroom to the deponent and told him to listen and he would soon hear Mrs. Loveden come down stairs and go through the billiard-room into the green-house; that he continuing to listen as desired, he plainly heard Mrs. Loveden come down the stairs and go into the billiard-room; she went through the communication as before described in the conservatory; that Hooper afterwards came and told the deponent he had been through the billiard-room and Mrs. Loveden’s dressing-room, and into the small further room, and that she was not in either of the said rooms, and must have gone into the green-house; that being then quite certain that Mrs. Loveden and Mr. Barker were together in the said green-house, and having occasion to be about some part of his business in the house he desired the deponent to keep on the watch from the butler’s bedroom window in order to see whether they came out of the said green-house or not; that the deponent accordingly did watch until the family returned from church; that Hooper occasionally came into the said bedroom to him; but neither Mrs. Loveden nor Mr. Barker were seen till Mr. Loveden’s carriage drove up to the front door on the return of the family from church, which could plainly be heard by them in the green-house; and immediately after this, upon the hearing the noise of the carriage [14] coming up, the deponent saw the said Mr. Barker come out of the green-house by one of the windows thereof, and go round by the back of the green-house and pass the north front of the house and go towards the stables; that he directly afterwards saw Mrs. Loveden come out of the green-house through one of the sash windows thereof nearer to the house, and go and meet her mother; and he heard her mother blame her for being out and say she would have more pain in her face, or to that effect. That he immediately came out of the butler’s bedroom where he had remained at the time, and ran down to the stables, and overtook Mr. Barker going to the stables, and brought out his horse to him, and he rode away in the direction for Oxford.”

Now to be sure this is evidence which shews an advantage was taken of the retirement of the family for the purpose of going to church. This is fully confirmed

by Hooper as far as he had an opportunity of observing: he did not wait along with Chamberlain, because his business called him into the house; but, as far as he goes, he fully establishes the fact—that in this green-house they were together from the time that the family went till the time that the family returned, and that they then separated in such a manner (for that is a circumstance not to be laid out of consideration in all these cases), that they then separated in such a manner as to elude the appearance of their having been at all together, thereby giving to this meeting an appearance of secrecy and clandestinity which leads to a suspicion of every thing improper.

[15] There is another thing spoken to by Hooper at a succeeding time, and it is this. He says “that in the month of January, 1808, when Mr. Barker was on a visit at Buscot Park, and all the company then at the house had gone out to take the diversion of coursing, and amongst them Mrs. Loveden and Mr. Barker, these two, as they usually did on such occasions”—a fact which is spoken to by other witnesses—“came home about an hour before the rest of the company and more: and after they had been in the house a short time, there having been a dish of fine fish caught, and the cook wishing to know how Mrs. Loveden would choose to have them dressed, he the deponent took them on the dish in order to shew them to his mistress and to take her orders as to the dressing the same; that for that purpose he went into the library and breakfast-parlour, then up to Mrs. Loveden’s own bedroom; and having knocked at the door thereof, which was ajar, and no person answering he went into the same, and from thence into the little dressing-room adjoining, which was used by Mrs. Loveden, and also into the adjoining room called Mrs. Loveden’s dressing-room, and into every other bedroom on that floor, except one room,”—that he particularly describes—“and he could not find her in any of the said rooms, nor did he see Mr. Barker: that upon his return down stairs he met Miss Loveden on the hall floor nearly opposite the library door, of whom he inquired if she knew where Mrs. Loveden was; to which she answered she did not, but supposed she was in the room called the dressing-room, or to that effect. He told [16] her he had been there, but that she was not in the said room: that immediately afterwards she came out of the dining-room into the hall to the deponent, and appeared very red in the face and extremely confused, and held her riding-habit half way up her legs, as if she did not know what she did from the confusion she was in; and that having given the deponent orders as to the manner she would have the fish dressed, she then went into the library to Miss Loveden, and the deponent carried the fish down stairs: that he immediately came out again to the side of the stairs and listened, and that he heard a man’s footsteps come out of the said dining-room, which Mrs. Loveden had just before left, and run up stairs.” The fact then is that the parties came home an hour before any of the rest of the family, that they were not to be found, and that this servant who went to speak to his mistress came to the dining-room door; that she met him, so as to prevent his entering the door, in a state of confusion, and that a man was there; and as Mr. Barker could not possibly be any where else, I think it leads to the unavoidable conclusion that he was the person who was there.

There is another fact which is mentioned that is of the same nature and which leads to conclusions of the same kind. He says “it was not a custom with him, as business did not call him, to walk in the gardens, pleasure grounds, or plantations at Buscot; so that he had but little opportunity of seeing them; but he knew that they were in the habit of walking together about the said grounds, plantations, and gardens; for he has himself seen them go into the plantations [17] and about the green-house garden, and has at such times frequently seen them walk together arm-in-arm within view of the house. That one afternoon in the year 1805, when a Mrs. Stephens of Bath was on a visit at Buscot Park the deponent and William Musson, a servant to a gentleman who was there likewise on a visit, having been walking out in the park, and coming into the plantations they saw two persons at a little distance approaching that part of the plantation where they then were: upon which the deponent and this other servant who was with him, not knowing who they were, stopped in the thick part of the plantation among the shrubs till they passed them; and as the said two persons approached the deponent and this other servant plainly saw Mrs. Loveden and Mr. Barker walking together, having his arm round her waist, and Mrs. Loveden having her arm round his waist; and he and his companion remained concealed in the plantation until they had passed by: then they

came out of the plantation and went towards the house; and when they had got into the park again to go to the house they met Mrs. Stephens, who inquired of the deponent if he had met Mrs. Loveden: and the deponent, not choosing to say he had met her with Mr. Barker, said he had not seen her; upon which Mrs. Stephens said she had lost her." So that she had contrived to quit this lady and to join Mr. Barker, and to walk with him in the manner which these witnesses have described.

There is another witness to whose evidence I will advert, and that is M^cNichol. Something of an objection was taken to his evidence as a witness [18] from what appeared upon an interrogatory that he had had a quarrel with Mr. Loveden on account of his having bartered some fruit for some seeds. I do not think that that can be admitted to affect the testimony of this witness in any degree: it is known that those things are on a different footing in different families; it is a confidence reposed in gardeners in some families to make exchanges; and a man acting fairly and for the advantage of his master's concerns would not be in the least degree discredited by it: and if he supposed that his authority went further than it did that cannot be considered as a circumstance at all invalidating his testimony as a witness—least of all would it give a favourable bias to his testimony towards the person who had so resented the liberty he had taken. He says "he observed there was a great degree of intimacy between Mr. Barker and Mrs. Loveden, for they were in the habit of walking together and alone arm-in-arm in the flower-garden and pleasure-grounds at Buscot Park on every occasion they could find so to do: that from the manner in which they met at times in the plantations and in the gardens he had no doubt but that they met there by appointment:" he says "that he remarked that when Mr. Barker was visiting at Buscot, Mrs. Loveden used to get up in a morning much earlier than was her usual custom, and to come into the flower-garden where she was always met by Mr. Barker, and that they used to walk there together and alone till Mr. Loveden's bell was rung; and whenever the deponent was in the garden at such times and was near enough to hear the bell, he always observed that they separated, and Mrs. Loveden [19] went into the house; for it was then known that Mr. Loveden had got up; and he has at times found them walking together in the plantations when it was not known in the house that Mr. Barker had come there; and on one day in particular he well recollects"—that goes to a fact which I shall have occasion to observe upon by and by.

There are other witnesses that speak to situations exactly of the same kind, and as situations frequently occurring between these parties. Now I do confess that, upon a view of this general evidence applying to the general conduct of these parties to each other, I am very much inclined to accede to the doctrine which has been stated by the counsel for Mr. Loveden, that it would justify the legal conclusion that adultery had been committed if any situations were shewn in which the fact was at all likely to have passed. It would be, I think, a doctrine extremely dangerous to the security of domestic life if all this could pass without warranting such a conclusion. What!—when an improper attachment is admitted to have existed between the parties—when it is admitted that indelicate acts have passed between the parties when they were within the reach of observation, shall it not be concluded that those acts were carried much further when they were out of the reach of observation? I am not ignorant what allowances are to be made for the laxity of modern manners; but does it in practice or in reason extend to liberties of the kind described, without subjecting the parties to unfavourable conclusions, if they are found in situations in which they are withdrawn from the eye of an observer? I think [20] the law would lose sight of that justice by which it is to regulate the rights of individuals if it were to hold that all this took place, and that nothing further passed when the parties were entirely unrestrained by the eyes of any persons whatever.

However, the matter does not rest here: the evidence goes a great deal further; and is such as, I think, to leave but little doubt upon the minds of those who have to consider its effect. I mean particularly here to allude to the clandestine correspondence which has been produced. The fact that any correspondence whatever, unknown to the husband, had passed between this lady and Mr. Barker, would of itself be highly suspicious; even if its nature and its tenor were wholly unknown, it would have been open to the most unfavourable conclusions regarding that nature and tenor. But how is it conducted? Why, it appears that in the country she was in the habit of putting letters directed to this gentleman privately into the bag, letters not directed by her

husband, though a member of parliament. It appears that she was in the habit of receiving letters not addressed to her husband, but separately to herself; that she was in the habit of receiving them with great eagerness; and in the latter period of the history that she was in the continued practice of getting the bag before it was produced to her husband or to any body else; that in town she herself put letters directed to this gentleman into the receiving offices, or delivered them herself to the postman with her own hand; some of these letters are sufficiently proved to have been directed to this gentleman. All these facts are established very fully by Stratton, by Chamberlain, by Hooper, by [21] M'Nichol, and by Dyke. Now under such circumstances as these I think all conclusions must be unfavourable.

The correspondence of a young married woman with a young man, unknown to her husband, is what I presume hardly comes within the known latitude of modern manners; but connected with the general footing on which these parties by all the evidence to which I have alluded were proved to have stood, it speaks a more decisive language with respect to its nature. But, however, it does happen in this case that letters have been intercepted and are within the view of the court; the time and the manner of their being brought to light and their authenticity are fully proved. They were taken out of the bag: and without entering into the particulars, there is very sufficient evidence that they were written on the 26th of November, 1808; that they were put into the bag by her; that Hooper, having suspicions that there were letters passing from her to Mr. Barker in this bag, contrived to get these letters out of the bag; that he communicated those letters to some others of the servants, particularly to Haynes, with whom he appears upon a footing of intimacy, and that they were afterwards delivered up to Mr. Pryse, the son-in-law, upon the discovery which took place some time afterwards. I think their identity is clearly established by this witness, and by the other witness who has proved their contents, and by Mr. Pryse himself; and I see nothing which at all shocks probability in the idea of his having kept those letters by him so long. They are letters which it might puzzle such a man as this to determine [22] how to produce till some opportunity offered; and he appears to have been unwilling to awaken the feelings of his master upon the subject: he waited for an opportunity of seeing Mr. Pryse, and then he took the opportunity of communicating them immediately.

The handwriting of the letters is proved, and they are proved to have been written upon a frank of Mr. Loveden's. The larger letter contains two inclosures; the larger letter is itself declaratory of violent and of mutual attachment; it concludes with desiring and hoping that they may affectionately love, that their attachment may be co-eternal, and that they may affectionately live and die adoring one another: it describes in terms of great lamentation the difficulty of access to the former rendezvous, for that the access and retreat were become too visible from felling the woods in the shrubbery: it relates her repairing to different outbuildings in order to ascertain whether a meeting might be accomplished in them; but complains that the barn is locked, and that the other hovels are unfit for any one to enter: he is desired to devise a scheme to meet; and he is told that in the day-time there is no possibility of escaping detection from the curiosity of servants and other prying persons; that she has a difficulty in inviting the danger of a night's attempt, but thinks that from the hall window there is no doubt of admitting him quietly for an hour or two.

In this letter there is one envelope dated in May, 1804, and which she says will speak for itself; and that I suppose it might do to persons who understood the transactions to which it alludes; but to be sure there is nothing in that [23] letter itself which does shew how it comes to be there with that particular date affixed to it. The other is sealed up intelligence to explain to him what it is essential for him to know. To be sure that is a letter which speaks for itself without reference to any external transactions. It is a letter which from public decency was not permitted to be read in this Court; but I feel that my public duty calls upon me to state so much as this—that it does contain an account of the times in which the periodical indisposition of the sex visits her, and when she says she must avoid intercourse: she promises to mark the period in future so that he may always compute it without difficulty; and she desires him to consider this communication as most indulgent, as she certainly had a right to do, and most explicit.

This is a letter which I think requires no comment whatever. It is admitted that

it does contain a declaration of violent attachment on the part of the writer; but it is said that there is no proof of any adultery having been committed between them. I confess I cannot help considering such a letter in a very different light, and that it does connect itself with a direct acknowledgment of facts of adultery having passed between these parties. There are only three possible suppositions in which such a letter as this can be conceived to have dropped from the pen of the writer. One of those is that it may have been written by a woman in a state of absolute insanity, with a mind disordered, and indulging itself with vicious images that have no connexion with any reality and fact; that is a possible case undoubtedly. It is another possible case that such a letter might be written by a woman with the malicious intent of defaming [24] the character of a virtuous man to whom such letter might appear to be addressed, but who had no such connexion whatever as those letters import: that is a possible case. But that either of these suppositions exist in the present case is out of all question; nobody imputes that this lady had any thing in the nature of lunacy; nobody imputes that she had any malicious design against the reputation of this gentleman who was the object of her ardent attachment.

Then what is the only other supposition to which the Court can allude? That it was written by a woman, and could be written by no other than by a woman, who had made a surrender of her body, her mind, and every thing which belonged to either the one or the other, to the person to whom this letter was addressed. Here is an act, and a proximate act it is undoubtedly, as connected with something which had passed between the parties before; because it is impossible to conceive that a woman would write such a letter as this, saving in one of the two possible cases which I have excluded from all consideration as applying to the present case. It is quite impossible to conceive that such a letter could be written by a woman who had not, in the most unreserved manner, submitted her person to him to whom it is written. It appears a matter of a stronger nature than that which we hold here to be a direct proof of adultery, the having gone to a brothel with a person. The act of going to a house of ill-fame is characterized by our old saying that people do not go there to say their paternoster: that it is impossible they can have gone there for any but improper purposes; and that is universally held a proof of adultery. But many persons would [25] go to a brothel who could not bring themselves up to the writing a letter of this kind. It is a letter that proves, in the most striking and conclusive manner, not only that the parties must be contriving for future indulgences, but that there had been that sort of intercourse which alone could have produced such a familiarity, and which alone could have emboldened a woman to describe, in terms which I do not repeat, that which certainly shewed beyond all question the fact that these parties had been so connected together.

After such letters as these are proved, the proof of facts might appear superfluous: and I think it is super-abundant in this case. There are meetings, both prior and subsequent to the date of these letters, in which the commission of adulterous acts must be inferred. I do not say that from every one of these acts I would draw the same conclusions in the case of all individuals to whom no such history applied; but that is not the way in which evidence is to be considered. Other facts and other circumstances are explanatory of meetings which are doubtful in their own nature, and capable of candid interpretations: they define appearances that might otherwise be ambiguous. These letters are a gloss or a running comment, I think, upon the text which occurs in the history of these parties: they are decisive of the terms upon which these parties met: and that the writer of these letters could meet privately, and out of the reach of observation, the person to whom they are addressed, without any view to the purposes these letters express, is impossible to be conceived; and I think it is not less impossible that they should have met in the manner described without his [26] having concurred in effecting those purposes: for though these letters never reached Mr. Barker, I cannot but think that the probability highly is that verbal communications were in the opportunities which afterwards presented themselves, made upon this subject, agreeably, as she says, to his directions, and agreeably to her inclination to give the communication that was wanted.

The first fact that occurred to which I shall advert is one that happened at Kingston House, and which is spoken to by Hastings, upon the 7th article. It appears that Mr. Loveden, who is a member of parliament, had left the country in the month of February, 1807, and went to reside at a house at Knightsbridge called Kingston

House, where he continued 'till about the 4th of July in that year, when the family returned to Buscot: that Mr. Barker dined twice while Mr. Loveden was there: that in the month of May Mr. Loveden went down to Shaftsbury, on the occasion of the general election which took place at that time, and that Mr. Barker came twice to Kingston House during Mr. Loveden's absence: that on the first of such visits Mr. Barker came with a gentleman, who remained for some time in a room in front of the house, and Mr. Barker and Mrs. Loveden remained alone together for about three quarters of an hour, without being seen by the witness; and that he then went away, and let himself out. It is said, cannot people go into decent rooms in a decent house without being suspected? Yes, certainly, if they are decent persons; but if such an intercourse is proved between them as is established by the fact of this correspondence, and by the other facts to which I have alluded, [27] I say the fact of such parties being close together for such a length of time, and unobserved, warrants the conclusion that they have committed the criminal act.

But, however, the next fact is of a stronger kind. It appears that he then came alone: "that Mrs. Stephens was with Mrs. Loveden at the time, and was sitting with her in the breakfast-parlour, in which she usually received other visitors: that Mr. Barker then rang the bell; and just as the deponent had let him in, and was going to announce him, and to shew him up stairs, she came running down stairs, having seen him from the breakfast-room window, as the deponent supposes, met him in the hall, shook him by the hand, and took him into the green dining-room, which was a back room on the ground floor, with windows opening into and communicating with the garden by five steps; in which room there is an inner room, which had formerly been used as a bedroom, and which was a dark room, having no other than a borrowed light from a water-closet within; so that though the workmen might be employed in the garden at such time, Mrs. Loveden and Mr. Barker might have retired to such room, and been out of the sight of any persons; and after they had been together and alone in the green dining-room about an hour, and 'till the men employed in the garden had gone to their dinner, they then went into the garden and walked together there for about half an hour; and then Mr. Barker let himself out as before." I confess, after what has been proved of these parties, this fact, that she quitted the company in which she was, that she did not introduce Mr. Barker as a [28] visitor where all other visitors were received, that she retired with him into a room communicating immediately with a dark room, and that they there staid alone together in a situation that afforded such facilities; this does impress upon my mind a very strong conclusion that those facilities were not thrown away upon these parties.

The next fact to which I shall advert is that which is spoken to by Major, upon the 9th article, as having passed in the barouche: and what he says is this, "She was much in the habit," he states, "of going about in her carriage in the streets, and meeting Mr. Barker there; and that he does not remember ever to have seen Mr. Barker get into the said carriage when they have so met in the street, but once, and that was in very warm weather in the said year 1807: that they met in Bond Street, where Mrs. Loveden was stopping in her carriage at a chemist's shop door; that he came up to the carriage and desired the deponent to open the same, which he accordingly did, and Mr. Barker then got into the carriage; and she desired to be driven to a house, a dress or cotton shop, about two doors beyond Temple Bar, on the right hand side of the way going from Bond Street; that they were driven there, that she got out of her carriage, went into the shop for a few minutes and then returned to her carriage to Mr. Barker, and ordered the same to be driven to Hyde Park corner, where Mr. Barker got out of the carriage. That it had been customary for her to have her carriage, which was a barouche, open when she rode out, which she generally did in company with Miss Love-[29]-den; but that on this day, which was a very warm day, it was kept close or shut up: that when he, the deponent, got down from behind the carriage to open the door to let Mrs. Loveden out at Temple Bar, he observed that the sun-blinds were all drawn down, and he observed the same when he got down to let Mr. Barker out of the carriage at Hyde Park corner; and he then observed that the said Mr. Barker seemed much confused, looked about him very much, desired the deponent to make haste: and Mrs. Loveden appeared much heated and very red, that her hair was more tumbled and disordered than ever he had before observed it. From which he concludes"—a conclusion in which I am disposed to concur from what I have seen of the nature of the intercourse which is proved to

have subsisted between these parties—"and he has not the least doubt," he says, "and he in his conscience believes, that whilst they were in this carriage they had carnal use and knowledge of each other's bodies."

The next fact which I shall notice is that which occurs in the deposition of M'Nicol. He says "that one day, happening on a Sunday, in the summer of 1807, just after the family had returned from London to Buscot Park, Mrs. Loveden having remained at home whilst her husband and his daughter and the mother of Mrs. Loveden had gone to church, he happening to observe that the windows of the green-house or conservatory, near the centre thereof, which he had himself opened in the morning to give air to the exotic plants, were shut (it being then about one o'clock), and likewise that the inside [30] shutters to such windows, which were made to prevent the effects of the frost and of inclement seasons injuring the plants, were also shut-to, he went in at one of the windows which fronts the west of the house, conceiving that some of the persons about the grounds had shut the same through mistake, and on his entering the said green-house he was very much surprised to find Mr. Barker and Mrs. Loveden standing close together between the plants and the back wall of the green-house, directly opposite the windows which were so as aforesaid shut up; that on seeing the deponent enter, they stood close together quite still as if desirous of avoiding being seen, and the deponent then opened the shutters and windows and walked away through one of the windows of the said green-house, and went through the side door through the colonnade that communicates with the house, and immediately afterwards met Mr. Loveden's carriage in the south front of the house coming from church; and having seen Mr. Loveden and his daughter and Mrs. Lintall go into the house, he was desirous of seeing which way Mr. Barker would make his escape from the house, as he had not a doubt he had been secretly and clandestinely with Mrs. Loveden that morning in the green-house; and for that purpose he went round the flower-garden, in order to see whether Mr. Barker would go out at the back door thereof, as he found he did not come out at the front door; and just when the deponent had got half way round to the back door he met Mr. Barker, and saw him pass the south front of the house in haste; and [31] though it was a very warm day, he had a great coat on buttoned round him, and stooped to avoid being observed who it was; that he looked after him to see whether he had a servant or a horse waiting for him, or whether he went towards the stable; but he passed the road leading to the stable." He says again "that he had not a doubt"—and I confess it does not appear to me to be in the least degree an uncharitable conclusion—"he had not a doubt, but does verily believe, that whilst Mr. Barker and Mrs. Loveden were as aforesaid in the conservatory or green-house on the said Sunday forenoon, they then and there had the carnal use and knowledge of each other's bodies." It is said they were fond of plants; and she is proved particularly to have been very fond of dressing up his room with flowers, and very fond of going to nursery gardens: but I should think they would not go and shut up the windows and shutters of a green-house in order to speculate on plants: that is not the way in which their attention would be exercised; nor can I conceive, after such a circumstance, that that was the object which had brought these persons together in a situation like this.

The next witness to whom I am under the necessity of adverting is Mary Day, or the 5th article. The account spoken to by M'Nicol passed in the year 1807, I think. The facts spoken to by this witness passed in the Christmas of that year; for it appears that Mr. Barker was in the habit of paying annual visits; she describes Mrs. Loveden's general conduct in common with all the other witnesses; and it would really be nothing more than [32] repetition of the depositions if I were to cite the evidence of all the witnesses that vouch the facts, that they were fond of being together in the rooms of the house. She says, "particularly she remembers that on one morning about nine o'clock, happening a few days after Mr. Barker had come on such visit, and just before Mrs. Loveden had gone down to breakfast, the deponent having gone up stairs to a closet she had on the same floor with the bed-rooms, and intending to go into such of the rooms as had been left by the persons who had slept therein, and among them intending to go to Mr. Barker's bed-room, to make his bed and put the room in order, if he had then left the same; she on going to his bed-room door found he had not left his room, but heard him talk to some person then in his bed-room with him, who the deponent then supposed was his own man-servant: but she immediately found her mistake in that respect; for the man was below, and came

up to his room door with a trunk which had just come by the coach or some other conveyance; and making a noise by bringing the trunk up and putting it down at the door of his master's bed-room, she heard the door locked within, and the man-servant went away; and the deponent then well knew that the voice she heard was the voice of Mrs. Loveden; and from such circumstances she is certain that Mrs. Loveden was then in the said bed-room," that is to say, in the bed-room of this gentleman with the door locked. She says that she considered this as highly improper; but she cannot take upon herself to say whether the act of adultery was committed. She adhered to the strict [33] rule of evidence that, unless she sees the fact, she will not take upon herself to warrant it.

She says, further, "That on this Christmas visit, Mrs. Loveden, and the company then in the house, having gone up stairs for the purpose of preparing or dressing for dinner, the deponent having gone up stairs on the bed-room floor to her aforesaid closet, between the rooms where Mr. and Mrs. Loveden slept and that where Mr. Barker then slept, it being then near dinner-time and getting quite dusk, but quite light enough to see any person in the passage leading to the bed-rooms, she being then in the closet, and having the door thereof a little open, was thereby enabled to see to the end of the passage, and particularly his bed-room door, without being herself seen therefrom, for she had no light with her; and she then observed Mr. Barker come out of his bed-room, which was nearer the top of the stairs than Mrs. Loveden's was, and look all around as if to see if any person was within sight, and then look at the clock a little, and immediately afterwards saw him go down stairs, and a few minutes after the deponent heard a footstep come out of Mr. Barker's bed-room, and down the two steps which led therefrom, and along the passage past the closet where the deponent was; and she having the door open a little a-jar, plainly saw that it was Mrs. Loveden who came out of the said Mr. Barker's bed-room, and saw her go into her own bed-room—for she was obliged to pass the closet in going thereto—and she clearly and distinctly saw it was her said mistress; and her conduct was so extremely suspicious that, upon [34] this occasion, she admits that she cannot but believe that they had at such time been criminally connected together. She says that upon several other occasions she has known Mrs. Loveden and Mr. Barker to be alone together unknown to Mr. Loveden during Mr. Barker's visits at Buscot Park, particularly in a room on the bed-room floor, which was Mrs. Loveden's dressing-room, but was used as a sitting-room for ladies only, and was a room where Mrs. Loveden used to write in, and where gentlemen were not admitted."

Elizabeth Haynes, who was her own woman, speaks to particulars of a similar nature. She observes that she was particular in dressing herself when this gentleman was expected, more than at other times: in seeing that his bed-room was put in proper order, and his fire kept up, which she never troubled herself about with other gentlemen; and that from these and other circumstances she was led to suspect they did conceive a criminal passion for each other. Then she goes on to say, "That she had often reason to believe that Mrs. Loveden went in a secret manner into the bed-room of Mr. Barker while he was there, and remained alone with him for some time; for she remarked of late years their connexion became more unreserved, particularly while Mr. Barker was on a visit there at Christmas 1807, and for a fortnight or three weeks that Mrs. Loveden used frequently to go up stairs to dress before the usual time for the afternoon; and when she went out of her room to go down stairs, she would not allow the deponent to light her down, but said she would light herself to the top of the [35] stairs, and would put the candle in the room at the top of such stairs, called her dressing-room, and that the deponent might afterwards fetch it away; that she then supposed that Mrs. Loveden used to go into Mr. Barker's room frequently whilst he was so there dressing; and she was confirmed in such her suspicions from the circumstance of having, on one of the afternoons when Mrs. Loveden had dressed for dinner rather earlier than usual, and had gone out of her bed-room for the ostensible purpose of going down stairs, heard Mr. Barker's bed-room door open, and just about the same time that Mrs. Loveden could have got there; and that after remaining in Mrs. Loveden's room about ten minutes without hearing the said door open again, having then gone into a closet which was appropriated to the deponent's own use, and is in the bed-room passage opposite the housemaid's closet, from the door of which she could see the steps leading to the recess from which Mr. Barker's bed-room door opened, she very soon afterwards saw him come out of the said bed-room down the said

steps in his dressing-gown, and walk to the clock directly opposite; and having first held the candle up to the clock, and looked at it, he then turned and looked both ways down the passage, as if to take a survey whether any person was within view: seeing the deponent, he returned up the steps again, as if to go into his bed-room; that she then went out of the door leading from the bed-room passage to the back stairs, and went so far up the back stairs as to enable her to see through a partition light over the back stairs door into the [36] passage; and after remaining there about five minutes, or not quite so much, she saw the said Mrs. Loveden come down the said steps leading from Mr. Barker's bed-room without any light, and go down the best stairs; so that she is certain Mrs. Loveden had, at the time deposed to, been in Mr. Barker's bed-room whilst he remained therein, and that they were there alone together."

There is another fact she remembers: "That on another occasion, happening one afternoon whilst this visit took place, Mrs. Loveden having gone up stairs to dress for dinner, and Mr. Barker having gone into his room, she ordered her, Haynes, to wait a little, for that she had forgot something and must go down stairs, or to that effect; and she then took a light in her hand, and went out of her bed-room, and pulled her door to after her, and went along the passage, as if to go down stairs; but the deponent having immediately opened the door again, heard Mrs. Loveden go up the steps leading to Mr. Barker's bed-room, wherein he then was; and the deponent being curious to see her come out of Mr. Barker's room again, went up the aforesaid back stairs again, high enough to see the passage of the bed-room floor through the partition light before described; and in a quarter of an hour from the time Mrs. Loveden so went into the bed-room she sees from the back stairs the said Mrs. Loveden come down the steps leading from Mr. Barker's room, with the candle and candlestick in her hand, but with the candle extinguished, and saw her go from thence into her own bed-room."

[37] There is another fact of the like kind that she mentions: "That one morning during Mr. Barker's visit at Buscot, at this Christmas time, she was employed in her usual way, being at that time putting away some things in her aforesaid closet, and that she saw Mrs. Loveden in her riding-habit, which she frequently wore, coming down the steps from Mr. Barker's room, where he then was; and she, observing the deponent, turned back, and went into another room in the recess to which the steps led, and which was next to Mr. Barker's room, as if she had forgot something, by way of excuse, as it struck the deponent, for her coming down those steps; that she opened a drawer in such room, and took out a port-folio with some papers therein, and gave it the deponent, desiring her to put it in another closet she had the care of; that she seemed very much confused, and that she very soon afterwards saw Mr. Barker come out of his bed-room and go down stairs; and she has not a doubt that they had been together and alone in his bed-room, and that they had again committed adultery together."

I should exhaust my own strength as well as the patience of those who hear me if I were to go into an enumeration of all the facts that are proved to have taken place as between these two persons. There are two or three of them which I am under the necessity of noticing, and those are the facts which occurred upon the 8th of August, 1808, and which are spoken to by two or three witnesses, who in all material facts perfectly corroborate each other. There are some little differences, but which, in my opinion, give a support to evidence, [38] and do not break in upon it. The witnesses, to whom I now refer, are Hastings, Calcutt the housekeeper, who had lived long in Mr. Loveden's family, and Haynes, her own maid. The person who gives the most particular account of these circumstances is a man who seems to have behaved with great zeal for his master's honour, with fidelity, and with considerable prudence and forbearance, and that is Warren Hastings. The account which he gives is this. He says "it was Mr. Loveden's custom, for many years, to go to Abingdon on the 8th of August, to attend a school-meeting or mayor's feast, and to send two bucks and dine there; and as it was seventeen miles from Buscot Park, he used generally to sleep there, and he did not return till the following day: that it was very well known to his wife that such was his intention on the 8th of August. That two days previous to that day the deponent had entertained a strong suspicion that it was the purpose of Mrs. Loveden to introduce Mr. Barker into the house on the night during which Mr. Loveden was certainly to be absent; for he says that on the

6th of the month, two days before, she had called to him over the baluster that she wanted some oil, and that he the deponent gave some in a table-spoon to James Dawson, then Mrs. Lintall's servant, who took the same to her; and at the time he gave it to James Dawson he told Dawson that he knew what she wanted the oil for, and that she had got some mischief in her head; for his suspicions had been awakened on the morning of the 28th of July, from the circumstance of having observed a noise made in opening the billiard-[39]-room door, which stuck at the top, and after listening a little he heard the door shut again and locked; and what more particularly awakened his suspicions, and from which he believed that Mrs. Loveden had had Mr. Barker in the house that night, was that she had a carpenter's man sent for from Farringdon on the 30th of July, who came and by her own directions planed the top of the billiard-room door and made it go easy; and from those circumstances he strongly suspected that she meant to use this oil for the purpose of oiling the doors leading from the billiard-room to the conservatory or green-house, so that she might introduce Mr. Barker into the house unheard by any person. That accordingly a few minutes after, he went and examined all the doors leading from the conservatory into the vestibule, through a little room into Mr. Loveden's dressing-room, from thence into the vestibule, and from thence into the billiard-room, and found them every one oiled, and he knew that they had not been oiled before that time. He says that the next day she asked for more oil, which she applied to all the doors leading up to her own bed-room." From these circumstances and from another circumstance which he mentions, "that her maid communicated to him that her mistress had made rather unusual preparations in her bed-room, by getting lavender, hyacinth roots, roses, and other flowers, of which Mr. Barker was very fond; the deponent was pretty certain that that was the night Mrs. Loveden intended to get Mr. Barker into the house through the conservatory, and from thence by the doors before described; and they agreed [40] to watch together in order to detect it. Arrangements were accordingly made, and the housekeeper and the lady's maid, among others, were to take their stations for the purpose of observation. He states that about eleven o'clock, Mrs. Loveden having rung the bell to take away the supper things, he went into the library for that purpose, and found that Mrs. Loveden had then gone up to her bed-room; and after having taken the supper things away he went down stairs again, and sat within his own pantry door, having concealed his candle, for the purpose of seeing Mrs. Loveden let Mr. Barker into the house, and then they were to surprise him. That that night was quite a moonlight night, being the full of the moon, and that Mrs. Loveden could from the windows of her bed-room plainly see any person approach the house. That about half past eleven o'clock Mrs. Loveden having come out of her bed-room into the passage, and the female servants having discovered themselves too soon, and having been asked by their mistress what they were doing there, for they were looking through the baluster of the attic story, they told her they were sure there was a man in the house, and desired the witness to come up stairs and search the house: he went up stairs to the bed-room floor, having first locked the back stairs door to prevent the escape of any one that way, and he then passed Mrs. Loveden, who was in her bed-gown and night-cap, and leaning with her face in her hands over the baluster; that he searched all the rooms on the best bed-room floor but found no person therein. There was a candle which had been [41] lighted in a room above, which these witnesses supposed to be a signal to Mr. Barker, lighted up by Mrs. Loveden to invite him to the house on some agreement they had entered into before; but this light was extinguished by the wind." He says "that he went down stairs, and that he examined and found nobody; that he then went out into the plantations, being confident that Mr. Barker had either approached or entered the house though he had not seen him, satisfied that these arrangements which had been made were not made for nothing, but that he was to be found in the neighbourhood if not in the house. He went into the plantations, where he was for a considerable time. Mrs. Loveden, he says, appeared to be greatly agitated when he went up to search the rooms, and he also saw her looking out of her bed-room window, which he concluded was a signal for Mr. Barker to keep out of sight. After remaining in the grounds for some time, he came back again to the house, but he went out again some time afterwards armed with a pistol; and then being alarmed by the noise of some person jumping off the top of the privy or the shed adjoining to it, he instantly made for the spot, and there he immediately found the gentleman he was in search of, Mr. Barker. He told him,

you are the man I am in search of: and the deponent then ordered him immediately off the premises, and said he was astonished at his boldness in attempting to enter the house at such a time; and Mr. Barker seeing the deponent was in a great passion, begged him not to be so loud, and entreated the deponent to let him go under Mrs. [42] Loveden's window just to speak to her by way of explaining himself, and said that he should hear every word he had to say: he refused his request and he then again repeated it: he was at last induced to consent that he might speak to Mrs. Loveden at her window: he walked with him along part of the front of the house; but before they got under the window Mrs. Loveden had shut her shutters close," having before been from her windows eagerly observing this witness's motions. "Mr. Barker declined going on, saying that the servants might be on the watch and might hear what he had to say; and Mr. Barker then said he wished to speak to the deponent, and drew him for that purpose under the elm trees, where they remained in conversation together near three quarters of an hour. Hastings reproached Mr. Barker with ingratitude to Mr. Loveden, in coming to disturb his peace of mind and the peace of his family, who had always treated him in the most friendly manner; and then told him his conduct towards Mrs. Loveden on the preceding Christmas had been noticed by all the company; which he said he knew: and the deponent added that the under-gamekeeper had seen him in a familiar or unbecoming situation with Mrs. Loveden, and had talked of it all over the country; and that another person, Miller, a horse-dealer, had mentioned it at the public markets, and so on. He admitted that he had been so seen; and the deponent told him he knew that his own father (that is Mr. Barker, sen.) had given orders that he should not visit the family any more; and added that on account of such the conduct of Mrs. Loveden and [43] Mr. Barker to each other, neither his father nor his family had for some time visited at Buscot House, as they had before done when on a friendly intimacy. Mr. Barker admitted the truth of all he said; and Hastings told him that pursuing that line of conduct would be the ruin of the peace of mind of Mrs. Loveden and her mother and family. He asked him how he dared approach the house, and for what purpose he came. He made some excuse that he merely wanted to speak to Mrs. Loveden to caution her not to write to him any more: he said that the story would not do. The conversation proceeded: and at last he promised him (the deponent having positively declared he would inform Mr. Loveden of the discovery he had made if he, Mr. Barker, ever came to the house any more) that he would pledge himself he never would come again. He shook the deponent by the hand, and accordingly gave his word of honour that he never more would come to the house; soon after which they parted." It appeared that this man kept his word; for when he came into the house he told the other servants, who were in the confederacy with him to discover Mr. Barker, that he had never seen him. They, however, had their suspicions; for it appears from the evidence of Monk and others that they suspected Hastings had actually surprised Mr. Barker in the garden.

The next morning Rachael Monk came to him in his bed-room and told him Mrs. Loveden wished to speak to him. On his entering her dressing-room, she first desired him to shut the room-door. He remonstrated against this. She said she had been [44] wrong in sending for him so early, and by the house-maid who knew nothing of what had passed on the preceding night. He says "that she then came close to the deponent, and crying very much said, O Hastings, what a miserable night I have passed! I am a ruined woman for ever. Upon which the deponent told her that her conduct had been very imprudent; that he had been watching for three nights and that he knew Mr. Barker was coming, and that she was to have let him in from the conservatory, through the dressing-room and the billiard-room, and that she had oiled the locks and hinges of the doors of those rooms leading to the conservatory to prevent their making a noise; and he also spoke of the wax candle which she had burning on the hearth of her said dressing-room; and said he knew she was first to have taken Mr. Barker into such dressing-room, and afterwards into her bed-room. She confessed to the deponent she had oiled the locks of the doors, that she had intended to have introduced Mr. Barker into the house, and into the room in the way above mentioned but that she would never do so again, and would keep no correspondence with him and begged and prayed of the deponent that he would conceal from her husband and every person what had so passed the preceding night: which he did."

Here is the direct acknowledgment of both parties, at least going to the extent of

nocturnal and clandestine meetings; and from the other facts there can be no doubt whatever of the intention of such a meeting as this. Is not the proof of a young man being privately introduced [45] into the house evidence of the fact of adultery passing? It is said in this case it was prevented. And so it might be. But if it shall appear that other clandestine and nocturnal meetings are contrived, and did actually take place, there can be no doubt what conclusion in reason and law and justice ought to follow from the facts here stated; namely, the concert of the parties and the fact that took place in consequence of this concert. It does appear certainly that for some time after this great caution was observed. I think nothing further appears during that year, except the writing these letters, which took place in the November following. In these letters she laments the difficulties under which their connexion was laid by the alteration of the grounds, which had made every part of them visible to every eye; that it was impossible, therefore, for them to take advantage of the plantations and shrubberies; that the hovels were unfit to enter, and the barns kept locked: but she intimates in that letter that there was a possibility of his being admitted at the hall window.

The occurrence next referred to is that which took place in the month of March, 1809. Mr. Loveden was in the habit of going to visit his son Mr. Pryse at Woodstock. Mrs. Loveden declined paying this visit in company with him: and then the facts occurred which led to the open disclosure of all this intercourse, which had now been going on, certainly for a considerable number of years, utterly unknown to the master of this family. The person to whose evidence I shall principally resort in this case is Hastings—he being corroborated as he is by all the other witnesses, particularly by [46] Haynes and by Calcutt, in the most exact manner. He says that upon the 8th of March Mr. Loveden went to his son-in-law's; that she declined the invitation given to her to accompany her husband; that the day after Mr. Loveden set off for Woodstock, Mrs. Loveden dressed herself in a most elegant manner, and more so than she was accustomed to do: that is proved also by the other witnesses; and that she used to dizen and adorn herself; and that she was very much in the habit of doing so while her husband was absent: and it appears that attentions to her person were very much recommended to her by Mr. Barker, so far as one can judge from the letters which are produced. He says that Elizabeth Haynes having communicated to him that Mr. Barker had been introduced into the house secretly, and had slept with Mrs. Loveden on the nights of Wednesday and Thursday the 8th and 9th; and Hannah Calcutt having locked all the doors on the ground-floor, they were at a loss to know how he could possibly have got into the house. The suspicion of this witness being, that it must have been by means of the hall window from the steps on the outside, and that Mrs. Loveden concealed him in a room called the study, upon the ground-floor; the maids to whom he communicated this suspicion told him that it was quite impossible, for that nobody but Mr. Loveden was thought to have a key of the study. He, however, was satisfied that must have been the place in which she concealed him, and that she must have a key of the study for that purpose. That she had a key is clear; for it appears that, on a communication subsequently made to her of the discovery, she delivered up the [47] key to Mr. Pryse in answer to his demand. He determined to watch in the butler's pantry on the Friday night, being the 10th of the month of March, to discover if Mr. Barker or any person was let into the house by the hall window, which he could plainly hear from that place; that he accordingly took his stand there about six o'clock in the evening of this day; that he continued there 'till about half past nine, except when he went to answer the bell in the library; that whilst he was on the watch just at nine o'clock, the kitchen-maid having opened the deponent's pantry door where he was sitting, he at that instant saw Mrs. Loveden run down the vestibule stairs leading to the billiard-room and unlock the billiard-room door, which is on the basement story; and after having heard her open a book-case therein she immediately ran up stairs; he saw her run across the great hall, and open the shutters and throw up the sash of the east window of the said hall; that he then plainly heard some person alight from the said hall window on the floor, and instantly heard Mrs. Loveden and the person whom she had so let in walk through the breakfast room to the study door, which he then heard unlocked and two persons go therein. He says that his bed-room is under part of this study, and in order that he might with greater certainty hear what passed in the study over head, he got upon the table so as to raise himself nearer to the floor; that he heard a person, who he was

sure was Mrs. Loveden, go out of the study and lock the door thereof on the outside in the breakfast room, and go from thence into the library and shut the door thereof; and after that he plainly heard a person move over [48] head in the study; and the library bell having then rung, he took up a glass of wine: that he took the opportunity of looking through the key-hole of the study to see if there was a light in the study; but he was prevented from so doing by the key-hole being stopped in the inside by paper. He says that he then opened the mahogany door which leads into the hall from the grand stair-case, by means of which being left open the passage through the house from the stair-case hall is lighted by a large reflecting lamp in the stair-case hall, the said door being always left open for such purpose: he had observed it had been shut once or twice that night by some person, although he had as often set it open again: that he then went down stairs, told the housekeeper and the other persons who were on the watch that he was very certain a person was there, but that they would not believe him; that they said it was quite impossible—he, however, said he was confident of it: that he saw the mahogany door which he had opened was again shut. That he took up the supper to Mrs. Loveden about ten o'clock; that he then found the mahogany door again set open; from which circumstance, and from afterwards having listened in his bed-room, he verily believes that Mrs. Loveden had taken such person from the study up stairs into her own bed-room; and he is confirmed in that belief by his having heard two persons in Mrs. Loveden's bed-room after she had gone up stairs to bed about eleven o'clock at night: and he is very certain that at that time he heard the conversation of two persons in her bed-room. Haynes was below stairs, because they had been both together [49] there; and he says that Mrs. Loveden having rung her bell, Haynes, who was below stairs in the house-keeper's room, went up to answer the same; and before she could get up stairs he heard Mrs. Loveden run across her bed-room several times in great haste. He sat up watching till two o'clock, but saw nothing further.

The next witness who comes in here in the order of time of the transaction is Haynes, the maid: and she says that her mistress had been dressed much more gaily that day than at other times; that she went to bed much earlier than she had been accustomed to do; that when she attended to put her to-bed as usual she observed that Mrs. Loveden seemed much confused and acted strangely; that instead of lying on her own side of the bed when she got therein, as she used to do, she lay quite in the middle of the bed, as if to tumble it more than usual, and directed the deponent to draw the curtains close to the feet of the bed, which she never before had done; from which she had her suspicions that he was to be admitted on these nights; and that they having communicated their observations to each other, that she had had her bed-room put in more order—had removed several useless things—had got flowers in her room, and that she appeared confused and agitated, and that she, the witness, being informed that night by Hastings that he had heard Mrs. Loveden let Mr. Barker into the study about nine o'clock at night, and that he could hear him move therein; she was led more particularly to notice the conduct of Mrs. Loveden when she attended as usual to put her to-bed. That about eleven o'clock Mrs. Loveden having got up to her bed-room and rung her [50] bell, she attended her in her bed-room to put her to-bed, and during the time she was so doing she observed Mrs. Loveden to be extremely flurried and confused; that she kept her eyes upon the deponent whenever she moved, and particularly when she went near the windows, the curtains of which were drawn, which the deponent then thought was very suspicious: and on the following morning, being Saturday, the 11th of the month, when the deponent went at the usual hour she observed that she looked very much confused, and she particularly noticed that the bed was extremely tumbled, and had the appearance of two persons having lain therein on the preceding night.

On the next morning it appears that Hastings being fully satisfied that there was a person in the study, who had returned by that time to it, she being seen carrying breakfast things into that study, and it being cold, and it therefore being probable there would be some fire, he was curious to observe whether there would be any smoke issuing out of the study chimney: he went and saw there was and he then went and made a demand of the key from Mrs. Loveden. She resisted—he said he was sure there was a fire in the room—she said there was none—he said he was certain there was—she said if there was it could do no mischief, that it was so strongly divided from the other rooms that no injury could ensue—she affected to look through the key-hole and

ridiculed their fears. He said it was impossible she should see any thing because the key-hole was stopped: and at last he insisted on breaking open the door, for that the party of whom he was in quest was there. She resisted this a good while; [51] and he was after a long time persuaded to take another course; namely, to call in the assistance of some carpenters who were at work: they opened the windows of that room, and therein was found Mr. Barker endeavouring to conceal himself by standing up as close as he could to the wall. Upon that the disclosure took full effect—the door was afterwards opened and conversations passed, in which there was a full admission that he had come into the house the night before and that he had been in the house, and was so introduced by this lady. A servant was immediately sent off with a communication to Mr. Pryse at Woodstock, who communicated it afterwards to the husband: and steps have been taken since which bring this cause for a separation before this Court.

Upon the whole of this evidence the difficulty which has really occurred to me is to conceive how there can be a doubt of the fact—it appears to me hardly possible—it is evidence, so far as I see, that is hardly capable of explanation or observation; and it is in itself so direct and consistent, that no observation can apply it more closely to the conviction of any man's mind that has occasion to peruse it.

It has been said that either there has been no verdict in this case, or that if an action was brought it must be presumed that the verdict was unfavourable to Mr. Loveden; because it is not, as usual, noticed in the proceedings in this cause. Certainly it is usual to plead the verdict where damages have been obtained against the adulterer; but it will be recollected that the introduction of [52] verdicts was long resisted in this Court, and it is now perfectly understood that they are introduced merely as circumstances of evidence; and that a party does not stand upon a higher footing in a case here agitated between different parties and upon other evidence. Judicially I am not informed whether any verdict of any kind was obtained; but supposing the fact to be as understood, that an action was brought, and that there was a failure in that action, that is not a matter from which any thing can be drawn to the prejudice of the evidence that has been adduced here. What produced the failure there it is not for me to speculate upon—whether it arose from any negligence on the part of Mr. Loveden or of his agents—whether from any undue confidence in the sufficiency of the evidence which he there adduced—whether much of the evidence which is here adduced might be admissible there.

The letters, I presume, which are demonstration against this lady here, would not be in their present form evidence against him, for they are letters which he never received. Whether, if they had been actually received by Mr. Barker, and he after the receipt of such letters as these, had continued that sort of intercourse with this lady, which is here proved to have existed, the receipt of such letters, coupled with his conduct after the receipt of them, might not have been admitted consistently with the rules by which the wisdom of those courts regulates the admission of evidence, it is not for me to say. But, however, that case failed. It is a matter, however, that is utterly out of the view of this [53] Court, and out of all further explanation here, and nothing that passed there can affect the sufficiency of evidence here, if the evidence adduced here is sufficient to bring one's mind fairly to the conclusion; for it is upon the evidence adduced here that the cause must here be determined.

I am most clearly of opinion that the evidence adduced here must lead to the conclusion of adultery. I am most perfectly satisfied that repeated acts of adultery have been committed between these parties; that an adulterous connection subsisted between them for a very considerable length of time; and that Mr. Loveden is most unquestionably entitled to the sentence which he prays, of separation by reason of the repeated acts of adultery which have taken place.

Affirmed on appeal, 20th Feb., 1811.

[54] DALRYMPLE v. DALRYMPLE. 16th July, 1811.—Marriage, by contract without religious celebration, according to the law of Scotland, held to be valid: distinction, as to the state of one of the parties being an English officer on service in that country not sustained.

[Discussed, *Reg. v. Millis*, 1844, 10 Cl. & F. 534. Referred to, *Earl Nelson v. Lord Bridport*, 1845, 8 Beav. 537. Applied, *The Hallay*, 1867, L. R. 2 Adm. & Ec. 17; *Longworth v. Yelverton*, 1867, L. R. 1 Sc. App. 224; *Sottomayor v. De Barros*, 1877,

L. R. 2 P. D. 89. Explained, *In re Goodman's Trusts*, 1881, 17 Ch. D. 281. Referred to, *Mackonochie v. Lord Penzance*, 1881, 6 A. C. 447. Adopted, *The Dysart Peerage case*, 1881, 6 A. C. 515. Referred to, *Collins v. Collins*, 1884, 9 A. C. 230.]

This was a case of restitution of conjugal rights brought by the wife against the husband, in which the chief point in discussion was the validity of a Scotch marriage, per verba de præsenti, and without religious celebration: one of the parties being an English gentleman not otherwise resident in Scotland than as quartered with his regiment in that country.

Judgment—*Sir William Scott*. The facts of this case, which I shall enter upon without preface, are these: Mr. John William Henry Dalrymple is the son of a Scotch noble family; I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in His Majesty's Dragoon Guards, he went with his regiment to Scotland in the latter end of March or beginning of April, 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years and upwards: she was, however, young enough to excite a passion in his breast, and it appears that she made him a return of her affections: he visited frequently at her father's house in [55] Edinburgh, and at his seat in the country at a place called Braid. A paper without date, marked No. 1, is produced by her: it contains a mutual promise of marriage, and is superscribed "a sacred promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual declaration and acknowledgment of a marriage. A third paper, No. 10, produced by her, dated July 11, 1804, contains a renewed declaration of marriage made by him, and accompanied by a promise of acknowledging her the moment he has it in his power; and an engagement on her part that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope, inscribed "Sacred promises and engagements," and all the three papers are admitted or proved in the cause, to be of the handwriting of the parties, whose writing they purport to be.

It appears that Mr. Dalrymple had strong reasons for supposing that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss Gordon repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment and the intercourse founded upon it did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they were either already, or soon would be married. He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the [56] terms of husband and wife to himself and her. It appears that they were in the habit of having clandestine nocturnal interviews both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at Braid. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father who came down alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more which are not exhibited. No letters of Miss Gordon's addressed to him are produced; he has not produced them and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to

her on the eve of his departure, reinforces his injunctions of secrecy; and conjures her to withhold all credit from reports that might reach her [57] of any transfer of his affections to another: it likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the first commissioner of the Board of Transports. He continued abroad till May, 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history unknown to his father, and as it appears, to this lady. It is upon this occasion that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters which she might write either to the one or the other.

Mr. Hawkins executed this commission by intercepting many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three as he believes of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers which she denominates according to the style of the law of Scotland, her "marriage lines." She took no steps to enforce [58] her rights by any process of law. Upon the unlooked-for return of Mr. Dalrymple in the latter end of May, 1808, he immediately visited Mr. Hawkins who communicated what had passed by letter between himself and Miss Gordon; and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins however dismissed him with the most anxious advice to adhere to the connection he had formed; and by no means to attempt to involve any other female in the misery that must attend any new matrimonial connection. Within a very few days afterwards Mr. Dalrymple marries Miss Laura Manners in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid to enforce the performance of what she considers as a marriage contract.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland.* It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English Court, it must be adjudicated according to the principles of English law [59] applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage beyond that which it must unavoidably sustain in the inferior qualifications of the person, who has to decide upon it to the talents of the eminent men to whose judgment it would have been submitted in its more natural forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form if she had chosen to intervene; in substance she is; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question

* It has been deemed proper that this information with the evidence should accompany the report of this case: it has therefore been printed in the Appendix.

respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost is this, that the native forum [60] would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process to extract them from the person in whose possession they must be if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced the necessary conclusion is either that they do not exist, or that they contain nothing, which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say to all systems of law. They are circumstances which are not to be left entirely out of the consideration of the Court in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law which in both countries allows the minor to marry, attributes to him in a way which cannot be legally averred against upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, quoad hoc, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education, [61] it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party who has engaged under a proper knowledge, and sense of the obligation which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult living in a civil capacity, and with an established domicile in that country.

The marriage which is pleaded to be constituted by virtue of some or all of the facts of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction in any ignominious meaning of the word; for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favour as it does the most public. It depends likewise entirely upon the law of the country whether it is justly to be stiled an irregular marriage. In some countries one only form of contracting marriage is acknowledged as in our own, with the exception [62] of particular indulgences to persons of certain religious persuasions; saving those exceptions all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage being a contract is of course consensual (as is much insisted on, I observe, by some of the learned advocates), for it is of the essence of all contracts to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium,** the maxim

* D. lib. 50, tit. 17, l. 30, De Reg. Juris. D. lib. 35, tit. 1, l. 15. Huber, D. Nuptiis, p. 23, lib. 24, tit. 2, De Divortiis. Voet lib. 23, tit. 2, s. 2. Vinnius, lib. 1, tit. 9, s. 1. Cujac, in D. de Rit. Nup. v. 1, p. 800, in Cod. lib. 5, tit. 1, De Spons. c.

of the Roman civil law is, in truth, the maxim of all law upon the subject; for the concubitus may take place for the mere gratification of present appetite without a view to any thing further; but a marriage must be something [63] more; it must be an agreement of the parties looking to the consortium vitæ: *¹ an agreement indeed of parties capable of the concubitus, for though the concubitus itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate that the incapacity of either party to satisfy that duty nullifies the contract.†¹ Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind; it is the parent, not the child, of civil society, "principium urbis et quasi seminarium reipublicæ" (Cic. De Off. l. 17). In civil society it becomes a civil contract regulated and prescribed by law and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations it has had the sanctions of religion superadded: it then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that because it is the one therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance with respect both to its theological and its legal constitution; though it is not [64] unworthy of remark that amidst the manifold ritual provisions made by the divine lawgiver of the Jews for various offices and transactions of life there is no ceremony prescribed for the celebration of marriage. In the Christian Church marriage was elevated in a later age to the dignity of a sacrament in consequence of its divine institution and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which in spite of its absurd pretensions to a higher origin is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed it had the full essence of matrimony without the intervention of the priest; it had even in that state the character of a sacrament; *² for it is a misapprehension to suppose that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law till that council passed its decree for the reformation of marriage: the consent of two parties †² [65] expressed in words of present mutual acceptance constituted an actual and legal marriage technically known by the name of sponsalia per verba de præsenti, improperly enough, because sponsalia in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore Brower justly observes *jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit* (l. 1, c. 1, n. 6). The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed sponsalia per verba de futuro, a distinction of sponsalia not at all known to the Roman civil law (Swinburn, sect. 3, § 3). Different rules relative to their respective

Arrhis. Taylor's Civil Law, p. 301. Puffendorf, b. 6, c. 1, s. 14. Wood's Instit. book 1, chap. 1. 27, qu. 2, c. 1, Matrimonium. 27, qu. 2, c. 2, Sufficiat. 27, qu. 2, c. 5, Cum Initiatur. 27, qu. 2, c. 6, Conjuges. C. 25, Extra. de Spons. et Matrim. Huber, Eunom. Rom. ad lib. 23, Pand. Vind. s. 1. Hoppii, Commen. ad Ins. lib. 1, tit. 10. Wood's Instit. book 1, chap. 2, Ayl. Parerg. 362.

*¹ D. lib. 23, tit. 2, l. 1. Instit. lib. 1, tit. 9, s. 1.

†¹ C. 2 et 3, Extra. de Spons. et Matrim. Vinnius, lib. 1, tit. 9, s. 1. Burn's Eccles. Law, v. 2, p. 500, Ayl. Par. 226.

*² Sanchez, lib. 2, disp. 6, s. 2, et lib. 2, disp. 10, s. 2. Father Paul, p. 737. Pallavicini, lib. 23, chap. 8. Pothier, tit. 3, p. 290. 27, qu. 2, c. 10, omne.

†² C. 25 et c. 31, Extra. de Spons. et Matrim. C. 3, Extra. de Sponsa Duorum. Swinburn, sect. 4, s. 2, 3, 4, et sect. 18, s. 1. Brower, lib. 1, cap. 2, s. 8, 9, et cap. 22, s. 12, et cap. 27, s. 21.

effects in point of legal consequence applied to these three cases—of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the (Swinburn, sect. 17, § 1) ceremony was enjoined to be undergone as matter of order. In the promise or sponsalia de futuro nothing was presumed to be complete or consummate either in substance or ceremony. Mutual (c. 2, Extra. de Spons. et Matrim.) consent would release the parties from their engagement; and [66] one party without the consent of the other might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal * intercourse with each other the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse to convert the engagement into an irregular marriage and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the canon law the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in Brower and Swinburn and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage per verba de presenti, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise per verba de futuro looked to a future time; the marriage which it contemplated might perhaps never take place. It was (Swinburn, sect. 18, p. 1, et sect. 4, p. 2) defeasible in various ways; [67] and therefore consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted; it must be a (Swinburn, sect. 17, p. 11) promise cum copula that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the canon law, the known basis of the matrimonial law of Europe. At the Reformation this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony, but it likewise retained those rules of the canon law which had their foundation not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others that rule which held an irregular marriage, constituted per verba de presenti, not followed by any consummation shewn, valid to the full extent of voiding a subsequent regular marriage contracted with another person (Brower, l. 22, 12). A statute (32 Hen. 8, cap. 38, sec. 2) passed in the reign of Henry VIII. proves the fact by reciting that "Many persons after long continuance in matrimony without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and [68] lawful, and after the same matrimony solemnized, and consummate by carnal knowledge, have by an unjust law of the Bishop of Rome, upon pretence of a former contract made, and not consummate by carnal copulation, been divorced and separate," and then enacts "that marriages solemnized in the face of the Church and consummate with bodily knowledge shall be deemed good, notwithstanding any pre-contract of matrimony not consummate with bodily knowledge, which either or both the parties shall have made." But this statute was afterwards repealed as having produced horrible mischiefs which are enumerated in very declamatory language in the preamble of the statute 2 Edw. VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal as worthily and in good reason enacted. The same doctrine is recognized by the temporal Courts as the existing rule of the matrimonial law of this country in *Bunting's case*, 4 Coke, 29. "John Bunting

* C. 30 et 31, Extra. de Spons. et Matrim. C. 3, Extra. de Sponsa Duorum Brower, lib. 1, cap. 22. Swinburn, sect. 17, s. 11.

father of the plaintiff, and Agnes Adenshall, contracted marriage per verba de presenti, and afterwards, on the 10th of Dec., 1555, the said Agnes took to husband Thomas Twede; and afterwards, on the 9th of July, Bunting libelled against her in the Court of Audience, et decret. fuit quod prædict. Agnes subiret matrimonium cum præfato Bunting, et insuper pronunciatum fuit dictum matrimonium fore nullum." Though the common law certainly had scruples in applying the civil * rights of dower, [69] and community of goods, and legitimacy in the cases of these looser species of marriage. In the later case of *Collins and Jesson*, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole Bench, that "if a contract be per verba de presenti, it amounts to an actual marriage which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been in facie ecclesiæ." "But a contract per verba de futuro, which do not intimate an actual marriage, but refer to a future act, is releasable." 2 Salk. 437. Mod. 155. In *Wigmore's case*, 2 Salk. 438, the same Judge said, "a contract per verba de presenti is a marriage; so is a contract de futuro; if the contract be executed and he take her, 'tis a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case: I mean the case of *Lord Fitzmaurice, Son of the Earl of Kerry*, coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing: the first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11, 1724, was to this effect: "I take you for my wife and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a [70] full commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. Things continued upon this footing till the Marriage Act, 26 G. 2, c. 33, described by Mr. Justice Blackstone (book 1, chap. 15, s. 3), "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig (Craig, lib. 2, dieg. 18, s. 17) for asserting that the canon law is its basis there, as it is every where else in Europe, "totam hanc questionem pendere a jure pontificio," though it is likely enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very unsettled, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman that it settled upon its former foundations, for he expressly says that the canon law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient canon law; and I observe that in the depositions of most of the learned witnesses, and indeed in all the factums that I have seen upon these subjects, they are referred to as authorities. Several regu-[71]lations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriage. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment during the conflict between the episcopal and presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr. Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as necessary. It rather appears difficult to understand this consistently with the fact that other marriages have always been held legal and valid. What the form of solemnization by a clergyman is I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the Church of Scotland for any office whatever. Whether

* Swinburn, sect. 1, s. 2, and sect. 17, s. 29. Tract. de Repub. Ang. p. 103. Perkins, tit. Feoffments, fol. 40, p. 38, ed. 3, 12. 1 Roll. Abridg. 341 and 357. Moor, 169.

the clergyman merely receives the declaration as a witness, or pronounces the parties by virtue of his spiritual authority to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition "that to make marriage valid it is not necessary that it should be celebrated in *facie ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some mode equivalent to an actual celebration." So Lord Braxfield in a loose note which is introduced is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or something equivalent." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, [72] though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages as nearly equal to that before a minister, though certainly not a marriage in *facie ecclesiæ*, in any proper sense of the expression.

Sir Ilay Campbell states in an opinion of his given to the English Chancery (Lib. Reg. A. 1780, f. 552) in a case furnished to me by Dr. Stoddart, "that marriages, irregularly performed without the intervention of a clergyman, are censurable, and formerly the parties were liable to be fined or rebuked in the face of the Church, but this for a long time has not been practised." The regulations therefore, whatever they may be, are not penally enforced; and it does not appear that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates who describe the modes of marriage by the terms regular and irregular seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages which take place between persons in higher classes of society are contracted in such irregular forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it that the distinction between the regular and irregular marriages was much stronger than I am enabled by the pre-[73]-sent evidence to suppose, the question still remains to be examined, how far actual consummation is required by the law of Scotland in marriages which are so to be deemed irregular.

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges that by the law of Scotland this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, e.g. if she failed in proof of a copula, but succeeded in establishing a solemn contract. If the law had been more distinctly understood here at the commencement of the suit the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have to a great degree supplied the want of that distinctness in the libel by bringing forward the distinctions in their answers, and applying what they conceive to be the law applicable to the possible case that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro*; secondly, of a promise *cum copula*; thirdly, of a solemn declaration or acknowledgment of marriage; and, fourthly, of such a declaration accompanied by a copula. It may be convenient to consider, first, whether the present case is a case of promise or of present declaration and acknow-[74]-ledgment. It will be convenient to do so in two respects; the first convenience attending it is that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may in a great degree be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a copula, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then

of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the stipulatio sponsalitia are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in [75] the books of the canon law will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de presenti*, or only promises *de futuro*.

The first paper is without date, and is merely a promise. Mr. Dalrymple promises to marry Miss Gordon as soon as it is in his power, and she promises the same; it is subscribed by both their names—is endorsed “A sacred promise,” and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2 and 10. The paper marked No. 2 is dated on the 28th of May, 1804, and contains these words, “I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge John William Henry Dalrymple as my lawful husband.” I see no great difference between the expression declare and acknowledge; the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No 10 is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise “that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power.” She makes no repeated declaration, but promises that “nothing but the greatest necessity which situation alone can justify) shall ever [76] force her to declare this marriage.” It is signed by him, and by her, describing herself J. Gordon, now J. Dalrymple, and it is dated July 11, 1804. Both the papers are inclosed in an envelope, on which is inscribed “Sacred promises and engagements:” there are promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed that the words “promises and engagements” are not improperly applied to the marriage now itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, it plights their troth, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2 is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only evidence against the existence of a marriage, when no such prudential reasons can [77] assigned for it, and where every thing arising from the very nature of marriage calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise urged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the constitution, as some of the gentlemen who have been examined call it, or as others of them term it, the evidences of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are constituents, or merely evidences of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated

as evidences, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may controul or confirm them. What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," and [78] "in accepting of it she will prove her acknowledgment of it." Her sister he calls his sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind. But, non constat that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations, similar in their imports to the contents of No. 2; might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner till after they have talked together in the same style. The post-mark on the letter, No. 4, is May the 30th, and this letter refers to what passed on the night after the paper, No. 2, bears date; in it he says, "You are my wife, to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties." The letter, No. 5, has these expressions: "Remember you are mine: that God Almighty may preserve my wife is the prayer of her husband." No. 6. "It grieves me to suffer you five minutes from your husband; nothing can change my sentiments, independent even of those sacred ties which unite us. Nothing ever can or should (if 'twere possible) annul them. Put that confidence in me which your duty requires. That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring . . ." No. 8. "I have [79] received letters from town which say that Lord Stair has heard of our marriage." No. 12. "Whatever money you may want draw on me for without scruple." No. 13, dated May 29, 1805. "Situated as you are, nothing could strengthen the ties which unite us, therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves. I insist upon a paper acknowledging yourself as my wife." No. 14, dated June 10, 1805. "Forward to me the paper I requested in my last, and acknowledge yourself my wife—that as we are not immortal I may leave you in trust of a friend, the small remains of what was once a tolerable fortune; you can't refuse on any legal grounds do, my dearest wife, forward it." In No. 15, dated June 28, 1805, he says, "I would not give up the title of your sister's brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank; I will arrange before my departure money-matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress in his affairs. "Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me. I solemnly assure you I will not be absent from you very long." In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong [80] conjugal expressions contained in these letters. Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined. Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay, are all clearly of opinion that they are "present declarations." Mr. Cay is equally clear that they "are contracts *de præsentì*." Sir Ilay Campbell describes them as "very explicit mutual declarations of marriage between the parties." Mr. Clerk says that No. 2 is evidence of a very high nature to prove that "a marriage had been contracted by the parties; it is a full and explicit declaration of a contract *de præsentì*." "No. 10," he says, "imports little more than No. 2; it is important evidence to the same effect." Mr. Cathcart and Mr. Gillies, who hold a copula in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, whether, by the law of Scotland, a present declaration constitutes or evidences a marriage without a copula; and, secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judgment [81] which ought to accompany any opinion of mine upon points which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court which has to weigh them, *stare decisis*.

Before I enter upon this examination I will premise an observation from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean is this, that the canon law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire or has been varied, I take it to be a safe conclusion that, in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is that it continues the same. Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto un- [82] known in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and, on this point, it is not necessary for me to restate that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which council were never received as of authority in Scotland.

It appears from the case of *Younger*, cited by Sir Thomas Craig (lib. 2, dieg. 18, c. 19), that, in his time, the practice upon a contract *de præsenti* was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. Hume, they might still consistently retain the principle that a present consent constituted a valid marriage. Whether it was retained is the question I have to examine, assuming first (as I have done) that, if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus: Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who [83] have been examined upon the question at present before the Court, are all clear and decided in their opinions that a declaration *per verba de præsenti* without a copula does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree—oportet isentem credere, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated I must add the opinions of the learned persons examined upon the case of *Beamish and Beamish*; a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of law obtained from the learned advocates of

Scotland, pronounced for the validity of the marriage. Mr. John Millar, professor of law at Glasgow, there said, "that, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman. Consent must be expressed or understood to be given *per verba de præsenti*; for consent *de futuro* that is, a promise of marriage, does not constitute actual marriage. By the Scotch law, the deliberate consent of parties constitutes marriage." Mr. John Orr, in his deposition, said, "By the laws of Scotland, a solemn acknowledgment of a marriage having happened between the parties, whether verbally or in writing, is sufficient to constitute a marriage, whether expressed in *verbis de præsenti* or in an acknowledgment that the marriage took place at a former period. A promise followed by a copula would constitute a valid marriage; and a written instrument containing not a consent *de præsenti*, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland." Mr. Hume said, "Marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife. The mode or form of consent is not material, but it must be *de præsenti*." Mr. Erskine and Mr. Robertson agreed in saying, "that a deliberate acknowledgment of the parties that they were married, though not containing a contract *per verba de præsenti*, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillies, and Mr. Cathcart, who are examined in the present case on the part of Mr. Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a copula necessary, "although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to [85] learn, is, through some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question which of the two opinions he favours; for in the former part of the deposition he is made to say that "by the general principles of the law of Scotland, marriage is perfected by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties as perfecting a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule that consent without a *concubitus* constitutes a marriage; but in a latter part of the deposition he lays it down that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*, where the words are *de præsenti*, but the effect future." And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to future acts as the fulfilment of a [86] present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery (Lib. Reg. A. 1780, F. 552) upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson and Catharine Grierson, the opinion dated August 18th, 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a copula, antecedent or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at the time a necessary ingredient in the validity. I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority—the opinion of a person whose death is justly lamented as one of the greatest misfortunes that have recently visited that country. I need not mention the name of the Lord President

Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I [87] am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation may have conferred upon them. In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero*; I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*), and finding that much the greater number of learned persons recognize a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say that, as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—*Promise cum copulâ*, the copula is in the ordinary phrase, a constant adjunct to the promise—never to the *contract de præsentî*, strongly marking the known distinction between the two cases that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers: the first to whom I shall refer is Craig (*Cragii jus feudale*, lib. 2, dieg. 18, § 17 & 19). It does not appear to me that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria*, sed *judicis ecclesiastici*, and the case [88] of *Younger*, which he cites from the Court of the Commissaries, is a case not of a declaration *de præsentî*, but of a promise *cum copulâ*; unless, therefore, it is previously established that a promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract *de præsentî* without a copula (which certainly it does in the canon law, and is so recognized in the majority of the opinions upon the law of Scotland), it is no direct authority; and the conclusion is still more weakened by observing that, in that case, a judicial sentence of the commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties—a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a question, and determines it thus (*Stair's Institut.* lib. 1, tit. 4, § 6): “It is not every consent to the married state that makes matrimony, but consent *de præsentî*, not a promise *de futuro matrimonio*.” The marriage consists not in “the promise but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by marital cohabitation, or acknowledgment, or by natural commixtion where there hath been a promise preceding, for therein is presumed a conjugal consent *de præsentî*, but [89] the consent must specially relate to that conjunction of bodies as being then in the consentor's capacity, otherwise it is void.” I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be that without a commixtion of bodies immediately following (though in all cases to be looked to as possible, and at some time or other to take place), a present valid marriage is constituted by a contract *de præsentî*.

Sir George Mackinsie (*Mackinsie, Institut.* book 1, tit. 6, § 3), Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says “Consent *de præsentî* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may *Resile rebus integris*,” manifestly intimating that this could not be done under the consent *de præsentî*.

Another authority of more modern date, but entitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down (b. 1, tit. 5, § 5) that “marriage consists in the present consent, whether that be by words

expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be perfected by the consent of parties declared by writing, provided the writing be so conceived as to import a present consent." Nothing upon the direct meaning of these words can be more [90] clear than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decision of the Court, there is reason to doubt, if it can now be held as law, that the private declarations of parties, even in writing, are per se equivalent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says, "he considers the doctrine to be incorrect," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favour of the doctrine that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been happily retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the Repealing Statute of Edward VI. as being worthily [91] and for good reasons enacted, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. Hutcheson mentions it as a fact that in the case of *M^cAdam* against *Walker* none of the Judges, who dissented from the judgment, disputed that doctrine of the law. His testimony to such a fact is equivalent to that of any person of unimpeached credit—even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "Elucidations respecting the law of Scotland" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copula*, which has no application to the present case, unless it is assumed that this amounts to the same thing identically in [92] law, to all intents and purposes, as a contract *de præsenti*. I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient canon law and to the modern English law, tends not a little to shake the credit of his representations of all law whatever. In this chapter (page 32) he asserts that by the present law of England, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person, when I say that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy therefore, to strike the balance upon this class of authorities; they are all in one scale a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals. Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as

apply to the cases of promises de futuro cum copulâ I dismiss for the present observing only that if a promise of this kind be equivalent to a contract de præsenti nudis finibus, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

[93] With regard to decided cases, I must observe generally that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and obiter, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the canon law, establishing the doctrine that a contract per verba de præsenti is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane versus Edmonston*, before the Court of Session in the year 1804, was a case of contract de præsenti, and of this I shall take the account given by Mr. Clerk. The Court there held, "that a written acknowledgment de præsenti was sufficient to constitute a marriage. The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage de præsenti without referring to the copula." Mr. Clerk says "he cannot suppose the Court overlooked the very material circumstance of the copula," which did exist in that case, and which he says "would have been sufficient with a bare promise to bind the man to marriage." I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, [94] which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court that they should have declared consent be præsenti sufficient, without express mention of the copula, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly that on the evidence of the report he thinks it at least highly probable that some such doctrine, as that held by Mr. Erskine, was laid down in that case by the Judges.

The next case which I shall mention is that of *Taylor and Kello*, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words:—"I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another mutatis mutandis in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the concubitus, but the report states that the Court, in its decision, held this to be out of the question. The commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was [95] much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary, it was agreed that the writing was to be delivered up whenever it was demanded: the whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an irrevocable contract, such as that of marriage is in its own nature, from which the parties cannot esile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an irrevocable contract de præsenti does of itself constitute a legally valid marriage. Mr. Cathcart admits, in his deposition, that this sentence of the commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine that a contract de præsenti constitutes

a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognized: most [96] assuredly it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered irrevocable, the House of Lords would have attributed to it a very different effect.

In the case of *Inglis against Robertson*, which was decided in the same year, the commissaries sustained a marriage upon a contract de præsenti, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of concubitus in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the copula. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of *Ritchie and Wallace*, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr. Hamilton, who was of counsel in the cause. It was the case of a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was [97] pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. Hamilton says the woman founded on the written acknowledgment as a declaration de præsenti constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the acknowledgment libelled, relevant to infer the marriage.

The case of *M'Adam against Walker* (13th of November, 1806), which underwent very full discussion, is by all parties admitted to be a direct decision upon the point though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr. M'Adam, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so he said, "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that in this case there had been a copula antecedent, though none could have taken place subsequent to the declaration: it could not therefore have been upon the ground of want of copula that Sir Ilay Campbell, who holds a prior copula as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges dis-[98]-puted the law, but there were other grounds of dissent arising out of the circumstances of the case unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage; they considered also that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise cum copula has been admitted to constitute a marriage, if the rule of the canon law, transfused into the law of Scotland, be sound, that copula converts a promise de futuro into a contract de præsenti. If it does not, if copula is required in a contract de præsenti, what

intelligible difference is there between the two—between a promise *de futuro* and a contract *de præsenti*? None whatever. They stand exactly upon the same footing. A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the [99] certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of *Grierson and Grierson*.

What are the cases which have been produced in contradiction to this doctrine? As far as I can judge, none—except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched. The case of *M'Lauchlan contra Dobson*, in December, 1796, was a case of contract *per verba de præsenti* where there was no copula, in which the commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states that “the Court did not think there was sufficient evidence of a real *de præsenti* matrimonial consent.” Mr. Hume says “the conduct of the parties had been variable and contradictory;” and Sir Ilay Campbell says “there were circumstances tending to shew that the parties did not truly mean to live together.” The dicta of Lord Justice Clerk M'Queen have been quoted and much relied upon; but I must observe that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr. Clerk to be found in notes of the handwriting of Mr. Henry Erskine, who is not himself examined for the purpose of authenticating them, although interrogatories are addressed to other [100] persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, “The case of *M'Lauchlan* against *Dobson* is new, but the law is old and settled. Two facts admitted hinc inde, no celebration, no concubitus, nor promise of marriage followed by copula; contract as to land not binding till regularly executed, unless where *res non sunt integræ*.” This proposition that “contract as to land not binding till regularly executed,” proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. “A promise without copula *locus penitentia*—even verbal consent *de præsenti* admits *penitentia*”—that is the matter to be proved. “Form of contracts contains express obligation to celebrate; till that is done either party may rese.” The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. “Private consent is not the consensus the law looks to. It must be before a priest or something equivalent; they must take the oath of God to each other;” this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice: “a present consent not followed by any thing may be mutually given up, but if so, it cannot be a marriage.” To be sure, if the propositions contained [101] in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the bill of advocacy in the case of *Taylor and Kello*, complaining of the sentence of the Consistorial Court, which found “mutual obligations relevant to infer a marriage.”

The other case that has been mentioned is that of *M'Innes* against *More*, which came before the House of Lords upon appeal in the year 1782. The facts therein

were that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the status personarum was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

[102] I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of declaration or acknowledgment) constitutes, or, if you will, evidences a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative have been adjudged directly upon this principle, and that where they have been otherwise determined, it turns out that they have rested upon specialities, upon circumstances which take them out of the common principle and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord [103] Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe—to the principle which I venture to assume that such continues to be the rule of Scotch matrimonial law, where it is not shewn that that law has actually resiled from it—to the opinions of eminent professors of that law—to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*) I think that being compelled to pronounce a judgment upon this point, I am bound to say that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become “very matrimony;” that it does, *ipso facto, et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the [104] best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first that they were of a peculiar and characteristic nature, I really cannot, upon consideration, discover in them any thing more than the ordinary qualifications requisite in all contracts. It is said that the marriage contract must not be extorted by force or fraud. Is it not the general law of contracts that they are vitiated by proof of either? In the present case, menac

and terror are pleaded in Mr. Dalrymple's allegation as to the execution of the first contract No 2, for as to the promise No. 1, he admits that it was given merely at the entreaties and instigation of the lady (an admission not very consistent with the suggestion of the terror afterwards applied), but he asserts that he executed this contract, "being absent from his regiment, without leave, alone with her, and unknown to her father, and urged by her threats of calling him in." What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the fact, for he has not read the only evidence that could apply to it, the sworn answers of the lady to [105] this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declaration contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10 have been executed by a man smarting under the atrocious injury of having been compelled by menaces to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a deliberate contract. It is, I presume, implied in all contracts that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular tempus deliberandi for the marriage contract any more than for any other contract.

It is said that it must be serious, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed a priori that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the animus contrahentium must be regarded: is that peculiar to the marriage contract? It is in the intention of the [106] parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, dehors the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in facie ecclesiæ acit fidem; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man under all the anctions of religion and of law; not so in Scotland where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to shew that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be resumed to make upon him; first, he must assign and prove some other intention; and, [107] secondly, he must also prove that the intention so alleged by him was fully understood by the other party to the contract at the time it was entered into: for surely it cannot be represented as the law of any civilized country that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to void a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Craigie can have no such meaning, "that if there is reason to conclude from the expressions used that both or either of the parties did not understand that they were truly man and wife, it would

enter into the question whether married or not," because this would open a door to frauds which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other animus is set up and endeavoured to be substituted, but the animus of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced unless it can be extracted from the letters.

Do they qualify the express contracts and shew a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions entertained by Miss Gordon that Mr. Dalrymple would resile from the obligations of the contract, and others that are [108] intended to calm those apprehensions by promises of eternal fidelity, both which, it is said, are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de presenti*, from which neither of them could resile.

In the first place, is there this real inconsistency? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: that a wife left in that country exposed to the chances of a change in his affections, to the effect of a long separation, to the disapprobation of his friends, to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it that he should endeavour to remove them by these renewed professions of constancy. But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage if it were otherwise unimpeached. We are at this moment enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of [109] opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. Dalrymple might himself entertain honest doubt upon this point; but if he felt no doubt of his own meaning, if it was his intention to bind himself so far as by law he could, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A public marriage was impracticable; he does all that he can to effect a marriage which was clandestine, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letter written to Mr. Hawkins. In one of them she says, "my idea is that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract so far by law as he could, no doubts which accompany the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even despondency; "you will never see me Mrs. Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to [110] encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprise, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair should occasionally betray the discomposure of her mind. As what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems more point rather to a corrupt purchase of her silence than to any idea existing in her mind of a claim of damages, by way of a legal solamen, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Burnaby that it is not mutuality of possession, but mutuality of intention, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here that Mr. Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him [111] furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence that he confided the proofs of his marriage entirely to the honour of the lady; but if he did it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to enquire what proof there is of carnal copulation having taken place between the parties; and upon this point I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards; and I take it as an incontrovertible position that the circumstances which would be sufficient to prove intercourse in any other case would be equally sufficient in this case. I do not charge myself in so doing with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place, I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these [112] parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity (necessity which situation alone can justify), shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves and compel a disclosure.

I observe that Mr. Dalrymple denies in his allegation that any intercourse took place after the date of the written declarations, which leaves it still open to the possibility of intercourse before that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1 was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them [113] daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it in some way or other; for to what other motive can be ascribed such a series and stile of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed from the contents of his letters that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind, that she was an 'acute and active female who, with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavouring, quacunque viâ datâ, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman (which can be known only by herself) this at least must be granted, that she was most sincerely desirous of this marriage connection which marriage connection, both of them perfectly well knew, could not be publicly and regularly obtained. Taking then into consideration these dispositions of the parties, his desire to obtain the enjoyment of her person on the one hand, and her solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all [114] events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a private surrender, because a public ceremony being here indispensably required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In Scotland the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled" according to the notions of that country: it is the actual ceremony as well as the substance of the marriage: it is the conversion of the lover into the husband: transit in matrimonium, if it was not matrimonium before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed that Mr. Dalrymple was in that state of incapacity to enter into such a contract, which [115] Lord Stair alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connection lasted during the whole of Mr. Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and indeed it could not be denied) by nocturnal private visits, frequently repeated, both at Edinburgh and at Braid, the country-seat of Mr. Gordon, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr. Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says "that Captain Dalrymple used to visit in Mr. Gordon's family in the spring of 1804; that before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings; that Miss Gordon's directions to her were that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice that she should thereupon, without coming up to her, open the street door for the same purpose; that agreeably to these directions she frequently let Capt. Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell, or using the knocker; that the first time he came [116] in this way, she shewed him up stairs to the dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards, upon her opening the door, he went straight up stairs, without speaking, or being shewn up; but how long he continued up stairs she does not know, as she never saw him go out of the house; that the dressing-room above alluded to, was on the floor above the drawing-room, and adjoining to the bed-room where the three young ladies slept, and next to the ladies' bed-chamber was another room, in which there was a bedstead with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon." She says that she recollects

and it is a fact in which she is confirmed by another witness, Robertson, "that the family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast" (the King's Fast Day for that year was on the 7th of June), "and on a Wednesday, as she thinks, as the Fast Days are generally held on a Thursday; that at this time Miss Charlotte was at North Berwick, on a visit to Lady Dalrymple; that Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr. Robertson the butler, and one or two more of the servants."

It appears from the testimony of other witnesses that Mr. Gordon her father appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr. Dalrymple's letters which point to the necessity of her [117] continuance in town, as affording more convenient opportunities for their meeting. Lyall states, "that she recollects admitting Captain Dalrymple that evening, as she thinks, some time between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking; that on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock, and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after, and on the deponent going up to her, she met her, either at the bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was unlocked, and immediately after went into the dressing-room, and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing room which is to the street, and on looking out she observed Capt. Dalrymple walking eastwards from Mr. Gordon's house; that from this she suspected that Captain Dalrymple was the person who had gone out of the house just before; that nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion; that having gone down stairs after this, Mr. Robertson, the butler, observed to her that there had been company up stairs last night; but she did not mention to him any thing of her having let in Capt. Dal-[118]-rymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects that he desired her to remember the particular day on which this happened." Now from this account given by Lyall, the counsel have attempted to raise a doubt, whether it was Mr. Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes "that on the 7th of June, which was the King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very [119] honest and understanding servant who might foresee that such a record might, one day or other, have its use. The witness Lyall goes on to say "that Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that on that evening or a night or two after, she was desired by Miss Gordon to open the window of the breakfast parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it, and this she thinks might be between ten and twelve o'clock, and she shewed him up stairs, when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs; that she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he

went away ;” she states that “ Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon and the deponent went to Braid ; that at Braid Miss Gordon and Miss Charlotte slept in one room and Miss Mary in another : that within Miss Gordon and Miss Charlotte’s bed-chamber there was a dressing-room, the key of which Miss Gordon kept ; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in she was surprised to find in it a feather-bed lying upon the floor without either blankets or sheets upon it, so far as she recollects : that it struck her the more as she had frequently been in that room before without seeing any bed in it ; and as Miss Gordon kept the key she imagined she must [120] have put it there herself ; that she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room ; that when she observed the said bed in the dressing-room it was during the time that Captain Dalrymple was paying his evening visits at Braid ; that upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed.” Three other witnesses, Robertson and the two gardeners, have been examined upon this part of the case, and they all prove that Mr. Dalrymple was seen going into the house in the night or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much that the window of the room where he kept his plate was found open in the morning, and that it must have been opened by somebody on the inside : it is proved that nothing was missing, not an article of plate was touched, and that Mr. Dalrymple was seen by the two gardeners very early in the morning coming away from the house, and in the vicinity of the house, going towards Edinburgh ; and as to what was suggested that he might have been in the outhouses all night, I think it is not a very natural presumption that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o’clock at night would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels belonging to the house. There is another witness of the name of Brown, Mr. Dalrymple’s own servant, whose evidence is strongly corroborative of the nature of those visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father. He says to the second interrogatory, “ that he often accompanied his master to Mr. Gordon’s house at Edinburgh, but he cannot set forth the days upon which it was he so attended him there, except that it was between the 10th of May, and the 18th of July, 1804,” subsequently therefore to the execution of the last paper. This witness further states, “ that on the night of the 18th of July, which was the last time Mr. Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curriele at the house of Charles Gordon, Esq., till about twelve o’clock, when Mr. Dalrymple came out of the said house and got into the curriele and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop, and having told him to go and put up his horses in Edinburgh and to meet him again on the same spot at six o’clock the next morning with the curriele, Mr. Dalrymple then got out and walked back towards the said Mr. Gordon’s house, and on the next morning at six o’clock he met his master at the appointed spot and brought him in his said curriele to Haddington, from whence he went in a chaise to the house of a Mr. Nisbet in the neighbourhood of that town, where Mr. Dalrymple’s father was then staying ; that he does believe that Mr. Dalrymple did, on the night of the said 18th of July, go back to [122] and remain in the said Mr. Gordon’s country-house : ” and I think it is impossible for any body who has seen this man’s evidence and the evidence of the other witnesses, not to suppose that he did go there and did take his repose for the night in that house. Now it is said, and truly said in this case, that the witness Lyall upon her cross examination says, “ she does not think that they could have been in bed together, so far as she could judge ; ” what means she took to form her judgment does not appear ; the view taken by her might be very cursory : she is an unmarried woman and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw, from the fact proved by her evidence that Mr. Dalrymple

passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark or at least in a twilight state. It rather appears from the letters that there were some quarrels and disagreements between Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June, she slept with her sister and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: in truth it is the strongest adverse evidence that is produced on this point: but she admits "that from what she had herself observed she had no doubt but that Mr. Dalrymple had made his addresses to her sister in the way of marriage; that when the deponent used to ask her said sister about it, she used to laugh it off:" from which it appears that Miss Gordon did not communicate freely with her upon the subject. She says "that never till after the proceedings in this cause had commenced had she heard that they had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other so as to have a tie upon each other that neither of them should marry another person without the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, [124] though that paper purports a great deal more, and she says "that although she did suspect that Mr. Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a marriage between them." But since it is clearly proved by the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature: "My dearest sweet wife—You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, thinking only on what he felt last night, for the height of human happiness was his." It is said that this has reference only to the happiness which he enjoyed in her [125] society, for an expression immediately follows in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, private and clandestine society; society which commenced at the hour of midnight and which he did not quit till an early hour (and then secretly) in the morning. That society is meant only in the tamest sense of the word is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6 he says, "Put off the journey to Braid if possible till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how a-propos plans come into her pretty head; there appears to me only one difficulty, which is where to meet, as there is only one room, but we must obviate that if possible." In the next letter, No. 7, he

says, "But I will be with you at eleven to-morrow night; meet me as usual. P.S.—Arrange everything with L. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon, with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4 and No. 6. But it is said, here are passages in these letters which shew that no such intercourse could have passed between them; one in particular in No. 4 is much [126] dwelt upon, in which he says, "Have you forgiven me for what I attempted last night; believe me the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage and had been repulsed. Now this expression is certainly very capable of other interpretations: it might allude to an attempt made by him to repeat his pleasures improperly or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as a right. He says, "You will pardon it; although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday."

In a correspondence of this kind passing between parties of this description and alluding to very private transactions some degree of obscurity must be expected. Here is a young man heated with passion writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur they must be received with such explanations as will render them consistent with the main body [127] and substance of the whole case. Another passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as shewing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but (on Sunday, on my soul (torn)) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear from the whole course and nature of the transaction that no such ceremony was ever intended: it appears from all the facts of the case that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one [128] night of the month of May, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued; but it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in Scotland. I ask if it is to be understood that with such feelings he would relinquish the pleasures which he had been

admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common [129] consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said that by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred personally exceptio from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell versus Cochrane*, in the year 1747, the Court of Session did hold this doctrine, yet it [130] was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a medium impedimentum to be no other than this, that on the factum of a marriage, questioned upon the ground of the want of a serious purpose and mutual understanding between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay, in his answer to the third additional interrogatory, and Mr. Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking ab initio an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage which at the earnest request of his gentleman, and on account of his most important interests (in which interests [131] her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief “to a variety of reports which

might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says, "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained that the reports to which he, in this mysterious language, adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her according to his own injunction, and nothing [132] could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr. Hawkins says that upon the return of Mr. Dalrymple, in the month of August, 1806, when he came to England privately without the knowledge of his father, or of this lady, he then for the first time "communicated to him many circumstances respecting a connection he stated he had had with a Miss Johanna Gordon at Edinburgh, and expressed his fears that she would be writing and troubling his father upon that subject, as well as tormenting him the said John William Henry Dalrymple with letters, to avoid which he begged him not to forward any of her letters to him, who was then about to go to the Continent, and in order to enable him to know her handwriting and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore that if he did forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters from falling into the hands of General Dalrymple, and that he went off again to the Continent in the month of September." Mr. Hawkins further says "that he did find means to prevent several of Miss Gordon's letters addressed to General Dalrymple from being received by him, but having found considerable risque and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to [133] her at Edinburgh, wherein he stated that the letters, which she had sent to General Dalrymple, had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr. Dalrymple, she soon afterwards commenced a correspondence with him respecting Mr. Dalrymple, and also sent many letters, addressed to Mr. Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr. Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says "that it was some time in the latter end of the year 1806 or the beginning of the year 1807 that the correspondence between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr. Dalrymple."

It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before [134] him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of Scotland, she called her marriage lines. She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, and he says "that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says "that in the latter end of May in the year 1807 Mr. Dalrymple returned again to England." I ought to have mentioned that

appears clearly that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr. Dalrymple. She says in a letter to Mr. Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day; the last one is that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken place with Miss Manners, but [135] is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May she writes to know whether any accounts had been received from Mr. Dalrymple, and says, "Any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman. In the end of that very month of May, Mr. Dalrymple came home, having been at different places on the Continent; he went down to Mr. Hawkins's house at Findon, where having met him, they conversed together upon Mr. Dalrymple's affairs, and particularly upon his marriage with Miss Gordon, and on that occasion Mr. Hawkins having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr. Dalrymple that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St. Alban's, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their respective families might be involved, owing to Mr. Dalrymple's previous marriage.

Mr. Hawkins thought at the time that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr. Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. [136] He says "that Mr. Dalrymple took them under pretence of shewing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of shewing that Johanna Dalrymple was not his wife." It was about the end of the month of May that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2d of the following month, Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law. I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

[137] Little now remains for me but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one or perhaps more individuals; but the Court must discharge its public duty, however painful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first session of the next term.*

* From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple—described as wife of John William Henry Dalrymple, Esq., the appellant in the cause.

[138] THE OFFICE OF THE JUDGE PROMOTED BY COX v. GOODDAY. 7th Dec., 1810; 1st Feb., 1811.—Offence under the st. 5 & 6 E. 6, c. 4, as charged against the clergyman, for words spoken during divine service. Defence—that they were justifiable as reproof—not sustained.

[Referred to, *Combe v. Edwards*, 1878, L. R. 3 P. D. 133; *Enraght v. Lord Penzance*, 1882, 7 A. C. 252; *Rex v. Bishop of Sarum*, [1916] 1 K. B. 467.]

This was a cause of office promoted by Hannah Cox, a parishioner and inhabitant of Terling, Essex, against the Reverend William Goodday, vicar of the said parish, “for the lawful correction and reformation of his manners and excesses, especially for quarrelling, chiding, and brawling, by words, in the said parish church of Terling.”

On the part of Mr. Goodday, Drs. Arnold and Burnaby objected to the admission of the articles, on the ground that they only imputed matter of an admonitory nature, such as was the duty of the clergyman to express upon his seeing an impropriety committed during the time of divine service, and therefore did not come under the offence meant by the statute. On the other side the admission was supported by Dr. Swabey and Dr. Edwards, upon the words of the articles themselves; pleading, “that during the sermon he, Mr. Goodday, was preaching, he did, without any just cause or provocation whatever, and with great warmth and passion, and with a loud voice, address the complainant from the pulpit, to the following effect:—“Miss Cox, I have observed the most indecent behaviour from you in this church from time to time, and if you cannot behave better, I will order the sexton to turn you out; I have represented you to the bishop, and will again; and if that will not do, I will put you into the Spiritual Court.” The articles further stated “that as Miss Cox and her sister, to whom he had administered the sacrament in the morning, were going out of the church, he said, “Let them go, let them go to a play-house, and act their acts there.”

[139] *Judgment*—*Sir W. Scott*. This is a proceeding against a clergyman, on the statute of Edward VI., for brawling and chiding in a church. This statute was made to repress the disturbances that in the early ages of the Reformation were too apt to arise between the professors of different religions. It has since been applied further—to repress quarrels and offences violating the sacred character of those places. This statute is not absolutely necessary to found the jurisdiction of the Ecclesiastical Court; as it has undoubtedly a right to punish offences in disturbance of public worship. There must be some jurisdiction in reason and in principle to effect this; and it properly belongs to the Ecclesiastical Court. It has been objected that the offence charged does not come within the words of the statute; and perhaps it is not necessary that it should, on the observations which I have made.

Here a clergyman is charged that, without any just cause or provocation, he did, with a loud voice and in a quarrelling manner, address the complainant in the words that have been set forth; and it has been said that this is no offence at all—no more than reproof, which a minister is justified in using, and bound to use, against an impropriety of conduct. It is impossible to say that cases may not arise which would justify such an act, as far as was necessary to remove an obstruction to the public service.

In this case, part of the charge in the articles is that no offence had been committed by the lady to call for this public reproof—that will be a subject of evidence hereafter to be adduced. At [140] present, and for the mere purpose of admitting the articles,

On the 3d Session of Mich. Term, viz. 18th of November, 1811, an allegation was asserted on her behalf, and the Judge assigned to hear on the admission thereof on the by-day. On that day, viz. 4th of December, her proctor prayed the assignation to be continued, which was opposed; and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. Hil. Ter. viz. January, 1812, her proctor alleged the cause to have been appealed: and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, “that the Judge of the Court of Arches had rejected the prayer of the said Laura Dalrymple, for time to be allowed for the admission of an allegation on her behalf.” Time was allowed by the Court of Delegates—and the cause being there retained, her allegation was given in and opposed, and ultimately rejected. The cause was afterwards heard upon the merits; and on the 19th of January, 1814, the sentence of the Consistory Court was affirmed.

I am to consider that such was the fact, and that there was no cause for such interposition. The words that were used are, in my opinion, of a chiding, quarrelling, and brawling nature, even if expressed without any tone of passion; for the words themselves are of a passionate tenor. The articles state also that in the morning he had administered to the parties the Holy Sacrament. I think this is not so immaterial as to be improper to be admitted to stand, that they were persons who had been admitted to the Holy Communion. It may aggravate the imprudence of this language: the words are very particular—"Let them go to the play-house and act their acts there." It is difficult to assign any meaning that can be defended from the charge of impropriety to such words—uttered in such a place and on such an occasion; they cannot, upon the most tender consideration, be deemed to come within the bounds of decorum and propriety. It will be for the clergyman to justify himself; and if he does not, it will be the bounden duty of this Court to say that he has exceeded his duty.

1st Feb., 1811.—On this day Mr. Goodday appeared in person, and gave an affirmative issue to the articles; when it was prayed on the part of the promoter that the Court would suspend Mr. Goodday from the administration of his office so long as it should deem meet—and condemn him in costs.

Judgment—Sir William Scott. Mr. Goodday—you have been proceeded against for brawling in the church, [141] of which you are the minister. The articles state that you did so, during a sermon which you were preaching, addressing yourself to Miss Cox in the manner which is there pleaded. You have admitted the substance of these articles, and of course you have admitted what the articles charge, that this was done without any offence committed by Miss Cox that called for any censure. You have therefore admitted that you have been betrayed into a public act of indiscretion; and it becomes my duty, as representing the bishop, to recommend greater caution in the future exercise of your public functions.

The duty of maintaining order and decorum in the church lies immediately upon the churchwardens, and if they are not present, or being present do not repress any indecency, they desert their proper duty. The officiating minister has other duties to perform, those of performing divine service. In saying this, I do not mean to say that occasions may not occur in which it may not be justifiable, and even unavoidable, for him to take a part in suppressing any disorder or interruption in the church. It is rather unfortunate when they do occur; and if they do, they ought to be used with the most guarded prudence and gravity. If passion is interposed it is apt to break out in unseemly expressions, such as may be deemed to have been indulged on the present occasion: they produce surprise and discomposure in the congregation, may endanger the engaging the minister himself in scenes of altercation and contention that may derogate from the proper dignity of his functions, and may produce unhallowed consequences, very inconsistent with the purposes for which himself and the assembly [142] are collected together. In the present case, you have admitted that no such occasion had occurred as called for your interposition. It becomes therefore my painful duty to admonish you to guard your zeal with more temper and discretion—and I so admonish you; and further, I must, in obedience to the statute, suspend you from the administration of your office for one fortnight, to be computed from this day. But as you have appeared in person to receive this admonition I shall not think it necessary to order the publication of the sentence in the church, or to enlarge further upon the subject.

POUGET v. TOMKINS, FALSELY CALLING HERSELF POUGET. 24th Jan., 1812.—

Nullity of marriage, by reason of false and imperfect publication of banns. Omission of one Christian name, which had been the name most commonly used—fatal.

[S. C. 1 Phill. 499. Referred to, *Holmes v. Simmons*, 1868, L. R. 1 P. & D. 530.]

This was a suit of nullity of marriage brought by the father of William Peter Pouget, as guardian of his son, by reason of minority, and want of consent, and the publication of banns, in names not corresponding to the true name of the parties, as required by the marriage act.

Judgment—Sir William Scott. This is a proceeding to annul the marriage which has been had between these parties, at the suit of the father, by reason of publication of banns in false names connected with the minority of the husband, and want of consent of his father.

The suit is brought by the father, as guardian of the son, who is much under age being, at the time of the marriage, of the age of 16 years only, having been born on the 5th of May, 1794, and [143] married on the 28th January, 1810, at St. Andrew's, Holborn, though his father's residence was in Marylebone. The alleged wife was a servant in the family, and her age is not particularly stated. I have letters from her exhibited which shew that she was an uneducated woman, but nothing which marks her age, a circumstance that might have been material in a case of this kind, in which fraud is charged. It appears that he was described in the publication as William Pouget instead of William Peter Pouget. In strictness, I conceive that all parts of a baptismal name should be set forth as composing altogether the name and legal description of the party. At common law they are all set forth, and, if any part is omitted, it is ground for a plea in abatement. In proclamation of banns it is also highly proper that they should be enumerated; at the same time I cannot go so far as to say that, in all cases, it is absolutely and essentially necessary, and that the publication would, on account of such omission alone, in all cases, be invalidated. Where there was no fraud intended, nor any deception practised, and where the suppression was only of a dormant name, that had not been generally used, it might be too much to hold that a perfectly honorable marriage should be invalidated by such omission.

The case might be put also that one party had wilfully suppressed a dormant name, not known to the other, for the purpose of reserving a plea for invalidating that marriage at a future time. That would be an effect which the law would be unwilling to give to an omission so practised. Where, however, there is fraud intended, and where the omission is not casual, but intentional, and made a principal part [144] of the machinery of the fraud, I should hold that the Court would be bound to enforce the most literal interpretation for the purpose of supporting the true spirit of the act.

It has been said, in argument, that the Court is forbidden to inquire into the publication of the banns, for the purpose of shewing a false residence contained in it, after the marriage has been actually celebrated; but this exception, on which that restraint is expressed, shews that the Court is at liberty to inquire into the manner in which the banns have been published for the purpose of shewing that, in other respects, that publication was vicious, and consequently the marriage was void. It remains therefore only to consider to what class of cases this particular case belongs. The minor's name of baptism was William Peter, and it is proved, by the testimony of his family, that the first name, William, had been superseded in common use, and that he had been constantly called Peter. The grandmother says that, from his baptism, her grandson has been constantly addressed by the Christian name of Peter only by his relations and friends, and is scarcely known by his other name of William, except to his near relations. It is also proved that, in various letters written by him to his father, he commonly subscribed himself Peter Pouget; but that since the commencement of this suit the witness has observed the signature of Peter William Pouget. In two letters of the party, against whom the suit is brought, she addresses him by the name of Mr. Peter; so that it is clear that, although William was a baptismal name, it had been almost obliterated in common use; and the name of William Pouget [145] would not have described him to most persons so as to notify him. The name that was kept out of the publication was the only one by which the party had usually been known. To effect a marriage then with William Peter Pouget under the unknown description of William Pouget only is unquestionably a fraudulent act, being under a description which does not properly belong to the party; but must be considered as assumed for the required purpose of notification with intention of falsehood. By what preliminary steps the marriage was brought about does not appear; since nothing transpires before the attempt to publish banns at Highgate, which miscarried. One of the witnesses, Mary Hemming, who speaks to this fact, says "that she received from William Peter Pouget a paper containing the names of himself and the said Lucretia Tomkins; that he sent her in a coach to order the banns for their marriage to be put up in Highgate Church, but on her delivering the same to the clerk, he asked her if the parties resided in the parish? to which she, after some hesitation, answered she believed they did, but that she did not know where; and in consequence, as she apprehends, of the clerk's not believing her, the banns were not published."

It appears, in this case, that the banns, on which the marriage took place, were delivered by the minor—that circumstance would not take away the fraud, which is not charged to be committed on the boy, but on the rights of the father; and though it might have been a grosser case if it was proved that the party charged with fraud had been more active in giving the banns herself, yet [146] it makes no material difference that they were delivered by the boy, so far as regards the fraud upon the parent. The account which the same witness gives of the marriage is, “that the parties were married in the presence of her, the deponent, by the name of William Pouget, as she recollects from the clergyman putting several questions, and being very particular in his name and place of residence, to which he answered that his names were William Pouget; and being confused, Mr. Wyatt, the brother-in-law of the said Lucretia Tomkins, gave evasive and untrue answers for him as to his residence.” It may indeed be inferred from this that this person had probably been a principal mover in the business, though this does not distinctly appear from any other part of the transaction. It is clear, however, that banns were published in the name of William Pouget, omitting Peter; that the father and family were entirely ignorant of the transaction, and not informed of it till some months afterwards, when they expressed their surprise and grief at what had happened.

The Act of Parliament recites, “that great inconveniences have arisen from clandestine marriages,” and proposes to provide against them in future: for that purpose it directs the true names and residence to be given to the minister in writing seven days before, or he is not obliged to publish the banns, though he is not forbidden so to do. It has been matter of regret that this provision of the act has not been more generally observed. The clear intention of the act is that the true names of the parties should be published; and, if they are not so published, it is no publication [147]—no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held, therefore, since the case of *Early v. Stevens* (Consist. 1785), that a publication in false names is no publication.

It was pleaded in the libel that, at the time of publication at St. Andrew's, Holborn, the parties were not living in that parish, but at his father's residence in another parish. It was pleaded as a circumstance of fraud; and it was objected to on the admission of the libel, as in violation of the 10th section of the Marriage Act, which forbids the Court to inquire into the fact of such residence. It was answered that it was not done for the purpose of invalidating the marriage, but merely to shew the fraudulent character of this transaction from the conduct of the parties. The article was admitted with hesitation by the Court, and subject to future objections; and if it was necessary to decide on that point, I should entertain very strong doubts; as the words of the act are very exclusive, “that it shall not be allowed to be done touching the validity of the marriage;” and if I was called upon to determine, I should still hesitate to admit that article. It is, however, unnecessary, as the same inference arises from other parts of the transaction not liable to the same objection. The attempt to have the banns published at Highgate, and the behaviour of the parties on that occasion, sufficiently establish the fraudulent purpose.

All these circumstances proclaim the fraud. If the age of the wife had appeared, the case of fraud might have been still stronger. What the actual [148] disparity was does not appear. The boy was a school boy of sixteen years only, and, at any rate, to be presumed much younger than the wife. It is not a case of casual omission, and where one party has committed a fraud upon the other—in either of which cases the Court might have possibly hesitated; but a confederacy of both to deceive the father. Under this view of the case, I am of opinion that the suppression of one baptismal name is such a false description as will be sufficient to render the marriage null and void.

HARRIS v. HARRIS. 2d Feb., 1813.—Divorce by reason of cruelty, on words of menace, accompanied by violence, &c.

[S. C. 2 Phill. 111. Referred to, *Kelly v. Kelly*, 1870, L. R. 2 P. & D. 61; *Russell v. Russell*, [1897] A. C. 447.]

This was a case of divorce, by reason of cruelty, brought by Elizabeth Mary Harris against her husband, William Harris, of the parish of St. Dunstan, Stepney.

Judgment—Sir William Scott. This is a suit brought by the wife for separation by reason of cruelty, in which there is no defensive allegation on the part of the

husband; and the Court has only to determine how far the prayer of the wife is supported by the facts stated by the witnesses who have been examined on her libel. The Court is not in the habit of interfering in ordinary domestic quarrels; and there may be much unhappiness from unkind [149] treatment or violent and abusive language, in which parties can obtain no relief in this form; but must be left to correct the intemperance, of which they complain, by such private means as they can employ for the purpose. There must be something which renders cohabitation unsafe, or is likely to be attended with injury to the person or to the health of the party, in order to sustain an application to this Court. Words of menace may partake of either of these characters; they may be merely the language of passion, or they may be the expression of determined malignity which, if they are likely to be carried into effect, may warrant the Court to interpose and prevent the actual mischief which is thus threatened! Where such violence of language is accompanied with blows it is a more aggravated case, and the mischief is actually inflicted. It is impossible for the Court to say there has not been that species of ill-treatment in the present case.

It is proved by the evidence of the servants, who appear to have given a very impartial testimony, and even speak favorably of the husband's affectionate behaviour to his children, that he had been in the constant habit, for a considerable time, of insulting his wife with the most opprobrious language; and I see nothing to induce the Court to suspect that these witnesses have spoken with undue colour or partiality, in the accounts which they have given.

The first matter complained of is an act of violence in May, 1803, of which there is no direct evidence; but the Court has, I think, sufficient proof that a blow was actually given. The two sisters of the wife say "that in June, 1803, she had [150] for some time abstained from her usual visits to her father's house, and that when she came, on being asked the cause of her absence, and being questioned as to a mark on her chin, she declined at first to say any thing, and did not appear eager to complain; but on being pressed, she said 'she had received a blow from her husband with a poker;' and they further allege that the mark continued for some time." There is also a confession of the husband, which supports this statement at a later occasion, when he admitted to Elizabeth Jackson "that he had struck her before;" which must be taken either as an acknowledgment of this blow, or as adding to the number of injuries of which the wife has to complain. That she bore this treatment with all the patience that can be required from a wife is also satisfactorily proved. It appears further that she was deposed from the management of her family, which was given to his sister, Ann Harris; that she was not permitted to dress suitably to her situation in life; and that she had been obliged to resort to the kindness of her own family for occasional supplies of money. The terms fool, devil, and liar, are amongst the mildest that were applied to her. There is evidence of a threat "to throw a knife in her face, at the time when he actually had a knife in his hand; and also that he would knock her head off;" words which are well calculated to excite just alarm in a mind of greater firmness than she probably possessed.

The only suggestion that is offered to the Court in exculpation is that she had habits of contracting debts, which might justify the severity of taking the management of her family from her. [151] But when the Court sees the manner in which she was kept as to her own dress, it has reason to suppose that if these habits were satisfactorily proved, which they are not, they were still not more than the husband himself may be considered to have occasioned. The facts above referred to are spoken to by Jane Benson, who says "that on one occasion, in the year 1811, there was a quarrel, on account of some allowance she had received from her father, for her own use, which the husband wanted to apply to domestic purposes, to buy the children some shoes, and that he flew into a great passion, and abused her father as a villain and a fool." I see no reason to think that she was not fully justified in the use which she proposed to make of the allowance, or that it was other than was intended by her father.

The same witness, on the 12th article, speaks to a quarrel at supper, in which the husband swore "that if she did not mind what she was about, he would throw a knife in her face." On the 11th of September there is satisfactory evidence, in the depositions of Sarah Chalk, of a blow "given by a tea-cup, and that the child came down stairs and said that his father had thrown a tea-cup at his mother, and had cut her face and it bled; that she immediately went up, and saw a cup broken all to pieces in the room, and the wife's face bleeding, and there was a scar on her face for some

time after. That, about seven months ago, the husband asked the deponent if she had heard any thing about the cup, and she told him what the child had said, and he could not deny it." His silence, in conjunction with the [152] circumstances stated, leaves no doubt on the mind of the Court as to the truth of this fact.

On the 14th of November there was another outrage, which led to the final separation. This happened in consequence of some dispute about the testamentary dispositions of her father's will. On this Ann Cole says "that on the night of the father's funeral, Mr. Harris asked her to let him see her father's will, which she refused; that, after some altercation, Mr. Harris said to his wife, she might go as soon as she liked, for she should have no peace while she was in the house. That on some day in the same month of November she heard a scuffle in the parlour at ten o'clock at night, and she heard the said Elizabeth Harris open the door and say, 'Now I am off;' that she went up stairs; that her master came out from the room, and desired the deponent to leave her alone; that Mrs. Harris went out of the house, and the husband shut the door after her."

It may be thought rather singular that though this happened in the presence of Ann Harris, the sister of the husband, she says "that she was sitting between them after supper, with her elbow on the table, and her head on her hand, and she did not see either of them." It is further proved, however, by his own admission to two persons, "that he had put himself in a menacing attitude, and thrust his fist in her face with some violence," as he acknowledged to one witness, Ford; and "that her infant child was in her arms at the time;" though he denies the violence to the other witness, Elizabeth Jackson.

[153] On these facts the Court is called upon to prevent the repetition of such outrages, and it has no hesitation in pronouncing for the separation, as prayed on behalf of the wife.

WARING v. WARING. 16th July, 1813.—Suit of divorce brought by the wife for cruelty. Justification, from the conduct of the wife, sustained.

[S. C. 2 Phill. 132. Referred to, *Kelly v. Kelly*, 1870, L. R. 2 P. & D. 61; *Goodden v. Goodden*, [1892] P. 4; *Russell v. Russell*, [1897] A. C. 447.]

This was a suit for separation and divorce, by reason of cruelty, brought by the wife, in which a libel had been given in stating the charge, a defensive allegation on the part of the husband, and a responsive allegation on the part of the lady.

The usual proceedings being had, the case was argued by Dr. Arnold and Dr. Lushington on the part of the wife, and by Dr. Adams and Dr. Jenner on the part of the husband, on the facts appearing in the observations of the Court.

Judgment—*Sir William Scott*. This is a proceeding by the wife against the husband for divorce, by reason of cruelty, and likewise originally of adultery. It appears that the parties were married in 1800, and that there are five children of that marriage. In 1811 the wife left her husband, and applied to this Court for a divorce, on the charge of cruelty and adultery; though that of adultery has not been pursued. A letter indeed has been introduced, annexed to the interrogatories, on which some observations, tending that way, have been made. But it is im-[154]-possible for the Court to take up the suggestion in that form, as the other party has had no opportunity of contradicting it. I shall therefore follow the example of the party herself, by dismissing that charge from any further consideration. The case, therefore, standing on the single charge of cruelty, must be maintained on the usual principles, which require that such complaints should be supported by proof of violence and ill-treatment, endangering, or at least threatening, the life, or person, or health of the complainant.

Suits of this nature are usually brought by the wife, as the more infirm party, though they may be also brought on the part of the husband, and have been so brought, with effect, in cases before this Court. When the wife is the complainant, presumptions of injury may be derived from the comparative weakness of her constitution. It is not, however, impossible that she may have been the aggressor, and by provocations have brought upon herself the ill-treatment complained of; when that appears, she is not entitled to demand relief from the Court: it is the consequence of her own conduct, and she has the remedy in her own hands, by an alteration of her conduct; and if the law was not backward in its interference in such a case, it would furnish the wife with a very short course to a sentence of separation, if she wished it, for she would have nothing to do but to provoke ill-treatment by

ill-behaviour. I do not mean by this that every slight failure of duty, on the part of the wife, is to be visited by intemperate violence on the part of the husband. The correction of such failings must be softened by a due recollection of [155] human infirmity, and of the tender relation subsisting between such parties; and there may be cases of that kind, provoked by the wife, but unduly visited by the husband, in which the Court would not decline to interfere. But if the conduct of the wife is inconsistent with the duties of that character, and provokes the just indignation of the husband, and causes danger to her person, she must seek the remedy for that evil, so provoked, in the change of her own manners. There is reason to hope that such a remedy would not be ineffectual; but should it prove otherwise, it may then be the proper opportunity for application to the powers of the Court. Under these observations I proceed to consider the evidence by which the charge is supported.

It appears, certainly, that there had been grievous family dissensions between these parties, not becoming the decorum of their situation in life, or the duties of their relation to each other. Much gross abuse, coarse language, personal struggles, proceeding to the annoyance and disturbance of the neighbourhood, such, indeed, as the Court has seldom observed, in other such cases, to have come before its notice. But it does not necessarily follow that the husband is to blame, or is the only one to blame; for it may have been the fault of both, or of the complaining party herself alone.

On the view of the witnesses these observations occur, that they are chiefly servants, respecting whom it is a common remark that they usually give but unsatisfactory representations of scenes of this kind, of many of which they can, in fact, know but little—for they have seen but little—nothing of the cause or commencement, and but [156] little till near their conclusion, which usually brings more noise along with it, and so compels their attention. The greater number of these witnesses are produced by the complainant; they are females, and naturally range themselves on the side of their own sex; but their prejudices and partialities (for prejudices and partialities such persons are subject to) may have been thrown on the other side, by occurrences that have happened to themselves in the family: a passionate wife may have been a passionate mistress, and they will judge and speak according to their own supposed injuries. Three are cook-maids, who, from their situation, could see but little; they intrude when the battle has raged for some time, and become loud and vehement. Two are house-maids, liable to the same objection, that they come in only towards the close of hostilities. The butler had better access, but does not appear to have made the best use of his opportunities. A surgeon, Mr. Cooper, likewise produced, appears to have had some little differences with the husband, which may have insensibly coloured his evidence; but, in truth, his knowledge of facts, resulting from his own observation, is not very considerable. In one passage of his evidence, he says “that the attention of Mr. Waring to his wife was not what it should have been.” This is matter of opinion; it may depend on the different warmth of feeling in different men, and, being merely negative, is hardly sufficient to sustain a charge of legal cruelty.

Mr. Utterson, who describes his house to be the next door to her own, says “that she came to his house in a state of great distress, which affected him;” but he knows nothing of the commence-[157]-ment or cause of that quarrel, to which she attributed it, and can speak only to present appearance; and perhaps the husband, if he had come, might have come in a state of equal disorder, and of course might have excited equal sympathy.

Many of the witnesses speak of frequent noises of the lady calling for assistance from the windows, and other circumstances which indicate a state of great disorder and confusion in the house. But many of them are liable to the objection on which I have already observed, that the persons to whom she appeals were not present at the origin of the outeries to which they speak. It by no means follows that those who cry out the loudest have been the most peaceable. What might appear harsh or offensive to such persons might be justified, or palliated, by the circumstances out of which the treatment arose. That which is violent if aggressive may be justified or excused if defensive: and if the wife gave the first blow—if she was the prior laders—though to return it may not be manly, the law will allow for human infirmity under such gross and scandalous indignity. The general substance of the evidence of these persons is, on that account, not entitled to much credit; but even of these, several impute the blame to the party complainant.

I come to the evidence of Mr. H. Waring, who has been examined on both sides, and has therefore that voucher of impartiality from both. He speaks also with that moderation which entitles him to ample credit from the Court. He says that there were faults on both sides. He saw them daily, and describes the conduct of the wife in [158] their quarrels to have been provoking, and that it soon became violent.

The account of general behaviour that is given by several of the servants is unfavourable enough; she frequently put herself in violent passions—often said provoking things to him which made him quarrel with her—that she would refuse to go down to dinner, and sent irritating messages to him by his child. That at other times she would order dinner not to be prepared for him—that she would sometimes lock him up in his room, and that he was once obliged to get out of the window. These are particulars selected from the depositions of Margaret Chapman, the servant who waited on them; of Elizabeth Wickens, Lucy Wickens, and Sarah Wickens, who are examined on the part of the wife, and give this description of her conduct, which proves it highly reprehensible; and which might be expected to provoke a husband's resentment, and in which she must be considered as the authoress of her own wrongs, and not entitled to seek relief from the Court.

I must next discharge from the case those parts of the libel to which no evidence has been adduced: that he gave to her an emetic with an intention to produce a miscarriage; on which there is no evidence whatever but what rests on the declaration that she herself made to the surgeon and to a servant; and seeing the manner in which she has indulged herself in the representations which she has made of her husband, I do not think that any statement so founded can be accepted as entitled to credit. I have looked into the answers, and find that he denies this imputation positively on oath. He says, indeed, "that he may have [159] advised her to take such medicine; but positively denies that it was done with any such motive."

Another charge which is totally destitute of proof is that she was left without money in his absence; the fact appearing to be directly the reverse.

Another, that he compelled her to come down to dinner when she had just miscarried. That she came down when she was infirm in health is certainly true, but nothing further is proved except her own complaints, on which, considering the general colour of her assertions, the Court cannot confidently rely.

It is pleaded that the husband had forbidden her to hold intercourse with her own family for several years; and it was not without hesitation that the Court admitted that article to stand, for although it may be a harsh exercise of marital authority, there may be circumstances that will justify that prohibition. And the Court could ill judge of the reasonableness of such an injunction. Though the wife may be very amiable, her connexions may not be so, and there may be many reasons which would justify such exclusion.*

[160] It appears however that some coolness had taken place on pecuniary matters, as he thought that he was ill-treated by her father, on whose recommendation he had furnished some articles of merchandize to a person, for which he thought him responsible, though the father did not so consider it.

The husband complains that the wife threw the note from her father on this subject into the fire, and she admits in her own plea that she told the husband what would fully justify such a surmise on his part.

Whatever may be the result of the evidence on these points, the principal facts may be considered to be three in number, on which the counsel for the wife admit that if they are not proved, so as to entitle her to the legal consequence of separation, the suit must entirely fail.

The first is that which is pleaded in the eighth article of the libel in these terms: "That, on the night of the 6th April, 1808, James Waring, without any provocation, put himself in a violent passion, swore at her most violently, insisted that she should

* The coincidence of legal reasoning in distant ages and countries is not unworthy of remark. The propriety of sustaining such a restriction under certain circumstances is noticed in the Jewish law. "*Si quis uxori dixerit, nolo veniat ad me pater tuus, mater tua, frater tuus, soror tua, obtemperandum est. Si quid igitur his adversum accidat, uxor ad ipsos sese conferat. Isti contra non ibunt visere ad mulierem, nisi si subito quid ei contigerit, morbus, puerperium; nemo enim homo vi cogitur alios ad semittere.*" *Maimonides de Matrim. Judæorum*, ch. 13, s. 14.

go out of the house that instant; attempted to drag her by force from the fire where she was sitting; and with great force and violence beat her head against the marble chimney shelf, and thereby broke the comb which was in her hair, and the broken part thereof was forced into her head; that by the violence of such blow and the pain occasioned thereby the said Marianne Waring fell to the ground, and the said James Waring then dragged her by the arm along the floor with an intention of putting her out of the room, but her screams having brought the servants into the room, the [161] said James Waring upon seeing them immediately left the room."

The servants who have been examined came in in the heat of the battle, and knew little of what led to it. It turns out, however, that the parties had been invited to spend the evening with Mrs. Rule, and that there was some altercation about a coach; though it is deserving of remark that the sister did not mention the preliminary quarrel in her examination in chief, nor till she was pressed by the interrogatories that were addressed to her on that fact. In chief she had said that a quarrel ensued just as they were going out, and that the complainant was so much agitated by the altercation that she determined on staying at home; and she speaks of the latter part of this history nearly to the effect of the plea: but on the interrogatory she says, "that Mr. Waring went alone, because the wife sent her to him to ask to have a coach, and on his answering in the negative that she went again in about ten minutes to ask the same question, to which he replied as before; but on the weather proving rainy, he sent down one of the children to order a coach to be called, and when he came down dressed, was angry that the servant had not brought one; and from the lateness of the time, and the uncertainty of getting a coach, he went alone, leaving his wife and the deponent to follow."

I see no reason in this statement why the parties should be seriously dissatisfied with each other. It appears, however, from Mrs. Rule's evidence, "that a message was sent afterwards at nine o'clock by her, at Mr. Waring's request, desiring that [162] she would come or explain whether she would or not; that on delivering the message, the servant was instructed to say by Mrs. Waring, 'that Mr. Waring himself could best tell the reason;' and with this message the servant was sent back."

I cannot but think that this was improper behaviour on her part, and that such a message could be intended only to expose her husband to the ridicule or censure of the company. Such conduct was irritating; and it is not surprising that it should bring home a provoked husband.

What passed at first on his return appears only from the sister's statement; and when I consider how much she had made herself a party, by not dissuading the wife from sending such a message, I think her account improbable in itself, and related under impressions that tend to weaken its credit. She says "that they were sitting up for him when he returned about twelve o'clock, in a violent passion, passed the deponent without saying a word, caught hold of his wife, and jirked her off her chair, by which she was thrown the whole length of the hearth, and struck her head against the mantle-piece, and broke her comb into her head; that he dragged her across the room, when she screamed, and the servants came in." When they entered the room it appeared there had been a quarrel. Wells says "that she and another servant came up and found Mrs. Waring on the ground, crying 'Oh! my head!' to which the husband replied with an oath, 'Yes, and oh! my head too;' and said he would have his wife's sister out of the house, as he could not live in the house with them."

[163] It appears, then, that both were complaining. The next day they were reconciled, and dined together; though I cannot but think that, if the outrage had happened quite in the extent described in her allegation, and by the sister in evidence, she would have put herself immediately under the protection of her friends.

The substance of all the evidence on this part of the case is, that she gave provocation in not going to the party, and still grosser in sending the message which has been described; that there was a conflict on his return, which is described as a scuffle, in which both parties complained; that they dined together amicably the next day on a formal reconciliation, effected by Mr. Abernethy, at the instance of her father.

It appears from the evidence of Mr. Abernethy that "soon after the husband went to Ireland, and on the 8th of January, 1808, when he, Mr. Abernethy, informed Mrs. Waring that her husband was coming home, she burst into a passion of tears, continued hysterical all the day, expressed her disgust and dislike of her husband, and said 'she wished he might never return, but be drowned in his passage.'" Connect

this expression with the irritating message which had before been sent by the child, and I ask if this was an outrage that could be expected but from a female, who had so surrendered her mind and her tongue to ungovernable passion.

After this there is everything ungracious on both sides, particularly on her's, but no open quarrel until that which happened at Sandgate in 1809; and of which there is a particular account in the evidence of Mr. H. Waring.

[164] The account of their general manner of living together is certainly not very favourable to her. From the evidence of the women servants, "that she ordered no dinner to be prepared for him—that at times she was outrageous, particularly about the marriage"—and many other particulars, I collect that the system of the wife's conduct must have tried, most effectually, any husband's temper. It is stated also by them that she contradicted him in every thing, which he bore in a way rather inconsistent with the irritability of temper which is ascribed to him. The general tenor of this description gives great credit to what is stated by Mr. H. Waring, "that he has heard her say 'that she would oblige her husband to make her a separate maintenance, and would have £600 per ann. settled upon her; and if he did not, she would make his life as uncomfortable as she could.'" Mrs. English mentions the same fact, though she speaks only of £80 per annum; and that she, the witness, made some observations on the smallness of the sum; to which Mrs. Waring replied, "that she would make it do, by boarding in a family, rather than live with him." It is not improbable that she might mention different sums at different times. That she had the design of forcing a separation is established beyond all contradiction, and such conduct could not possibly be pursued for any other purpose.

A particular fact which I next proceed to examine is that which is stated in the tenth article of the libel, and of which Mr. H. Waring gives the following account. He says "that she came into the drawing-room, and asked the deponent [165] to walk out with her to see some fireworks, which the husband refused. She replied, if he would not suffer them to go, he should not go out himself—that she went out and immediately locked the door of the room; he forced the door with the poker, and, whilst he was opening it, she stood on the outside provoking him; he gave her a slap on the face with his open hand, but not enough to do her any injury. She attacked him, pulled off his wig, and carried it down stairs, and soon afterwards returned with the poker and threatened to strike him, on which he went into the bed-room," she carrying off the wig, the opima spolia of this not inercuenta victoria. In the mean time he followed her in vain, asking for and attempting to recover his wig, which had been pinned up in the window curtains of the drawing-room, and not discovered and recaptured till the next day. That she went to the window and threw it up, and, by her screams, collected a concourse of people round the house.

Elizabeth Wickens says, in continuation of this contest for the wig, "that Mr. Waring being without his wig, made inquiries of his servants, and of this deponent, respecting it; and when the family were just setting off from Sandgate, which was the following day, Mrs. Waring then told Susan Wickens, the deponent's sister, that her master's wig was in one of the drawing-room window curtains." It is difficult to speak on such scenes with gravity, if they did not most seriously affect the peace and happiness of the family. In this instance the lady appears to have taken the law into her own hands, and those hands were most energetically employed.

[166] It is not to be wondered at that he came home to town in anger. Reconciliation was attempted by their friends—and it might have been hoped that a sense of duty would have returned. Something of that kind appears indeed in one letter, which has been exhibited, acknowledging her misconduct. He required that she should retract the former dreadful expressions, which are not mentioned, though threats of hers are mentioned; and she does consent to retract, thereby acknowledging that they had been used, and were unfit to be used. It has been observed that this was wrung from her; however that may be, it certainly appears that she was not sincere, for she made various disavowals. Her subsequent conduct was quite the reverse of what should have followed a sincere retraction; her very penance was little short of renewed provocation.

The last act, which led to the final separation, was on the 22d January, 1811. Of this also we have an account from Mr. H. Waring, in the 7th article of the allegation, on the part of the husband, who says "that the husband asked him to go to the play, and she desired that they would wait till the next day that she might go with them,

to which the husband replied that he would go the next day too ; but the wife answered that he was not going to the play, but to a mistress, and immediately left the room, and he heard the house-door locked, and the door leading into the area."

Suppose her suspicions were even true, is it the proper way to regain the affections of a husband to turn his castle into a gaol, and for the wife to become his gaoler? Such conduct would lead more [167] likely to the very opposite result, and drive the object of such treatment to the comforts of some more indulgent society; for, to commit an act of false imprisonment, is a singular measure for breaking up an illicit connexion, and calling back his wandering affections. "She returned to the room, and he then demanded the key, which she refused to give up. He desired her to observe that he did not mean to use violence; but he attempted to take it from her pocket, on which she flew to the bell, and screamed out murder. He said again he would not hurt her, but he would have the key," as he had certainly a good right to insist. A struggle ensued—the servants came up, and one of them desired that she would give him the key, to which she replied, "How can you plead for such a villain." What must be the effect of an answer like this? He is locked up in his own house, his servants remonstrating for him. A further scuffle ensued; "the lady threw a small trunk at him, and aimed a blow at his head with a candlestick. She then got him down in a chair, and bit his nose, and said if he would promise not to go out she would give up the key," which was at last obtained on something like a conditional surrender.

After this the consequence followed that was quite unavoidable: the husband found it necessary to effect, by any means, the dismissal of his wife; and I cannot say that if he was reduced to the unhappy dilemma of being deprived of his liberty, and locked up in his own house, or of parting from his wife, either law or reason would frown upon him, with much severity, if he preferred the latter alternative. I shall not enter into [168] the consideration of the mode which he took to effect this purpose; all that follows being nothing more than the natural sequel of this history, which has degraded the attention of this Court for nearly three days.

On this state of the evidence the Court is not entitled to say that either party was entirely without blame. To entertain personal scuffles with a woman and a wife is a cruel necessity; but a man may protect and defend his own life and liberty. It is a difficult task to return blows, let them come from whom they may, with words only. Force may be opposed, and in some cases must be opposed by force; but supposing that some portion of blame is imputable to the husband, there is enough to warrant the Court to pronounce that a wife who is guilty of such conduct, is not entitled to complain.

I forbear to observe further on her behaviour in these scenes, lest it might look too much like the indignation which every Court must feel, but would willingly repress, on having such behaviour brought before it. I recommend to her the duty of self-examination, and to consider whether a proper change in her own conduct may not be the most effectual remedy for the evil of which she complains, and consist better with her duty to her husband, her children, and herself. In the hope that such a change may take place, I dismiss the complaint and exonerate her husband from further attendance.

[169] PARNELL v. PARNELL. 2d Jan., 1814.—Committee of a lunatic competent to institute a suit of divorce, by reason of the adultery of the wife, on behalf of the lunatic.

[S. C. 2 Phill. 158. Referred to, *Mordaunt v. Mordaunt*, 1870, L. R. 2 P. & D. 137; *Mordaunt v. Moncrieffe*, 1874, L. R. H. L. 2 Sc. 380.]

This was a suit of divorce by reason of the adultery of the wife, instituted on the part of the husband, who was a lunatic, by his committee.

The admission of the libel was opposed, on the ground that there was no authority for a proceeding in this form; that although the general right of lunatics to sue by their committees could not be denied, it was subject to some limitations; that in cases of importance it was the common practice for the committees to take the directions of the Lord Chancellor, who usually referred the case to the Master, to ascertain whether the suit would be beneficial to the lunatic. That the prayer of separation in this libel was unnecessary, as it was pleaded that the parties had had no intercourse since 1797, in consequence of the lunacy which still continued; that no such case had

occurred before; and it was submitted that the Court would not entertain a complaint of this nature, which depends so much on the acts and disposition of the husband on a suit instituted by any other person.

In support of the libel it was contended that a lunatic may sue by his committee, and more particularly when it is for his benefit or protection; that it would be highly prejudicial to the lunatic to prohibit proceedings of this nature, [170] as he might have a spurious issue imposed upon him; that if the husband should recover he might receive his wife again; but that in the mean time it was of the greatest importance to him that the misconduct of his wife should be established by legal proceedings, as it might affect the nature of the relations between them; that although there was no precise case in point there had been stronger cases; as in *Morison v. Morison* (Arches, 1745), and in *Fust v. Bowerman* (Arches, 22d Feb., 1790), the proceedings for nullity had been brought by the committee and sustained.

Judgment—*Sir William Scott*. I am not aware of any case which has occurred precisely similar to the present; it must therefore be decided not on express authority, but on principle or rules of analogy drawn from other authorities, which are clear and undisputed. The question resolves itself into two points: first, whether a lunatic is put out of the protection of the law; and, secondly, if he is not, whether there is any other mode in which redress can be obtained. On the first there can be no doubt; and it never can be asserted that the wives of lunatics should be universally released from the duties of their marriage vow. It would be an imputation on the law of this country to suppose that it had not provided some remedy against such a mischief. Then in what way is this protection to be afforded? It must be, I conceive, in the same way as in other cases, by the committee, who is the officer appointed by the Lord [171] Chancellor to represent him, who is the guardian of all lunatics, and to whom the person and estate and family of the lunatic are entrusted. The lunatic cannot personally institute the suit, and therefore he must act by his ordinary guardian. It is true, as has been observed, that in complicated matters, the committee ordinarily applies to the Lord Chancellor for authority to sue; but I do not know that it would be advisable to promote a suit before the Lord Chancellor, preparatory to proceedings of this nature. This Court has no authority over the committee to require that he should make an application to it. It is bound, I conceive, to receive his plea when brought before it as matter of right. On these grounds, and upon principle, the powers of the committee must be upheld to protect the lunatic from the greatest of all possible injuries.

But looking further to the rules of analogy, which govern other cases of persons who, on account of disability, are allowed to sue by their guardian as in the case of infants. How then does the case stand? The committee also brings suits in other instances. In suits of nullity that power has been recognized and allowed. In the case of *Fust v. Bowerman* the committee was permitted to proceed: that was a stronger case. In these proceedings the wife can sustain no injury, as the lunatic will have the power of condonation if he recovers, or he may stand on what has been done for him. I am of opinion, therefore, that the libel is entitled to be admitted.

[172] DAYS, FALSELY CALLED JARVIS v. JARVIS. 1st March, 1814.—Nullity of marriage by licence, by reason of minority and want of consent, sustained.

This was a suit of nullity of marriage, instituted by Elizabeth Hannah Days, spinster, described as falsely called Jarvis, and wife of Samuel Raymond Jarvis, Esquire, of St. Marylebone, Middlesex, against him, on the ground of his minority and the want of legal consent to the marriage, which was celebrated by licence.*

* The facts of this case appeared to be, that Mr. Jarvis was born at Lambeth, on the 26th of February, 1786, and baptized there as the son of Samuel Lancelot Jarvis and Frances Sophia Ligonier Jarvis his wife. In consequence of a commission he held in the Durham militia, he was stationed for some time in that part of the country, and there formed the acquaintance with Miss Days, which led to the marriage in question. The marriage took place clandestinely on the 2d of May, 1805, at Monk Wearmouth, Durham, by virtue of a licence obtained by Mr. Jarvis, representing both parties as of age, though both were then in their minority. On its coming to the knowledge of Miss Days' father, he, from an apprehension of its irregularity, insisted on their being married again, which they accordingly were, on the 14th June following, at

[173] An objection was taken on the part of Mr. Jarvis that there was not sufficient proof that his father might not have made a will and appointed a guardian; that though the mother in her examination swears that he died intestate, the letters of administration were not produced, nor was it shewn that due search had been made in the different registries for a will. To which it was replied that the evidence of the mother was sufficient; and that she might have taken letters of administration, though she had not mentioned it, as it was a circumstance which the examiner had omitted to ask her.

Judgment—Sir William Scott. This is a suit in which it is particularly the duty of the Court to proceed with all possible caution: it has for its object to set aside two marriages between the same parties; the second of which was had for the express purpose of correcting the infirmity of the first. The parties are both young; but it does not appear whether there is any issue of the marriage upon whom the consequences of a sentence of nullity would fall the most heavily. It was to obviate such consequences that the Court had, in its construction of the statute, held, and not without some controversy arising in other quarters, that it is necessary to prove the negative of consent, together with the other circumstances relied on, in the strongest terms.

In the present case the two marriages are proved by two persons present, besides the usual entry in the parish register; and the parties were afterwards received in society in the acknowledged character of husband and wife: there is no rea-^[174]sonable ground of doubt as to their identity, and there is sufficient proof of the minority of the husband. The Court, however, has a right to expect the best possible proof of every fact tending to shew the want of legal consent: in the present instance, the father's intestacy appears only incidentally from the evidence of the mother; a degree of proof that the Court in this case thinks insufficient. It should have evidence of the nature called for, and it has a right to expect due search to be made in the public offices of those jurisdictions, in which his will would naturally be proved, either in the registry of the Prerogative Court, or of the diocese in which he lived. This is not what the Court ordinarily requires; but in such a case as the present, I think it ought to have a clear and certain constat of an intestacy, and of the consequent non-appointment of a testamentary guardian, in the same manner as a search of the records of the Court of Chancery ascertains the non-appointment of a guardian by the Court.

A prayer was then made to the Court to rescind the conclusion of the cause, for the purpose of introducing the proof of intestacy by search; which was granted upon the consideration that there was ample proof of all the other necessary facts.

6th May, 1814.—On this day evidence was produced that due search had been made by a competent person; by which it appeared that no will of the deceased father of the minor had been proved or letters of administration granted.

[175] *Sir William Scott.* The Court is of opinion that this evidence supplies all the information required, and that the case is now complete. It must, however, observe that, as the object of this suit is to set aside a marriage which was twice celebrated, with a view to give it more complete legal effect, and which has subsisted, undisturbed, for so many years since, it is not without great pain the Court feels itself under the necessity of pronouncing this marriage null and void; which the evidence in the cause now renders an imperative duty.

EWING, FALSELY CALLED WHEATLEY v. WHEATLEY. 6th May, 1814.—Nullity of marriage, by reason of fraud and alteration of licence, not sustained.

[Referred to, *Moss v. Moss*, [1897] P. 269.]

Dalton-le-Dale, Durham, by a second licence obtained by the husband in which he alone was represented as being of age, Mr. Days consenting on the part of his daughter as a minor. From the circumstances in evidence, however, it appeared that Mr. Jarvis was not of age, as represented, at the time of the solemnization of either of the marriages, being little more than nineteen; that his father had died in December, 1795, and, as stated incidentally by his widow, Mrs. Jarvis, in her evidence, without a will; that she had on the 26th of August, 1797, intermarried again with Joseph Turner, Esq., and was thereby deprived by law of the right of consent to her son's marriage; that no guardian of his person with such right of consent had been appointed by the Court of Chancery, as appeared by due search in the records of that Court.

This was a suit of nullity of marriage, brought by the wife against Francis Wheatley, of the parish of Saint Mary-le-bone, by reason of fraud and alteration of licence, as described in the citation.

The libel was opposed by Dr. Swabey, who contended that the citation, which described the cause of nullity to be founded on fraud, was not supported by the facts pleaded in the libel.* That [176] the libel pleaded the marriage act, and that the marriage was had without licence duly had and obtained; but these were words not to be found in the act of parliament, and had not any definite sense in law that would support the conclusion of nullity, for which the Court was prayed to pronounce. It further stated that, in order fraudulently to procure a licence, the husband took an oath that the wife was of the parish of St. George, Hanover-Square, when, in reality, she resided in [177] St. Mary-le-bone. The only restriction, on the description of residence, was that under the 104th canon, which applied only to persons in widowhood and was not enforced at any time as a ground of nullity. The canon itself explains what is intended by the words "that every suit, licence, or dispensation shall be held void, to all effects and purposes, as if there had never been any such granted:" by the clause immediately following, "and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages." The consequence of nullity did not attend clandestine marriages previous to the marriage act; and that statute expressly declares that the residence of the party shall not be enquired into for the purpose of setting aside the marriage after it has been celebrated. It cannot therefore be considered, on any ground, as a material part of the description; and no variance of that kind can be fatal to the validity of the marriage. It is further pleaded that the licence was granted in the name of Martha Ewen, and afterwards altered by the husband, to the name of Ewing: this objection also was immaterial, as the variation was very slight, and not proceeding from fraud or design; and it had been decided, in the cases of *Cockburn v. Garnault* (Commissary of Surry, 4th May, 1792. *Arches*, 4th Dec., 1793) and *Cope v. Burt* (vol. i. p. 434) that the mere variation of name would not vitiate a licence, where there was no doubt as to the identity, and no fraud practised in obtaining the licence in those terms. That the circumstances which were pleaded, respecting the motives and objects of [178] the husband, were altogether irrelevant, as the parties were both of age, and were both privy to all the acts that were now set up as causes of nullity; that the marriage, therefore, could not be affected on any such ground.

In support of the libel, Dr. Stoddart and Dr. Lushington contended that the

* The third article of the libel set forth, "That, in order fraudulently to procure a licence, the said Francis Wheatley did make an affidavit, wherein he did, falsely and fraudulently, swear and describe himself to be an esquire, of the parish of Saint Mary-le-bone, aged above twenty-one years; and that he did intend to intermarry with Martha Ewen, of the parish of Saint George, Hanover-Square, aged above twenty-one years; and that he did, with a fraudulent and false intent, sign and execute the usual bond entered into by parties on granting of marriage licences; and that he did therein, falsely and fraudulently, describe himself and the party whom he intended to marry, as before set forth."

The sixth article pleaded, "That the said Francis Wheatley is not an esquire, nor a person of good state and quality, but is a person of low condition; that he has, on account of misconduct, been obliged to quit the army; that he has since been in prison, and has commonly associated with persons of bad character, and was, at the time of the pretended marriage, in embarrassed circumstances; that Martha Ewing was dependent on her uncle; that he falsely and fraudulently represented himself to her as belonging to a family of the first respectability, and that he had great expectations; that he had divers sums of money owing to him from government, and from private persons, to a large amount; that he persuaded her to meet him in her morning walks, and, on one of these occasions, to consent to be married to him; that the licence being obtained, as set forth, which he falsely represented to be a proper licence, he informed her that it was necessary to make some alteration and addition to it, and, for that purpose, went into a shop alone, where he, falsely and fraudulently, altered the name Ewen to Ewing, and returned to her in the coach, &c. and presented the same to the minister, and did, falsely and fraudulently, represent to him that Martha Ewing was Martha Ewing of Saint George's, Hanover-Square, &c."

charge of fraud was to be collected from all the circumstances; and that it was not material to object to the specification of fraud described in the citation, if the general character of the facts alleged were sufficient to support that charge. That they were to be taken as proved for the purpose of this argument; and it was to be considered, first, whether the licence was not invalid at the time when it was granted; or, secondly, whether, if originally valid, it was not vitiated by the alterations that had been made in it. Licences were special grants, which persons could not claim as of right. The canons direct (101) "that they should be granted only to such persons as are of good state and quality, and that upon good caution or security taken." And it must be the legal interpretation of such an instrument, that if not granted according to the form and rules prescribed, they should be null and of no effect, as was expressly declared in the 104th canon, which related to residence; that the policy of the marriage act, which had prohibited all marriages that were not celebrated by banns or licence, must be understood to imply this consequence, that if the licence is not duly, that is truly and bonâ fide obtained, on a right description of the particulars on which it pur-[179]-ports to be founded, it shall not be held a valid instrument to any effect; and the consequence would follow that the marriage would be a nullity under the marriage act, being solemnized without banns or licence, in construction of law: that in the common construction of all grants they must be understood according to the intention of the grantor; and, since the facts alleged sufficiently shewed that deception and fraud had been used, both in obtaining the licence, and in the alteration afterwards made in it by the parties, it was impossible to maintain that it could be valid, either in its original form, or in the manner in which it had been used.

With respect to the former, the libel stated that the description of the wife was false, as to her name, being in the name of Ewen for Ewing, and also with respect to her parish, as she was described as of St. George's, Hanover-Square, though she resided in the parish of Mary-le-bone. It was not merely a misnomer, as to the spelling of the name, but substantially a false representation, both in name and parish, and must have been intended to elude the observation of the clergyman, and of others who might have prevented the marriage. With respect to the latter, the alteration of that name also by the party rendered it not the act of the ordinary; and a marriage so had and obtained could not be held to be celebrated under any legal authority. The general circumstances under which this connection had been formed were introduced to shew the real complexion of the case; as had been admitted in the case of *Pouget v. Tomkins* (supra, p. 142), and it was submitted that they were strictly relevant, as tending to establish a system of artifice and deception in getting [180] possession of this lady, and would more strongly support the construction which the Court would put on the falsehoods used in obtaining the licence. That it was in the power of the Court to expunge that part of the libel, if it thought it not material; but it was hoped that the Court would hold the substance of the libel to be such as entitled it to be admitted to proof.

Judgment—Sir William Scott. This is a proceeding by Martha Ewing, to set aside a marriage which is not denied to have been regularly solemnized. The citation assigns the cause of nullity to be fraud and the alteration of the licence. Now, undoubtedly, there may be such fraud as would vitiate the licence, and, therefore, I do not see that there is any reason to object to the terms in which the citation has issued. It will, however, be for the Court to consider how the terms are supported, and whether the circumstances, which have been pleaded in this case, are sufficient for that purpose.

The first article of the libel pleads the marriage act, and "that all marriages had without banns or licence are null and void." The second article goes on to allege "that the present marriage was celebrated without banns or licence duly had and obtained."

I do not think that there is any reasonable ground of objection to the use of the latter words, not duly obtained; because if they are not precisely the words used in the act of parliament, they must be understood to be necessarily implied with respect to the restrictions which the canons impose on the grant of licences. The only conditions of [181] the security required are that there shall be no lawful impediment; that there shall be no suit of pre-contract depending (which has been taken away by the marriage act); that the parties have obtained the necessary consent; and that the marriage shall be celebrated in the parish of one of the parties, and at canonical

hours. The 104th canon requires further, in the marriage of persons in widowhood, that the residence of the parties shall be expressed; though it does not appear that this restriction was intended to be imposed on others. The statute has since declared that the fact of residence shall not be inquired into for the purpose of invalidating the marriage; and, therefore, this marriage cannot now be impeached on any such ground. These are, however, only the preliminary articles of the libel; the admissibility of the libel itself must depend on others, without which these will be of no avail.

The third article pleads that, "in order fraudulently to procure this licence, the husband personally attended and made an affidavit, in which he falsely swore to his own description as Francis Wheatley, Esquire, being in reality not of that rank and degree; that he intended to marry Martha Ewen of St. George's, Hanover-Square," whereas she was not resident in that "parish, but in the parish of St. Mary-le-bone."

There are other facts in the affidavit which are not alleged to be false—as that both the parties were of age, a circumstance which is very material, the principal object of the statute being to protect minors: the place also in which the marriage was celebrated corresponds with that inserted in the licence, and therefore I do not understand what is [182] meant by the averment "that all this was falsely sworn." It is argued, however, that there was fraud in the false description of himself as an esquire, as that title belongs properly to persons of good state and quality, whereas he was a person of low condition, and assumed that description only to assist his fraudulent object of getting possession of the lady for the sake of her fortune.

It is certainly true that, in the description of persons, there may be fraud that would vitiate the licence; but the mere exaggeration of fortune or rank will not have that effect. Such circumstances may indeed be very proper to be admitted, where the main fact itself is of dubious nature, and where a reasonable doubt is entertained whether the transaction altogether is not substantially fraudulent. Such was the case of *Pouget v. Tomkins* (vid. supra, p. 142), where one party was a minor of tender years and the other a cook-maid in his father's family, and one of his names, by which he was most commonly known, was entirely suppressed; and the publication was of one by which he was hardly known, and the marriage was had by banns, under artifices which were used to defeat the just exercise of the father's rights. In that case the disparity of circumstances was admitted to be pleaded, though abstractedly it would be no ground; as it might tend, in conjunction with the other facts, to elucidate the nature of the transaction and shew whether the suppression of the true name originated in error or in fraud. But in general, where no such consequences are to be apprehended, that a man should represent himself of superior condition [183] or expectations will not of itself invalidate a marriage, as the law expects that parties should use timely and effectual diligence in obtaining correct information on such points.

It is perfectly established that no disparity of fortune, or mistake as to the qualities of the person, will impeach the vinculum of marriage; and the mere description is not a constituent part of the affidavit. Considering the laxity with which the title of esquire has been used, as is the subject of remark by Sir Thomas Smith in his days, as to the title of gentleman (Commonw. of Eng. b. i. c. 20), and that the husband in this case had been an officer in the army; the Court cannot take upon itself to define whether it has been improperly assumed, much less to pronounce, that the use of that addition to his proper name was a fraudulent act. On the other fact, that the residence of the wife was falsely described, I have already observed that the place of abode is not a cause of invalidating a marriage, by the special provisions of the act: the directions of the 104th canon, therefore, would be immaterial, even if they were applicable to this case; but they are confined specifically to the particular case of the marriage of widows. Then what are the other circumstances which have been relied on? The circumstances in the sixth article may all be material, if the main facts can be shewn to support illegality; then they might be subsidiary, but they do not go farther. It appears that the true and proper name of Ewing was written Ewen in the licence; that the man altered [184] it, as the parties were going together to church, to the right spelling of that name. The original description was not so materially at variance with the true name as to make the licence in the terms in which it was granted, invalid, and unless it was invalid before this alteration, it could not be considered as fraudulent to make the alteration. In licences the identity is the material circumstance to which the Court principally looks: in banns, it is the proclamation which is defective in the way of notice, if there is any material variance. In the present case it is impossible to attach any fraudulent intention on this act.

It is pleaded "that, under colour of marriage, the man intended to get possession of the property of the wife, and that he made his visits clandestinely, and continued to be introduced without the knowledge of the uncle." But the uncle had no legal rights over this young woman which could be the object of the protection of the law, nor any legal authority over her. It was left to the discretion of the parties to act as they pleased in this respect. There was a request that the connection should be kept secret: that again was a matter of prudence and discretion; and if their conduct was blameable in any view, it is not a matter that can be urged on the Court, any more than the charge that he falsely and fraudulently misrepresented his expectations. The particulars, then, that are set forth in this part of the plea, are entirely irrelevant, viz. "that he persuaded her to be married privately; that, for that purpose, he met her in her walks, and told her that it could be done in half an hour—that he handed her into the coach." In all this there was no force nor [185] deception on her; every thing was done with her entire consent, and it appears that she was as ready to be handed into the coach as he was to hand her.

Two letters, written before the marriage, have been introduced, which are in the common style of real or pretended affection. Two others have also been exhibited, which were written after the marriage; these are perfectly nuptial, and being written afterwards they could not contribute to this act. There is nothing then in these general circumstances, which have been pleaded, that reflects any additional imputation of fraud on the manner in which the licence was originally obtained. It is impossible to suppose that any misrepresentation was made to the surrogate, with a design of imposing upon him, or for the purpose of procuring any facility that would not otherwise have been granted. There is no ground for any such interpretation of the motives with which this was done. I think, therefore, that the licence is good and valid, as it was granted; and though the clergyman, if he had been aware of the variation, might properly have hesitated, yet if the marriage had been celebrated, the Court is still of opinion that the marriage would have been perfectly good.

With regard then to the alteration—Can the Court hold that the instrument was affected by what was done afterwards? The spelling of the name was changed as the parties were going to church. It must be admitted that this was an imprudent act, as it must always be considered as treading on very tender ground to alter any instrument; but where there was perfect satisfaction as to the identity, would the clergyman have paused in celebrating the marriage, on the licence as it before stood, or could there be any intention in this act of effecting a marriage which would not have been otherwise obtained.

I am of opinion that there is no ground shewn on which this marriage can be invalidated, and that the false representations of circumstances, which have been assigned, will not have that effect. They did not lead to the obtaining the licence in any manner, or to the alteration, and are wholly unconnected with it, and are of no significance whatever by themselves. The variation, in itself, is little more than a clerical error, and affords no ground on which, on any evidence of facts which is before the Court, it could pronounce this marriage void. The libel, therefore, must be rejected.

[187] **SEARLE v. PRICE, FALSELY CALLED SEARLE.** 1st March, 1816.—Suit of nullity of marriage, by reason of a former marriage, sustained. Strict proof required of the identity of the parties.

This was a suit instituted by Edward Blakemore Searle, of the parish of St. Peter, Cornhill, against Sarah, his wife, to annul his marriage with her on the ground of a former marriage alleged to have taken place between her and one Charles Price, who was living at the time of the latter marriage.

On the part of Mrs. Searle, Dr. Burnaby and Dr. Jenner contended that there was not sufficient proof* to identify the parties to the second marriage as being the

* On the opening of the case, the counsel for Mrs. Searle took an objection to the reading of the evidence of Price, the alleged first husband, on the ground that it was a received principle of law that a husband and wife cannot be witnesses either for or against each other; a principle resting on the consideration that their evidence, if in each other's favor, was open to the presumption of an undue bias, and if of an adverse character might lead to dissensions in families, which it was the policy of the

actual parties in the present cause; that the mere belief of that fact, expressed [188] by two witnesses present at the latter marriage, undeduced from any fact stated by them to warrant such a belief, was insufficient; that the admissions or acknowledgments of the party herself could not, even if more consistent with each other than they actually were, be admitted to supply that deficiency, or furnish in any way grounds for a sentence in a case of this nature.

On the other side, Dr. Stoddart and Dr. Lushington submitted that the belief of identity expressed by the two witnesses to the second marriage was sufficiently supported by the nature of the confrontation; that the party was cited to be confronted as the party in the cause; that she appeared in obedience to the mandate of the Court in that character, and the general conduct of the suit in her name and on her behalf confirmed the fact. If, however, the Court should still hesitate on this point, they hoped it would for its own satisfaction extend to them the indulgence of rescinding the conclusion of the cause, to enable them to confront the party with other witnesses in support of the identity.

Judgment—Sir William Scott. In this case it is sufficiently established that a Charles Price was married on the 20th of December, 1783, to a Sarah Pollard, and that a Sarah Price was married on the 28th of February, 1811, to Edward Blakemore Searle, at which time the Charles Price, first married, was living. The only question therefore is whether the Sarah Pollard who was married to Price is the Sarah Price who was married to Searle; whether in fact the identity as to the second [189] marriage is proved in a way satisfactory to the Court.

In all cases where a dissolution of marriage is the object of the suit, it is the especial duty of the Court to guard against imposition: where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion; and should only be brought into question upon the most undisputed proofs. It greatly concerns the interests of families that the marriage contract should be preserved inviolate. Experience of the world plainly shews that married persons are often but too ready to seek a release from the nuptial chain, and too little scrupulous of the means of effecting it. For this purpose a false case might be established before the Court, whose utmost vigilance is therefore requisite that the truth should be established, independent of the confessions of the parties. In cases of adultery no confession of the fact can be admitted alone, and in cases of this description it is the more necessary to guard against the imposition of making false acknowledgments to obtain a separation. A married person may afterwards wish the marriage avoided; for this purpose a former marriage might be propounded by the one party and admitted by the other; but the Court could not rely on declarations thus made, and that too not on oath, in furtherance of the common purpose. They might go further; by substituting false parties, who might admit themselves to be parties in the cause when they were not, and various impositions of this nature might be resorted to, to destroy the rights of the real parties. Even a decree of confrontation would not protect the Court in such a case, as the [190] real parties might be unknown to the officers of the Court, unknown to the practisers, and certainly unknown to the Court itself; so that in this way a real marriage might be set aside without the least knowledge on the part of those interested in it. It is therefore a clear rule, and a rule founded on the necessity of the case, that the identity must be proved by other testimony than that of the parties themselves; it must be proved by witnesses who can speak to the facts from their own personal knowledge. What could have been more easy in the present case than for a person to have appeared to the decree of confrontation, and have acknowledged herself the party in the cause? It is therefore necessary that the party should be produced to witnesses who have known her in

law to discourage and repress. To this it was replied that it was not competent to the wife to take this objection, or she would thereby admit the principal fact in question and convict herself of an act of bigamy; and that as to the evidence of the husband, it would not tend to affect any interest under his relation to his wife, or to exonerate himself from any responsibility, but rather to onerate himself with the obligations attending the character of husband.

The Court permitted the evidence to be read, *de bene esse*, reserving the point for more formal argument, in the event of the case appearing to depend in any material degree upon the evidence objected to.

both characters, or to one witness at least who may have known her in each; why this was not done in the present case is a circumstance perhaps not easily explained, however much it may be lamented, on account of the inconvenience that has been occasioned by it.

The Court cannot but remark that the result of the evidence on the present case, compared with the principles that it has thus briefly laid down, appears liable to much objection. Mr. Phippen, the witness to the second marriage, speaks only to his belief of the identity; on what he grounds such a belief does not appear, as he states no antecedent facts within his knowledge from which the Court can judge of its accuracy. On the decree of confrontation the evidence adduced is that of two witnesses who knew the party as Mrs. Price, and who prove that she then acknowledged herself to be the party in the cause; so that this part of the case rests only on that acknowledgment, and [191] that is insufficient. A decree of confrontation is an assistance to the proof, only to be applied for on special grounds, and yet this is all that has been done upon it in the present case. The other evidence, that of the admissions of the party in conversation, resolves itself into the same point, as, if the Court relies on that, it will pronounce a sentence upon the mere confession of parties.

Under these circumstances it is impossible that the Court can come to the conclusion that there is sufficient evidence to satisfy the strict demands of the law in a case like the present. If any case, however, can be produced where a party, after having had the benefit of one decree of confrontation, has afterwards received the indulgence of another (of the existence of which the Court much doubts), it will yield, though not without reluctance, to the application now made. If, however, no such case can be produced by the next Court day, it will then pronounce for a failure of proof and dismiss the suit.

On a subsequent day it was shewn to the Court that three of the former witnesses had been re-examined, with the addition of one new witness; that two of them deposed to the first marriage, and the other two to the second; that they had all had an opportunity of seeing the wife upon the occasion of her being examined at the police office, Queen-Square, upon a charge of bigamy, and that they all concurred now in identifying her.

[192] *Judgment*—*Sir William Scott*. The Court was certainly of opinion at the former hearing of the cause that there was a material defect as to the identity of the party proceeded against. The indulgence of a decree of confrontation had been granted, but the result was not such as the Court was entitled to expect. It was necessary that the wife should have been confronted with a witness who knew her in both characters, or with two or more at the same time, who could separately identify her in each.

The acknowledgment, however, by the party produced that she was the party in the cause, seemed to have been too much relied on. Acknowledgment, indeed, is a term in such a case improperly applied, as it is no acknowledgment at all unless the party is otherwise proved to be the party in the cause; and without such proof the acknowledgment is open to the suspicion of having been collusively made, and by another than the real party. The person, however, has now been seen by the witnesses, not indeed under a decree of confrontation, but under a confrontation otherwise effected, and the defect is supplied to the satisfaction of the Court. It is proved that the party thus confronted is the person with respect to whom both the marriages are proved; the witnesses connect her with each, making a complete chain of evidence that she is one and the same person. The Court then is of opinion that the proof is now complete in all respects, and it has no longer any hesitation in signing the sentence of nullity accordingly.

[193] *FIELDER v. SMITH, OTHERWISE NELSON, FALSELY CALLED FIELDER*. 12th Feb., 1816.—Nullity, by reason of the want of due consent: the mother, who had given consent, being alleged to be the natural mother. Evidence on that point, how considered, not sufficient; party dismissed.

This was a suit instituted by John Fielder, Esquire, of St. James's Street, against his wife, describing her as Sophia Augusta, otherwise Sophia Smith, otherwise Nelson, spinster, and falsely called Fielder, for a nullity of his marriage with her, on the ground of her minority and a want of legal consent.

The marriage took place on the 13th of May, 1797, as between John Fielder and

Sophia Nelson, a minor, by consent of Mary Nelson, widow, her mother, and in virtue of a licence obtained by Mr. Fielder upon the joint affidavit of himself and Mrs. Nelson. It was stated that there were twelve children, issue of the marriage; and the ground of nullity now assigned was the minority of the wife, and that she was the illegitimate daughter of a Mrs. Nelson, formerly Smith, who, as the natural mother, had no right to give her consent; and that the marriage having been solemnized without the consent of a guardian appointed by the Court of Chancery, was void under the statute. The marriage was proved and not denied; and the birth of the minor in August, 1777, and her baptism soon afterwards, as the daughter of Thomas and Mary Nelson, were also proved.

[194] *Judgment*—*Sir William Scott*. This is a suit to dissolve a marriage which has taken place above twenty years ago, and, as far as appears from the family history of the parties, has subsisted ever since without any attempt at interruption. It is a marriage perfectly regular in form, had with the consent of the mother, the only person, *prima facie*, appearing to have the right of consent; and at this distance of time, the Court is called upon to declare the marriage void upon a principle of law, that such a consent is not the consent of an authorized person.

It has been held, both here and in the Court of King's Bench, that the consent of the parents of illegitimate children is not a consent within the meaning of the act. This has been matter of doubt; and it is perhaps a point not yet finally settled, as a case raised upon it is said to be now in progress, for the decision of the last court of resort.* In the present case all persons interested concurred in the marriage, and it is now sought to be invalidated upon this strict principle of law, the growth of latter times. It is hardly necessary to observe that the feeling of the Court, as far as it can be properly indulged, is strong in favour of the marriage; and the evidence must be of a very peremptory nature, that should induce the Court to pronounce such a marriage null and void.

The first and great question respects the marriage of the parents, since it is objected that the mother [195] could not legally give consent, not being the lawful wife of the father; and the Court is now expected to pronounce on the marriage of persons, one of whom has long since been dead; and that those parties, while living together, were living in unlawful cohabitation. Surely this would require the strongest attainable evidence to be produced. That they were living together without marriage is asserted upon two grounds; first, the reputation of that fact, and, secondly, that Nelson had a wife living at the time.

It is certain that the illegitimacy of a child may be proved by probable evidence, perhaps by reputation only; but then the reputation must be clear and undoubted—it must be uniform; for if a reputation has existed both ways, the conclusion would be in favour of the marriage. Here the reputation is contradictory; a cohabitation for many years is proved, children were born, and the parties constantly passed for man and wife. There were, it is true, some persons that had their suspicions; but the general impression appears to have been in favour of the connection being legitimate. Three witnesses only are produced on the point of reputation. Mr. Watts, an upholsterer, deposes “that he furnished a house for Mr. Nelson, upon his marriage with one Mary Kelly; that the marriage took place in April, 1771; that he, the deponent, was not present at the marriage, but he remembers their going out to be married; that on their return they both acknowledged that they were married, and he dined with them upon the occasion; that they lived together two or three years, but then disagreed and parted; that he, the deponent, was trustee for [196] Mrs. Nelson; that he believes that she died about the year 1792, but knows that she was alive many years after the year 1788; that in 1774 Mr. Nelson removed into a street opposite to the Pantheon in Oxford Street, from thence to Gerrard Street, Soho, where he kept the Royal Larder, and lastly to Drury Lane in 1776, at all which places he kept a gaming-house, &c.; that whilst he lived in Gerrard Street, he went one evening with deponent to Bagnigge Wells; that they there met with two young women, one of whom, Mary Smith, from that time lived with Mr. Nelson as his wife; that they had four children, to one of which he, the deponent, stood godfather; that he believes it was Sophia Augusta, and that she was born in 1777; that he often saw

* This is understood to have applied to the case of *Priestly v. Hughes* (vid. vol. i. p. 360): but it is believed nothing further was done upon it.

her during her infancy, and latterly at the house of her mother in Pall Mall, as Mrs. Fielder."

It is to be remarked upon the degree of credit due to this man's testimony, that though he deposes against the existence of any marriage, he had himself attested the legitimacy of the child by a solemn act in the house of God—that of being godfather to her, as "the daughter of Thomas and Mary Nelson." Considering, therefore, the habits of this man's life, as disclosed by himself in his deposition, and the slight and contradictory nature of his evidence, he is not much to be relied on.

The next witness is Ellison, who deposes "that the parties were not married, though passing as husband and wife"—he gives as his only reason his belief "that the former wife, Mary Kelly, was alive at the time; that he remembered the day [197] of the marriage with Mary Kelly, as he called to wish them joy, and had cake and wine." The law is at all times very unwilling to admit evidence to bastardize children; but here the balance of evidence is the other way. The minor was baptized as legitimate; her mother has stated that she was improperly described by the name of Smith, and has sworn to her legitimacy to obtain the licence, and asserted it by giving her consent to the marriage, though she has not thought fit to enter into that subject in her deposition. She had an undoubted right to decline doing so if she thought proper, as the onus probandi was upon the party prosecuting the suit; and he is not entitled to the assistance of any proof, which the law would not be disposed to enforce for him.

Upon the fair result of this evidence then, if reputation alone could be admitted to establish the fact of an illicit intercourse, there is an insufficiency for the purpose. As to the other ground, that of the former wife being living at the time when this child was born, it rests solely upon the evidence of the two witnesses alluded to, unsupported by any documentary proof. No register is produced, nor any person who can swear to their being present at the marriage. The mere fact of the parties going out by themselves with the avowed intention of being married, resting, as it does, only on the evidence of Watts, whose credibility has been already remarked upon, of itself proves nothing; as from the character and habits of life of Nelson, it is not improbable that this might be a simulated transaction; he might have designed it as a cloak to an illicit connection, without any marriage really passing. Neither is the fact stated [198] by the same witness, of his being a trustee of the wife, any proof of the marriage, as his trusteeship might have been under the separation. There is also no proof that she did not die before the second reputed marriage; for though it is in the deposition of Watts, that she was alive after the year 1788, yet no grounds are stated for that opinion. The other witness states nothing more than his calling to wish them joy—a fact which is open to similar observations; and if a marriage really had passed it might easily have been traced, and there is no doubt that it would have been proved more decidedly. The evidence to the contrary is, therefore, too slight to operate to the dissolution of a marriage sufficiently proved and admitted; had with the consent of the mother; and in every other respect perfectly regular.

Upon the whole of this case, the Court is of opinion that there is such an imperfection in the evidence as ought, under the circumstances of the case, to be considered sufficient to destroy the claim of the party proceeding to a sentence of nullity. It therefore pronounces for a failure of proof, and dismisses the wife from the suit.

[199] **BRISCO v. BRISCO.** 1st March, 1816.—Alimony, pending suit of divorce, proportion, according to circumstances. £200 given in addition to separate income.

This was a question as to the alimony to be allowed to Lady Brisco, during the dependence of a suit, instituted by her against her husband, Sir Wastel Brisco, for a divorce, on a charge of cruelty and adultery.

Judgment—Sir William Scott. This suit originally began as a suit, brought by Lady Brisco, for cruelty and adultery, against Sir Wastel Brisco; but it has now assumed the shape of recrimination, by a charge of adultery against her. The allegation of faculties, as it is technically called, was given in, as the first step in a question of alimony, early in the year 1814. It is always desirable that an allegation of this nature should be given at an early period; and that the question of alimony should be disposed of in the first stage of the proceedings, to prevent the husband being unnecessarily harassed with suits and demands for his wife's debts. After the admis-

sion of the allegation, some objections had been taken to the answers of Sir Wastel Brisco, one of which objections, "the want of a sufficient specification of the value of an house, and some demesne lands, occupied by himself," was held sufficient for the Court to require further answers upon those points. It appears that he thought that, as this house and domain or park were occupied by himself, as they had been also by his ancestors, they should not be charged; a mistake which might easily occur; for it does not usually happen that gentlemen appreciate their mansion-house and demesnes as if they were to be let. It was not improper, therefore, in him to [200] take time to consider upon the terms of his answers (which he gave in by the end of that year), before he inserted the exact specification of the value of this part of his property.

Now, undoubtedly, though it is usual for the party to accept the answers, particularly when reformed by order of the Court, the wife is not compelled to acquiesce in the valuation of her husband, and it is open to her to examine witnesses if she thinks proper: this, however, is a right not to be exercised wantonly, but with great caution and tenderness. It is hardly ever necessary, in cases of considerable property, to enter into an inquisitorial scrutiny of its exact value: it is to be taken upon a fair general estimate. Here, however, Lady Brisco charged the value of a particular property at £2000 per annum, which Sir Wastel set at £350. So great a difference as this induced the Court to go into the enquiry: upon the result of which it now turns out that Lady Brisco's valuation is enormous, and unfounded in the extreme; and that even Sir Wastel's is above the real value. This is a misrepresentation which the Court must consider to have been imposed upon the party herself; as it is unwilling to suppose that she designed such an imposition upon the Court. By what witnesses is this valuation supported? by two only, who have been in open hostility to Sir Wastel Brisco, persecuting him with law-suits, and indicting his steward for perjury, but prevented by the grand jury indignantly rejecting the bill. The testimony of such witnesses is of a piece with the allegation upon which they were examined, and is utterly undeserving of credit.

[201] Taking the whole of Sir Wastel Brisco's income upon the fairest calculation warranted by the proof, the Court is of opinion that, taken altogether, it may be considered to be £2600 per annum; subject, however, to an immense depreciation from the present state of landed property; the extent of which cannot be foreseen, no man knowing what he shall receive; some farms being let at rents reduced 25 per cent., others paying no rent at all, and others thrown up altogether. It has been said that all this might be temporary; so may the continuance of the present suit; but the one appears, at present, as improbable as the other. Supposing every thing had been clear in the case, the Court might have been inclined, perhaps, to allow one-fifth of the whole property to the complainant, including her pin-money. This would be quite as much as is necessary for her suitable maintenance, in a situation calling, as hers does, for retirement and prudence; and in which she must be expected to have some little regard for the interests of her husband and her family. He has to maintain the expences of the suit, which have been carried to an extent of which the Court hopes never to see such another instance; and, as a country gentleman, living in his own county, he has to support the dignity kept up by his ancestors, and has also to maintain his three children.

These would have been considerations which would have had great influence with the Court, even if there had been no misconduct on the part of the lady; but she has launched out into expenditures to an astonishing amount, with no necessity to justify them. There appears to have been orders given to tradesmen for plate, clothes, linen, [202] china, horses, and carriage, &c. with no communication with the unfortunate husband who was to pay for them, and whilst litigation was going on, which prevented the Court from proceeding in the allotment of alimony. It has been said that this was done to replace the clothes burnt by her husband; it is admitted that he did burn some, and he assigns as a reason "that he burnt them to induce her to write for some more from the place where she had left them," an extraordinary reason, and certainly a most unfortunate expedient. The carriage, too, and plate, if ordered on the authority of her father, should have been at his expence, so as to secure her husband from the payment; but the bills are sent to him. The father dies, and it does not appear that his executors have ever been applied to on the subject. It has now been said that Lady Brisco is ready to give up the articles in her own possession. This will be but a secondary satisfaction if made; there is, however, nothing to

prevent her converting them into money for herself, if she is so minded. Under all these circumstances, where enormous expences are thrown upon the husband in every mode to which female extravagance can apply itself, if the Court did not feel that by ordering alimony it was most consulting the protection of the husband, it would hardly be disposed to allot any alimony at all. Under all considerations, however, the Court allots the sum of £200 per annum, in addition to the sum of £200 per annum pin-money.*¹

[203] WILSON v. WILSON. 16th March, 1797.*²—Costs of the wife, having a sufficient independent income, not allowed to be taxed against the husband during the proceedings.

[Cited, *Gilroy v. Gilroy*, [1914] P. 123.]

This was a suit of divorce by reason of adultery, brought by the husband, in which application was made on the part of the wife that she might be allowed to have her costs paid, as incurred, during the suit.

In support of this prayer, it was said that the husband had dissipated a considerable fortune which the wife had brought; and still retained £2000, for which he paid no interest; that there was no instance in which the wife had been refused her costs in a suit instituted against her.

On the other side it was contended that costs and alimony stood on the same principle—the presumption that the wife had no separate income; and both claims had been denied on the same grounds. The cases of *Furst v. Furst*, Consist. 1739, and *Holmes v. Holmes*, Arches, 1755, and *Davis v. Davis*, 1789, were cited, by which this point had been determined. In the present case the wife had a separate income of £440, and the husband £400; that if it could be considered as one income, the Court would not, for alimony, grant a moiety to the wife. It would not therefore deduct from the income of the husband, in order to spare an equal income which the wife now actually possessed.

[204] *Judgment*—*Sir William Scott*. In suits instituted either by the husband or the wife (for I consider that fact to be indifferent), the wife is a privileged suitor as to costs and alimony; and on the same principle that the whole property is supposed, by law, to be in the husband. If the wife therefore is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit; and that she should be enabled to procure justice, by being provided with the means of defence. This arises out of the ordinary condition of connubial society, and the state of the property, between the parties, as usually vested, under the more ancient law of the kingdom.

If it should happen, as by the introduction of other principles and operation of law, it often may, that the wife has an income correspondent to her own expences and the necessary expences of the suit (for both must appear), there is no longer the same reason that she should be a privileged suitor. It may turn out that, on the result of the proceedings, she may be still entitled to her costs; but, by a variety of cases—particularly the last of those mentioned,*³ in which I was of counsel, it has [205] been

*¹ Affirmed on this point, in proceedings in the Court of Arches, 20th May, 1819; and in the Court of Delegates, 15th Feb. 1820.

*² A report of this case has been obtained and inserted, though out of its order of date, as connected with the subject of the preceding case and referring to former authority. Vide *infra*, *Davis v. Davis*.

*³ The case of *Davis v. Davis*, Arches, 1789, was the subject of much discussion, on the principle and on the authority of former practice, and was argued at length by Dr. Compton and Dr. Scott, on the part of the wife, and by Dr. Harris and Dr. Bever, on the part of the husband.

Judgment—*Sir W. Wynne*. This is a suit for separation, by reason of cruelty and adultery, brought by the wife against the husband. An appearance has been given on the part of the husband, and a libel, and issue confessing the marriage, but otherwise contesting the suit negatively. The cause then is come to that stage where, in ordinary cases, the proctor for the wife usually prays costs. The general rule is admitted that, in all cases, the wife's proctor is at liberty, at this period, to correct his bill and pray it to be taxed against the husband; but it is stated that the present case ought to be an exception to that rule. It is alleged in the act of court

decided that where there is an independent income, competent to the support of the wife and the maintenance of the suit, the privilege is no longer considered to continue. In the present income of the parties there is almost an equality, and the Court will not look back to what may have been dissipated; observing only, that what has been dissipated in the present case appears to have been [206] so dissipated not without the assistance of the wife. Looking at the fact that she has £440, with a prospect of increase, for herself alone, the husband only £400 for himself and family, I am of opinion that it would be injurious to the husband to make any such allowance; and that there is no reason for it; and, therefore, I reject the application of the wife.

[207] *MEDDOWCROFT v. GREGORY, FALSELY CALLING HERSELF MEDDOWCROFT.* 12th July, 1816.—Nullity of marriage, by banns, by reason of minority and want of consent of the father. On the suit of the father, sustained. Vide facts. [S. C. 2 Phill. 365. See further, *Meddowcroft v. Hugucium*, 1844, 4 Moore, P. C. 386, and *Perry v. Meddowcroft*, 1846, 10 Beav. 122.]

This was a suit of nullity of marriage, instituted by the father of the husband, on

that she had, at the marriage, £160 a year, which was secured to her separate use, and of which she is now possessed—that he is a clergyman unbeneficed, having no cure or faculties to enable him to pay her costs; and that, under such special circumstances, the general rule ought not to prevail. It has been argued that it is laid down, as a rule without exception (save as to the case of a pauper, who sues as such), that, let the faculties of the husband be what they may, the proctor of the woman may porrect his bill of costs *de die in diem*, and the Court will decree payment.

It is admitted that the principle on which the rule is founded is that, under the ancient law of the country, the wife is presumed to have no separate fortune, and that by marriage every thing becomes the property of the husband; yet it has been said that, although facts may be established to rebut the presumption; although the husband could prove the law of the country inverted—yet that costs must still be given, the rule admitting of no exception. If it were so, I should feel myself much inclined to depart from such absurdity; but I am not under those difficulties. There are instances occurring to my relief, where the contrary doctrine has been laid down: the first case is *Holmes v. Holmes*, heard in the Arches, 3d Feb., 1755, on an appeal from the Consistory Court of London. It was, in the first instance, a suit for restitution of conjugal rights; in the Arches, the wife's proctor porrected his bill, praying costs to be taxed in both courts; the husband objected thereto, stated that he was a bankrupt and worth nothing, and that she had £300 a year and a considerable personal estate in trust for her separate use. She set forth in affidavit that he had in the marriage deceived her, that he had defrauded her, and a commission of bankruptcy had issued against him at the suit of her trustees; and she admitted that she had £2000 in money, £500 in plate, but not more than sufficient for her decent maintenance. The Judge said, "that it was a rule that the husband should pay costs on whichever side the suit began, but that it was founded on the presumption that he had every thing and the wife nothing; that where the contrary appeared, the law and presumption were done away;" and he cited a case, *Pierce v. Pierce*, before Dr. Edmunds, Chancellor of London; in which, on petition for alimony and costs, it appeared that the wife had £200 a year to her own use, the husband was a gentleman-pensioner of £100 a year salary, had children, and was much in debt. The Court gave neither alimony nor costs—the wife appealed to the Arches—Dr. Bettesworth, the dean, on the motion in Dr. Scott's argument, allowed costs, but not alimony. From thence the husband appealed to the Delegates, where the first sentence was affirmed.

These cases completely shew that where the foundation of the rule is taken away, the rule will fail. In both it was adjudged that neither costs or alimony were due; I have only to consider, therefore, what are the facts in the present case. The wife admits she has £160 a year, which she enjoys; the husband has sworn that he can only do occasional duty as a clergyman, is prevented frequently from that by illness, and has no income or property whatever. No situation can be more distressed; and I think, if I can do it, that I ought to reject the prayer of the wife's proctor. I am of opinion that the cases I have before stated will warrant me in so doing, and I reject such prayer accordingly.

his own behalf, by reason of minority and undue publication of banns. The libel also pleaded that the marriage had been contracted clandestinely and fraudulently.*

On the part of the father, Dr. Swabey and Dr. Lushington contended that it was not necessary to shew actual deceit if the publication was such [208] as was adapted to deceive; and that publication would be vitiated by any variation that tended to conceal the identity of the parties; that the difference in this case was material, and such as fully produced the effect of concealment. Some illustrations were referred to, of what might or might not be material variations; and reference was made to the case of *Mather v. Neigh* (Consist. 10th July, 1807), in which a publication in the name of Wright instead of Neigh was held false.

On the other side, Dr. Jenner and Dr. Dodson contended that the Court would be tender of an-[209]-nulling contracts actually solemnized, unless under such circumstances as were clearly in breach of the provisions of the act. The construction which had hitherto been put on the act was admitted to be sound; but the Court would not extend the restrictions further than was necessary to afford adequate protection to the rights to be secured by the marriage act. In a case where fraud was pleaded in direct terms it was a material failure of proof that no evidence had been offered to that effect. There was no act that bore such an aspect. The uncle had been apprized of the intention; and if he had heard the publication in the form in which [210] it was made he could not have been deceived. The father was at a distance from London, and there could be no object to alter the name on his account. The names were rightly delivered; and it was owing to the mistake of the daughter of the clerk that they were wrongly taken down.

* It appeared that Mr. W. Meddowcroft, the minor, had been brought up and educated by his uncle, Mr. J. Meddowcroft, a solicitor in Gray's Inn. On completing his education he was received into his uncle's office and articulated to him in his profession of a solicitor. Whilst serving his clerkship, and when about the age of eighteen, he was placed as a boarder in the house of a Miss Lewis of Devonshire Street, Queen Square, where he became acquainted with the lady proceeded against in the present suit, Mrs. Mary Gregory, a widow, about the age of thirty. An attachment took place between them which ultimately led to the marriage in question on the 28th of February, 1815.

Mr. J. Meddowcroft, the uncle, proved that about April or May, 1814, his nephew first disclosed to him his attachment, by letter, and requested his consent to the marriage. He, in reply, told him that he was not of an age to talk on such a subject, and threatened to turn him out of doors if he persisted in the idea. He also went to Miss Lewis's to make inquiries on the subject; upon which occasion Mrs. Gregory introduced herself to him, and apprized him that his nephew had hopes of ultimately obtaining his consent; but he then positively expressed his dissent, and assured her that their mutual ruin would be the inevitable consequence of such a match, as he should turn his nephew out of doors and discard him for ever. He repeated these assurances to her upon several subsequent occasions until she signified to him that, as he was so positive in his determination, she had given up the matter and should think no more of it. He afterwards removed his nephew to lodgings in Cook's Court, Carey-Street, and remained in entire ignorance of the marriage until informed of it by a friend about November, 1815. He made various inquiries, and also endeavoured to ascertain the fact from his nephew, but without success; until in January, 1816, Mrs. Gregory called upon him in Gray's Inn and confirmed the fact, stating the particulars; upon which he animadverted with some warmth on her conduct and threatened to prosecute her for a conspiracy. He then repaired to the parish church of St. James, Clerkenwell, where the marriage took place, and inspected the marriage-register, the entry in which was made in the right names of the parties. He examined likewise a book kept by the parish-clerk at his own house, in which he entered the names of parties, on application being made to him for the publication of banns, and found the entry to have been as between "William Widowcroft, a bachelor, and Mary Gregory, widow." The parish-clerk informed him that the names were copied from this book into the regular banns-book for publication; and on inspecting the entry there, it appeared to have been altered from "Widowcroft" to Meddowcroft, partly in ink of a different colour to that of the original writing, and partly by an erasure with a knife.

There may have been cases where fraud has been practised, or a name assumed, to which the party was in no manner entitled, which, of course, would not bear upon this case. The distinction is laid down in the cases of *The King v. Inhabitants of Billingham* (3 Maule & Selwyn, p. 250. Vid. cases there cited), and *The King v. Inhabitants of Burton-on-Trent* (ib. p. 537), in which the marriages were [211] held good; and in the present case the Court cannot consider the variation to have been such as will affect the validity of the marriage.

In reply, it was said that it was not necessary to prove the fraud in a specific manner; that it was enough if there was actual concealment. If the clergyman had made the mistake, and there had been the *animus publicandi*, it might have been a different case; but it was clear that there was an intention to conceal; for the name was entered wrongly also in another particular, as it had stood originally Widdowcroft, and was altered to Widowcroft.

Judgment—Sir William Scott. This is a proceeding of the father to dissolve a marriage of his son, on the ground that it was had without his consent; the son being a minor, and the marriage being had without publication of banns. The Act requires, if not in words, yet in fact and reasonable construction, that the publication should be regularly made in the true names. It appears in the present case that the young man had two uncles resident in London, who watched over him with parental regard, put him to school, and afterwards placed him with a solicitor, and sent him to lodge at the house of a Mrs. Lewis, where Mrs. Gregory was also a lodger. An attachment took place, though under a very considerable disparity of age, he being a minor, and she above thirty. Whether there was any other disparity in their circumstances, or whether the young man had any provision which was likely to have been an object in procuring this marriage, does not appear. It is [212] clear, however, that the

Mrs. Ann Alexander, a boarder in Miss Lewis's house at the time Mr. W. Meddowcroft and Mrs. Gregory were there, deposed to her impression of Mrs. Gregory's endeavouring, by her constant attentions, to attach Mr. Meddowcroft to her. Mrs. Alexander took upon herself to express her opinion of the impropriety of this conduct, and the probable uneasiness that would ensue from it to Mrs. Gregory, but without effect.

Upon the latter removing from Mrs. Lewis's, she took private lodgings in the same street, where she was visited by Mrs. Alexander, whom, in February, 1815, she informed of the intended marriage, observing that it was to be clandestine, and, above all, to be kept from the knowledge of Mr. Meddowcroft's uncle, and that she had sent the banns for publication. Mrs. Alexander was then invited and consented to be present at the marriage; and accordingly she was so, no other person being present except the parish-clerk, who gave the bride away. When they were about to sign the marriage entry the mistake of the name in the banns-book was discovered and altered by the minister or clerk from "Widowcroft" to Meddowcroft.

Mrs. Elizabeth Bradley, in whose house Mrs. Gregory took lodgings on removing from Miss Lewis's, confirmed the clandestine courtship, and proved that Mrs. Gregory applied to her to get the banns put up. She asked why they could not wait until Mr. Meddowcroft was of age? but was informed by Mrs. Gregory that it was intended to keep the marriage a secret, especially from Mr. Meddowcroft's uncle, if possible; and she then inquired what church she would recommend to have the banns put up at. After mentioning several, Mrs. Bradley suggested Clerkenwell church as being as little likely as any for them to be known at by the publication; to which Mrs. Gregory assented, and then wrote the names and necessary instructions on a slip of paper which Mrs. Bradley, without reading, took to the parish-clerk's house, and delivered to his daughter, who entered them in his book. Mr. Penny, the parish-clerk, confirmed what he had stated to Mr. Meddowcroft respecting the transcribing of the names from his book into the banns-book; and proved, from the three marks drawn across the names, that they had been published three times in the name "Widowcroft," as it originally stood. He further stated that it is always his custom in marriages by banns to ask the parties before the entry is signed whether their names are spelt right in the banns-book; and upon doing so in the present instance the mistake of the names was discovered; but the clergyman treating it as a thing of no consequence, the clerk made the alteration. The minority and non-consent were fully proved by several of Mr. Meddowcroft's relations.

difference of age alone rendered it a very imprudent connexion for a young man who was then in the course of his education. It was so considered by one of his uncles, who, on being informed of the intention, expressed his entire disapprobation, both to his nephew and to the lady. The young man was withdrawn to another house for the purpose of breaking off the connexion, though without effect. The intimacy was continued—and they were married—and it was not till some months afterwards that the uncle heard of it, when he was very angry.

The facts appear to be shortly these: that Mrs. Alexander was the only person to whom it was communicated, with a request that she would attend, with which she complied. Another woman, who kept a perfumer's shop, by the name of Bradley, was employed to carry notice of the banns to St. John's, Clerkenwell; and it appears that on consultation with the friends of the wife it was thought right that the banns should be published where there might be the least chance of the young man's relations hearing of them. There is, in this, undoubted concealment: a consultation to choose an obscure church where there was little likelihood that the publication would come to the knowledge of his friends—the very effect which it is the object and the policy of the Act to prevent. Mrs. Bradley took the notice of the names, in the handwriting of Mrs. Gregory, to the clerk, but he was not at home. The Court cannot refrain from observing, on this statement, how very loosely a matter of such importance is conducted in this town. The notice was received by his daughter, entered in a private book, and afterwards trans-[213]—planted into the regular banns-book, being written in the first Widowcroft, in the second Wedowcroft. At the marriage, it appears they were, for the first time, altered to the right names, the publication having been in the name of Wedowcroft instead of Meddowcroft.

It has been contended that where no fraud is practised, though the names may be so distorted, as to be quite different, it will not vitiate the marriage; but no authority has been cited for that position. Mrs. Bradley, who delivered the notice, knew nothing but “that they were given by Mrs. Gregory on a slip of paper,” and she did nothing more than convey them. I must take it, therefore, I think, that the clerk's daughter received the names as they were actually sent, and intended to be published.

The first question is then, whether there was any fraud designed? and it is said none; because the parish was one where his friends were not likely to attend. When, however, all is done that could be done, to conceal the publication, but so as not to invalidate the marriage, according to the expectation of the parties, it has no weight to repel the imputation of fraud, that it was in a distant church. It is said that the alteration would have been more material if fraud had been intended; but I am of opinion that the alteration is, in itself, material, as it varies the substance of the name; and being in the initials of the name, it is more conspicuous and effectual, than a variation of the same extent merely in the body of it. It is only in late times that great exactness has been used, in spelling the names of families, which [214] were formerly written in many different ways, and there may be cases in which it might be reasonable that an allowance should be made for errors of that kind. But I am of opinion that this alteration is so material that it was likely to deceive, and intended so to do. The uncle, indeed, who had an intimation of the designs of the parties, might not have been deceived; but friends, who were not acquainted with the clandestine intention, might naturally be imposed upon by this alteration. The Court cannot doubt that it was intended to elude the vigilance of parental authority.

It is proved to have been the object of the parties to effect a clandestine marriage; and this cannot be considered otherwise than as an auxiliary circumstance, and as part of the concerted plan. The husband appears not to have been conscious of this particular fact, since he discovered the variation at the marriage, and desired that it might be set right, and it was accordingly corrected.

On the whole of these circumstances, I have no hesitation in pronouncing this to have been a fraudulent publication, and effected for fraudulent purposes; and that the name was altered to elude the knowledge of the father. I must, therefore, declare this marriage to be null and void, under the provisions of the statute.

[215] WYATT, FALSELY CALLED HENRY v. HENRY. 20th June, 1817.—Nullity of marriage, by a publication of banns in a false name, sustained. Nature of proof required as to identity.

This was a proceeding at the instance of Charlotte Wyatt otherwise Henry,

and wife of Thomas, otherwise Charles Henry, of Ealing, Middlesex, against him, to annul a marriage which had been solemnized between them, on the ground of an undue publication of banns.

When the cause was about to be opened Sir William Scott observed, "This being a suit undefended by any counsel, on the part of the party proceeded against, is a circumstance greatly to excite the vigilance of the Court; and I here remark that it is the determination of the Court never to hear any causes of nullity of marriage, unless they are defended by counsel. In cases of such importance, as those involving the dissolution of the marriage contract, and where the absence of all defence tends to the presumption of collusion, it is too much to expect that the Court should take upon itself the responsibility of sustaining, exclusively, the cause of the defending party. The Court has, however, read the libel and evidence very attentively, and will point out to the counsel for the complaining party those parts of the case to which it will require them, particularly, to address their attention, leaving it to their discretion to advert to such other parts, as they may think proper."

[216] The libel states "that Thomas Henry, the party proceeded against, was the natural and lawful son of Thomas and Marcella Henry, and was born on or about the 21st of May, 1789, in the village of Rathsan, in the parish of Kilvarnet, in the diocese of Killala, and county of Sligo, Ireland; that search had been made in the registers of that and the neighbouring parishes, but no entry of his birth or baptism could be found; that his parents being Roman Catholics, he was baptised privately at home, by a priest of that persuasion; that they had five children besides, who were baptised in a similar manner; that Miles Henry, the uncle of Thomas, and who was an apothecary in Ireland, having taken the two elder children into his shop, and ultimately provided for them, in 1802 took Thomas Henry as his assistant, and sent him at the same time to a school in the neighbourhood; that upon his uncle's death in 1804 he went into the employ of a gentleman, who was apothecary to the Royal Hospital at Kilmainham, in Dublin, and afterwards returned, and went into practice for himself at Sligo, where on the 5th of February, 1808, he married one Eliza Robinson, according to the ceremonies of the Roman Catholic Church, but soon afterwards deserted her, and came to England, and that during all this time he passed and was married by his proper name of Thomas only."

All this private history of the party is fully established; but the libel then goes on to plead, "that on the 1st of July, 1812, Thomas Henry was married to the complainant, Charlotte Wyatt, at [217] the parish church of Christ Church, Surry, under the assumed name of Charles Henry, and in virtue of a publication of banns in that name."

The first point, therefore, to be proved is that the Thomas Henry, to whom all these occurrences in Ireland apply, is the Charles Henry who was married at Christ Church—the contrary being the inference that results from the diversity of the names; for, unless this point is established, all the Irish history goes for nothing. If this was established, the next proposition to be made out would be, that the name of Charles had not been subsequently acquired; that, not being a baptismal name, it also was not adopted or used in common parlance; and that the former continued to be his only proper name, and the only one in general use. If this proposition should be made out, it would still remain to be shewn that the marriage was an act of fraud committed on the complaining party, and that she was not an equal participator with him in the fraud of the transaction.

Now, there is a total blank in the evidence as to the name or connections in life of this Thomas Henry, from the time he quitted Ireland in 1810 until the marriage in July 1812. It does not appear by what name he passed, or was known, during that interval, except from his own admission. It is pleaded "that, in the November following the marriage, he was taken into custody, and examined at Bow Street, on a charge of bigamy, and that he then admitted his real name was Henry." Admissions of parties, however, in cases of this description are open to great suspicion, and it is unsafe for the Court to rely upon them.

In support of the prayer, Dr. Arnold and Dr. Swabey submitted that the inferences, resulting from certain parts of the proof, were sufficient to establish the propositions laid down by the Court.

Court. There are many circumstances in this case which would dispose the Court to go as far as it could to relieve the complaining party. The marriage is that of a

minor child, under circumstances which must render it inconsistent with the approbation of her family, and peculiarly within the spirit of the Marriage Act, the provisions of which it is the duty of the Court to enforce; but yet, in so doing, it must adhere to principles which will stand the test of general application. There are, certainly, peculiar difficulties in the way of the complaining party's establishment of her case; but before the Court can concede any indulgence to her, in its requisitions of strict proof, it must be shewn that all her diligence has been used to remove those difficulties.

The present is a case greatly composed of admissions; though of admissions, certainly, of a character and description greatly distinguished from ordinary admissions; but still, if there are any means of confirming the identity, it will be more satisfactory to the Court that those means should be resorted to. Much of what is alleged stands in allegation merely; upon this the Court requires explanation, which, if possible, must be furnished. It is the more necessary that every elucidation of the case should be afforded, as there is no counsel for the adverse party; and though [219] the Court feels every disposition to give relief, yet it is bound to call for every possible satisfaction of proof. The Court, therefore, directs the cause to stand over for the present, to enable the party prosecuting to furnish, by affidavit, such explanation as may be possible upon the points on which it considers the proof to be defective.

On a subsequent day affidavits were offered of persons who had boarded in the same house with the parties, soon after their marriage, tending to establish their identity, from a detail of various circumstances.

Judgment—Sir William Scott. This is a case of nullity of marriage, in which the ground of nullity assigned is, that the publication of banns has been in the name of Charles instead of Thomas, which is said to be the true name of the party. A great deal of Irish history has been produced, as applying to this person. He had been born in Ireland, baptised by a Roman Catholic priest, educated, taken as an assistant to his uncle, who was a surgeon, and afterwards practising in an hospital in Dublin, all this time passing by the name of Thomas Henry, and the name of Charles is pleaded to have been assumed. Upon the evidence adduced, three difficulties arose: first, it was not sufficiently apparent that Thomas was the baptismal name of the party; that that name was an authorized name, and had not merely been used in common parlance, and had therefore [220] grown into repute as the real name. If such was the case, the party would have an equal right to adopt another afterwards in the same manner, and the latter name would then be as much the true name as the former one; and consequently the use of it in marriage would not be a ground of nullity. Secondly, the proof was defective upon the point that the Charles Henry who was married to Charlotte Wyatt was the Thomas Henry married in Ireland, and to whom all this Irish history applied; and, thirdly, there was a blank in the family history of this man for two years prior to the marriage in question, and it did not appear but that he might have acquired the name of Charles, by use, in that interval.

Upon the first point, it is to be remarked that the registering of Roman Catholic baptisms is a matter of some irregularity. The parents commonly give their children in infancy a name to place them under the protection of some tutelary saint; but there is no solemn ceremony on record of that act, such as is usual among other classes of Christians. In the present case there is proof that the name of Thomas was given and generally used; and, considering this irregularity, the Court is of opinion that it may very fairly come to the conclusion that this is the baptismal, and not an assumed name. Mr. Henry afterwards came to England, but there is no proof as to his life, or actions, for a space of two years. If, during that time, he had adopted the name of Charles in such a way as to supersede that of Thomas; if he had, by general use, acquired a kind of prescriptive right to it, and it had gone forth to the world as [221] his proper designation, it has been decided both here and in the courts of common law that this would be the true name for the purpose of a publication of banns. Nothing of this kind, however, is shewn; but it appears that the name was evidently assumed for this special purpose. Looking then to the circumstances in which the party is placed, and to the motives which he had for concealment, his former wife being alive, the Court can have no doubt, but that this assumption was for a fraudulent purpose; that it was for the purpose of concealing the new contract he was about to form from the knowledge of those who were interested in preventing it. The case

then comes within the range of the principle of law that a marriage, fraudulent in its nature, and in names other than the true names of the parties, adopted for a fraudulent purpose, is absolutely null and void. The only remaining question therefore is, whether the person thus married to Charlotte Wyatt is the person who had previously gone by the name of Thomas Henry in Ireland, in the manner proved.

The proof of this rested, at first, only on the confession of the party himself, who had admitted the fact when under examination at Bow Street, upon the charge stated in the affidavit. A confession, under such circumstances, one which might subject him to such penal consequences, is certainly of greater weight than any ordinary confession; it was still, however, but a confession; and therefore a species of proof upon which it is very unsafe for the Court to rely. The affidavits that are now produced fully supply the proof that is demanded upon this point, and establish the identity. [222] Had this additional evidence been produced by the examination of these witnesses upon the plea, it would have saved the Court the necessity of departing from its accustomed course of proceeding, so far as to admit of the introduction of these affidavits. It is, however, a departure which, under the peculiar circumstances of this case and the difficulties which the complaining party had to contend with in proving her case, the Court thought itself warranted in submitting to; but though it is borne out in such a course, by the peculiar features in this case, the Court would not wish to have it established as a precedent in any other.

The parties must attend to their proof in the first instance; or they would find that there are few circumstances which would induce the Court afterwards to give them the opportunity of amending it. The present case is now so fully established that I am satisfied that the ground of nullity, as charged, is sustained, and I therefore sign the sentence declaratory of the nullity of the marriage.

[223] *BURGESS v. BURGESS*. 10th July, 1817.—Divorce, by reason of adultery; proof—confession of the particeps criminis, as connected with the act of the wife, admitted.

This was a cause of restitution of conjugal rights, instituted by Mrs. Burgess, in which an allegation was given, on the part of Mr. Burgess, pleading the adultery of the wife, and praying divorce on that ground.

Judgment—*Sir William Scott*. This suit commenced by a citation on the part of the wife. The prayer of Mrs. Burgess is met by an allegation on the part of the husband, pleading facts of adultery, and on that ground praying the legal remedy of divorce. A responsive allegation has been given in by the wife: witnesses have been examined on both pleas; and, upon their evidence, the case now comes on for hearing.

It is proper that I should consider, in the first place, the proofs of the charge against the wife; because if that is sufficiently proved, it will exclude her prayer for a restitution of conjugal rights; and if it is not proved, it will exclude his prayer for a divorce, and he will still lie under the necessity of cohabitation with her.

The marriage is admitted and proved on both sides; it took place at Lambeth in the month of August, 1802, and the parties lived together from that time until January, 1812, and had several children. It appears that Mr. Lane, a young gentleman, was introduced into this family about the latter end of the year 1813, or beginning of 1814; [224] that until that time the husband and wife had lived in a sufficient degree of amity. He was an affectionate husband, and fond of seeing his wife admired; and she met his affection with no return of unkindness on her part; their harmony was uninterrupted, notwithstanding differences which had occurred with respect to the settlement of some family property; and it does not appear to have been affected by any waywardness of disposition on her part. There was no ground to complain of any want of attachment on the part of the husband: if any thing was to be observed, he might be said to have entertained a blind confidence in her, unsuspecting of those consequences, which might have been anticipated by a man of greater caution. In short, nothing materially affected their domestic peace until Mr. Lane was introduced into the family; caressed and courted by the husband, and unhappily by the wife also, if the facts charged are true.

In September, 1814, Mr. and Mrs. Burgess, with their two children, went on a visit to the Reverend Mr. Lloyd, a friend of theirs, at his living in Northamptonshire. Mr. Lane accompanied them. The visit appears to have lasted about a fortnight, and during that time Mrs. Burgess's conduct to Mr. Lane attracted Mr. Lloyd's observa-

tion: he says "that he observed Mr. Lane was very attentive to her, and that she appeared desirous of attracting and engrossing his attention; that she was always desirous of sitting next to him at table and on various other occasions, either in the carriage or on the barouche box; but that he never saw any thing in her conduct that approached to indecent familiarity, nor were any liberties taken in his presence, but she shewed a [225] partiality to his society; that, on one occasion in particular, when they were all on a fishing party, Mrs. Burgess separated herself from the rest of the party to return with Mr. Lane to a spot, which they had left, at a distance of more than half a mile from where they then were, contrary to Mr. Lloyd's expressed wish."

In November of the same year, Mr. Lane, the father of this young man, at the request of his son, and as an acknowledgment of their civilities to him, gave them an invitation to pass a few days at his house at Leyton. During this visit Mr. Lane observed the conduct of his son and Mrs. Burgess towards each other; and though he did not see any personal liberties taken, yet there was generally such a particular and improper familiarity, in their behaviour towards each other, as gave him great uneasiness, and induced him to remonstrate with his son, very strongly, on the impropriety of their mutual conduct.

It is objected, on the part of the lady, that all this passed in the presence of the husband, or within the scope of his observation, and it is asked why did he not take notice of it? Undoubtedly, it would have been more prudent in him to have so done; for such marked attentions, and such acts, as sitting almost in Mrs. Burgess's lap, were, to say the least of them, very unseemly, and such as are not at all usual in persons of a class of life above the lower orders; but sometimes a husband's fondness renders him as blind to his wife's faults as to his own; and if that was not the case here, where was the proof that Mr. Burgess did not remonstrate? A man does not usually go upon the house-tops to reprove an impropriety of conduct in his wife; such [226] remonstrances are more usually confined to hours of privacy; and it does not appear that Mr. Burgess had not availed himself of some such opportunity; for the circumstance of his wife's not desisting from that course of behaviour was no proof that no remonstrance had been made; as it is pretty evident, from many circumstances in the case, that it was not amongst this lady's peculiarities that she had not a will of her own. It has been said also, why did not Mr. Burgess forbear Mr. Lane's company? It would, certainly, have been better if he had; but his not doing so furnishes no very serious inference against him, as he, perhaps, did not think there was any thing really culpable in what was passing.

The criminal licence that arose out of this attachment was during a visit of the parties at Ryes, the seat of Mr. Chamberlayne, in Hertfordshire, where they all went, for a few days, at Christmas 1814; here affairs assumed a more serious aspect still, and it is here that a charge of adultery is made, and made for the first time; for no part of the evidence refers to such a charge elsewhere. It was confined within the limits of this visit, between the 23d and 29th of December, and within this time it must have occurred, or not at all.

In considering the legal effect of this evidence, I must proceed on the established doctrine of this Court, as it has been laid down in various cases; that it is not necessary to prove the fact of adultery at any certain time, or place, *modo et formâ, loco et tempore*. It will be sufficient if the Court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situa- [227]-tion. To prevent, however, the possibility of being misled by equivocal appearances, the Court will always travel to this conclusion with every necessary caution; whilst, on the other hand, it will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof. If, then, proof of a specific act is not necessary, it is equally unnecessary that a confession, if confession there be, should apply to a particular time and place. The confession, if general, will apply to all times and places at which it might appear probable, in proof, that the fact might have taken place. Another principle is equally clear, that confession alone cannot be received; so says the canon (canon 105); for, without this restriction, there would be no check upon the collusion and imposition that might be practised on the Court. Here, however, there is no such danger: the suit commenced, in the first instance, for a restitution of conjugal rights, and the confessions are strongly opposed to such a claim. They appear confessions wrung from a heart against its inclination, and

though I will not say that they are not within the general rule, they do not fall within the particular scope of it. Under these observations, I shall proceed to consider the effect of the evidence as to adultery.

It is deposed by Mr. Staines Brocket Chamberlayne "that, during the time Mrs. Burgess and Mr. Lane were at Ryes, they took every opportunity of being alone together; that, in the evening, when the family were assembled in the drawing-room, they used to go together to the [228] piano-forte, where she used to play and sing to him; that, on the first evening when they did this, some others of the family went to pay her the civility of standing by her; that this was evidently not agreeable to her, she was disconcerted by it, in consequence of which they were on the subsequent evenings left to themselves: that it was also Mrs. Burgess's custom, when any of the other ladies sat down to the instrument, to move away immediately to another part of the room; that she was followed by Mr. Lane, who was always in attendance upon her; and that she appeared better pleased to be engaged in conversation with him alone, than to join any other of the family." It appears also that they both left the room in the evening: there are other members of this family, who say "that they courted each other's society, and paid a degree of attention to each other which was remarkable, and to such a degree as to be wanting in attention and civility to the rest of the company." Mr. Chamberlayne deposes still more strongly—that they sat very close to each other continually; too close a great deal; and that he remarked it to them in a friendly and jocose manner; that Mr. Lane was sometimes sitting almost in Mrs. Burgess's lap, when the witness told him 'he gave her no room to move;' to which she replied, 'that she had room enough.'

These statements, taken together, are sufficient to establish a high and undue degree of familiarity between these parties. It has been argued that one was an isolated and detached fact; that another was so likewise; and that none of them led to a conclusion of crime; but this is not the proper [229] way to consider such evidence: the facts are not to be taken separately only, but in conjunction; they mutually interpret each other; their constant repetition gives them a determinate character; and such habits continuing to be persevered in in public, it is to be inferred that the parties would go greater lengths, if opportunities of privacy occurred. Such gross indecorums, and improper familiarities with opportunities of privacy, advance to the footing of proximate acts; and if the privacy is shewn to be frequent, the Court will infer the commission of crime. Nor is evidence of this sort wanting. The parties met together apparently by agreement in the breakfast-room, before the rest of the company were assembled. Mr. Chamberlayne speaks to this part of the history, "that he used to joke with them, as being early risers;" and though this place might be too public for any criminal act, it was not so for assignments and appointments. After dinner she withdraws from the ladies, and he leaves the gentlemen. Her pretence was that she might superintend the putting of her youngest child to bed: she does not return to the ladies, nor he to the gentlemen. Their absence is shewn to have been habitual, and that they retired about the same time. Circumstances, such as these, connected with the proof of previous intimacy, must be considered as laying a strong ground of probability that they met, at such times, in private interviews.

There are, however, one or two facts which require still more particular observation. It was the intention of the family to be present at a ball at [230] Hertford, on Tuesday the 27th of December; but that intention was afterwards abandoned. Mr. Chamberlayne junior, after the idea of the ball had been given up, went out into the garden, about an hour and a half before dinner, and before the family had retired to dress, when he observed the curtains of Mr. Lane's room drawn—this attracted his notice; upon which he went into the drawing-room, where several of the ladies then were, but not Mrs. Burgess: it is proved also that she was not in her own room at that time. There is another circumstance also deposed to—"that Mr. Lane, having torn his hunting-coat, and it having been but indifferently mended, spoke of getting Mrs. Burgess's maid to mend it better; that, in the evening, after the gentlemen were assembled in the drawing-room, tea being over, and a card-table about being set out, Mr. Lane left the room, saying he would go and see if he could get his coat mended a little better; that, when he was gone, Mr. Burgess asked his wife to sit down to cards, which she declined; that he pressed her to play that evening, saying he wished to talked to Mr. Chamberlayne, but she refused; and presently afterwards, Mr. Burgess

having said, if she would not, he must, she left the room. She returned in a few minutes, popped her head in, and said 'So you have sat down,' appearing to address her husband; and then coming to the table, she asked, how far they had got? and nothing being scored on either side, as they were then playing the first deal, she said, 'Oh, you have but just begun,' and again left the room; that neither she nor [231] Mr. Lane returned for as much as an hour; that when they did return, they appeared much flurried and agitated; she sat down to the instrument, and sang in a hurried manner; her neck was very red, she was a good deal heated, and so was Mr. Lane, all of which attracted the deponent's attention so much that he observed, jokingly to them, 'that they had had warm work with the coat; that he supposed they had all been at it, and that it had been a hard job to require all three,' alluding to the maid as the third. He noticed that she was touchy and out of humour at this; that when they sat down together at supper he remembers that she drank an unusual quantity of ale, and that both of them ate quite voraciously, and were in a continued state of agitation, which they appeared anxious to conceal."

This, again, is not to be taken as a solitary fact, but in connection with the habits before described; and with the opportunity of privacy that was so afforded and so sought, it would be losing sight of the natural effect of human passions, excited as those of these parties were, not to infer the consequences that are imputed to them. There is also the evidence of the servants as to seeing Mrs. Burgess often coming out of Mr. Lane's bed-room: Stone, the butler, says "that one day, about three or four o'clock in the afternoon, having occasion to go up stairs into the passage where Mr. Lane's bed-room was situated, he saw Mrs. Burgess coming out of Mr. Lane's bed-room: she closed the door after her, but not so as to shut it close or hard; nothing was said; but [232] just then he heard a man's voice in the room, which he knew to be Mr. Lane's, but he could not distinguish what he said."

Here is an act of a married woman being seen to come out of the bed-room of a young unmarried man; a circumstance which, generally speaking, might only be considered in the light of a very high indecorum; but it is, in the present case, to be taken in conjunction with the whole conduct of these parties, and the Court is then to consider what would be the probable consequence of such an opportunity of privacy between them. She was seen also coming out of this room on another occasion, and there are other opportunities of being alone together fully established.

Having now considered the testimony of others, I proceed to the testimony of her own conduct: this appears to me to have been such as to leave no moral doubt of her guilt, both from her verbal acknowledgments and from her letters. In her letters there are expressions which shew the commission of the crime imputed to have happened at this place which would entitle the husband to the sentence which he prays.

Mr. Burgess returns home, and is followed by his wife and children, and by Mr. Lane. There was great uneasiness then existing, according to the evidence of the maid-servant, who deposes "that they then both appeared in low spirits; that she did not know the cause, and had no reason to suppose that Mr. Burgess suspected his wife's fidelity. She did not think that any thing serious was the matter until the 5th of January following, when she was rather surprised at Mr. [233] Burgess sending a verbal message that he should not dine at home that day. He did not return until past eleven o'clock at night, when Mrs. Burgess was in bed; that, about an hour afterwards, she came to deponent's room, and desired her to prepare a bed for her in the spare room; the bed was prepared, and she slept apart from her husband that night. That, on the following day, Mr. Burgess wrote a letter to Mrs. Barrett, Mrs. Burgess's mother, desiring her to come to his house, as a separation must take place between himself and his wife; that this letter was first shewn to Mrs. Burgess, by her husband's direction, before it was forwarded. That, on the same day, Mrs. Burgess wrote a letter to Mr. Lane, which she read to the deponent; that it informed him that there was to be a separation between her and her husband, but for what reason she could not tell, and requested him to find out from Mr. Burgess; that the next morning, Mrs. Burgess having written another letter to the same effect to Mr. Lane, an answer was received from him, while Mrs. Burgess, Mrs. Barrett, and witness were together; that Mrs. Barrett read it aloud, and the purport of it was that he had seen Mr. Burgess, who appeared to him just as usual; that, at the bottom of it, there was something to this effect—'Has any thing transpired about Ryes?'

That Mrs. Burgess sent a message the next morning desiring to see her husband in her own room; that he went, and, after he had gone away, witness heard her telling her mother the particulars of the interview; that she stated that her husband had charged her with having been guilty with Mr. [234] Lane, and had added, 'I have seen Lane, he has confessed every thing, and by this time, I suppose, he has shot himself; you are the best judge whether what he has said is true;' and that she had thereupon told her husband that whatever Mr. Lane had said was true."

This is a natural conversation. It is said that it is denied by the mother in her account of that conversation. The Court, however, cannot believe that the mother has actually stated all that passed in that interview—merely "that her daughter had informed her that she had entreated her husband not to send her away, but he would not consent." It is impossible that she should not inquire into the cause of her being so sent away. And then "that she had satisfied her husband of her innocence, and that was enough, that no one else had a right to know any thing about it;" when it appears clearly that he had not been satisfied any further than that he had said "he would not expose her." With respect to the concluding part of this conversation, "that was enough, &c." how could it be considered enough for a parent, without knowing the cause, which had led to such an imputation on her daughter's house! I think it is clear that the mother's recollection must have been imperfect; and that, comparing the evidence of the maid-servant and Mrs. Barrett upon this point, the Court must consider that of the former as being the most to be relied upon, and the mother's account as unnatural, and to be attributed to a failure of memory.

It is said that Mrs. Burgess had been entrapped into the confession which she had made. The Court recollects that the admission of the articles, plead-[235]-ing this conversation, was opposed as irrelevant.* How is that consistent with the present supposition that she was entrapped into it. It is said, however, that she had been entrapped by his telling her what was not true, and pretending that Lane had made a confession, when, in fact, he had not. Supposing this to have been an artifice [236] to detect her, supposing it to be false, it would not detract from the effect of her confession, since, if false, what would have been the language of an innocent and virtuous woman under such an accusation? She would not have pleaded guilty. Would she not rather have repelled the charge, and inveighed against her traducer with animated indignation, and not have admitted the truth of it? I see no reason, however, to

* 20th Nov. 1816.—On the admission of the allegation, which was opposed, the Court observed—This is an allegation, not in an original suit for adultery, but in bar to a suit for restitution of conjugal rights on the part of the wife. In such a plea the Court is disposed to allow some latitude, since it has not only to state the charges of accusation against the wife, but to account for the husband's conduct in not bringing the suit earlier. Objection is taken to two articles only; the eleventh and the twelfth. On the eleventh, "that circumstances led the husband to suspect a criminal intercourse of his wife with Mr. Lane, and that he went to her, and she denied it; but that her conduct increased his suspicions; that he determined to separate, and wrote to her mother; that Mrs. Burgess wrote a letter to Mr. Lane, informing him of what had passed, which she first shewed to her maid." The objection is that part of this will be difficult of proof, and that the latter part is very slight. It may be so; but what the husband did may be explanatory of his conduct: and that she should write to Mr. Lane was at least indelicate, unless in strains of indignation; but it may be very important to see what account will be given of it. In the 12th article it is pleaded that Mr. Burgess charged Lane with the fact, and that he admitted it. It is objected that this can be no evidence against her; and it certainly cannot be so used: but it is merely introductory of what follows—that Lane wrote to her, informing her of it, and that she shewed the letter to her maid. It may be of consequence to know how she expressed herself on this occasion; there may be something of joint acknowledgment. It is followed by what is much stronger in another article—that the husband informed her of Lane's confession, and that she admitted it was too true. By this acknowledgment she adopts it, which is the same as if she had confessed originally herself. The matter pleaded may be important to shew the meaning of the conversation between her and her husband; I therefore think that the objections to the admission of this allegation cannot be sustained. Objection over-ruled.

think that there was any such artifice practised. Then what has been the subsequent conduct of the parties? Lane went abroad. Could this be, if he was conscious that Mr. Burgess had unjustly traduced this lady, and that she had been entrapped into a confession by a false assertion of a confession of his? Would he not feel himself bound to stay to vindicate his character and her own? The letters, also, on the style of which it is unnecessary to comment, contain passages which it is quite impossible not to interpret as distinct admissions of detected guilt: they prove, in the clearest manner, guilt, submissive guilt, with as little merit of confession as can possibly be. No notice is taken of them in her responsive allegation; it is, however, attempted to give an explanation of her going to Mr. Lane's room; but no witnesses are examined upon it.

With regard to the confessions, they have been described as if it was common for persons circumstanced as Mrs. Burgess was to run from one extreme to another; that after strongly denying guilt at one time, yet afterwards feeling conscious of some little improprieties, they, in an agony of repentance, would confess more than was true. This is an hypothesis to which the Court cannot accede, as being contrary to its own experience, which has generally found persons prone to extenuate [237] their faults, and willing always to take a lesser, rather than a greater, share of guilt than might be due to them. Again, it has been said that the confessions were made under promises of forgiveness, and in the hope of inducing Mr. Burgess, by her repentance, to receive her again; but of this there is no proof whatever; for though the husband continued to live with her till the 7th of January, it was not till that time that he had proofs of her actual guilt, when he had her confession and that of Mr. Lane; and a man cannot act on mere suspicion as he would on full proof. The parties remained under private separation: she acknowledged that his conduct was generous, kind, and noble. What a return has she made for such conduct and for having been spared the shame of a public exposure? She remains quiet for some months, till Mr. Lane goes out of the kingdom, and, when he is out of the way, she brings forward this suit of restitution of conjugal rights, and with these confessions of guilt staring her in the face, asks the Court to enforce a cohabitation for her with her injured husband. Not content with this, she throws into the interrogatories imputations on his character which are totally unfounded in fact; whilst his only fault appears to be that of having placed too much confidence in her who deserved none.

I am of opinion that the evidence establishes not only moral, but judicial proof of guilt that fully entitles the husband to the sentence which he prays.

Affirmed, on appeal, Arches, 4th June, 1818; Delegates, 15th November, 1819.

[238] SULLIVAN v. SULLIVAN, FALSELY CALLED OLDACRE. 11th June, 1818.—Nullity of marriage, by reason of publication of banns in false names, not supported in fact.

[Affirmed, 1819, 3 Phill. 45. Referred to, *Moss v. Moss*, [1897] P. 265.]

This was a suit of nullity of marriage, by reason of the publication of banns not being made in the true names of the parties. The suit was brought by the father of the husband, as his natural guardian. The libel stated the circumstances, in which it was alleged that the marriage was effected by artifices and misrepresentations, and in a clandestine manner, and in a parish to which neither of the parties belonged, and entirely unknown to the father of the minor; and that it was celebrated by banns under a false designation of the woman.

The cause was argued much at length by Dr. Swabey, Dr. Phillimore, and Dr. Lushington, on the part of Mr. Sullivan; by Dr. Stoddart, Dr. Jenner, and Dr. Dodson, contra.

Judgment—*Sir William Scott*. This proceeding is instituted by the Right Honourable John Sullivan, to annul the marriage of his son John Augustus Sullivan with Maria Oldacre, otherwise Maria Holmes Oldacre, which marriage was contracted and celebrated under the following circumstances:—The son John Augustus Sullivan was born on the 19th of October, 1798, and having left Eton school, was resident during the latter part of 1815, and beginning of 1816, at his father's seat, called Richings Lodge, in Buckinghamshire, under the care of a private tutor preparing for the university. In the [239] year 1815 he began to hunt with some hounds (which have made no small noise in the world), called the Berkeley hounds, at that time under the management of a Mr. Thomas Oldacre, who lived at Gerard's-cross, seven miles distant

from Richings. The consequence of these pursuits, on the part of young Mr. Sullivan, was to visit frequently at the house of that person, who appears to have lived with his family, in a style of hospitality, and reception of company, not very common in such a situation of life; and with a character free, as far as the evidence discloses, from any general reproach.

The young man here became acquainted with Maria Oldacre, a daughter of this person, who was just three years older than Mr. Sullivan, being born in October, 1795. The young woman was illegitimate, her mother, whose maiden name was Holmes, not being married till four months after her birth; but she was baptized as the legitimate child of the parties, and never bore, either at baptism, or on any occasion that is shewn, any other names than those of Maria Oldacre, by which alone she was known.

The acquaintance between these two young persons ripened into intimacy, and the visits of the young man became more and more frequent. Of all this intercourse his father, Mr. John Sullivan, was ignorant. With the misfortune incident to most men of business, the duties of a considerable office in London left him little time personally to superintend the conduct of his son, and he had therefore transferred this care to a tutor. In the present instance, the *gandet equis canibusque* was not *custode remoto*; for the tutor accompanied his pupil occasionally on his hunting excursions, and [240] likewise on several (it does not exactly appear how many) of the visits just noticed. On one occasion, the young gentleman took with him two of his sisters; but still no information respecting the conduct of his son was derived to Mr. John Sullivan, either from the tutor or from any other person.

In June and July, 1816, the intimacy having ripened into attachment, Mr. John Augustus Sullivan caused banns of marriage to be delivered at two churches, namely St. Andrew's Holborn, and St. Olave's Southwark, in the latter of which they were regularly published, by the names of John Augustus Sullivan and Maria Holmes Oldacre. The parties were afterwards married at the church of St. Olave's, to which parish they were both aliens; and they were both minors, she being within three months of twenty-one, he of eighteen.

In the course of the ensuing week, he informed his father of what had taken place. Mr. John Sullivan received the news with great surprise, and with a degree of affliction, of which there is no reason, either from the nature of the thing itself, or from any circumstance that occurred in his behaviour at the time, to doubt the sincerity. However, upon further reflection of his own, and advice of his friends, and under the impression that the marriage was irreversible, he and his family bent under the blow, became to a certain degree reconciled, and performed some acts of civility and kindness, which, however, were soon suspended. The present proceedings were instituted by Mr. John Sullivan, in the first place, against Mr. Thomas Oldacre, as the guardian of his sup-[241]-posed legitimate daughter; and, after her coming of age, the proceedings were continued against herself.

These facts are produced in evidence, upon the only two pleas that have been taken in the cause—one alleging the facts on which Mr. John Sullivan asserts the invalidity—the other, in which she maintains her marriage rights; and most of these facts are so little controverted that they may be deemed common to both parties, as the foundations on which their adverse positions of law are constructed. The birth of the parties, the actual celebration of the marriage in a church to which they were strangers, after a proclamation of banns therein, in which the name of Holmes was for the first time interposed in the description of Maria Oldacre—the entire want of consent on the part of Mr. Sullivan's father to the marriage, any further than the law may imply a consent from this unopposed publication. This is all clear and undisputed ground, to substantiate which it is unnecessary for me to apply evidence, for nobody denies it.

To the evidence of one fact I shall, for another reason, not pay much particular attention—that which is brought to prove Mr. John Sullivan's reconciliation to the marriage; for if this evidence were ever so strong and unimpeached, it could prove at the outside nothing more than capricious conduct on his part. It could not affirm the validity of the marriage; for if that marriage were invalid for want of his consent at the time it was solemnized, no consent given afterwards could corroborate it. It must be a precedent or a contemporary consent, [242] otherwise the marriage is radically and incurably bad.

The fact, however, is not without an explanation. For it appears that this apparent approbation of the marriage took place at a time when Mr. Sullivan con-

sidered the marriage to be irreversible. He was afterwards otherwise advised—and then he began the present attempt to break the connexion. It is likewise true that an interrogatory has been rather unfortunately put, on the behalf of Mr. John Sullivan, which insinuates that, at the time of his reconciliation, he believed her character and conduct unimpeachable; but that, finding he had been misled, he put an end to all intercourse with her, and instituted the present suit. Mr. Forbes, to whom that question is put, knows nothing at all of any such matter, but puts the change of conduct on a change of opinion respecting the legal question. Certainly, if any such discovery had been made, it might naturally have augmented the father's desire to overthrow the marriage, though it would have been perfectly impossible to do it on the mere proof of such a discovery alone; for the marriage, if originally good, had got beyond the reach of all effect of character and conduct. At the same time, I am bound to discharge a debt of justice by saying that there is nothing in the evidence before me which, in the slightest degree, impeaches that character.

That in a house where many young gentlemen resorted for the pursuit of field-sports, things might occasionally pass, not much calculated to cherish habits of feminine delicacy and reserve, is not im-[243]-probable; but I see nothing bordering on impropriety upon her part. Her parents are not inattentive to that matter. Her father expresses a disapprobation of her riding alone with young Mr. Sullivan; her mother desires him to write no more letters to her daughter: she is sought in marriage by a person of her own family connexion, which strongly proves that no taint of known dishonour had attached to her: and though it is objected that she permitted liberties to be taken by the young gentleman, Mr. Sullivan, at the playhouse, after Ascot races, when she was in fact contracted to another, those liberties are not of an offensive kind; they are slight; she is merely passive under them, and that at a time when the other person had determined her, by his inattention, to break off all further connexion with him.

It is quite impossible, if any thing grossly improper had occurred, but that it must have attracted the notice of the numerous persons who resorted to this house. Yet nothing of the sort is insinuated, except by Beaman, a discarded stable-servant, of whom I say, once for all, and without wasting a single observation on the particulars of his evidence, that he is a witness far more deserving of animadversion than of credit. The testimony given by Mr. John Augustus Sullivan himself to this young woman's conduct in his letter to his father, although it may be not a little coloured by present passion, is nevertheless a statement far more worthy of attention than this of Beaman's. He says he has been "for a long time attached to Maria Oldacre, who is a very virtuous girl, but on whose virtues he will not then dwell, but leave that for [244] his father to be a witness of;" and that "she, together with her family, bears every where the best of characters." It is quite impossible if her conversation had been what this discarded stable-man represents, "such as would rather disgust than please," that a youth, brought up in a decorous and elegant family, and in the society of gentlemen, could have approached towards such a style as this in speaking of her. I have to lament here, as well as elsewhere, that Mr. Burder has not been examined. He could have spoken with exact information on this point; and, in doing justice to this young woman, let that justice fall where it might, he would have relieved himself in some degree from the observations applied to the inattention which is said to appear on the face of his conduct. On the whole, I see nothing to the disadvantage of her character, except what comes from the reprobated witness Beaman.

More has been said on the disparity of age than I am disposed to pay much attention to; for surely no very revolting disproportion exists between a woman under twenty-one and a man nearly eighteen years of age. It might, indeed, be rather desirable that the relative ages should be differently placed; but still they are not widely unsuitable: and as to what is said of greater maturity and experience, and knowledge of stratagem and tactics on the female side, surely a young man who has had the experience of Eton school, and has a private tutor constantly at his heels, may be deemed sufficiently armed for such an encounter, without taking into the account that this [245] young man appears, from his letters, to have a more sedate and reflecting mind than is usually expected at that age.

Another disparity has been pointed out which is entitled to graver attention—that of rank and condition: for, without adverting to extrinsic inconveniences, it is not to be denied that two persons coming together with very different educations and

systems of manners and habits are not likely to have that correspondence and harmony of mind, without which the comfort of a married life cannot exist. At the same time it is to be remembered that the passion which leads to marriage is apt to overleap these distinctions, and that marriage levels them all, both in legal and moral consideration. It is likewise to be observed that she is of an age susceptible of better impressions; and at which objections of that kind might, in a great degree, have been removed by the plan, which Mr. Sullivan's father had most wisely projected, of sending her abroad for the benefits of an improved education.

Laying such considerations aside, I proceed to consider the direct case. From the strong observations thrown out in some preliminary debate, on the admissibility of evidence, I was led to expect that it was to be argued as a case (rather of rare occurrence in these Courts) of a most foul conspiracy, directly involving four persons, the two parents, the young woman herself, and a fourth person whose name I do not repeat, because it unduly crept in at first, and has been totally omitted in all the later discussions. I confess it appeared to me rather singular that a case so represented could be maintained upon evidence [246] taken on a plea which only charged two persons at all—the two parents, and them in a slight and indefinite way—"that they used various means to effect a marriage without the knowledge of his father," and that "opportunities and facilities were given;" and that "he was prevailed upon by their artifices and misrepresentations to consent." However, the case was described in the representations of counsel to bear very hard, and in a most criminating way, upon the four conspirators. The Court had no right to prescribe the view which the counsel should take of their respective cases; and therefore rejecting some evidence which appeared foreign to the question. It waited to see how the case of conspiracy was to be maintained upon this evidence.

I will not lay it down that in no possible case can a marriage be set aside on the ground of having been effected by a conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another, and marrying him in that perverted state of mind, this Court would not hesitate to annul a marriage on clear proof of such a cause connected with such an effect. Not many other cases occur to me in which the co-operation of other persons to produce a marriage can be so considered, if the party was not in a state of disability, natural or artificial, which created a want of reason or volition amounting to an incapacity to consent. I presume it does not often happen that marriages between young persons are the sole acts of the parties themselves. It is not imputed as a crime, if fair opportunities and facilities are allowed, for improving a favourable disposition that may appear in a respectable young man towards a female of the family, and for encouraging a prospect of what the law calls an advancement of a daughter in marriage. It would create some alarm if the Court were to lay it down that the good offices of a mother, an aunt, or an elder sister, so performed, were to be scrutinized with a severity that tended to call in question the validity of marriages so promoted. The object is not illegal or illaudable if pursued with proper delicacy; of which proper delicacy different people have different measures. To some females, indeed, the promotion of marriages in general is said to be a favourite employment, without any motive arising from family connexion, and merely from a good liking to the occupation itself. Certainly it assumes a different complexion if these endeavours are directed to the advancement of a very unworthy object; if they are directed against a youth of green and unripe years, and with a studied concealment from his parents; and still more, if, as charged here, by vitiating and debauching the mind. These circumstances may be so mixed up as to make it a most illaudable act; and if one course of transaction be pursued, they may make the marriage null and void; but it is not to be denied that, by the existing law of this country, the same circumstances may be combined to a very frightful amount, and yet, if the marriage be effected by another course of transaction, it may constitute as valid an union as can be produced by the most honourable means.

Suppose a young man of sixteen, in the first bloom of youth, the representative of a noble family, and the inheritor of a splendid fortune; suppose that [248] he is induced by persons connected with a female, in all respects unworthy of such an alliance, to contract a marriage with her after due publication of banns in a parish church to which both are strangers; I say the strongest case you could establish of the most deliberate plot leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court

to release him from chains which, though forged by others, he had rivetted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, is his own act, and he must impute all the consequences resulting from it, either to himself, or to others, whose happiness he ought to have consulted, to his own responsibility for that consent. The law looks no further back. If ten times the number of circumstances here alleged to be fraudulent had been stated in the libel, this Court could not have admitted it unless the undue publication of banns had been pleaded. That circumstance alone entitles me to entertain the cause; and if that circumstance be not proved, all the other circumstances go for nothing.

I have already observed on the slightness and obscurity of the fraud imputed, and imputed to the father and mother only, for the daughter is not at all implicated even in these. In the same article in which the charge of fraud is alleged it is distinctly stated that the young man went frequently to the house; that a great intimacy took place between them; and that he was induced by their artifices to consent. Therefore this is a case [249] of admitted consent. What the artifices and misrepresentations were is left wholly unexplained. Be they what they might there was a consent, and a consent, even in this description of it, apparently not involuntary on his part. How is it on the evidence? Not a single witness to explain, or to prove, any artifices or misrepresentations whatever. All rests on probabilities and conjectures on arguments of counsel that it must be so; as if it were a thing unprecedented that a young man of 18 should conceive a passion for a female near his own age, or as if such an event could only be accounted for by the intervention of something approaching to the nature of spells and magic. In order to support this argument counsel are compelled to have recourse to rather violent distortions of facts. The father reprehends her riding out with the young man; the mother writes to him to request him not to correspond with her daughter; the cousin informs him (as the fact was) that she is already engaged; and, it is said, all this is mere simulation, in order to inflame him by an apparent opposition to his desires.

What sort of language or what sort of conduct is to be held? If that of direct encouragement, what would then have been said? This is discouragement, but it is argued to be all disguise for the purpose of stimulating him further. According to such a mode of arguing, no language and no conduct would be practicable without incurring censure. There must have been a total silence; and that, I suppose, would have been interpreted into criminal connivance. What were the artifices, what the misrepresentations em-[250]-ployed? On the part of the young woman, none whatever. He was perfectly conscious of her fortune, her condition, her age; where then was the delusion? He knew that his father was in ignorance of the whole transaction, and with this full knowledge of his own he determined to marry her. It is impossible for evidence to shew a more spontaneous and more determined movement of a young man's mind towards a marriage. All the following, all the declarations are on his side, and no return on hers, but what may fairly be attributed to an affection gradually cherished by his attentions. I may presume without injustice that the affection on her part was not checked by the prospect of a considerable elevation in life. Such a prospect is not apt to have such an effect. But I see no part of her conduct that bears the appearance of a hungry, an eager, and mercenary attachment. On the other hand, every word, every act of his, points to a spontaneous passion, and that with an ardour that admits of no check. He himself writes the banns, and delivers them at both churches. His letters after marriage speak the same language of not only passionate but confirmed attachment. There is not a particle of proof that this was incited by any studied efforts on the other side. I see nothing that can be strained to that import; and I really must say that the averment of artifice is left entirely bare of proof, and of course can have no weight whatever in the charge.

But it is said the courtship was not communicated to his parents, and there is clandestinity. By clandestinity in the canon law was meant the contracting of a marriage without the full so-[251]-lemnities of the Church, as by sponsalia per verba de presenti, or any other defective mode. I am not aware that clandestinity has been subjected to any legal definition by the law of England, but it is introduced into the later Marriage Act, and seems to be there used in the popular sense, in which it is generally received; and in which this imputation charges it, of a concealment of the intended marriage from the parents of the parties, or of one of them. But on whom

does the charge of clandestinity rest? Upon the son himself certainly, who was bound to communicate—and not on the young woman, who was not so bound at all; for mere silence is not clandestinity, unless you first make out the obligation on the party to communicate: nor do I know that the law imposed any such positive obligation on her parents. Certainly it is proper and usual so to do among people in higher situations, and the omission would be deemed a gross departure from those rules of nice and delicate honour that belong to more elevated conditions of life; but such was not the condition of these persons: nor are they chargeable with positive fraud if they left the discovery to the observation of his tutor, or to the vigilance of his family, or to the casualty of general report; though they undoubtedly saw the growth of this young man's passion with great satisfaction. When he had engaged his own consent most fully to marry (which no solicitation was necessary to procure), that they should have acquiesced perfectly in the marriage cannot be doubted; that they should in that advanced state of things look rather to the efficacy than the regularity of the means employed, one cannot be surprised to observe. I do not see, [252] however, that they directed and advised those means: the merit of such advice and direction is attributed elsewhere. What part the father took, otherwise than in advising that the proper name should be used, does not at all appear. The mother, who attended at the marriage, certainly went further, and declared the parties to be (what they were not) of Tooley Street in that parish. This was going beyond what was true at that time, but which I have no right to advert to, as the Marriage Act forbids any proof to be now received to shew that St. Olave's was [not the parish in which they actually resided. In fact, I repeat the whole charge of fraud goes very little, if at all, on this evidence beyond mere non-communication. No solicitations were employed, no measures as far as appears taken, but what were taken at his own instance, and almost personally by his own act. I am not entitled to say that he was moved otherwise than by his own impulse; and if so, it is impossible to maintain a charge of active conspiracy; and that being excluded, the whole is reduced to the simple question of the due or false publication of the banns.

In considering that question, I shall not deem it necessary to enter into the canonical history of banns, previous to the passing of the Marriage Act. It has become in some measure matter of antiquarian learning, at least in this part of the island; and is not unfamiliar to us from various decisions in causes where it has been properly introduced. As little shall I think it necessary to enter into any minute analysis of the provisions of that Act, which are still more familiar to us. It is sufficient for me to state the following positions, as com-[253]-posing clear and settled parts of the matrimonial law of this country, built as that law is on two foundations, the ancient canon law and modern statutes: that banns or proclamation of intended marriages must be thrice published in the church or churches of the parish or parishes where the parties dwell, and in one of which the marriage is to be celebrated: that these banns, being notifications of the intended marriage, must indicate the parties by the description of their names and parish residences: that the law, derived, as I have described, from two sources, does in terms or in effect require those two particulars, but under different sanctions. A false description of residence is, by a particular clause of the modern Marriage Act, rendered a mere impedimentum impeditivum, imposing on the clergyman, if the fact be known to him, the duty of not proceeding with the marriage, but not invalidating the ceremony if once performed. The publication of false names is different, though no such difference is marked in that statute; it forms an impedimentum dirimens, invalidating the marriage in toto; and this arising from the very nature of the thing, and the intent and use of the publication.

The Court has had occasion to observe that it may in some cases be difficult to say what are the true names, particularly in the case of illegitimate children. They have no proper surname but what they acquire by repute; though it is a well known practice, which obtains in many instances, to give them the surname of the mother, whose children they certainly are, whoever be their father. However, if they are much tossed about in the world, in a great variety of obscure fortunes, as such per-[254]-sons frequently are, it may be difficult to say for certain what name they have permanently acquired, as was the case in *Wakefield v. Wakefield* (vol. i. p. 394). In general it may be said that where there is a name of baptism and a native surname, those are the true names, unless they have been over-ridden by the use of other names assumed and generally accredited.

Variations of the names of parties sometimes occur in banns. If they are total the rule of law respecting them cannot be doubtful. It never can be contended that such names can be deemed true designations; nor could one have supposed that such names could have been used but for the purposes of gross fraud; if the case of *Mather against Neigh* (Consist. 10th July, 1807) had not occurred, in which the woman from a mere idle and romantic frolic insisted on having her banns put up in the name of Wright, to which she had no sort of pretension. Such a publication, whether fraudulently intended or not, operates as a fraud, and is therefore held to invalidate a marriage.

But besides total variations there may be partial variations of different degrees, from different causes, and with different effects. The Court is certainly not to encourage a dangerous laxity; neither is it to disturb honest marriages by a pedantic strictness. Variations may consist in the alteration of one letter only, as it did in *Dobbys for Dobbyn* (Consist. 26th January, 1813); in more than one, as *Widoweroft for Meddoweroft* (supra, p. 207); in the suppression of a name, where there are more than two, as *William Pouget for William* [255] *Peter Pouget* (vid. supra, p. 142); in the addition of a name where there are only two known, as in the present case; and in those of *Heffer against Heffer*,† *Tree against Quin*, and *Dobbyn against Corneck*. Such varieties may arise not only from fraud, but from negligence, accident, error from unsettled orthography, or other causes consistent with honesty of purpose. They may disguise the name and confound the identity, nearly as much as a total variation would do, in which case the variation is for the very same reason fatal, from whatever cause it arises. Where it does not so manifestly deceive, it is open to explanation if it can be given. If the explanation offered implies fraud, that fraud will decide any doubt concerning the sufficiency of the name to disguise the party. The Court will certainly hold against the party that what he intended to be sufficient to disguise the [256] names shall be so considered at least as against him. He can have no right to complain that too strong an effect is given to his act, when he himself intended it should produce that effect. But if the explanation refers itself to causes perfectly innocent, and if it be supported by credible testimony, overcoming all the objections that may be applied against its truth, the Court will decide for the explanation, and against the sufficiency of the variation to operate as a disguise, where no such effect was intended. If the explanation should leave the matter doubtful, then evidence of general fraud intended may be let in to decide what is left undecided on the explanation. But the only falsehood that can be shewn in the first place is the falsehood, at least the insufficiency of the explanation itself; for, till that falsehood or insufficiency is shewn, there is no admission for evidence of any matter besides.

It is only by virtue of pleading that there was a false publication of banns, that you are admitted to bring your case at all before the Court; or that the Court is authorized to receive it. The Court could not receive a libel which stated all the other circumstances of fraud here imputed unless upon the allegation, that there was such a false publication: and if it be shewn that there was no such false publication, no evidence, applying to the other falsehoods imputed to the transaction, can be received. You may have pleaded historically and provisionally in your libel, that

† In *Heffer v. Heffer*, Consist. 17th May, 1811, an objection was taken to the admission of a libel in a suit for the restitution of conjugal rights, brought by the wife on the ground that the copy of the parish register, which was exhibited, stated "that George Heffer and Anna Sophia Colley were married:" and that the true name of the woman being Anna Colley, there was a false publication of banns.(a) In *Tree v. Quin*, 29th May, 1812, one of the articles of the libel (in a suit for nullity of marriage, brought by the father of a minor) pleaded that the woman was baptized by the name of Martha, and that she was known by no other; and that the banns were published in the name of Martha Caroline. In *Dobbyn v. Corneck* (supra) the real name of the man was William Augustus Dobbyn, and of the woman Maria Corneck, but the banns were published in the names of W. A. Dobbys and Maria Philippa Corneck. In these two cases the Court overruled the objection to the admissibility of the libel, on the effect of the variation alleged, so far as to admit the case to proof, but not determining on the effect of the variations assigned. It does not appear, however, that any further proceedings were had in them.

(a) On 21st Feb., 1812, this marriage was pronounced valid.

such other frauds existed in the case ; but you cannot originally use that evidence in any manner to impeach the publication. It would be the most circular of all arguments to say that the falsehood in the publication [257] lets in the evidence, and then that this evidence proves the falsehood of the publication. From all the cases, therefore, I take the doctrine to be, that wherever the disguising effect of the variation does not appear on the very face of the name, it is open to explanation calculated to shew that the party has not forfeited his right by what is neither shewn to be, nor to operate as a fraud—that if no explanation is offered, the Court may generally conclude against the bona fides of the variation—that, if being offered, it fully and satisfactorily protects the variation from all imputation of fraud, the publication is to be recognised as a due publication, has all the authority of such, and you can bring no evidence of any other fraud connected with the marriage, except such as you would have brought in a marriage, where the publication had passed in the most orderly and regular manner. The falsehood of the publication is the whole of the case ; prove that, and every thing is proved : without it nothing.

Is this then a case in which it appears clearly on the face of the publication that the variation entirely confounds the identity ? I think clearly not. I cannot consider that the mere appearance of the name of Holmes could have any such effect. Upon strangers who did not know the parties it of course could have no effect at all. To persons who were intimate with her it would be most probably known that the mother's name was Holmes : therefore they could not be much startled or misled. To those who were not intimate, it would naturally occur that it was a dormant name, one which she did not commonly bring forward ; as occurs in a thousand instances ; for nothing is more familiar to us than dormant [258] names. Indeed very few persons who have three names have more than two in every-day use. If they have a third name, whether of baptism or a surname, it seldom occurs in writing otherwise than as a mere initial flourish ; in common parlance it is usually quite extinct. The case of Pouget was, that he was called William in the banns, which was really one of his three names, but that he was known only by the name of Peter, which was the only one by which he was generally known. In higher families where two surnames are possessed, the Christian name is often omitted, as in Wellesley Pole and the like. It is seldom, except on formal occasions, that the whole array of names is brought into use, or indeed any names more than two. When the singularity too of the name of Oldacre is considered (and the Court must advert to all the circumstances, small as well as great), I cannot think that the name of Maria Holmes Oldacre, used on a very formal and solemn occasion, could mislead any person with respect to the identity of Maria Oldacre.

Then the next question is, did this variation originate in fraud, or in what else ? For I admit that the party using it is bound to explain it and to support the explanation by proper evidence against all fair objections. The explanation here offered is, that she was born before the marriage of her parents ; that her mother's maiden name was Holmes : that she had always borne the name of Oldacre only, until her own marriage was in agitation ; but when she came to this solemn act—an act that was very likely to be scrutinized, and which her parents naturally thought, if it was done at all, should be [259] done in a valid and effectual manner—they, under a common but very erroneous impression that she was legally entitled to her mother's maiden name, advised her to prefix Holmes to Oldacre. In truth, it is this mistake of theirs which has occasioned the whole of the present question.

No man can say that this explanation is not probable enough in itself. It is a most natural solution of the fact ; and the circumstances on which it is founded are proved in a way that compels the belief of Mr. Sullivan himself in his answers, for I have looked into those answers, and I find that Mr. Sullivan admits upon his oath that he believes them to be true. That she was the illegitimate child of Thomas Oldacre and Amelia Holmes—that she was born four months before they repaired this misfortune by marriage—that she was baptized as the legitimate child of Mr. and Mrs. Oldacre, and brought up under that character and name—all these admitted facts lay the most natural foundation in the world for the only other fact that follows, and which is very sufficiently proved by two witnesses—that she was advised to use the name of Holmes in the publication of banns as most properly belonging to her. It is very true that she never had used the name of Holmes ; in all probability she did not know that it belonged in any way to her. Even if she had known it she probably

would not have used it on any ordinary occasion, as it might have led to the necessity of unpleasant explanations. She herself was a minor, and could have had no occasion before to execute any formal instrument that required precision. Therefore no improbability arises from her not [260] having ordinarily used the name before: and there is the highest probability that, in order to secure such a marriage, she should have been honestly advised by her parents to use the name on this occasion, as legally belonging to her.

Now, what is to be opposed to the facts and probabilities which constitute this explanation? Surmises merely. That it must have been done to conceal the marriage from Mr. Sullivan the father—that other parts of the transaction shew a fraudulent intention—and that these other frauds are to be transferred over to the publication of banns. But they do not break in upon any one fact on which the explanation rests; they leave every thing in it quite untouched. It stands perfectly good, as far as any thing can apply immediately to it; and, therefore, it is to be falsified aliunde by evidence which could not be admitted at all, but on the antecedent proof of the falsehood of this very explanation. If this could be admitted, hardly a case would escape in which the slightest and most immaterial variation could be found; for you have nothing to do but to scrutinize the whole of the courtship to find out something which you can colour as fraud, and then apply that to discolour the variation. It is argued that whatever is clandestine is fraudulent; and, therefore, in every clandestine marriage, if you can but find out a flaw in the banns, be it ever so slight, it is enveloped in the general fraud, with which, in truth and in reason, it has nothing to do; and that flaw shall enable you to set aside a marriage which the whole body of fraud by itself would not even entitle you to question.

[261] In the present case the counsel are compelled to admit the name might be honestly used; that it might be used for the intent described in the explanation; but they say there might be likewise a fraudulent intent. Why adopt this double purpose gratuitously, if the first purpose is quite adequate? If there was even a hope that the name thus varied might excite less notice, that does not make it fraudulent, supposing that her father really believed that the name belonged properly to her. There is one circumstance decisive in my mind, that the name could not be used for fraud. Who was to be concealed upon this occasion? Not Maria Oldacre, but John Augustus Sullivan, whose interests his father had to protect. What would the marriage of Maria Oldacre, or of Maria Holmes Oldacre, have been to Mr. John Sullivan? Even if proclaimed in his own parish church, it would not have troubled him, for he did not know that such a person existed. But if the undisguised name of John Augustus Sullivan going to marry somebody, he knew not whom, had appeared, what would have been his sensations? The fraud then, if any had been intended, would have nestled there, in a partial or total disguise of that name; and the more so as the name is a marked one. That would have been the startling point. Whose name was disguised in *Pouget's case*? The young man's. They must have been bunglers indeed if they placed the fraud not in the name which required to be concealed, but in that which needed no concealment. The very course of the transaction, therefore, entirely repels the suspicion of fraud.

Another circumstance, though somewhat slighter, deserves notice. It is quite impossible, but that Mr. [262] John Augustus Sullivan must have thoroughly known why this name was introduced; and if he did it must probably have come out by some means or other, either in his letters to or personal communications with his father; but there is nothing to authorize a belief of any suggestion coming from him of improper or fraudulent conduct touching this matter. I see nothing in Mr. Sullivan's answers that leads to the suspicion of any such communication from his son; and if such a communication had been so made, and been introduced into a regular plea, it would have met with the most decided contradiction from her father, whose answers upon oath utterly disclaim any such imputation.

Such is the view which I am led to take of this case, on the fullest deliberation, and with a firm conviction that it is the view which I am bound by law to take. I am not insensible of the pain which the judgment founded upon it may inflict on persons entitled to high respect—a respect undiminished by any thing that has occurred in this cause. It is not for me to advise those persons: their own good sense, and their own feelings, will be their best monitors. If my opinion does not mislead me, the knot of this marriage is not to be untied by the hand of the law. I have, there-

fore, only to pronounce that the marriage is valid, and to dismiss Mrs. Sullivan from the suit which has been instituted for its annulment.

Affirmed on appeal, Arches, 16th June, 1819.

[263] *LADY HERBERT v. LORD HERBERT*. 4th July, 1817; 3rd Feb., 30th Ap., 1819.—Validity of a marriage celebrated at Palermo according to the law of Sicily, established.

[S. C. 3 Phill. 58. Referred to, *Ogden v. Ogden*, [1908] P. 63.]

This was a suit for restitution of conjugal rights, brought by the Hon. Octavia Herbert, commonly called Lady Herbert, of the parish of St. Mary-le-bone, against the Hon. Robert Henry Herbert, commonly called Lord Herbert, on a marriage alleged to have been celebrated between them, at Palermo, in the island and kingdom of Sicily: after the proceedings stated below, on the part of Lord Herbert, a general negative issue was given to the libel, thereby denying the marriage; and as it was not a public and regular marriage, it was the object of the proceedings to prove the fact, and the validity of the marriage by the law of Sicily.

When the usual citation had been returned, with certificate that the party was not found to be served, &c. a further citation viis et modis was issued, and returned, and a decree obtained calling on the party to appear and see proceedings, with intimation that the court would proceed on non-appearance: a libel was then offered, and was about to be read in pœnam, when a proctor asserted that he gave an appearance, under protestation to the jurisdiction of the Court, on the ground that the house at which the citation had been served did not belong to Lord Herbert at that time, &c.

The Court was disposed to overrule this application; when Dr. Arnold and Dr. Swabey, on the part of Lord Herbert, submitted that he was entitled to be heard on the authority of the case of *Buller v. Dolben*, Arches, 1756, in which there was an appearance under protest, and Sir George Hay overruled the protest, the party not being ready, and [264] the excuse frivolous; on appeal to the Court of Delegates, it was held that the party ought not to be precluded from being heard.

The Court said that in deference to that authority, it would not refuse to hear Lord Herbert, though the matter of fact now suggested, being in contradiction of the fact on which the citation viis et modis had issued, ought to have been brought forward on affidavit; that there was the appearance of delay on the part of Lord Herbert, and it would be the duty of the Court to prevent Lady Herbert from receiving any prejudice. It would, therefore, permit the witnesses to be examined, de bene esse, during the long vacation. Dr. Arnold and Dr. Swabey suggested that what was done before the party appeared would be a nullity. The Court thought it was competent to direct the witnesses to be examined, as it had intimated; though the libel was not admitted and the husband had appeared under protestation.

From this decree there was an appeal to the Court of Arches: but a caveat having been entered against the issuing of the inhibition, the case was argued in the Court of Arches on that point (3d Nov., 1817), when the Court held that it had a discretionary power in granting inhibition, for purposes of justice, under particular circumstances, although it would be extremely reluctant to interfere with the ordinary course of appeals, and relied on the provisions of the 96th and 97th canons to that effect. On reference to what had passed in the Consistory Court, the Court held that the Judge was competent to order the examination of witnesses to proceed, de bene esse, on the libel, as had been directed in the Court below; and on further discussion of the facts sustained the caveat, and directed the inhibition not [265] to issue. The proceedings were then continued in the Consistory Court; and the evidence having been taken by commission, in Sicily: on the 3d of February, 1819, an objection was taken to the form in which the examinations had been there conducted, principally on the ground that the directions from this Court were "secretly and diligently to examine;" and that the examinations had not been taken secretly, but in the presence of Don Camillo Gallo, the substitute of the proctor for Lady Herbert. To this it was replied "that the requisition was executed, in every respect, in entire conformity with the subsisting laws at Palermo, and according to their best understanding of the terms thereof."

3d Feb., 1819.—*Judgment*—*Sir William Scott*. The present question arises on an objection to the return made to a requisition for examination of witnesses abroad; and it is concluded that enough appears on the face of the return, and on the protests accompanying it, to induce me to quash all the proceedings under the requisition,

without so much as inspecting the depositions. After the length of time that this cause has been depending, and after the various obstructions which have so long prevented its being brought to a close, the Court would greatly regret being under the necessity of protracting it still further, by acceding to the prayer which is now made. However, if the objection be of sufficient weight the Court will be bound to act accordingly.

The case turns on a marriage alleged to have been contracted between these noble persons, in [266] the kingdom of Sicily; and great part of the evidence being to be sought there, it became necessary, according to the practice of this Court, to take out a requisition for the examination of witnesses. This instrument therefore issued. It was couched in the usual terms, and addressed to his Britannic Majesty's Consul General in the Kingdom of Sicily, and to the civil and ecclesiastical magistrates of that country generally. The consul accepted the requisition, and so did a Judge of the Supreme Court of Judicature in the island; and they appear to have proceeded with great deliberation in the business, having occupied several days in the examinations which are transmitted to this Court, with a formal return or certificate of the execution of the commission.

Several objections appear to have been taken in Sicily, but these are all dismissed as irrelevant and immaterial here, one only excepted; namely, that the examination was not conducted according to the tenor of the requisition. It is urged that the execution of the instrument ought not to have taken a wider latitude than the instrument itself authorized and directed to be taken; that by the tenor of the commission, the witnesses should have been examined secretly; but that the fact was not so; for that one Signor Gallo, the person who acted in Sicily as the substitute of Lady Herbert's proctor, was present at the examinations; and that this is such, and so important a deviation from the tenor of the requisition, as to vitiate all the proceedings which have been had under it. On the other hand, it is not denied that some error has crept into the execution of the commission, but it said to be unintentional in its [267] origin and trivial in its effect. Certainly if the Court saw any reason to apprehend that an error in the execution of the power delegated to the authorities in Sicily was likely to lead to important consequences in the ultimate result of the suit, it would use every precaution against those consequences; but if the irregularity has arisen from the mere mistake of a word, easily misconceived, in the requisition, the Court would depart from its duty if it did not at least inspect the depositions, and see whether that irregularity had really led to the consequences suggested. The requisition directs that the witnesses should be examined secretly. Such is the general rule both of the civil and canon law. Our own municipal law adopts a different mode of proceeding, by *vivâ voce* examination of witnesses in open Court; but the former mode is not only practised in the Ecclesiastical Courts of this country, but in the tribunals of all those countries, where the ancient civil and canon law has been received in practice.

It must be observed, however, that the secrecy prescribed by the general rule is very much varied by local regulations: the original law is modified in different countries. Strictly, and originally, the witness was examined by the Judge himself, taking to his assistance a notary to reduce the deposition into writing, but no one else being present. Here, in the Ecclesiastical Courts of this country, the examinations are taken by a practitioner who represents the judge, a notary, who reduces the deposition, and who remains quite alone with the witness. In the present case, the execution of the commission, in Sicily, was effected in a more dignified manner, so far as regards the persons who [268] took the examination. The Court, therefore, has some security from the station, character, and functions of the commissioners, that there was no intentional irregularity. I must admit, that supposing the word secretly, in the requisition, had been well understood by the commissioners, in the sense given to it in our practice, they ought to have executed it according to the law from which they received this delegated authority; for, having accepted such a delegation from a foreign country they were not to act under it in a manner which that law could not recognize; and it is not sufficient to say that they acted according to the law of Sicily.

I accede, however, entirely to the remark of Lady Herbert's counsel that the word secretly is a word, in some degree, ambiguous; for there are different degrees of secrecy in the examination of witnesses adopted in different countries. It may be

considered as a secret examination, where the proceeding is merely *januis clausis*, with closed doors, the public being excluded; but the parties or their representatives being present; or it may be, where the Judge and notary only are present, or where the notary alone acts as an examiner. Now, if the mode in Sicily is to proceed, in such matters, *januis clausis*, the commissioners might well construe the word secretly, as they appear actually to have done, giving equal permission to the substituted proctors of both parties to be present. Whether it might not be advisable, in future commissions for the examination of witnesses abroad, to throw in some explanatory words, specifying the sort and degree of secrecy intended, is a question which I need not now examine; but as this commission stands, I think the proceeding [269] of the commissioners has originated in a mere misapprehension, and a misapprehension in itself very natural; and that it affords no ground whatever for suspicion of intentional irregularity. The mistake was a mistake on all sides. The substituted proctor of Lord Herbert did not understand the word secretly, as we apply it in practice. In his protests he asserts that he himself ought to have been present, and to have been present alone, which would have been equally at variance with our rule. Where all parties laboured under a common error, it is impossible to infer any impurity in the proceeding; nor do I, at present, see any sufficient reason for rejecting the evidence. The Court, therefore, overrules the protest.

30th Apr., 1819.—On this day, the cause came on again upon the merits, when it was argued by Dr. Phillimore and Dr. Lushington, on the part of Lady Herbert; and by Dr. Arnold and Dr. Swabey, on the part of Lord Herbert.

Judgment—Sir William Scott.—This is a suit brought by the Dowager Princess of Butera of Sicily, against Lord Herbert, both of the persons being of noble birth and rank in their respective countries, and both of age at the time of the marriage, and consequently, appearing in their own persons. It appears that Lord Herbert was in Sicily in 1814, and was introduced to the family of the Prince of Butera, the then husband of this lady, whose house was much frequented by the English nobility and gentry there resident. Lord Herbert was received by them both with peculiar kindness and [270] hospitality; and the husband dying early in June of that year, Lord Herbert began to pay particular attentions, of a very marked nature, to the lady, in her widowhood. Her sister, who was the Duchess di San Giovanni, speaks to meeting him at her house, when he opened his arms to salute her, and on expressing her astonishment, he replied, "that he thought he was entitled to that indulgence, as he was about to become her brother-in-law." This led to further conversation, in which he declared his eager expectation of marriage, and shewed her a written promise to that effect. It appears, however, that some friends of the lady entertained doubts as to the propriety of this marriage; as one of the witnesses says that, in a conversation with her, he advised her not to marry, as it might not be altogether suitable to her; but observed, at the same time, that it was a point for herself to decide.

The intimacy of mutual affection continued to increase, with strong declarations of a desire to marry, on the part of Lord Herbert; and on the 17th of August the marriage took place, certainly not conformably, in point of mere ceremonial regularity, to the matrimonial rites of that country; in which, as in most other countries of Europe, a solemn ceremonial is appointed to be observed. But it appears that the priest of the parish was sent for, and that two servants of the family were present; and that the lady and Lord Herbert, in their presence, declared themselves to be husband and wife. It is said in objection that this was an unsolemn marriage, and so it was: but it was followed up by all the necessary forms of registration, and by other acts; and nothing was left undone by which the fact [271] could be established as having actually taken place.

This part of the case being fully proved, the only question which remains is respecting the validity of this fact of marriage: whether, celebrated in this form, it is invalid, according to the law of the country; it being the established principle, that every marriage is to be universally recognized, which is valid according to the law of the country in which it was had, whatever that law might be. On that point, witnesses have been examined in the usual way of proving that fact, by the judgments of the professors of that law,* [272] producing the law, and shewing that it is the existing

* The eighth article of the libel pleaded, "That by the laws, customs, and constitutions prevailing throughout the whole island and kingdom of Sicily, and especially

law, according to their opinions. They state with great distinctness and confidence that the Council of Trent is the law of Sicily, which requires the presence of the parish priest and two witnesses. The Court has the depositions of four professors of the law, declaring that they have no doubt whatever of the validity of a marriage so celebrated as this is proved to have been; and, indeed, the counsel here have felt that, on this evidence, the validity could not be resisted.

It is scarcely necessary to advert to subsequent circumstances; but there is the correspondence of [273] the parties, in the characters of husband and wife; letters of Lord Herbert, in the warmest terms of marital affection and acknowledgment, and a matrimonial cohabitation is fully proved for some days afterwards.

It appears, however, that there is in Sicily, a municipal and criminal law against clandestine marriages, which subjects parties to imprisonment: the husband, if noble,

by the decree of the Council of Trent, A.D. 1563, which is received and obeyed as law at Palermo, and throughout all Sicily, and which was in full force there on the 17th August, 1814, clandestine marriages are held to be valid. It is enacted that the mutual and free consent of the parties contracting marriage, expressed and declared in the presence of the priest of the parish in which the parties, or one of them, resides, and in the presence of two witnesses, is sufficient to constitute the indissoluble bond of matrimony, and a man and woman thus married are held to be legally united in wedlock; and so much was and is well known to the judges and advocates and lawyers presiding and practising in the courts of law at Palermo, or other places in the island and kingdom of Sicily, of the greatest reputation for their skill and knowledge in the laws of that country, and is in strict conformity with the exposition of the law of marriages in that kingdom, as laid down in the writings of authors of the greatest eminence and authority on that subject."

Ninth. "That several ordinances have, from time to time, been promulgated by royal authority in Sicily, which affix a civil punishment on persons contracting clandestine marriages, and render the husband, if the parties are of noble birth, liable to imprisonment for five years in a fortress, and the wife to confinement, for the same number of years, in a convent; but that these ordinances are never enforced, except at the suit of the parents or guardians of the parties clandestinely married; and it is the general usage of the King, at the petition of the husband or wife thus clandestinely married, to direct the Supreme Court of Judicature to remit the execution of the law, or to mitigate the severity of it; but that in no wise, by these proceedings, or by any other regulations imposed by the civil and canon laws prevailing in Sicily, is the validity of a clandestine marriage solemnized in the manner pleaded ever affected or called in question; but the parties thus married are held to be validly and indissolubly united."

Tenth. "That the Honourable Robert Henry Herbert, commonly called Lord Herbert, and the Honourable Octavia Herbert, commonly called Lady Herbert, having mutually and freely expressed their consent to be married, and having been married, and pronounced husband and wife, by the priest of the parish in which they or one of them resided, in the presence of two witnesses, were and are lawful husband and wife, according to the laws of Sicily."

Four eminent advocates were examined upon these articles, and deposed to the same effect, as follows:—

Don Domenico Mastrantonio, domiciled and resident in Palermo, doctor of both laws, and fiscal advocate of the High Archiepiscopal Court of the city of Morreate, to the eighth article of the libel deposes, "That a clandestine marriage, although illicit by the laws of the Church, is, notwithstanding, valid and indissoluble. This point was fully established by the Council of Trent, sess. 24, c. 1, De Reformatione. Since this decree, no law has been enacted repugnant thereto; on the contrary, the said council, with a view of obviating all judicial contests, threatened with excommunication all those who should call such decree in question. 'Dubitandum non est, clandestina matrimonia libero consensu contrahentium facta, rata et vera esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde jure damnandi sunt illi, ut eos synodus anathemate damnat, qui et vera et rata esse negant. Quique falso affirmant matrimonia a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse.' This decree of the council was received and adopted in Sicily, by an ordinance of the then King Philip the Second; and is the only source

in a fortress—the wife, in a convent; and there was a seclusion of these parties from each other, in consequence of this law; but not precisely, as the law prescribes, by close imprisonment. This is a law which appears to have been much dormant in the execution, and I suppose it is generally enforced only on the ap-[274]-plication of the friends of the parties; though I do not see that the application of the family would be particularly necessary, as any other information given to the authorities would probably be sufficient; or the government of the country might act upon its own notion: yet it is likely enough that no such interposition of government is given except when parents interfere for the protection of minors, or under other particular circumstances. Government was informed in this case by the application of Lord Pembroke, who was much dissatisfied with the marriage. Lord Herbert was sent to a fortress, from which he escaped, and she to a convent, from whence she [275] was

of sound doctrine, by which all the episcopal and royal courts of judicature are regulated and governed in matrimonial causes.

“A clandestine marriage is said to be contracted, when a man and a woman express and declare their mutual consent to contract matrimony, in the presence of the priest of the parish, or other minister by such parish priest for that purpose duly authorized and empowered, and in the presence of two witnesses. It is sufficient that the minister be the priest of the parish in which one of the parties resides. A marriage so contracted is called a clandestine marriage, as being unaccompanied by the following solemnities; viz. three previous proclamations during the solemn mass of the parish, on three distinct festivals or holidays, and the benediction of the minister of the parish; and it is the want of this solemnity which occasions it to be designated as illicit. This marriage is, notwithstanding, valid, and the union between the parties indissoluble, provided their mutual consent be expressed and declared in the presence of the priest of the parish and two witnesses, as above mentioned.”

To the 9th article—“That various civil ordinances, conformably to the provisions of the canon law, declaring the above-mentioned clandestine marriage to be illicit only, have been promulgated in our kingdom, which inflict a punishment on persons contracting such marriages, and, amongst others, the pragmatic sanction of the reigning King Ferdinand, vol. iv. tit. ‘De Delictis,’ which, not at all affecting or calling in question the indissolubility of clandestine marriages, but, on the contrary, respecting the same as a sacrament, merely prescribed that the parties guilty of such an illicit act should be subject to punishment, which, for parties of noble birth, renders the husband liable to imprisonment for five years in a fortress, and the wife to confinement for the same period in a convent. Should the parties, however, be of ignoble birth, the husband is liable to banishment for five years, and the wife to imprisonment in a solitary retreat for the same period. The rigour of this law, however, has been repeatedly suspended by his Majesty, when no persons have appeared to denounce the parties, or enforce the execution of such law.”

To the tenth article—“That the Honourable Robert Henry Herbert, commonly called Lord Herbert, and the Honourable Octavia Spinelli, Princess Dowager of Butera, commonly called Lady Herbert, having expressed and declared their mutual consent to become husband and wife, in the presence of the priest of the parochial church of La Kalsa (in whose district the palace, wherein the Princess Dowager of Butera at that time resided, is situate), and in the presence of witnesses, as pleaded, I am decidedly of opinion that, by the laws of the Church, and more especially according to the Council of Trent, and the civil law, they were and are lawful husband and wife, and indissolubly united in the bond of matrimony.”

The same witness, upon interrogatories—“That, according to the decrees of the Council of Trent, it is not necessary to the validity of a clandestine marriage that the priest or minister of the parish should pronounce any words, prayers, or benediction, the presence of the priest of the parish alone being sufficient—that it is not necessary that the witnesses should utter or pronounce any words indicative of their being witnesses to such marriage—that it is not necessary to obtain their consent, for intervening as such, on occasion of the celebration of a clandestine marriage—that the priest or minister of the parish ought to know, at the time of contracting such marriage, the names and surnames of the witnesses present—and that it is customary for either the intended husband or wife to furnish him with such information on the spot, or to leave the same with him written down on a piece of paper.”

released, on bail, to appear, if called upon; which she has not yet been, as the time is not quite expired, but will expire in the course of the present summer.

Under these circumstances, the Court is requested, on the part of Lord Herbert, not to pronounce for a sentence of cohabitation, to be enforced immediately, but to defer it till a distant day, that it may not interfere with the separation under the municipal law of Sicily, to which reference has been made. It is allowed that there is no precedent for such a limitation to the ordinary decree of this Court. Is there any principle in support of it? That this Court should borrow the criminal law of [276] Sicily, and incorporate it into its own rules; not at the suit of the friends or of the government of that country, but of the party himself, the husband being equally, or perhaps principally, involved in these irregularities. If the Court should accede to this prayer, I think it would undertake a task to which it is not competent in its own jurisdiction; and that it would act contrary to all principle, so to take up the criminal law of a country, which is almost obsolete there, and at the prayer of the particeps criminis himself. If it possessed such authority, it is to be observed, that the time for this punishment is almost elapsed.

On the whole of this evidence, I have no doubt that the lady is the lawful wife of Lord Herbert, and the Court is bound to direct that he should receive her as such, and certify to this Court, by the first day of Michaelmas Term, that he has so done.

[277] *LADY KIRKWALL v. LORD KIRKWALL.* 25th Apr., 1817; 13th Feb. 1818.

—Divorce, by reason of the adultery of the husband. Connivance on the part of the wife, from forbearance, not inferred. Objection to libel overruled.

This was a question upon the admissibility of a libel offered on the part of the Honourable Anna Maria Fitzmaurice, commonly called Viscountess Kirkwall, in a cause of divorce, instituted by her against the Honourable John Hamilton Fitzmaurice, commonly called Lord Viscount Kirkwall, by reason of alleged adultery.

In opposition to the libel, Dr. Arnold and Dr. Burnaby objected, that it did not plead the period when the adultery first came to Lady Kirkwall's knowledge. It was pleaded that the fact occurred in 1814, and subsequently in London and its neighbourhood; and that she was resident in London during the whole time; but yet the suit was not brought until the latter end of the year 1816. It was therefore to be presumed that she was cognizant of the adultery, and acquiescing in it, particularly as she was living in a state of voluntary separation from her husband.

Dr. Swabey and Dr. Lushington, in reply to the objection, contended that the mere residence of Lady Kirkwall in London did not necessarily give rise to the inference that she was cognizant of the adultery, as a large city was, of all places, the best adapted for carrying on such an intercourse with secrecy; but were it otherwise, forbearance to a certain extent was justifiable, and even commendable, on the part of a wife; and could not constitute any bar to the remedy which she might seek, after finding that her forbearance had been unavailing.

[278] *Judgment*—*Sir William Scott.* In this case the libel pleads "that Lord and Lady Kirkwall were married, by special licence, in August, 1802, at Abergelly, in Denbighshire; that they lived together, from that time, until the year 1809, and had two children. A separation then took place, in consequence of some unhappy differences which had arisen between them; that Lady Kirkwall has since resided, in various places in London, apart from her husband." The libel farther pleads "that, in the beginning of the year 1814, Lord Kirkwall formed a criminal intercourse with a woman of the name of Taylor, or Hankin, who lived in lodgings in Park Place, Grosvenor Square; and that he, from that time, was in the habit of visiting her there for criminal purposes." The libel then charges various acts of adultery to have been committed by them at those and other lodgings; and further pleads "that, about the same time, he formed a similar connexion with a married woman of the name of Webb, then residing with her husband; that he afterwards lived with her in various lodgings, and still continues to do so at lodgings in Margaret Street, Cavendish Square;" and it charges adultery between them at all those places.

An objection is taken to the admissibility of this libel, on the ground that it does not plead the period when Lady Kirkwall first became acquainted with the fact of adultery, with which her husband is charged. The Court, however, is of opinion that the objection is not sustainable, either in point of fact or in point of law. It cannot assent to the inference that Lady Kirkwall is [279] to be presumed cognizant of the

adultery, because she lived in London, where it took place; as a person in this great city moves in a state of comparative obscurity as to his actions, to what a person does, who lives in a less populous place, where his life is open to continual observation: *Magna urbs magna solitudo*. There is nothing in the facts charged to shew that Lady Kirkwall's suspicion must, of necessity, have been excited, or that the adultery might not have taken place without her knowledge: but supposing that she was acquainted with it, though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him, when afterwards seeking his legal remedy; yet this doctrine is not to be pressed against a wife, unless in very particular cases.

Even in the case of a husband it is not invariably expected that he should shew the time when the charge first came to his knowledge. It might be prudent and expedient for the success of his suit that he should do so, but it is not absolutely necessary—something must be allowed to convenience. Certainly a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society; and forbearance under this *spes recuperandi* has never yet been held to constitute a bar to her legal remedy, when every hope of that kind should be extinct. I therefore admit this libel to proof.

On the 13th of February, 1818, the libel being fully proved, the Court pronounced that Lady Kirkwall was entitled to a divorce, and decreed accordingly.

[280] LORD HAWKE v. CORRI, CALLING HERSELF LADY HAWKE. 23rd June, 1819; 16th May, 1820.—Jactitation of marriage. Factum of marriage pleaded but not sustained in proof. Effect of imposition of such celebration, if actually practised, *quære*. The Court ultimately declined to pronounce for jactitation; it appearing to have been done originally with the permission of the party.

[Discussed and followed, *Thompson v. Rourke*, [1893] P. 71. Discussed, *Cowley v. Cowley*, [1900] P. 313: affirmed, [1901] A. C. 450.]

This was a suit of jactitation of marriage, brought by Lord Hawke against Augusta Corri, calling herself Lady Hawke.

On the part of Lady Hawke an allegation was offered in contradiction to the libel, pleading the circumstances of an ostensible factum of marriage, had under a special licence obtained, or pretended to be obtained, by Lord Hawke.

Dr. Swabey and Dr. Daubeny contended that the allegation did not plead a factum of marriage as a real and valid marriage, and that such a plea could not be received as a defence in any other form; that no licence, or record of any, was exhibited; that it only averred "that Lord Hawke declared that he had obtained a licence, and that he produced an instrument which he said was a licence."

On the other side, Dr. Jenner and Dr. Lushington submitted that if the allegation had pleaded a fact of marriage even less strongly, it was sufficient to shift the proof of validity on the other party; that the averments were sufficient to put Lord Hawke on a proof of nullity of marriage; and if that could effectually be established, their party would be still entitled to the benefit of the facts pleaded, to repel the charge of false and malicious jactitation.

[281] *Judgment*—*Sir William Scott*. This is a proceeding not very usually adopted of late years; but it has, nevertheless, I presume, a legal existence. It is brought by Edward Lord Harvey Hawke against Augusta Elizabeth Corri, calling herself Lady Hawke, for jactitation of marriage. The libel states in the first article "that Lord Hawke is in no way married to or united with this lady" (meaning, as the Court presumes, neither in fact nor in law); "that she has falsely and maliciously boasted and reported that she is married to him, whereas, in fact, no marriage has taken place; and that on her being desired to desist from such conduct she paid no attention, but continued, falsely and maliciously, to boast and report such fact to the no small prejudice and injury of the complainant." The libel goes on to pray "that the Court will pronounce that she has been in no manner married to the complainant; that it will restrain her from such conduct and condemn her in the costs of the suit." The proceeding is therefore in the nature of a criminal suit. To this libel an allegation has been given in, which is strictly defensive; and the Court is always inclined to allow great latitude to defensive pleading, unless it clearly appears that the admission of the matter can lead to no useful result, which certainly does not appear to be the case here.

The allegation pleads "that in the months of January, February, and March, 1814, Lord Hawke, being a widower, paid his addresses to Augusta Elizabeth Corri, who was then a single woman; that he made proposals of marriage to her which were accepted; that she accompanied him several times to his proctor in Doc-[282]-tor's Commons, for the purpose of procuring a special licence for their marriage, and particularly on the 19th of March, 1814, she went with him, and that she remained in the carriage while he went into the proctor's office for the express purpose, as he declared to her, of obtaining such licence; that on his return he informed her that the licence would be sent to him in the evening of that day, and they accordingly agreed that the marriage should be solemnized on that same evening at No. 22 Park Lane, a house which Lord Hawke had purchased for their future residence; that the marriage was accordingly solemnized pursuant to the rites and ceremonies of the Church of England by a priest or minister in holy orders of the Church of England, or by a person whom Lord Hawke introduced as such; that on this occasion his lordship produced a written instrument which he stated was the special licence; that the marriage by the request of Lord Hawke was kept a secret for some months, but afterwards publicly avowed; that they cohabited together at the family mansion of Lord Hawke in Yorkshire, as also at Paris, Worthing, and other places, until the month of March, 1818; during which time a correspondence occasionally took place between them, in which he uniformly directed to her as Lady Hawke," which letters are exhibited, and are couched in a very strong style of conjugal affection, he signing himself her affectionate husband, &c.; "and that he directed his children by his former wife to address her as their mother."

Now supposing this allegation to be true (which the Court is for the present bound to suppose), nothing can be clearer than that Lord [283] Hawke has publicly and privately declared himself to be her husband. The Court entirely agrees with what has been said, that the defence might be sustained without a specific description of the fact of marriage; it is sufficient for a *prima facie* defence to allege that a fact of marriage actually passed; and the burthen of proof is unquestionably shifted on the other party to shew that any thing has occurred to invalidate it; especially as he has been, as she alleges, the party conducting the whole business throughout, and is alone in possession of the means of proof.

Looking at these facts, it is impossible for me not to say that there is abundant *prima facie* allegation of the fact which, in the present stage of the proceedings, is all that is necessary. How the case may be in a moral point of view if it should prove that the person who solemnized the marriage was not a clergyman and the paper not a licence, to the knowledge of the party who held them out as such to a person totally ignorant of the facts, no reasonable man can doubt. What it may be in legal consideration it is not necessary for me to answer at present; but I am not quite prepared to say that a marriage contracted under such circumstances would necessarily be pronounced null and void. If the case should arise, which the plea suggests, it would present a question worthy of the best consideration that could be given to it for the protection of the party abused by such treatment. No case has been cited to me in which it has been proved or has been laid down that an innocent woman so imposed upon would not be entitled to the complete protection of the law. A Court, I think, would strain hard to allow her the full benefit of it if she was really the dupe of so cruel an act of imposition.

[284] A responsive allegation was afterwards given by Lord Hawke, pleading the marriage of the defendant with Anthony Philip Corri; that she was at that time his lawful wife; that in 1814 she came to cohabit with him, the said Lord Harvey Hawke, and lived with him as his mistress; that he then allowed her to assume his name. It further pleaded a deed of settlement upon her, on their separation, in the name of Corri, and reciting her to be the wife of the said Anthony Philip Corri.

In objection to this allegation, Dr. Jenner and Dr. Lushington submitted that this was an abandonment of the whole case, as it set forth his own profligacy, and that as Lord Hawke had permitted her to use his name there was no ground for the suit of jactitation.

Dr. Swabey and Dr. Daubeney submitted that cohabitation was no bar to such a suit; that a suit of jactitation was the only remedy by which the party could protect himself and his family from such an assumption of a false relation to himself and to them; that it thus becomes in its consequences a marriage cause, in which it was

necessary to establish what was the real condition of the woman; that this sufficiently appeared from the contents of the allegation, and it was entitled to be admitted and to be considered with the other facts of the case in the final decision of the Court.

16th May, 1820.—*Judgment*—*Sir William Scott*. This is a proceeding in a cause of jactitation of marriage brought by Lord Hawke against a female who, as he represents, had usurped the title and character of his wife—a proceeding not now very familiar to this Court, [285] but which it is bound to receive for the protection of persons against the extreme inconvenience of unjust claims and pretensions to a marriage which has no existence whatever. If a person pretends such a marriage, and proclaims it to others, the law considers it as a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it) an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is therefore a fit subject of legal redress; and this redress is to be obtained by charging the supposed offender with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact obtaining a sentence enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceeding.

To a charge of jactitation three different defences may be opposed. It is obvious that the fact of having made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges; or, secondly, it may be admitted that such representations have been made, but that they are true; for that a marriage had actually passed, and in such a way as to give the party a right to claim the benefit of it. In that state of things the proceeding assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and [286] validity of such asserted marriage; and it will depend upon the result of that inquiry whether the party has falsely pretended, or truly asserted such a marriage. In the former case the Court would pronounce a sentence of nullity and enjoin silence in future. In the latter the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shewn that some other reason was interposed to dissolve that obligation. A third defence of more rare occurrence is that, though no marriage has passed, yet the pretension was fully authorized by the complainant, and, therefore, though the representation is false, yet it is not malicious, and cannot be complained of as such by the party who has denounced it.

As far as I yet see of the present case it is compounded of the two latter descriptions; for in one part of this female's defensive plea a marriage is set up; in the other part her defence is rested upon the authority given by Lord Hawke, and not only given, but also liberally used by the nobleman himself, and upon various occasions; where, to speak of it in the gentlest terms, it could hardly have been expected. Before the Court proceeds farther in this business, which appears in such a questionable character, it has a right to know precisely whether both these defences are sustained, or whether that of an actual marriage is entirely withdrawn, because the course of the Court will be materially varied by the answer to that question. If it is intended that this marriage, as stated in the plea, shall be adhered to (and if it be not, one hardly sees for what reason it found its way here), then the Court is bound to inquire into [287] the fact of its validity. If abandoned, then the attention of the Court is confined to the other plea, that of an authority given to claim the title of wife, though never married.

The description given of the marriage certainly insinuates something of a doubt respecting its canonical regularity; for it in some degree appears to authorize a suspicion that the licence was a forged instrument, and the officiating minister a mere pretender to holy orders. At the same time, there being no such admission, the marriage may be perfectly unexceptionable, performed by virtue of an authentic licence and by a clergyman regularly ordained. Lord Hawke does not advert at all to any such fact of marriage; but he asserts that she was a married woman with a husband living during his cohabitation with her; and taking that to be an undisputed fact, there is an end of any legal consequence belonging to this marriage, if it did pass in what manner it might.

But it is not an undisputed fact, for she asserts that at the time it took place she was a single, unmarried woman. What the real state of the case in that respect is remains to be shewn. If it is as contended, all that the Court has to observe upon it at present is that if any such prior marriage was existing, this act, if it passed, was a most unaccountable act of profanation in which the parties, for no reason whatever, being adjured in the name of the Supreme Being, and in the most solemn style in which an oath can be conceived, to declare whether either of them knew of any impediment to their marriage, take upon themselves to declare that there was none though both perfectly well knew that there was an impe-[288]-diment perfectly insuperable. If that were the real case the Court would be disinclined to stir a finger to relieve either party, both sticking deep in eodem luto. But if the facts were simply these, that, being a young unmarried woman, she was imposed upon by a pretended clergyman and a supposititious licence, the matter might perhaps be deemed an arguable point, whether a marriage, had under such an atrocious imposition practised upon her, might not bind the guilty artificer of such fraud.

It seems to be a generally accredited opinion that, if a marriage is had by the ministrations of a person in the Church who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for a sight of the minister's letters of orders, and if they saw them could not be expected to inquire into their authenticity. The same favourable principle might not be unjustly applied on behalf of an innocent young woman to this ostensible minister, though officiating in a private house, when the office is authorized by the special licence, to be performed with just the same validity as in a church. And even if this special licence were false, it might perhaps be considered by some as likewise an arguable point, whether the same principle which, in favour of innocent parties, supports the act of a pretended clergyman, might not be invoked to uphold the authority of a supposititious instrument of licence, obtruded upon a party, and deceived by so cruel a fraud; for it can as little be expected that a young woman should ascertain the authenticity of the instrument [289] under which her marriage is to pass as the ordination of the minister who is to perform it. Upon such points I give no further opinion than by saying that the Court would listen, without impatience, to any argument (whether successful or not) which had for its object to protect an innocent young woman against the effect of so detestable a fraud.

I am to remember that this is her own representation still standing upon her own allegation. Am I then to understand that this marriage, so remaining still in plea, is, upon this or any other ground, abandoned? The argument, in the direction of it, appeared to imply the contrary; for it was contended, and most justly, that wherever a marriage was set up in a cause of this nature, the Court was bound to proceed in its inquiry and could not dismiss the suit. But how do any such duties arise if the title of marriage is totally waived? If that is withdrawn from the plea the party cannot in the same breath call upon the Court to inquire into a fact which is disclaimed, and try a question in which no real interest remaining is set up.*

That matter being disposed of, the question then is reduced to the other ground, of an authority given by Lord Hawke to the defendant to use his name during an illicit connection between them, which lasted some years; and the fact is not only admitted by Lord Hawke, but avowed and asserted in his own plea that he did so; and there is rea-[290]-son in abundance to conclude, from documents produced, that the liberty was not only given, but that he himself clothed her with that character in all places and all situations—in England and abroad—in London and at his country residences—amongst his tradesmen, his neighbours, and his friends—in his intercourses of private life, and to the representatives of foreign governments, where it was necessary to give her a true description to entitle her to a privileged reception in the countries they represented. What is more appalling still, he introduces her to his own children by his deceased lady, as succeeding to her rights and duties, in the care and management of her unprotected offspring. I am not speaking here of the moral merits or demerits of such facts. No language of mine could be more forcible than the language of the facts themselves. I am concerned only with their legal quality; and I am bound to say of that, that it certainly deprives him of a right to complain

* Here it was tacitly intimated that that part of the plea was waived.

of an injury which, if it exist at all, he has inflicted upon himself; and this not in a moment of indiscretion at once lamented and withdrawn, but publicly and privately, in habit and for years, without intermission, and in situations where very powerful calls of both duty and decorum might have been expected to impose a restraint. It is difficult to maintain that she is liable to a charge of malice for following his own authorized precedents for adopting the character he had conferred upon her—for echoing his own assertions—and conforming to his own course of acting.

It seems to be a representation, rather insinuated than avowed, that the permission was given only [291] during the cohabitation, and, that this having ceased, the permission is expired. This may be true; but it does not follow that it is any part of the duty of the Ecclesiastical Court to proclaim its extinction; that Court is bound, in a cause of jactitation, to see that parties do not usurp the characters of husband and wife (characters sacred and indissoluble) to the injury of the complainant; but if there be no usurpation, if the title has been so licenced by the authority, and still more by the example of the complainant himself, this Court will leave him to relieve himself, by his own exertions, from the inconvenience of his own acts.

It is too much to expect that, if a person imposes false characters of this nature upon the world, the Ecclesiastical Court is to interpose in his behalf, as soon as the consequences of such unfortunate conduct begin to assail him. It looks in vain to find malicious boasting in language long authorized, and used by the party himself. Persons of such habits have their quarrels and reconciliations. They likewise change these transient connections, and the new favourite is privileged with the title of her predecessor. This Court cannot follow them in these variations of humour and conduct, and drop all recollection of the false character they have conferred at the moment they think proper to drop it in practice. According to Lord Hawke's own account, he has been living for years in an adulterous connection with the wife of another man, whom, for the conveniences of that connection, he has every where introduced and qualified as his own. What protection he may find in other Courts from the molestation of claims [292] originating from this imposture, which he has practised upon the world, is not for me to inquire. He must fight through the difficulties he has created; and in every case he will have the protection to which he is legally entitled. But this Court cannot indulge him with a general exemption from all possible inconvenience by pronouncing a sentence of malicious jactitation against the person whom he himself has tutored to use the language of which he complains. Suit dismissed.

PROCTOR v. PROCTOR. 16th July, 1819.—Divorce, by reason of adultery, barred by the *compensatio criminis*, committed even after the adultery of the defendant. Recrimination sustained.

[Referred to, *Drummond v. Drummond*, 1861, 30 L. J. P. 177; 7 Jur. (N. S.) 762; 4 L. T. 416; *Olway v. Olway*, 1888, 13 P. D. 148; *Symons v. Symons*, [1897] P. 173; *Constantinidi v. Constantinidi*, [1903] P. 258; *Evans v. Evans*, [1906] P. 128; *Brooking-Phillips v. Brooking-Phillips*, [1913] P. 87.]

This was a case of divorce, by reason of adultery, brought by the husband against the wife, in which the principle of recrimination was fully discussed, and with reference to acts of the husband subsequent to the commencement of the suit.

The case was argued by Dr. Swabey and Dr. Lushington for the husband; by Dr. Arnold and Dr. Jenner for the wife.

Judgment—*Sir William Scott*. This is a suit for a divorce, by reason of adultery, instituted by Charles Proctor, Esq., against Elizabeth Mary Proctor, his wife. The libel states "the marriage of the parties to have taken place on the 13th of September, 1810, and their cohabitation together from that time until the month of August, 1814, when they left London for the purpose of making a tour on the Continent; that they proceeded on their route, and reached Naples in January, 1815, where they [293] remained some time, and during their residence there became acquainted with a Mr. French, an Irish gentleman, with whom they formed an intimate connexion. Mr. French being also on an excursion of pleasure, and having ascertained the destination of Mr. and Mrs. Proctor, proposed to accompany them, which was agreed to, and they shortly afterwards left Naples together, and continued so until they reached Brussels. During this time the intimacy between Mr. French and Mrs. Proctor increased, and several acts coming to the knowledge of Mr. Proctor's valet, which

excited his suspicions, he thought himself bound to communicate them to his master, upon which Mr. Proctor determined to travel no further with Mr. French; and, on their arrival at Brussels, under pretence of their servants disagreeing, Mr. Proctor proposed that they should separate, which was agreed to, and Mr. French proceeded to Paris, and Mr. and Mrs. Proctor to London."

Notwithstanding this separation, the intercourse was still carried on by a correspondence; Mrs. Proctor receiving her letters under the feigned name of Madame Woolfort at several places on the Continent, until their arrival in London, at Gordon's Hotel, in August, 1815. Shortly after Mr. and Mrs. Proctor's arrival in London, Mr. French also arrived, and took up his residence at Long's Hotel, when the correspondence was renewed, and a person of the name of Lee, and another, the servants of the coffee-houses, were employed in carrying the letters. Mrs. Proctor about this time sent for a jeweller, and ordered two rings, one to be ornamented with two hearts entwined, [294] doves, and such like emblems of purity, and to be enriched with emeralds; the other to bear the same emblems, and the following motto to be inscribed on the inside of it—"J'avois goûté le plaisir, et croyois concevoir le bonheur. Ah! je n'avois senti qu'un vain songe, et n'imaginois que le bonheur d'un enfant." These rings were carefully wrapped up, and sent to her under the aforesaid feigned name of Woolfort. They remained a short time at Gordon's Hotel, and then returned to Mr. Proctor's seat, Mardox, near Ware, where the correspondence was still carried on. Mr. Proctor, having good reason to suspect the fidelity of his wife, determined to be convinced of it by searching his post-bag, and there he found a letter in his wife's handwriting addressed to Mr. French. This fact confirming his suspicions, he immediately repaired to the house of Mr. Hale, the father of Mrs. Proctor, and related to him the circumstance, when he advised him to bring Mrs. Proctor to his house, without acquainting her with the object, and the matter should be then thoroughly investigated. This was accordingly done; and, upon her being accused of her criminal correspondence, she strongly denied it; but on the letter being produced, she appeared extremely agitated, and left the room. She afterwards admitted her guilt, and implored pardon from her injured husband. On the development of these facts, Mr. Proctor was determined to seek redress against Mr. French, and consulted his legal advisers for that purpose; but, from the absence of witnesses abroad, he was unable to proceed. Pending the inquiry, however, it was ascertained that a criminal intercourse had taken place with [295] this lady and Mr. Standish, a gentleman to whom she had been introduced at Rome, and so conclusive was the information of this circumstance that Mr. Proctor commenced a suit at common law, the result of which was a verdict in his favour, and damages to the amount of £500 were awarded him.

It will be unnecessary to enter into a minute detail of the evidence in this case; it will be enough to say that the proof is abundant, and quite sufficient to maintain more than the individual case; and, therefore, if it rested here, Mr. Proctor would be entitled to the sentence of the Court: but it does not. Mrs. Proctor, notwithstanding all her professions of sorrow, regret, and her imploring acknowledgments of penitence and affection, has accused her husband of a criminal intercourse with a person of the name of Charlotte Phipps, which the counsel on his behalf were compelled to admit; but it appears that he had not any intercourse with this person until after the infidelity of his wife had been clearly established.

Upon this state of facts a question arises, whether the party has forfeited his remedy of a legal separation from his offending wife, by his incontinence proved to have taken place subsequent to the discovery of his wife's infidelity, there being no reason to presume otherwise than that he had always confined himself to his marriage bed till after the voluntary separation which followed the discovery? It is impossible not to see that, if this relief of a legal separation is withheld, both himself and his innocent family may eventually become sufferers to a very great extent. He will be *primâ facie* the father of the spurious offspring [296] which, from the past experience of her conduct, she may be likely enough to produce. He is *primâ facie* liable for the debts which she is likely to contract in this state of separation. He will be under the necessity of proving, by means not always easy or convenient to be had, an absolute non-intercourse in order to deliver himself from these painful obligations whenever they press. It is to be added that he is likewise to be barred in consequence of a failure in his present application from obtaining that complete relief which the legislature is in the modern habits of dispensing, of an entire dissolution of all

connection with a woman who has violated all her conjugal duties, and made his marriage bed a scene of pollution and dishonour. These are consequences that must be admitted to press with sufficient severity upon a husband, whose own irregularities may naturally be supposed to have had a main part of their origin in the failures of duty on the part of the wife; and if the law does really impose them, it is fair to presume that it has provided against them in some way or other, reconcilable with its notions of the marriage contract, and of the duties of the parties to each other in the relation in which they happen to be placed.

There can be no question that the legal nature of the marriage contract in this country had its entire root in the ancient canon law of Europe; not indeed since the Reformation to the full extent of that law which considered it as an absolute sacrament; but to the extent of considering it in each case as an act highly spiritual, consecrated by Divine authority, and as such indissoluble by human power for any cause whatever. The obligations of [297] marriage might be suspended, but could not be extinguished, the parties might be released in certain cases from personal cohabitation, but the relation of husband and wife still subsisted. These were characters absolutely indelible. No breach of the marriage duties affected the sacred vinculum. If the parties were released from personal cohabitation for reasons allowed by the law, yet still, as the vinculum remained, the guilt of adultery was just as much liable to be incurred by any act then committed, as when the parties were living in conjugal society and in the apparent discharge of all matrimonial obligations. The *corpus delicti* is the same, because *manente vinculo, semper remanent conjuges*.

It was a doctrine not peculiar to the canon law that it looked with disfavour to a complaining party who was himself an offender in the same way; for the civil law, certainly, did the same, to the extent of not barring the wife's demand of dower against such a husband. In one text of the civil law usually quoted upon this subject, which Brissonius justly calls *insignis sententia*, the allowance of dower seems referred to the supposition that the husband had betrayed the wife into acts of infidelity by the seductions and provocations of evil examples of his own: "*Iudex debet inquirere an maritus pudicè vivens mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat quam ipse non exhibeat*" (Dig. 48, 5, 13). Certain it is that the general maxim of compensa-[298]-tion, as applied to mutual moral failings, was forged in that mint. "*Viro atque uxore invicem accusantibus, causam repudii dedisse utrumque pronuntiatum est: id ita accipi debet, ut eâ lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur*" (Dig. 24, 3, 39); a maxim which it applied to other cases of mutual misconduct.

I do not find any express text that applies to the particular case of granting a legal separation to a husband who had remained constant to his marriage bed till after he had detected the infidelity of his wife, and retired from her society. No such favourable distinction is intimated any where in that system, as far as I recollect. There can be no doubt that the canon law acknowledged none such; the contrary flowed naturally from its peculiar doctrine of the absolute indissolubility of marriage. For the vinculum remaining perfectly unaffected by the adultery of either party, or by a private separation consequent thereon, the parties remanent conjuges, and an adultery then committed, was as direct and gross an infraction of that vinculum as if committed at any other period, and as such was held equivalent to it. It was a *par delictum*, subject to the same rule of compensation which leaves the parties to find their common remedy in common humiliation and mutual forgiveness. It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. [299] It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when it withholds its divorce of separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring. That such is the doctrine of the canon law is most certain, the authorities are numerous and precise to that effect; the texts of the canon law, the dicta of all commentators and professors, concur in holding out that there is no distinction between a delinquency of the

husband committed before or after a wife's infidelity in its complete efficiency as a bar to a claim of legal separation.*

[300] I should subject the Court to the charge of idle pedantry if I were to multiply authorities upon a point so clearly established. If the canon law is to be taken as the guide, there is certainly an end of all question on the subject. If it be not, then the question must rest upon modern decisions of our own (which, I am sorry to say, no diligence of myself or others have been able to produce); and if they are wanting, recourse must be had to the general principles of reason, morality, and public convenience applicable to such a case.

Upon the first point, the binding authority of the canon law in causes matrimonial, depending in these Courts, I look without success for any principle on which I can hold that they can release themselves, by any power of their own from a submission to that authority. The release, if proper, must come from a higher authority than they possess. It is notorious that this country, at the Reformation, adopted almost the whole of the law of matrimony, together with all its doctrines of indissolubility, of contracts per verba de presenti [301] et per verba de futuro, of separations a mensâ et thoro, and many others; the whole of our matrimonial law is, in matter and form, constructed upon it; some canons of our own may have varied it; and a higher authority, that of the Legislature, has swept away some important parts of it. But the doctrine of indissolubility remains in full force. The very practice of the Legislature in granting, by special acts, particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained by the Courts in their dispensations of justice. The principle of indissolubility brings with it all its consequences, and amongst the rest the consequence that every breach of the remaining vinculum continues with all the legal brand of adultery upon it full as much as at any period of its existence. It is a *par delictum* with any other act of adultery that may have taken place during any former period of the marriage contract—of course it carries with it all the disability which [302] an adultery creates of obtaining an authorized separation.

* The following quotations were introduced into this part of the judgment:—

Decr. Greg. ix. 5, tit. 16, vii. "*Tua fraternitas requisivit utrum aliquo denegante uxori suæ in adulterio deprehensæ debitum conjugale, si postmodum ipse cum alia perpetrat adulterium manifeste, cogi debeat ut uxorem maritali affectione pertractet: super quo taliter respondemus, quod cum paria crimina compensatione, mutua deleantur, vir hujusmodi fornicationis suæ obtentu uxoris nequit consortium declinare.*"

Panorm. in loci cit. "*Nota, quod licet propter adulterium mulieris possit separari matrimonium quoad torum, non potest maritus cum alia cohabitare, sed tenetur continere, alias ad uxorem redire, quia licet propter adulterium separatur matrimonium quoad torum, non tamen quoad vinculum quia remanent conjuges.*" He maintains that after sentence of adultery obtained against the wife, the judge may, *ex officio*, compel the offending husband to return to the wife—"De propter separationem jaceant in peccato."

Lancellottus, l. ii. tit. 16. "*Scæpius accidit, ut matrimonii remanente sacramento thori tantum fiat separatio, quo casu matrimonium minime aboletur, sed sibi sunt invicem conjuges, etiam separati.*" "*Nuptiale fœdus non aboletur inter eos qui etiam adulterii causa sejunguntur matrimonium inter fideles contractum, aut consummatum nullo casu quoad vinculum solvi posset.*"

Greg. Dec. ix. 4, tit. 19, iv. "*Repelletur uxor petens restitutionem mariti, si notorie fornicata est, et maritus continuit. Consultationi tuæ respondemus quod si notorium est mulierem adulterium commississe, præfatus vir cogi non potest nisi constaret ipsum cum aliâ adulterium commississe.*"

Sanchez, 10, disp. 6, De Divortii. "*Lapsus hic in adulterium potest contingere ante et post sententiam divortii latam; in utroque eventu disputatur. Prima conclusio certissima apud omnes est quando contingit ante latam sententiam utrumque conjugem adulterari, neutri licet ab alio divertere, sed mutuâ compensatione ambo adulteria abolentur.*" "*Nil refert ad hoc, uter conjugum prius sit lapsus in adulterium, quia jura solum ponderant, utrumque conjugem simili crimine jam infici et neutrum matrimonii fidem illasam servasse, non habitâ ratione prioritatis vel posterioritatis delicti idque verissimum est & nullum dubitantem inveni.*" "*Quando ante divortii sententiam contingeret innocentis lapsus, constat inter omnes doctores teneri hunc ad conjugam dimissam; immo post sententiam satis probabiliter docent multi.*"

Taking this, as I think I am compelled to do, as the rule of law binding upon the judgments of this Court, I cannot blind myself to the fact that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the canon law had anticipated in connexion with its rule. There is no return to cohabitation, nor are any means to be resorted to for the purpose of compelling it. In the state of separation, whether authorized or merely conventional, which usually takes place, there is certainly the increased danger of a spurious offspring, and, as the regulations of property exist amongst us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family. But even if such mischiefs may be presumed to follow the modern application of the rule, this Court still remains under the legal obligation of adhering to it till a competent authority provides another. Whether the inconveniences of the rule, as it now operates (considered as they ought to be in opposition to those which might follow the reversal of it), are such as nevertheless ought to produce a reversal, is a question which this Court has neither a right nor a duty to inquire. Whether a rule, which should relax the obligations of a husband to purity of manners, and should enable him, with little or no hazard, to practise an unlawful retaliation upon an offending wife, and this upon his own private knowledge (whether real or assumed) of her infidelity not yet legally proved; whether such a [303] relaxation should take place on account of his children, whom he ought to have protected by the regularity of his own conduct; whether such a rule could be established with perfect safety to the interests of general morality and to the claims of equal justice between the sexes are considerations that lie beyond the limits of the present inquiry?—that is confined within the narrow bounds of this question, whether the husband under the existing rule of law is entitled to a legal separation, and I am of opinion that he is not.

LAGDEN v. FLACK. 16th July, 1819.—Subtraction of tithes. Endowment.
Small tithes. Exemptions overruled.

This was a suit brought by the Rev. Henry Allen Lagden, vicar of the parish of Ware with Thundridge annexed, in the county of Hertford, against William Flack, a parishioner, and occupier of land in the parish of Ware, for the tithes of tares, clover, and wood.*1

[304] In support of the demand, Dr. Swabey and Dr. Lushington contended that the vicar was, by his endowment,*2 entitled to all tithes, except corn and hay; that clover and tares were articles of modern introduction since the endowment, and could not be considered as coming under the denomination of hay, more particularly when they were used green,† and did not undergo the process by which hay was distinguished.

*1 In reading the evidence, an objection was taken to one of the witnesses, on the ground that he was a farmer occupying land in the parish, who might be interested in the result of this suit. The Court held that, although he had no direct interest, he might be ultimately interested in the event of the suit; and the party had not waived the objection merely by administering interrogatories to him, as it did not appear that he was designated as farmer in the parish; but if so, non constat, that he is a farmer of wood land. It is a matter of ordinary prudence to administer the interrogatories, and the objection is taken the first time they are offered to be read. The Court is bound to consider this witness as incompetent by law—therefore rejects his evidence.

*2 The additional articles to the libel pleaded—first, “that in the year 1231, Roger, then Bishop of London, and Geoffrey Dean of the Church of St. Paul, London, made a certain composition or endowment concerning the vicar of the parish church of Ware, ordaining that the vicar and his successors should receive all small tithes and oblations whatsoever, and all things to the said Church of Ware and Chapel of Thundrych appertaining, or which, in future, might appertain, except the tithes of corn, &c. That the same vicar, and other vicars also, should receive the tithes of wood, trees, and underwood, &c. of all forests, groves, dales, and hedges of the whole parish of the vill of Ware and Thundrych, and of flax and hemp, gardens and fruit, wool, lambs, pigs, geese, cygnets, calves, cheese, butter, milk, and agistment of animals, tithes of stags, rabbits, fish, and all birds, tithes of mills, merchandize, gains, and lodging-houses, &c.”

† The libel pleaded, “that the said tares and clover were used green, or caused to be used green, by the said William Flack, for the feed of horses and other cattle

That, on the exemption claimed for wood, it was asserted to depend on special custom, and could be supported on no other ground; but no proof was offered on that point. With respect to the exemption for glebe land belonging to the impropriate rectory in the occupation of the defendant, as [305] lessee of Trinity College, Cambridge, it was a distinction perfectly familiar in practice that such exemption did not extend beyond the personal occupation of the clerical person, and could not be transferred to his lessee.

On the other side Dr. Arnold and Dr. Adams contended that clover was of the nature of hay, as a species of the same genus; and that there was no distinction between cutting it green and making it into hay, otherwise than when it might be fed off, in which case it was agistment. That as to the exemption from the tithe of wood, it was true that no evidence of particular custom had been adduced. As to the privilege of the lessee of the rector, it did not stand merely on the clerical character of the lessor, but on this further distinction, that glebe of the rector was not liable, if it had belonged to the impropriator at the time of the endowment of the vicarage, or if the land had come to the parsonage after such endowment. This benefice was appropriated at the time of the endowment; for the prior of Ware was bound to find a vicar, and the penalty for not complying with the terms then settled was that the vicar should have part of the great tithes: it continued appropriate to the priory till the dissolution; it then devolved to the Crown, and from thence passed to Trinity College. It is therefore within a case cited from Cro. Eliz. (*Blinco v. Barksdale*, Cro. Eliz. 578); and it is further to be observed that rights of this kind are reserved to the college by the lease.

[306] In reply it was said that by the general rule such lands would be liable to tithe under the distinctions before noted; that the case quoted from Cro. Eliz. did not affect that argument as the lands there referred to, as discharged at the time of the endowment, were considered as discharged by specific exemption, and not merely as belonging to the rectory.*¹

Judgment—*Sir William Scott*. This is a suit brought by the vicar of the parish of Ware against William Flack, one of his parishioners, for tithes of clover and tares used green, and for wood consumed as fuel in his house of husbandry in the parish. The endowment has been exhibited; and the general right of tithes is not resisted, otherwise than with respect to the character of the particular tithe of clover and tares, and the claims of exemption as to the wood. On the first article which relates to the tithe of tares and clover not made into hay, "but cut, mown, and used green, or caused to be used green for the feed of horses and other cattle," it is contended on the part of the vicar who claims all the tithes except those of corn and hay, that clover and tares so used are not to be considered as coming within the exception. I learn however from the highest [307] authority in the Court of Exchequer that grass, when separated from the soil by an instrument, though used green, is a great tithe; it then follows the nature of its genus: but if separated by the mouth of the animal, it is an agistment and a small tithe. The claim therefore of the vicar on that article cannot be maintained.

I am next to consider the ground of the exemption that has been contended for, with respect to tithe of wood used in fuel by the farmer, in his house of husbandry.*² This is a remote principle, and might apply to a variety of other articles consumed in the house. If it is a custom, it is one strictissimi juris, being against common right. by which tithe is due, and therefore requires to be established on the fullest evidence,

belonging to him or other persons, without setting out the tithe or tenth part thereof, which was and is justly due to the vicar of the said parish."

*¹ The principal cases referred to were: (Clover)—*Franklyn v. Bennet*, Bunb. 79. *Darrel v. Withers*, 3 Keb. 479. *Wallis v. Paine and Underhill*, 2 Gw. 749, 2 Com. Rep. 633. *White v. Read*, 1 Wood, 158. *Wood v. Harrison*, Ambler, 563. (Tares)—*Hodgson v. Smith*, 2 Wood, 21, 2 Gw. 773. *Steers v. Brassier*, 2 Gw. 742. (Wood)—*Walton v. Tryon*, 2 Gw. 829. *Norton v. Fermer*, Cro. Car. 113. *Erskine v. Ruffle and Brewster*, 3 Gw. 969.

*² The sixth article of the allegation given in by William Flack pleaded, "that by ancient custom in the said parishes of Ware and Thundridge, no tithe is due or payable, or hath usually been paid to the vicar for the time being, of wood cut and consumed by the inhabitants and occupiers of land in the said parishes, as fuel in their houses, occupied by them within the said parishes for the purposes of husbandry."

In the present case no exemption nor special compensation to the parson is shewn: this defence therefore cannot be maintained.

The next exemption claimed is for glebe land in the occupation of the defendant, as lessee under Trinity College, Cambridge. Supposing that Trinity College could be deemed a spiritual foundation, still the Court would, I think, set afloat all established law, which it has always understood on this point, if it decided that the vicar is not entitled to the tithe of this glebe. It has been constantly held that if land has no [308] discharge of itself, it is discharged only in the hands of the ecclesiastical owner, under the maxim, "*Ecclesia decimas non solvit ecclesiæ*;" a maxim that is binding as long as the land is actually held by an ecclesiastic; but if it is transferred into the hands of laymen it becomes liable. The authority of all cases is to that effect, though the circumstances of each case may not be accurately set forth; but they all come under the same principle. A person may shew that lands are discharged in their own right; if they are not so, but by a personal exemption alone, that will not extend beyond the person; for the privilege being only personal, does not travel from the parson to the lay-lessee. There are large words in the endowment, as to wood in favour of the vicar, and it is true also that there are large words in the lease, implying something like a title in Trinity College,* through whom this defendant claims to be exempted by virtue of his lease, but they are not parties, and claim nothing for themselves. It does [309] not appear that there has been any thing paid or claimed on their behalf. I must consider therefore the words of reservation, referring to them as surplusage.

If lands have any local privilege, the burthen of proof is on the defendant: nothing of that kind, however, is here alleged; and I see no ground for such a claim. Lands, it is true, in the actual occupation of the monks, were discharged from the payment of tithe, as belonging to ecclesiastical persons; but there is no exemption shewn here: on the contrary, there has been a payment by the lessee.

On the question of costs, the Court said—I am inclined to give, generally, to the clergyman his costs; and where he has succeeded in any part of his suit he should have them. In this case, the clergyman has incurred great expence in substantiating his just charges. With respect to the first point in discussion, in which he has not succeeded, I shall not allow the expence of the pleading; but the general costs must be given; not the particular expences on this point, on which he has failed; and I beg that the registrar will observe the distinction.

[310] *MORTIMER v. MORTIMER*. 9th Feb., 1820.—Divorce by reason of adultery: confession, in articulo mortis, as then apprehended, afterwards retracted: effect, as pleaded. Objection overruled. Cause ultimately settled by agreement.
[Referred to, *Wilson v. Wilson*, 1847, 1 H. L. C. 554; *Hunt v. Hunt*, 1862, 4 De G. F. & J. 238.]

This was a suit brought by the wife, for a restitution of conjugal rights; in which an allegation was now offered on behalf of the husband, pleading her familiarities with another man, and her confession of adultery with him. It further stated that, at the time of the confession, the husband not being able to prove an act of adultery, had not sued for a separation, and further alleging the specific charges of adultery, and that the adultery was carried on for a long time.

The facts alleged were these: that in the year 1805 Mr. Mortimer married this lady, then a Miss St. Barbe; that they cohabited together until 1811; that in the year 1807, whilst living at Blackheath, they became acquainted with a Mr. W. A. Young, who subsequently was much at the house; but no suspicion of any improper

* The defendant set forth in his answers "that he holds and possesses, and during all the time mentioned in the libel hath held and possessed, the parsonage and rectory of Ware, and the tithes and profits of the church, chapel, or chantry of Thundryeh, with all and singular the glebe lands, tenements, meadows, pastures, feedings, tithes, obventions, fruits, woods, and underwood, &c. &c. to the said church belonging, with a reservation to the lessors (namely the master, fellows, and scholars of Trinity College, Cambridge) of certain lands of the advowson of the vicarage of the tithe of wood and mills, belonging to the said rectory, &c. together with the royalties, interest, tithe, and right of keeping courts, and the profits, and other duties and rights, coming of the said courts, as lessee, by virtue of a lease from the said masters, fellows, and scholars."

conduct on his part then entered the mind of Mr. Mortimer. In August, 1811, Mrs. Mortimer being attacked with a very alarming illness, voluntarily confessed to her husband that she had some time before carried on a criminal intercourse with Mr. Young; and the same evening, after taking the sacrament, repeated the same confession to her sister-in-law. Mr. Mortimer, on receiving this intelligence, endeavoured to procure other proof of the fact, but could only ascertain that some familiarities had been seen to pass between the parties, but not sufficient, as he then thought, to enable him to obtain a legal divorce. On Mrs. Mortimer's recovery, her husband took her home to her father, [311] and communicated to him the circumstances, when it was mutually agreed that she should reside at her father's house, on an allowance from her husband of £100 a-year, and articles of separation were accordingly drawn up, on which all parties continued to act, until the father's death in 1816; subsequent to which Mrs. Mortimer instituted this suit against her husband for restitution of conjugal rights.

Dr. Burnaby and Dr. Lushington opposed the admission of the allegation, on the ground that, independently of the confession of Mrs. Mortimer, the facts pleaded were not such as could afford any inference of criminality whatever; and, therefore, if a divorce were to be pronounced upon proof of this allegation, it would in fact be a divorce on the mere confession of the party; but it is a known rule of the canon law, specifically set forth in the 105th canon of the English Church, that marriages cannot be dissolved on the mere confession of the parties, otherwise it would be impossible to prevent the most gross collusion. That the confession was made when her mind was weakened by disorder, and may have been carried beyond the truth; and on her recovery she retracted it in great part, admitting only that she had been guilty of levities, not of actual criminality. Such a confession was of no avail to the other party, as nothing was a bar to a suit for restitution, which would not found a sentence of divorce. That as to the deed of separation, which was pleaded, the Court has always held that such deeds did not alter the legal condition of the parties, and were never considered by this Court except as to alimony. [312] As to the other facts, if the proof of them was too vague, nine years ago, to enable the husband to come into Court on the ground which he now assumes; the subsequent lapse of time must render that proof still more indistinct, and must make it more difficult for the wife to produce contrary proof in establishment of her innocence.

On the other side, Dr. Jenner and Dr. J. Addams contended that, where the husband did not proceed originally, but was called upon for his defence against receiving his wife, a greater latitude of proof was allowed; or the wife might, by withholding her suit, till the witnesses against her were dead, defeat the just defence of the husband; that the rule, as to confession, was founded on the canon law (x. 4, 19, 5, *Glos.*), and the words of it seemed to apply only to cases of divorce and nullity (*Gib. Cod.* 445. *Oughton, t.* 214): it would not, therefore, preclude the husband from the benefit of it, in resisting the prayer of the wife; that with respect to the inability to bring sufficient proof in 1811, as set forth in the allegation, it was introduced merely in explanation of the conduct of the husband, and would not preclude him from offering proof at the present time.

Judgment—Sir William Scott. This allegation is given responsively in a suit for restitution of conjugal rights, and besides the formal articles pleading admitted facts (the marriage, the cohabitation of the husband and wife, and the intimacy formed by the wife with a Mr. Young, who resided near her [313] husband's house at Blackheath), it further pleads in four articles what I presume is intended as a defence against the application, and consists of a charge of adultery, which the husband proposes to establish against her. There is no prayer subjoined to the allegation; and the Court is left in the dark, so far as the allegation goes, with regard to its ultimate object; but I am led by the counsel to suppose that it will be for a separation à mensâ et thoro. If that be the intention, I have only to consider whether the facts alleged will support such a prayer. If they should appear to fail of answering such a purpose, it may then be time to consider the inferior purpose of inducing the Court to refuse to lend its authority to the wife's application for the return of her husband.

The first thing which the Court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, it will be indisposed to relieve

a party who appears to have slumbered in sufficient comfort over them ; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations. The allegation before me is constructed with a view to this purpose of explanation ; for it goes into a history of facts that led to the delay, and which, certainly, could not be all of them admitted, but for that purpose. The fifth article pleads, first, an habitual intimacy between the parties, certainly of an un-[314]-seemly kind, running over a great number of circumstances from 1807 to 1811. It is said that this imposes a great difficulty upon the defence of the wife, for that it is almost impossible for her to construct a defence against a charge of such extent. How is she to be able to frame her defence against time, so as to shew the impossibility that such things could have taken place ? The answer to that is, that if the charge is of habit and constant practice, it is just as easy to shew the contrary, namely, that no such habit and practice existed. She can cross-examine his witnesses ; and she may produce witnesses of her own, to prove that there were no such evening walks, no such "chambering and wantonness," in short, nothing that raised in the minds of the witnesses a surmise of any thing improper. But it is said there is a particular fact charged in a very loose way as to time. It is pleaded to have happened "in the latter end of 1810," that "the said Alexander Young and Frances Mortimer were alone together in an upper room of a certain house, and that the said Frances Mortimer was then observed to have her arm round the neck of the said Young, and to be kissing him." She there can at least cross-examine. The Court will scrutinise with due strictness, and with fair allowance for all the difficulties of her case, and it might hardly deem such a fact, if it stood alone, sufficient to induce the Court to admit it ; but after all, it is its duty to consider, how the delay originated, so as to produce this laxity in description of time, and whether she herself has not, in a great degree, created the difficulty of which she now complains.

The sixth article states a confession, and it is a confession of a very particularly accredited nature, [315] precise in point of reference to time—extremely solemn in its form, and confirmed by acknowledgment and repetition.*

Now, I need not observe that confession generally ranks high, or, I should say, highest in the scale of evidence. What is taken *pro confesso* is taken as indubitable truth. The plea of "Guilty" by the party accused shuts out all further inquiry. "*Habemus confitentem reum*" is demonstration ; unless indirect motives can be assigned to it. This confession, however, does not admit, either in its own immediate circumstances, or in any conduct of the party, the possibility of any such motives. It is wrung from her by the strong emotions of her own mind in articulo mortis, at a moment when her declaration, made even against others, much more against herself, would be received upon the footing of sworn testimony. It is made to the party injured for the exoneration of a loaded conscience. It is confirmed at her own desire by the most solemn act of her religion. It is repeated, some time afterwards, to another person interested in knowing it, and with a reference to circumstances within the knowledge of that person, which had occurred on the very day to [316] which the confession carried back the criminal act.

Two objections, however, are taken ; first, that confessions alone will not support a charge of adultery, though they would support charges of a higher nature, such as treason, murder, &c. ; and it is certainly true that such is the letter of the canon which guides the proceedings of this Court, and such is the interpretation which it has received. The more rational doctrine perhaps is that confession, proved to the satisfaction of the Court to be perfectly free from all suspicion of a collusive purpose, might be sufficient to found a prayer for mere separation *a mensâ et thoro* ; though

* The article states "that, in the month of August, 1811, she was attacked with a very alarming illness ; that she gave birth to a male child ; that her life was despaired of ; and that she sent for her husband, and said that she could not die happy without confessing that she had for some time carried on a criminal intercourse with Mr. Young ; that she then felt much easier, and received the sacrament ; and being still apprehensive of approaching dissolution, she repeated the same confession to Mrs. C. Mortimer, her sister-in-law, and recalled to her memory a certain day in 1808, when the crime was first committed."

not pro dirimendo matrimonii vinculo, so as to enable a party to fly to other connexions. The distinction is the more rational here; for certainly it would be a pretty harsh injunction of law to compel a man, whether he would or no, to live with a wife who had acknowledged her infidelity to his bed. And so the ancient canon law appears to have considered it, by recognising a difference of rule in the two different cases of absolute divorce, and of mere separation (x. 4, 19, 5). Such, likewise, is the distinction taken in the more ancient canon (A.D. 1597) of this country. But the canon (A.D. 1603, c. 105) now established, and as enforced by interpretations too literal and too numerous to be shaken, at this time of day, by any considerations of hardship (however justly urged), certainly has overlooked the distinction, and applied the rule indiscriminately to both cases: though Oughton (tit. 214) (an authority of no mean consideration, in matter of practice, in this Court) very reluctantly, if at [317] all, submits to the construction; and appears to hold out that if the Court after all circumspection used, is satisfied of the sincerity of the confession, it ought to rest upon it as proof. In the present case the sincerity can be no matter of question. No motive of a desire *advolare ad alteras nuptias* can be suspected. She resists a separation at the very time; and what is she now attempting, but to re-establish her rights in this very marriage? However, it is not necessary to pursue the matter further upon this objection; for the party in this case does not rest his demand upon a confession alone. He pleads facts to be supported by the testimony of others; and if these facts are merely proximate to acts of adultery, they may yet supply all the legal defect of a solitary confession.

A second objection is, that this confession was retracted; and that it is so admitted to have been in the succeeding article. Now this, which is argued to be a retraction, appears to me, on the contrary, to be little short of a recognition. It describes frequent intercourse unknown to the husband, as well at Mr. Young's house as at her husband's. It describes the unrestrained permission of indecent liberties with her person, and it then particularizes two occasions on which facts are described which, it has been rightly observed, would have been considered by any accidental spectator as direct proofs of the ultimate conclusion. It is rather too much for her to expect that, having advanced so very far as she did, the Court must stop short in its conclusions, at the exact point where she chooses to stop short in her narrative. The Court must draw its consequences [318] though she disowns them. Retraction is not the term that one can apply to such an admission, even if taken singly by itself, without being confirmed and enlarged, as it is, by all that had passed before in her more solemn and sincere admissions.

The seventh and eighth articles plead the circumstance which led to the deed of separation, and the deed is exhibited. The objection taken against these articles is, that deeds of separation are not pleadable in the Ecclesiastical Court: and most certainly they are not, if pleaded as a bar to its further proceedings; for this Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices, which the parties are not at liberty to desert—an assumption of a false character, in both parties, contrary to the real status personæ, and to the obligations which both of them have contracted in the sight of God and man, to live together “till death them do part,” and on which the solemnities, both of civil society and of religion, have stamped a binding authority from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants, as insignificant in a plea of bar; and leave it to other Courts to enforce them, so far as they may deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of [319] the matrimonial contract. As a plea in bar, therefore, this Court would be bound to reject it; but the truth is, that it is not offered here in that character. It is pleaded as a mere fact in the case, in a way historical and explanatory of the conduct of the parties; and in that character it is most material; for it contains a most satisfactory explanation of all the delay that is complained of, and likewise suggests very strong conclusions with respect to the truth of the facts charged upon the wife. It asserts that the husband was prevented from instituting proceedings by not having other evidence of his wife's infidelity than her confession; or if he had more (such as he now engages to produce) under-rating in his own estimate the legal effect of it for obtaining a divorce. He

communicated with her father, Mr. St. Barbe, "on her misconduct;" a private separation was agreed upon; and she returned to live with her father, under a certain provision of maintenance from the husband then agreed upon.

Now, nothing can be stronger to betray the real state of facts then existing than that she should agree, and her father should agree, to a separation upon such a charge of misconduct, which could not have been, had it not been fully admitted in the consciousness of the one, and fully credited on the information received by the other. The feelings of honour on the part of the wife, and of affection on the part of the father must otherwise have rebelled against such a proposition, founded on such a statement. However, the separation actually takes place, and the matter in consequence slumbers, at least in all public form, for years, during the lifetime of the father. [320] Upon his death the husband suffers it to remain on the same footing; not so the wife, for she then becomes the aggressor, and calls for a restitution of her conjugal rights; and when he objects to this demand, upon the charges which, with her consent and her father's, had been suffered to lie so long dormant, she cries out against the difficulties she is laid under for her defence, by the delay of proceeding to which she was as much a party as himself; and he has to fight up against the deficiencies of proof that the lapse of so much time may have produced. In all probability that delay has been full as favourable to herself as it could be to him, and she perhaps now proceeds in the confidence that such must be its effect.

I shall, therefore, admit this allegation to proof in toto; and I think it not premature to say that if it be proved to the extent in which it is laid, it will entitle the husband to a sentence of legal separation. What its effect may be as a mere bar to the present suit, if the proof falls short of that extent, I can better ascertain when I see how far it actually does fall short.

A counter-allegation was afterwards given in on the part of the wife, and witnesses were examined on both allegations. On 7th December, 1821, the cause was ready for hearing, when it was settled between the parties, and both proctors declared that they proceeded no further.

[321] GUEST v. SHIPLEY, FALSELY CALLING HERSELF GUEST. 5th May, 1820.— Citation in a suit of nullity of marriage, by reason of incurable impotence, not sustained: the complainant having confessed the validity of the marriage in former proceedings for divorce, by reason of adultery against him. [Discussed, *B. v. M.*, 1852, 2 Rob. Ecc. 580. Referred to, *W. v. R.*, 1876, L. R. 1 P. D. 409.]

In this case a citation was taken out, calling upon the woman to answer, in a suit of nullity of marriage, by reason of impotence, by mal-conformation in her person: an appearance was given for her under protest; on the extension of which, and the answer of the man in an act of Court, the matter was argued by Dr. Arnold and Dr. Addams for the woman; and by Dr. Lushington for the man.

Judgment—*Sir William Scott*. This is a proceeding by Thomas Douglas Guest to obtain a sentence of nullity of marriage, by reason of incurable impotence arising from mal-conformation of his wife; a mal-conformation which defeats the purposes for which the marriage contract is founded. Such cases are supposed to be physically possible, and the Court has occasionally received them; but, for reasons inherent in the nature of such causes, the Court is not disposed to encourage them without an evident necessity: the proofs being such as are palpably against the modesty of the sex. In this case it appears that the parties were married in 1813; the wife had a considerable property, £14,000; of which £10,000 was property reserved to herself; as it does not appear that the husband had any fortune. In the quality of her husband, under the marriage settlement, he has had the use of £4000, which furnishes a pretty strong inference that there was no such objection to the marriage, as is now stated, since it is only in the character of a lawful husband that he [322] could entitle himself to the use of this money. It appears that, within one month after the marriage, he was found by the wife in a situation with a maid-servant whom he had introduced into her service, which, though it might not afford direct proof of adultery, was sufficient to raise her suspicion, and a suit was accordingly brought on the part of the wife.* The libel was given in after some time, which pleaded lawful marriage

* On 9th February, 1816, in a suit of adultery brought by Mrs. Guest against her husband, an issue was given confessing the marriage, otherwise contesting the suit negatively: sentence was given in favour of the wife; and there was no appeal.

between the parties; and this plea was not opposed on the part of the husband. He had then the opportunity of controverting the fact that he was not her lawful husband, on account of these natural obstructions, which would defeat the validity of the marriage; but he did not use that opportunity. His conduct on that occasion may be considered as an admission that there was no such impediment to the marriage.

It is said that the validity of the marriage was only an incidental point in such a suit; but it is the foundation of the whole proceeding. There can be no adultery if there is no marriage; and it is always held, both here and at Common Law, that the first point to be proved is the marriage, which the other party may contest, and if he does not, the form of the sentence in such cases pronounces that there has been a true and lawful marriage as well as a violation of it. I am of opinion, therefore, that this point has been an essential part of a suit which this Court has determined; and that it is not in the power of the party now to bring it again before the Court, [323] even if there was no other objection to it. But the length of time which has elapsed is in itself almost a bar; for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.

It has been said that all this arose from the forbearance of the man; that he has no intention of obtaining money from the wife as is suggested; but that he colluded in the former proceedings, and submitted to the sentence on the engagement of the wife's proctor that he should not be subject to the costs. This is positively denied by the practiser in this Court, and it is highly improbable that any practiser of this Court should so have conducted himself. The denial is completely supported by a person who was present at a conversation, which occurred in a proper way, while he attended at the office of the proctor for the purpose of identifying the man. I am quite satisfied, therefore, that there was no such engagement; if, however, the averment was true, it would be what he has now no right to allege, that he agreed to submit to a sentence when he could have made a defence. The letters which have been produced contradictory to this are of a mendicant kind; and there is also something of the appearance of threats which forms part of the machinery in this shameful attempt to extort money. I am of opinion that the wife has acted with becoming spirit in resisting such an attempt and bringing this case before the Court. I dismiss this suit with costs.

[324] **BRIGGS v. MORGAN.** 21st June, 24th Nov., 1820.—Nullity of marriage by reason of incurable impotence alleged against the wife not sustained. The charge allowed to be repelled under the circumstances of age, &c. and by a denial in the form of protestation by affidavits.

[S. C. 3 Phill. 325. Referred to, *W. v. R.*, 1876, L. R. 1 P. D. 409.]

This was a suit of nullity of marriage brought by the man, "by reason of incurable natural mal-conformation and bodily defects in the person of the woman." The libel also stated that at the time of the marriage "the woman was a widow of the age of twenty-one years and upwards."

On the admission of the libel Dr. Arnold and Dr. Phillimore objected that the circumstances as stated constituted a case which was unprecedented; that the woman being a widow at the time of marriage raised a strong presumption against the truth of this complaint; that it might be different if the former husband had died very early in the cohabitation, but there had been a cohabitation of eighteen years under that marriage; and that, in such a case, it was not sufficient to plead generally the impotence as in the present libel, to put the party on the disgusting inquiry, which is the mode of proof in such cases when brought in due time, and under credible circumstances. That the libel was defective in a material circumstance in not setting forth the age of the parties in its statement; that the parties had lived together sixteen months, which was longer than might have been expected, if the case was really such as the libel described, and not long enough for the triennialis cohabitatio, which was required in cases of disability of another species. That there had been very few instances of suits of this [325] nature against the wife. It was submitted, therefore, that the Court would not admit the present libel, so as to put the woman on her trial.

In support of the libel Dr. Jenner and Dr. Lushington contended that the objections were inconclusive. The acquiescence of the former husband could not be urged as affording any presumptions against the present case; he might acquiesce from motives of advantage to himself from the wife's fortune, or in the pursuit of his own personal indulgence. Many reasons might be assigned why he might not think fit to complain; this part of the history was, therefore, immaterial. As to the want of specification, it was sufficient that the plea was intelligible to the Court, so as to induce it to apply the usual modes of inquiry. In *Greenstreet v. Cumyns* (Consist. 2d Feb., 1812. Vid. p. 332, post) a suit brought by the wife, the inspectors had declared that they saw no necessary cause of disability; but the party admitted the fact, and the Court was satisfied. Such might be the result in this case, or if the party had any plea that could be offered in answer to the matter of the libel, more particularly any thing proceeding from age, which was said to be so material, it ought to be set forth regularly. The Court would not presume past age, and the general description of the parties afforded no such presumption. It was a matter, at all events, that ought to be pleaded; and the wife was not entitled to defend herself in this way of general protestation, which furnished no answer to the complaint. It was trusted, therefore, that the Court would not refuse to admit the libel.

[326] *Judgment*—*Sir William Scott*. Cases of this kind brought by the husband against the wife are certainly not very frequent: it is said that there have not been more than two instances established by proof in sixty years, which it requires no very deep physiology to account for. Real defects of this nature are not very common, I presume, in our own sex, and probably much more uncommon in the other. Where they do exist, parties will often be discreet enough to abstain from marriage entirely, or where a marriage has been contracted in ignorance of the defect there may be many reasons—some good, and some perhaps occasionally bad, which will operate to prevent the parties from making a public application to the Court, or a public disclosure of any kind. On the peculiar character of the present complaint, however, the possibility of such an occurrence in point of fact cannot be denied; and in point of effect upon the state of domestic life, it cannot be maintained that the injury is not as great on the side of a husband as of a wife; and that there is not the same ground of complaint in the fullest extent. It is known to form no small article of discussion in the canon law. When cases of this species do occur, they are most certainly cases of a most unpleasant nature to entertain for the purpose of judicial examination; but I fear that the Court is not invested with the privilege of selecting cases on grounds of personal feelings of delicacy. Courts of the highest jurisdiction in this country are frequently conversant in inquiries into transactions, most certainly, not of an amiable kind, and often en-[327]-ertain those of a most odious nature; and they are so compelled to proceed where no suffering is to be relieved, but merely where punishment is to be inflicted: whereas here the question relates to a severe private injury received, and the proceeding is for relief and remedy—a purpose which has a much stronger claim on the attention of a Court.

In the case of *Harris v. Ball* (Arches, 1788) the Judge, at that time, who is never to be mentioned here but in terms of the highest respect, dismissed the libel, for reasons that appeared to savour much more of moral delicacy than of legal solidity; but the Court of Delegates reversed this sentence (Deleg. 16th July, 1789), holding, as it appeared, more correctly, that Courts are bound to exercise the jurisdiction which has been given them by law, and that they are not at liberty to decline it, merely because the cases are of a nature offensive to private delicacy; and that Court pursued that cause up to a final sentence.

Some objections have been taken to this libel which are of that general nature, and therefore do not lead to any conclusion; these may be as generally dismissed. There are others of a more particular description, arising out of the particular circumstances of the case—as that the woman had been long the wife of another man: though this may afford a very favourable presumption, it cannot be contended to be an estoppel of one man's complaint that another did not complain, who might have had the same cause of complaint, but which, for private reasons, affecting his own [328] discretion, he did not think proper to bring forward. The objection that the age of the parties is not set forth is, I think, more material; since this Court, in different cases, has declined to proceed in suits where the parties are at an advanced period of life. It is said that the man is of sound health; but if he chooses to take a wife of

advanced age, he must take the consequences with her; and it would be better that private disappointment should be endured in such a case than that the Court, and still more the public, should have the annoyance (for annoyance it undoubtedly is) of having such suits forced upon it, for the relief of a person who ought to have exercised his judgment at a much earlier time.

Under these considerations, the Court is disposed to admit the libel, but not at present; as it will allow the party charged an opportunity of stating any thing which she may have to offer, in the way of protest, that may induce the Court to decline proceeding further in such a case.

On 24th November, this cause came on again, for final hearing, on the affidavits of the parties.

Judgment—Sir William Scott. This is a proceeding for nullity of marriage, by reason of the incurable impotence of the wife. The facts necessary to be stated are shortly these: The parties were married in 1818; the wife being then, as it appears, a widow of fifty years of age—the man of forty-two. The woman had lived with a former husband eighteen years: they appear to have lived in great amity; [329] and it is no small proof that he thought he had no right of complaint, that he left her the whole of his substance at his death; and no proceedings were established, by the present husband, before March, 1820—the libel not being given in 'till last June, sixteen months after the marriage. It pleads “defect incurable, as by inspection of matrons will further appear.” When the libel was debated on a former day, the Court was disposed to hold it to be admissible, giving, however, the party an opportunity of offering, by way of protest, any special matter that she might wish to address to the consideration of the Court, in that stage of the cause, before it hurried on to a decisive enquiry. Affidavits have, accordingly, been given in on both sides; and the Court has now the unpleasant task of deciding upon them. It cannot be concealed that cases of this description are necessarily attended with serious mischiefs to parties, in the disappointment of very laudable or allowable purposes of marriage—the desire of having children, and the lawful enjoyment of each other's person. Such cases of disappointment, so originating, may not be frequent; but when any such occurs, it is a subject which the Court is bound to entertain, and to treat according to the ordinary modes of investigating the truth of the complaint, for the relief of the injured party.

The usual mode of proof is, without question, liable to strong objections on the ground of indelicacy, but it is the only effectual mode of proof; and the Court has already observed that it cannot, from feelings of delicacy alone, turn aside from it, if necessary for such a result. These are, however, rules adapted to cases brought for-[330]-ward with sincere motives, and under circumstances, in which the consequences may be supposed to inflict a real injury and disappointment on the party. Different considerations have been applied to persons of advanced age, and to those of an earlier period of life, with great reason and propriety. In the case of young persons the injury is greater; in age more advanced the mode of inquiry is less conclusive, and probably still more abhorrent to the feelings of the party who is exposed to it. On considerations of this kind, the Court required that the age of the party might be stated before the libel was admitted.

It now appears, from the statements which have been introduced, that the woman was fifty years of age at the time of this marriage, rather beyond the crisis when the expectation of children can reasonably be entertained, and more particularly in the case of a woman who had been married many years before, and had no children. The age of the man is not much a subject of observation, except that it is beyond the octavum lustrum, at which an experienced writer describes the passions to be in a state of greater composure: at any rate, it is an age at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in a case of actual mal-conformation no such proof is required. The party, according to his own description of the case, might have made his application at a much earlier period. The proofs of [331] an effective cohabitation with the former husband are clear and strong, both by the affidavit of the laundress, and of other persons; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it

is alleged, a case of natural mal-conformation ; though it may be a case of supervening defect, which may happen to the most vigorous constitution, and when it does happen, is not a subject of legal relief : *subeunt morbi* is the natural description of late periods of life ; and disorders, when they do come, at such periods, must be borne with.

The proofs relating to the former marriage, and to the harmony subsisting between the husband and wife, are attempted to be denied, in the affidavits offered on the part of the plaintiff, I think without success. It has been attempted also to shew something like an irregular cohabitation of the former husband with other females, under a declaration that his wife was no wife for him. This is a loose declaration, supported chiefly by the oath of the plaintiff, on hearsay, and by the sister of the former husband, who had been disappointed in the disposition of his fortune. I think, however, that this history is disproved ; and that, though he might have had such connexions in early life, he quitted them on marriage, and never afterwards renewed them. This is another feature of insincerity, which strongly disinclines the Court from proceeding further in this case. Under such circumstances, the Court will not think itself justified in exposing a woman of this advanced age to the only proofs (certainly of an offensive nature) by which the alleged defect can be satisfactorily established. It will not wade further [332] into the history of these parties. If the husband is seriously convinced that he is entitled to this relief, he must seek it, by appeal, in the Superior Court ; but I will not compel the woman to submit to this process. Woman dismissed.

1st Aug., 1821.—In another case of the same kind the Court, upon the report of Sir Astley Cooper, Mr. Thomas, and Dr. Key, which was read in camera, pronounced the case proved, and signed the sentence of nullity.

2d Feb., 1812.—Vide supra, p. 525. In the case of *Greenstreet, falsely called Cumyns v. Cumyns* ; which was a suit of nullity of marriage, instituted by the woman, by reason of incurable impotence on the part of the man.

Judgment—Sir William Scott. I think there is enough to satisfy the Court that, at the time when this marriage took place, there was incompetency, on the part of the man, to perform the duties of marriage ; a capacity to perform which is necessary to render it valid. The Court is, upon the whole, satisfied of the existence of this fact, and that there has been no collusion between the parties. There is an air of truth and sincerity in the evidence ; and the party appears willing to compensate, as far as is in his power, the injury which he states he has ignorantly done. The Court pronounced the sentence of nullity.

[333] THE OFFICE OF THE JUDGE PROMOTED BY GILBERT v. BUZZARD AND BOYER.

19th July, 8th Nov., 1820 ; 4th May, 1821.—Right of burial, in imperishable materials ; how far restrained by considerations of public convenience : patent iron coffins, the subject of the present question admitted at an increased rate of payment to the parish.

[S. C. 3 Phill. 335.]

This was a case of articles exhibited against the defendants, acting as churchwardens of the parish of St. Andrew, Holborn, for preventing the interment of a parishioner in an iron coffin.

An allegation was now offered on the part of the churchwardens, setting forth the circumstances of the parish, with respect to the number of the population, and the quantity of ground appropriated to the burial of the dead.

On the part of the promoter, Dr. Arnold, Dr. Jenner, and Dr. Phillimore objected that the first article entered into the particulars of misconduct imputed to the parties employed in conducting this interment, but only with a view to embarrass and obstruct the main question, which related to the right of the executors to use their own discretion in burying the deceased in any material which they thought most proper. This was a discretion which had been constantly exercised and without opposition. Stone, lead, wood, oak, or elm had been used indifferently. Under a late invention iron had been used, with great advantage as to the means of securing the dead from being removed or disturbed, which was a subject of legal policy, and had been so considered in the Courts of Common Law (*The King v. Lynn*, 2 T. R. 733). To this invention great [334] opposition had been given ; and the question for the decision of the Court was whether that discretion was not matter of right, and freely to be exercised, without obstruction from the parish officers.

The ostensible ground of objection was the apprehension of public inconvenience in occupying a greater proportion of the burial grounds. In bulk, iron plate was less

than wood, being only one-twelfth of an inch in thickness; and would, therefore, occupy less space than wood. It was said to be imperishable; but it is not more so than lead; and if the principle is admitted, it would be in the power of the churchwardens to exercise an arbitrary control over all other articles, permitting only such as will soonest perish. It is conceived that they have no such right; the church-yard is common to all parishioners for interment, but a particular spot being once assigned for the interment of a particular person, is severed or parted off, and appropriated, and the churchwardens have no right to interfere with such occupation, by speculating on the perishing of the body once deposited with a view to future interments in the same ground. To represent this right to the use of the common cemetery, as merely temporary, is contrary to the most received notions of propriety and to common feeling, as expressed in the popular language of mankind. The inviolability of sepulture is among the most ancient and universal rights; it is signified in corresponding forms of speech, as "our last home—not to be disturbed," &c. "ut requiescat in pace usque ad resurrectionem" (2 Inst. 489); and consecration of such places is used that they may rest secure from indignity. This [335] is a right which may terminate like others, when all signs of appropriation have disappeared; but the law which sanctions the appropriation will protect the use of it, and will not countenance a principle so adverse as this, which seeks to facilitate the destruction of the evidence by which it is to be maintained. The inconvenience which is alleged will not affect a legal right, 'till it becomes extreme, and matter of absolute necessity: no such effect can be alleged at present, to justify the obstruction which has been offered to this interment by the parish officers; and they are justly liable to be proceeded against in this form.

On the part of the churchwardens Dr. Swabey, Dr. Lushington, and Dr. Dodson contended that the present allegation was responsive to the charges in the articles, and was not to be considered, therefore, as merely introducing collateral matter in what it pleaded. Some control must necessarily be exercised over places of public interment in populous cities, which could not otherwise, be made adequate to the general use. In order to support the public interest, it was not necessary to deny the right of parishioners to be buried in the public ground; but this, like all other rights, was to be so used as not to injure or infringe on the rights of others. This limitation could not be enforced in any way so natural and compatible with common interests and common feelings, as by restricting the artificial prolongation of the appropriate use beyond the course of natural decay, by inventions like the present. The notion that the first occupiers are to remain *de jure*, in exclusive possession of the soil for ever, is unfounded; [336] all that the decency or sanctity of sepulture requires, is that the bodies may remain, unviolated, for the time of natural decay. The artificial preservation of bodies is not required by our laws, religion, or manners, as may have been the object of the Catacombs, and spacious Pyramids of Egypt. It is said that there is no law which expressly prohibits the use of such materials; that stone has been sometimes used, and lead. It is not necessary to produce a written law; it will be sufficient, if the necessary convenience of society requiring some limitation, has introduced a custom and usage which has been upheld by the sanction of the law. This limitation of the right of sepulture may be found in the form and order of consecration, by which ground is set apart from all ordinary purposes, for the interment of the inhabitants, on the petition of the parishioners at their expence, and sustained by parochial charges under the obligation of procuring fresh ground for the decent interment of the parishioners in the usual and accustomed manner. What materially contravenes all these objects of public policy cannot be maintained, as the exclusive right of individuals.

The present claim is not agreeable to accustomed usage: on the contrary, it has excited the alarm of all the parishioners, and justly called for the interference of those to whose care the interests of the parish in such matters is by law confided. The allegation states the population of the parish to be 30,000 inhabitants; that the average number of funerals is about 800 in a year, and that their number is continually increasing. That there are three burial grounds, the two latest [337] on special terms vested in trustees, and accessible only on higher fees—and they are not large; and that from this alteration in the mode of interment, if it should be generally adopted, the ground would soon become useless, and the parish could not procure more, but at a considerable distance from the church or even from the parish, which would be

attended with great inconvenience and expence to the inhabitants, in the mode of conducting funerals.

It is said that the churchwardens are not to speculate on future inconvenience; but that is advanced without authority. If a great inconvenience is reasonably certain to ensue, it could not be wrong in the parish officers to interfere, and warn the parties that the interment could not be permitted in this form. The ground might otherwise be closed up, as was necessary at Bristol, being dangerous to the health of the city. It is said that the dimensions are actually smaller than those of wood, in the present invention; but others may increase, and who is to keep a perpetual check upon them. Other metallic substances may be adopted, such as cast iron, which would be still more imperishable. It may be true that stone has been used, but not frequently; and lead, but not commonly, and chiefly in vaults, at additional fees, which prevent the common use of it. In London lead is forbidden, yet here a more imperishable metal is claimed to be used as of common right. It is asked where the restriction is to stop? If a novel and inconvenient mode is introduced, contrary to the will of the parishioners, the Court will have the power to restrict it; as is usually done in respect to vaults, which are not granted, but with the consent of the parishioners, [338] and by the authority of the ordinary. Agreeably to this principle, it appeared to be the unanimous opinion of the Judges of the King's Bench, on a late application which was made to that Court in this case (2 Barnewell and Alderson, p. 806), that it was a matter of ecclesiastical cognizance, and properly subject to the regulation of this Court. This power has been at all times exercised in analogous cases, either by restraining the permission, or by modifying the use of it by proportionate fees; and it is trusted that the Court will see the necessity of interfering, to prevent so great an inconvenience, as must be occasioned by the general use of this novel mode of burial, in populous parishes.

8th Nov., 1820.—*Judgment*—*Sir William Scott*. This suit is brought by John Gilbert, parishioner of Saint Andrew, Holborn, against John Buzzard and William Boyer, churchwardens of that parish, for the offence of obstructing the interment of his wife Mary Gilbert. The criminating articles state, in substance—that she was likewise a parishioner, and died on the 2d of March, 1819; that her body was deposited in an iron coffin, and proper notice given of the intended interment, and the usual fees paid for such a burial; but that the churchwardens prevented by force the burial from taking place; and, in consequence thereof, the body was deposited in the bone-house, where it remains. That the iron coffin would take up less space than a wooden one; and is so constructed as to prevent the body from being taken out. That again on the 14th of April [339] in the present year, a written notice was given to the rector, churchwardens, and sexton of an intended funeral on the 18th, and a written answer returned by the churchwardens that they would not permit it. That the demand of interment was actually made on the day mentioned; but that the churchwardens refused to permit the interment, unless the body was taken out of the iron coffin; and forbade any grave to be prepared for its reception.

The defensive allegation states in substance—that the account given by the promoter misrepresents the transactions: that nothing was said by Gilbert, on his first application, about an iron coffin, though he was then informed that the parish would not receive one; but that he said it was to be of wood. He paid the usual fees, and not 'till then declared it was to be of iron, and refused to take back the fees. That a select vestry, which governs the parish concerns, being assembled, took the subject into consideration and passed a resolution not to admit the iron coffin; and a copy of such resolution was served upon the undertaker. That on the 9th of March a forcible entry was made into the church-yard, and a great disturbance took place by a tumultuous demand for the body, and for its interment; but the burial was not permitted to take place, and the body remains in the bone-house. That the parish is very large and populous, containing an increasing population of 30,000 persons—that the annual burials are above 800 and are increasing—that they have three burial grounds, besides the church-yard, all nearly filled with corpses. That they [340] would soon be rendered useless by the introduction of iron coffins; that it is impossible to obtain new burial grounds, but at an enormous expence and with grievous inconvenience. That their proceedings had been all guided and authorized by the select vestry and by the parish at large.

The suit appears to have begun under strong feelings of mutual irritation which

have now properly subsided ; and the parties have agreed to take the opinion of the Court upon the dry question of right, without introducing into it any imputation of misconduct on either side, or engrafting upon it any demand of penalties to be inflicted, or costs to be decreed. In this act of amnesty the Court willingly concurs, and therefore forbears to repeat any observations upon the strange wanderings into which the case has strayed since the transaction happened, which appears now in its regular form of proceeding.

Before entering into the immediate question, it may not be entirely useless or foreign to remark that the most ancient modes of disposing of the bodies of the dead mentioned by history, are by burial or by burning, of which the former appears to be the more ancient. Many proofs of this occur in the sacred history of the patriarchal ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of His own person, imitated by that of His disciples and followers, has confirmed the indulgence of that natural feeling which appears to prevail, against the instant and [341] entire dispersion of the body by fire, and has very generally established sepulture as the customary practice of Christian nations. Sir Thomas Brown thus expresses himself, in his quaint but energetic manner, in his treatise upon urn-burial. "Men have been fantastical in the singular contrivances of their corporal dissolution ; but the soberest nations have rested on two ways, inhumation and burning. That interment is of the elder date, the examples of Abraham and the Patriarchs are sufficient to illustrate ; but Christians have abhorred the way of obsequies by fire, and though they sticked not to give their bodies to be burnt in their lives, detested that mode after death, affecting rather a depositure than an assumption, and conforming themselves to the will of God, which required them to return again, not to ashes, but unto dust." "But burning was not fully disused 'till Christianity was finally established, which gave the final extinction to these sepulchral bonfires" (c. 1 and 2).

The mode of depositing in the earth has, however, itself varied in the practice of nations. "Mihi quidem," says Cicero, "antiquissimum sepulturæ genus id videtur fuisse, quo apud Xenophontem Cyrus utitur" (Cic. De Legibus, lib. 2, s. 22). That great man is made by his historian to declare in his celebrated dying speech, "that he desired to be buried neither in gold nor in silver, nor in any thing else, but to be immediately returned to the earth ; for what," says he, "can be more blessed than to mix at once with that which produceth [342] and nourisheth every thing excellent and beneficial to mankind." There certainly, however, occurs very ancient mention (indeed the passage itself rather insinuates the same indirectly) of sepulchral chests, or what we call coffins, in which the bodies being inclosed were deposited so as not to come into immediate contact with the earth. It is recorded specially of the patriarch Joseph that "when he died, he was put into a coffin and embalmed ;" both of these being, perhaps, marks of distinction to a person who had acquired high and merited honours in that country. It is thought to be strongly intimated by several passages in the sacred writings, both old and new, that the use of coffins, in our meaning of the word, as inclosing chests deposited in the earth, was not familiar amongst the Jews ; and it is an opinion not lightly entertained by some of the learned that such was the case likewise in the practice of the Greeks and the Romans. It is some confirmation of that opinion that there is, perhaps, no word in the language of either of them that is exactly synonymous with our word coffin, though the word itself is borrowed from both languages, though in another signification.* The Grecian terms usually adduced, referring rather to the feretrum or bier on which the body was conveyed, than to a chest, or trunk, in which it was shut up ; and the Roman terms are either of the like signification, or are mere general words (such as *arca*, *loculus*, and the like) without any funeral meaning, and without implying [343] any final destination of the substances which compose them, to a deposition in the earth along with a human body.

The practice of sepulture has also varied with respect to the places where performed. In ancient times caves seem to have been in high request—then gardens, or other private demesnes of proprietors—inclosed spaces out of the walls of towns—or

* *Κόφινος*—*Cophinus* *fcenumque supellex*. Juv. iii. 14. In both languages the word signifies a basket.

by the sides of roads (*siste viator*)—and finally, in Christian countries, churches and church-yards, where the deceased could receive the pious and charitable wishes of the faithful, who resorted thither on the various calls of public worship (*vid. Hericourt Loix Eccl. p. 504*). In our own country the practice of burying in churches is said to be anterior to that of burying in what are now called church-yards, but was reserved for persons of pre-eminent sanctity of life. Men of less memorable merit were buried in inclosed places not connected with the sacred edifices themselves. But a connexion imported from Rome by Cuthbert, Archbishop of Canterbury, took place about the year 750; and spaces of ground adjoining the churches were carefully inclosed, and solemnly consecrated, and appropriated to the burials of those who had been entitled to attend divine service in those churches; and who now became entitled to render back into those places their remains to earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the act of interment.

In what way the mortal remains are to be conveyed to the grave, and there deposited, I do not [344] find any positive rule of law, or of religion that prescribes. The authority under which the received practices exist is to be found in our manners rather than in our laws—they have their origin in natural sentiments of public decency and private affection—they are ratified by common usage and consent; and being attached to a subject of the gravest and most impressive nature, remain unaltered by private caprice and fancy, amidst all the giddy revolutions that are perpetually varying the modes and fashions that belong to the lighter circumstances of human life. That bodies should be carried in a state of naked exposure to the grave would be a real offence to the living, as well as an apparent indignity to the dead. Some involucria, or coverings, have been deemed necessary in all civilized and Christian countries; but chests or trunks containing the bodies, descending along with them into the grave, and remaining there till their own decay, cannot plead either the same necessity nor the same general use.

I have already mentioned three nations of antiquity, two of them highly polished, in which such a practice is reasonably supposed not to have been familiar. In the eastern parts of modern Europe, the Christians, generally members of the Greek Church, as well as their Mahometan masters, the Turks, are carried upon open biers, and from thence descend, in their shrouds, or funeral vestments only, into their graves. Such is likewise the general practice of Asia, in those parts where the practice of burning does not continue to exist. Such is also represented to be the mode of interment in the great European establishments of South [345] America. In Western and Northern Europe the use of sepulchral chests has been more general. In our own times an attempt was made by a great European Sovereign* to abolish the use of them in his Italian dominions. The attempt was much applauded by some philosophers on the physical ground that the dissolution of bodies would be accelerated, and the dangerous virulence of the fermentation disarmed by a speedy absorption of the noxious particles into the surrounding soil. Whatever might be the truth of this theory, the measure was unfortunately accompanied by regulations which prescribed that bodies of every age, and of both sexes, and of all ranks and conditions, and of every species of mortal disease, however hideous and loathsome, should be brought out, naked from the houses, and tumbled into a night-cart at the sound of a bell, and conveyed to a pit beyond the city walls, there to rot in one common mass of undistinguished putrefaction—regulations which, as might have been foreseen, were so strongly encountered by the natural feelings and established habits of a highly civilized and polished people, that it was found necessary, at no great distance of time, to bury the edict itself by a total revocation.

In our own country, the use of coffins is extremely ancient, though, most probably, by no means general. They are actually found of great antiquity, of various forms, and of various materials—of wood—of stone—of metals—of marble—and even of glass (*vid. Gough's Sepulchral Monuments*). Coffins, says Dr. [346] Johnson, in his explication of the word, are made of wood and various other matters. From the original expence of some of these materials, or from the labour requisite in the preparation of them for this use, or from both, it is evident that most, if not all of them, must have been occupied by persons who had filled the loftier stations of life. In modern

* Leopold, G. D. of Tuscany, A.D. 1786. *Vid. Ann. Reg. vol. xxviii. p. 44.*

practice, chests or coffins of wood or lead, or both, are commonly used by persons who can afford to pay for them—for persons in abject poverty (whom the civil law technically calls the *miserabiliter egeni*), what is called a shell, and which, I understand, to be an imperfect coffin, and is successively used for different individuals, in some very populous parishes; unless public or private charity supplies something better as the vehicle. Persons dying at sea are, I believe, not unfrequently consigned to the deep, wrapped up in their hammocks or sleeping beds—but I know not that any of these are nominatim or directly required, by any authority whatever.

A statute of Charles 2d (30 Car. 2, st. 1, c. 3, s. 3) requires that coffins shall be lined with woollen, but it does not require that coffins shall be used. It is to be observed that, in the funeral service of the Church of England, there is no mention, indeed, there is rather an apparently studious avoidance, of any mention of coffins. It is throughout the whole service the corpse or the body. The officiating priest is to meet the corpse at the gate of the church-yard—at a certain part of the service, dust is directed to be thrown, not upon the coffin, upon the body. [347] In another part, certain portions of holy writ, or of pious admonition, are to be recited, whilst the corpse is making ready to be put into the grave. I observe likewise, that in old tables of burial fees, a distinction of payment is made for coffined funerals and uncoffined funerals. There is one of 1627, exhibited by Sir H. Spelman in his *Tract de Sepulturâ*, in which a certain sum is charged for a coffined funeral, and about half that sum for an uncoffined funeral, and expressly under those descriptions.* From which I draw this conclusion of fact—that uncoffined funerals were, at that time, by no means so unfrequent as not to require a particular notice and provision. I think I might also venture to deduce this conclusion, a conclusion by no means impertinent to the present enquiry, that, even at that time it was recognized as not unjust, that where the deceased, by the use of his coffin, took a longer occupancy of the ground, he should compensate the parish by an increased payment.

[348] The argument, therefore, that rests the right of admission for particular coffins upon the naked right of the parishioner to be buried in his parish church-yard, seems to stop short of that which is requisite to be proved, the right of being buried in a large chest or trunk of any materials, metallic, or other, which his executors may think fit. The rule of law which says that a man has a right to be buried in his own church-yard, is to be found, most certainly, in many of our authoritative text writers; but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is no part of his original and absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim, in the nature of an absolute right, can be deemed to extend. At the same time, it is not to be denied, that very natural feelings prompt to something beyond this—to a continuation of the frame of the body, beyond its immediate consignment to the grave. An indulgence of such feelings, highly allowable in themselves, naturally enough engrafts itself upon the original right, so as to appear inseparably connected with it, in countries where the practice has been habitually indulged; for, however men may feel, or affect to feel, an indiffer-

* A Vestry Constitution, 24 Nov., 1627. 25 April, 1628.

Whoever shall be buried in the chancel, shall pay to the parish as shall be agreed:

For interring the corpse	£0	10	0
In the isles of the chancel—			
To the churchwardens for the ground		1	6 8
To the parson for interring the corpse		0	6 8
In the body of the church—			
To the churchwardens for the ground		1	0 0
To the parson for interring the corpse		0	6 8
In the churchyard—			
To the parson for interring the corpse	£0	2 8	£0 1 4
To him in like manner for every child under			
7 years		0 2 8	0 1 4
All these double for every stranger.			

Spelman's Works, p. 185.

ence about the fate of their own remains, few have firmness, or rather hardness of mind sufficient to contemplate, without pain, the total and immediate extinction of the remains [349] of those who were justly dear to them when living. A sentiment of this kind has been supposed, as I have intimated, to have led in part to a preference of burial to the process of burning. It has likewise given birth to extravagant means for preserving human remains, for a period of time long after the term, at which any memory of the individuals, or any affection of their survivors, can be supposed to extend. Amongst such extravagances, the use of coffins is, certainly, not to be numbered: they are merely temporary themselves, though of much longer duration than is necessary for their primary intention, that of preserving the body from the ravages of the reptiles of the earth, if any such ravages are at all to be apprehended. In later times, and in populous cities, ravages of a more formidable kind are to be dreaded, against which they afford no security. Those of the persons engaged in the employment of furnishing bodies for dissection; an employment which, whatever be its necessity, is certainly not conducted without lamentable violation of natural feelings, and occasionally of public decency itself.

It is particularly, I presume, with a view to prevent such spoliations of the dead that the use of iron coffins is pressed, in this application to the Court. The purpose of security against such spoliations is, I understand, proposed to be effected by some ingenious mechanical contrivance, which prevents the coffins from being opened, when once effectually closed. I do not find that any objection is taken to the contrivance itself, on the ground of inefficiency, or on any other. [350] The objection is to the metal, iron, of which the whole coffin is composed; and I must say that, knowing of no rule of law that prescribes coffins, and certainly of none which prescribes wooden coffins exclusively, and knowing that modern and frequent usage admits coffins of lead, a metal much more indestructible than iron, I find some difficulty in pronouncing that the use of this latter metal is clearly and universally unlawful in the structure of coffins; and that coffins so composed are inadmissible, upon any terms whatever. Such coffins, being composed of thin laminæ, occupy, as I presume, and as I see it is alleged, rather less space than those of wood itself. There is no objection, therefore, on that ground; and the objection that they may be magnified to any size, however inconvenient, seems to apply to coffins, composed of this substance, not at all more than to those of any other. The real truth is that the claim, on the part of these coffins, which is quarrelled with is neither more nor less than this, that they shall be admitted upon the same terms of pecuniary payment as those of wood. This claim cannot, I think, be reasonably urged, but under shelter of one of two propositions—either that there is no difference in the duration of coffins of wood and those of iron, or that the difference of duration ought to make no difference, in the pecuniary terms of admission.

Upon the first of these questions, that of comparative duration, a wish was expressed by the Court that it might be assisted by opinions obtained from persons, more scientifically conversant with such subjects, than I can describe myself to [351] be—but being left to my own unassisted apprehensions, on such a matter, I must confess, that it was not without a violent revolt of every notion, that I entertain, that I heard it rather insinuated in argument than directly asserted or maintained, that iron coffins do not keep a longer possession of the ground than those of wood. To me it appears, without any experimental knowledge, that I can claim, that upon all common theory, it must be otherwise. Rust is the process by which iron travels to its decomposition. If an iron coffin deposited in the earth contracts no rust at all, from want of air or moisture, in that case it preserves its integrity unimpaired. But if, from the moisture of the soil in which it is deposited, or from the access of a little air, it contracts rust, that rust, until it scales off, forms an external covering which protects the interior parts, and retards their decomposition; whereas the decay of the external parts of the wood propagates inwardly its corruption, and promotes, and hastens, the dissolution of the whole. It is the fault of the party complainant if, being left to judge upon this matter without sufficient information, I judge amiss in holding that coffins of iron are much more durable than those of wood.

It being assumed that the Court is justified in holding this opinion, upon the fact of comparative duration; the pretensions of these coffins to an admission upon the same pecuniary terms as those of wood, must resort to the other proposition, which declares that the difference of duration ought to produce no difference in those terms.

Accordingly it has been argued that the ground [352] once given to the body is appropriated to it for ever—it is literally in mortmain unalienably—it is not only the *domus ultima*, but the *domus æterna* of that tenant, who is never to be disturbed, be his condition what it may—the introduction of another body into that lodgement at any time, however distant, is an unwarrantable intrusion. If these positions be true, it certainly follows that the question of comparative duration sinks into utter insignificance.

In support of them, it seems to be assumed that the tenant himself is imperishable, for, surely there can be no inextinguishable title, no perpetuity of possession, belonging to a subject which itself is perishable. But the fact is, that “man” and “for ever” are terms quite incompatible in any state of his existence, dead or living, in this world: the time must come when “*ipsæ periere ruinae*,” when the posthumous remains must mingle with, and compose a part of that soil, in which they have been deposited. Precious embalmments and costly monuments may preserve, for a long time, the remains of those who have filled the more commanding stations of human life—but the common lot of mankind furnishes no such means of conservation. With reference to them, the *domus æterna* is a mere flourish of rhetoric; the process of nature will speedily resolve them into an intimate mixture with their kindred dust; and their dust will help to furnish a place of repose for other occupants in succession. It is objected that no precise time can be fixed, at which the mortal remains and the chest which contains them, shall undergo the complete process of disso-[353]-lution; and it certainly cannot; being dependent upon circumstances that vary upon difference of soils, and exposures of seasons and climates; but observation can ascertain them sufficiently for practical use. The experience of not many years is required to furnish a sufficient certainty for such a purpose.

Founded on such facts and considerations, the legal doctrine certainly is, and has remained unaffected—that the common cemetery is not *res unius ætatis* the property of one generation now departed, but is likewise the common property of the living, and of generations yet unborn, and is subject only to temporary appropriations. There exists in the whole a right of succession, which can be lawfully obstructed only in a portion of it, by public authority, that of the ecclesiastical magistrate who gives occasionally an exclusive title in such portion, to the succession of some family, or to an individual who has a fair claim to be favoured by such a distinction; and this, not without a just consideration of its expedience, and a due attention to the objections of those who oppose such an alienation from the common property. Even a bricked grave granted without such an authority is an aggression upon the common freehold interests, and carries the pretensions of the dead to an extent that violates the rights of the living.

If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period at which the common local understanding and usage have fixed it, is an act of injustice unless compensated in some way or other. In country parishes, where [354] the population is small and the cemetery is large, it is a matter less worthy of consideration: more ground can be spared, and less is wanted; but in populous parishes, in large and crowded cities, the indulgence of an exclusive possession is, unavoidably, limited; for, unless limited, evils of most formidable magnitude take place. Church-yards cannot be made commensurate to the demands of a large and increasing population; the period of decay and dissolution does not arrive fast enough, in the accustomed mode of depositing bodies in the earth, to evacuate the ground for the use of succeeding claimants: new cemeteries must be purchased at an enormous expence to the parish, and to be used at an increased expence to families, and at the inconvenience of their being compelled to resort to very inconvenient distances for attendance on the offices of interment.

In this very parish three additional burial grounds are alleged to have been purchased and to be now nearly filled. This is the progress of things in their ordinary course, and if to this is to be added the general introduction of a new mode of interment, which is to ensure to bodies a much longer possession, the evil will become intolerable, and a comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis will be surrounded with a circumvallation of church-yards, perpetually increasing, by becoming themselves surcharged with bodies, if, indeed, land owners can be found who will be willing to divert their ground from the beneficial uses of the living to the barren preservation

of the dead, contrary to the humane maxim [355] quoted by Tully from Plato's Republic: "Quæ terra fruges ferre, et, ut mater, cibos, suppeditare possit, eam ne quis nobis minuatur, neve vivus neve mortuus" (Cic. de Legibus, tit. 2, s. 27).

If, therefore, these iron coffins are to bring additional charge and trouble upon the parish, they ought to bring with them a proportionable compensation. Upon all common principles of estimated value, you must pay proportionably for the longer lease which you take of the ground—to this condition coffins of lead are subjected, and what is the exemption to be pleaded for iron? If you wish to protect your deceased relatives by additional securities, which press upon the convenience of the parish, we do not blame the purpose, nor reject the measure, but it is you, and not the parish, who must pay the whole of the charge imposed. I am aware, as I have already intimated, that very ancient canons forbid the taking of money upon interment, upon the notion that consecrated grounds are amongst the *res sacræ*, and that money payments for them were, therefore, acts of a simoniacal complexion; but this has not been the way of considering that matter since the Reformation, for the practice goes up at least nearly as far; it appears founded upon reasonable considerations, and is subjected to the proper controul of an authority of inspection. In populous parishes where funerals are very frequent, the expence of keeping church-yards in an orderly and seemly condition is not small, and that of purchasing new ones, when the old ones become [356] surcharged, is extremely oppressive. To answer such charges both certain and contingent, it surely is not unreasonable that the actual use should contribute when it is called for—at the same time, the parishes are not left to carve for themselves in imposing these rates, they are all submitted to the examination of the ordinary, who exercises his judgment and expresses the result by a confirmation of their propriety in terms of very guarded caution. It is, perhaps, not easy to say where the authority could be more properly lodged, or more conveniently exercised.

Having, I think, sufficiently declared in these observations, my opinion generally upon the subject, I am not aware that much more remains than that I should direct the parish to compose a table of fees, for the consideration of the ordinary. It will be for their own consideration in the first instance, how far these coffins should be put upon the same footing as those of lead. It is certain that they occupy less room, and that they are more temporary in duration, but it is likewise to be remembered that being much more accessible in point of original expence, they are, therefore, likely to be much more numerous; they are more likely on that account to transmute the cemetery into a mine of iron, than there is any hazard of its being converted into a mine of lead. It may be said that imposition of high fees may, in effect, operate as a prohibition in populous parishes and crowded church-yards—to which I answer that, even if such an effect should follow, it is better than that a parish should be robbed of the fair and convenient use of their own public cemetery. [357] Patent rights (under which I understand these coffins are constructed) must be held by the same tenure as all other rights. *Ita utere jure tuo alienum ne lædas*—they must not trench upon rights more ancient, more public, and such as this Court is peculiarly bound to protect.

In the meantime I recommend that the body, which has lain so long unhonoured, should be committed to the grave without obstruction, but without prejudice to the present question, or to the rights of the parish. No public prohibitory resolution had passed at the time of the death, and I willingly lay hold of that circumstance to recommend a measure of peace towards the living, and of charity towards the dead.

I shall admit affidavits on both sides before any table of fees is confirmed.

4th May, 1821.—On a subsequent day this cause came on again, on the explanations permitted to be offered on affidavits, as above directed by the Court; and counsel were heard on the effect of those explanations.

Judgment—*Sir William Scott*. The general determination, which I have already arrived at, has decided the legal question (so far as my opinion could decide it) that if iron coffins were more durable than those of wood, they ought to pay in proportion to their longer occupation of the ground. The question of fact that it was more durable remained in a controverted state to be ascertained (so far [358] as it could be ascertained) by further evidence to be produced; and I need not add that to reach any thing like exactness upon such a subject of comparison was an expectation not to be indulged. The fact itself is liable to be affected and varied by the influence of various causes acting upon both substances, so as to make any general result, even of experiments themselves, in some degree unquestionable. But the truth is that

such experiments have not been, and cannot be made, in any time convenient for the present decision of the question. The whole of the illustration which it has received is derived from the opinions of persons scientifically conversant with such subjects, and from such exhibition of facts, as may have occasionally, and incidentally, presented themselves to notice.

Of the former of these species of evidence the Court is furnished with the declared opinions of eminent professors of the science of chymistry; and I should have been happy to have been able to apply, confidently, the safe and convenient judicial aphorism of "Peritis in arte sua credendum;" but where such opinions disagree, a matter of no unfrequent occurrence, that rule can have no application, and it is a work of no small difficulty to provide another. The Court cannot presume to pronounce directly a decisive judgment on a subject, which the conflicting opinions of those who understand it most familiarly have left in the state of doubt in which they found it; still less can it presume to decide another comparative question of perhaps equal difficulty, and certainly increased delicacy, that of the skill, [359] and experience, and judgment of the different professors. It can proceed merely "crassa Minerva," in looking to the opposing numbers of opinions; for the arguments by which they are supported, however just, come too little within the reach of its comprehension to authorize any dogmatical conclusion. The balance of numbers is certainly on the side of the greater durability of iron, and, therefore (prima facie at least), the balance of authority; for supposing merely an equality of individual skill and judgment it must be the number that should decide the weight of aggregate authority.

Having already, at the former hearing, expressed a pretty strong inclination of my own judgment (a very uninformed one, undoubtedly), on the greater durability of iron, I may, perhaps, be thought to be unduly influenced by my own prepossessions, when I say that the opinions of Mr. Brande, who fixes the proportions of durability of iron to wood as three to one, and Mr. Aikin and the two other persons who concur, find a readier way to the conviction of my own mind than those of their opponents. However that may be, the opinion of the Court, upon this matter, rests finally with them, so far as this species of evidence can lead it.

Another test, by no means improper to be noticed, has been suggested to me by a gentleman of much various and accurate information,* founded [360] upon the basis, to which I have already adverted, of the result of casual discovery of these substances, in situations not unconnected with the present subject. Both substances, wood and iron, have been found in contact with, or in deposit within the soil where they have been lodged, either accidentally or in pursuance of the antient usages of the inhabitants of the country, and discovered afterwards, at very distant periods of time—sometimes separately, and sometimes in conjunction. Three different states of the soil may be supposed in which these connections with it may have taken place—one, where the ground was perfectly dry, and remained so during the whole period of the connection. Both substances, in such a state, may be supposed entitled to a long and sound longevity: rust does not corrode the one where moisture and air are excluded—nor rottenness the other, if insects are prevented from committing depredations. The cases of Egyptian mummies, composed, it is said, of the sycamore of the country, but ascertained to be of 2000 years standing, are amongst the most signal instances of the *immortale lignum*—a character which Pliny appropriates to the larch; though it is not, perhaps, unworthy of notice that, in the interesting account given of the late disinterment of King Charles the First, the wooden coffin is described as very much decayed, though protected externally from air and moisture by being enclosed in a leaden coffin, carefully soldered up, and, internally, from the gaseous vapours which these chymical gentlemen mention in their affidavits as proceeding from a dead body by cerecloths and such other integuments.

[361] Another state is, where they are found in contact with a soil entirely and permanently covered with water, salt or fresh; as where anchors, or bolts, or chains, fished up from the bottom of the ocean, where they may have lain for unknown ages. The keys of Loch Leven Castle, fished up from the lake a very few years ago, after

* The information, which is here referred to, was communicated in some letters from a very intelligent and scientific chymist, which are inserted in the Appendix. There will be found also some other papers, originating with the patentee, which relate to the very singular subject of these proceedings.

having been thrown into it on the flight of the Queen of Scotland, had suffered little injury by lying there for more than 250 years. Manufactured wood is said to resist the action of moisture less perfectly; though the instances of Coway Stakes, in the Thames, and of Trajan's Piers, in the Danube, are striking proofs of the durability, under some circumstances; and entire trees have been found to have continued unhurt, in point of substance, for centuries in a submerged state.

But the third state is that which applies more immediately to the present inquiry—that in which the substances have been subjected to alternations of damp and dryness, and in which they both decay, but at very different periods.

It is a fact, falling within frequent observations, that of the various weapons that are found buried in the tumuli or barrows, or other places of antient sepulture in this island, the metallic heads of celts and spears, and the blades of swords and daggers, are in a condition from which they can easily be recovered to their antient use, or to any other metallic use whatever, whilst of the wood that formed their shafts or handles, or connecting parts, not a particle remains; but are all associated with the soil in which they were buried. Numerous [362] instances, authenticated in the most satisfactory manner, occur in the volumes of the *Archæologia*: I owe a collection of them to the active kindness of the same ingenious person.

An affidavit, brought in by the patentee and signed by three persons, records an instance of an infant's coffin of iron plate being deposited in the churchyard of St. Giles, Cripplegate, and found covered with rust at a very short period of time afterwards. I cannot infer much from a single instance of that kind, produced, perhaps, by the singularity of some circumstances, either in the soil or preparation of the metal, not stated in the affidavit; for if it were a fact not so singularly produced, the instances would be ordinary and frequent. Besides that the covering of rust would, as has been observed, operate, in some degree, to protect the metal from a further hasty decomposition. Perhaps the common practice, which has been adverted to in the argument, of having the ends of park palings and posts shod with iron, for the purpose of preserving them in the ground, may be deemed more than a sufficient counterpoise to such a solitary fact, at least as far as the common apprehensions of men are of any authority upon such a subject.

It is upon these four species of evidence (if I may so call them)—upon my own impressions, founded upon all personal observation of my own, extremely limited and superficial as it is—upon what appears to be the common apprehension of men generally upon this matter—upon the preponderating opinion of men of science—and upon the results of discoveries, in some degree, though, perhaps, remotely connected with this subject that [363] I am called upon to act—being the best, indeed the only evidence, that I can collect by any industry of my own, or by the more active industry of others. I must add, that if succeeding experience shall shew that these premises have led to an erroneous conclusion, it will be for the justice of the parties themselves to correct it; and if they should decline to do so, it will be for the remedial justice of this Court to reduce the matter to its proper standard.

The remaining question is that of the proper quantum of the increased taxation. Upon that question I am satisfied, by the great variety of circumstances under which both parishes and their cemeteries exist, that there can be no general measure of quantum, which can be deemed universally applicable, even in this town and its environs. The size of their church-yards relatively to their population—the possibilities of enlargement, if necessary—the facilities of obtaining additional cemeteries—the means of purchase within the possession of the parish—many circumstances, some of which occur, and others escape present recollection, render what may be said respecting this particular church rate applicable to others, only with such amplifications, and abatements, as the difference of circumstances may require.

I observe that there are demands that rather startle at first sight, and require some consideration to reconcile them to notions of propriety. St. Dunstan's in the West rates metallic coffins at twenty-five pounds extra fee: I am, however, to remember that it is a parish extremely populous—in the heart of a most busy part of the metropolis—[364] closely occupied by buildings—with church-yards extremely circumscribed—and that it is at a great distance from the country environs of this city. Less appears to justify the demand of twenty-one pounds in Islington parish—situated as it is out of this town—where ground, though highly valuable, may be more obtainable for the necessary uses of the parishioners. But I cannot take upon myself to say that

there may not be reasons that protect even their charges from the imputation of extravagance.

Upon this particular charge at St. Andrews, Holborn, an ingenious calculation was proposed by Dr. Arnold, respecting the number of graves of certain dimensions, and of certain depths, the churchyard was capable of receiving. If I took it accurately, it assumed as a basis, what I think is not to be admitted, that they were to descend to a depth below the soil of fifteen feet. As far as I could follow the calculation, I did not discover other fallacies—but fallacy, I think, there must be, for it seems quite incredible that parishes, if they could act conveniently, upon such a calculation, would incur the inconvenient expence, as they very frequently do, of purchasing new cemeteries.

An objection was taken to the application of the fee, as stated in the table. I think that this is a matter into which the present party has no right to look. If the whole demand be a proper demand for the longer occupancy of the ground, he has no right to quarrel with the public uses to which the parish immediately applies it, taking upon themselves the burthen of providing additional grounds for interment, when required. The objection to [365] the incumbent's proportion seems entirely to forget that by the general law it is the incumbent who has the freehold of the soil of the churchyard, though provided originally by the parish. By acquiescence, confirmed by usage, parishes in this town and neighbourhood have acquired concurrent rights, into the validity of which it is quite unnecessary and improper for me to enquire, as no adverse claim is or can be raised, in the course of the present discussion, in which the incumbent and parishioners stand upon one agreed footing of interest.

The sum charged is not for an iron coffin, but generally for a metallic coffin and, I think, without impropriety. Because having a right to know the extent of the patentee's powers, they find that under this patent he has just the same right to offer coffins of brass, or tin, or any metals, or mixtures of metals, which human ingenuity can devise, as coffins of iron. Those which are called the precious metals may very well, from their intrinsic value, be deemed, in their own nature, extreme and excluded cases—but this Court cannot, by conjecture, limit the possibilities of human art, and take upon itself to determine that by no attainable extension of discovery or improvement, other metals, and mixture of metals, may not be brought within the compass of a very reduced expence. Within our own time, other metallic bodies have been discovered, and other compositions of metal invented. And it is the more reasonable, in this case, to include such a supposition; because it is clear from the universality of the terms in which the patentee has sued out his own [366] patent that he has included them himself, in his own speculations of profit.

It is well worthy of observation that these coffins are, by their construction, out of the reach of all examination. The parish has no check, no means of internal search for prohibited materials. They may be internally varnished, or painted, or tinned, or otherwise prepared, so as to increase their duration, without betraying themselves, by any considerable increase of weight, or by any other manifestation. The parish is to accept them, upon the mere bona fides of the maker, guaranteed only by the general presumption that more durable coffins would not answer his purpose for a general traffic: even that would not exclude particular bargains with many individuals, who felt particular anxiety about their relations. It would not exclude more durable metals for his general traffic; if, by the improvements of art, he could be supplied with them at a marketable price. It appears rather too much to expect that the matter should be settled upon an assumption that these coffins, liable to no inspection, should be always of the exact quality which these affidavits describe. The parish has a right to guard itself against this way of increased expence—against the substitution of other metals, and the use of other disguises, even supposing that the simple coffin of rolled iron was fairly entitled to be received on the same footing as the coffin of oak.

The state of this parish is, likewise, to be gravely considered—situated in a most crowded part of this town—with a dense population both of the living and the dead; both populations rapidly [367] increasing. Here are four cemeteries crammed full of bodies, packed as close as notions of decency and convenience will permit. Here is a crying demand for more sepulchral space, with great difficulty of obtaining it. Is such a parish a fit subject for an experiment? for such it must be deemed, even by those who interpret the evidence most favourably, for the iron side of this question, and without adding, as most persons, I think, would do, a preponderance on the other side.

The inconvenience on one side is that the patentee of a novel invention must postpone his ample harvest of profit, till it is ascertained by experiments, made in places where no mischief can arise, whether it can be admitted in others, where it may disturb the fair use of a public, an antient, and a sacred possession. No Court could, I think, hesitate upon the decision of such an alternative, if proposed. The attempt to force this novelty has certainly produced public uneasiness, which ought to be treated with indulgence, and has generated oppositions, which have a right to be fairly disarmed, if to be disarmed at all. Let experience shew (and not many years experience will be required to shew what really exists) that the apprehensions entertained are entertained without foundation. If that can be shewn, it is to be hoped that the parishes themselves will do their duty, and if they do not, the Courts must endeavour to do theirs. At present, the subject requires further probation, before such a claim can be enforced: it is breaking ground for a novel purpose, in a soil not yet sufficiently explored to be known, how far it is at all fit; and the Court must see, and know [368] much more, and more authentically, before it can decree present notions, and existing practice, founded upon such notions, to be overthrown.

The sum charged, or proposed to be charged, is ten pounds extra; and I observe, what adds to the authority of the measure, that St. George's, Hanover Square, a parish peculiarly well governed, has proposed to adopt the same. It is possible that if it had belonged to me, to fix the measure in the first instance, I might have rated it somewhat lower. I observe that St. Saviour's, Southwark, which states similar circumstances of necessity, arising from their population, and the extent of their burial grounds, fixes it at five pounds; and St. George's, Middlesex, £6, 9s. 6d., stating likewise the same necessities. However, I shall not disturb what the parish has done, upon a deliberate consideration of all local circumstances, some of which may have escaped me, until the result of more experience is seen.

I hesitate more upon the expressed condition that the graves for the coffins shall be fifteen feet deep; I doubt not a little, both upon the justice and the prudence of this. If the parish accepts what it considers as a fair compensation for the longer occupancy of the ground, it should rather seem that the coffin is entitled to be received into this same ground. The condition will occasion additional expence—may produce occasional difficulties from obstructions—may lead to the irruption of water, and so affect other interments; and what weighs not lightly, it will put this question of durability too much into the hands of the other party, for these coffins buried at such a depth will [369] remain out of sight and out of attention—the parish will have no means of observing the period of decay. But the persons who have an interest in the future reception of these coffins will be provided with means of observation upon the comparative durability; and if the question should be revived, it will come on their side, with all the advantage of the evidence of experience to be produced by them alone. I wish this matter to be reconsidered; when I understand that it has undergone a reconsideration—I shall be prepared to sign the table.

On 18th May the table of fees as proposed was signed, that condition being omitted.

BURN v. FARRAR, FALSELY CALLED FARRAR. 30th June, 1819.—Nullity of marriage alleged on the *lex loci* of France, on a marriage between English subjects, celebrated by the chaplain of the British forces, then in the occupation of the country. Libel admitted: principal question reserved.

This was a case of nullity of marriage, instituted on the part of the wife, with reference to the circumstances of the marriage, as celebrated in France, by the chaplain of the British forces, under the Duke of Wellington, and not in conformity to the law of France, as pleaded and set forth. Upon admission of the libel in *pœnam*, no appearance having been given for the husband, Dr. Swabey described the nature of the case, as above stated, observing that it would be, when proved, a legal ground of nullity; as marriage, like all other contracts, should be celebrated according to the *lex loci*.

[370] *Judgment*—*Sir William Scott*. I shall admit this libel to proof, without deciding at present on the effect which it may have if proved; but merely to assist the party proceeding in procuring, if possible, an answer to it from the opposite party. I have received several letters addressed to me by English clergymen and others in foreign countries, relative to marriages of this kind, which letters I have

felt it to be my duty not to answer; as it certainly is no part of my public duty to answer private inquiries upon questions which may come judicially before me. Some of the marriages which gave occasion to those letters have been contracted under circumstances similar to the present; and it will be too much to expect that I should instantly give a judgment upon such questions in an undefended suit, and in which I can hear no argument in support of the validity of the marriage.

It appears that the husband here was an officer of the army of occupation; and it may, therefore, very well be doubted whether he was at all subject to the French law, as pleaded in the libel. I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument.

No further proceedings have taken place.

[371] RUDING v. SMITH, FALSELY CALLING HERSELF RUDING. 13th July, 28th July, 1st August, 1821.—Nullity of marriage, alleged on the *lex loci* of Holland, as not conformable thereto, with reference to a marriage celebrated between British subjects at the Cape by the chaplain of the British forces then occupying that settlement under capitulation. Libel not admitted.

[Referred to, *Armitage v. Armitage*, 1866, L. R. 3 Eq. 347. Followed, *Bates v. Bates*, [1906] P. 220.]

This was a case of nullity of marriage, brought by the husband, to set aside a marriage celebrated in a room in a private house, between the parties, being British subjects, at the Cape of Good Hope, on the 22d October, 1796, by the chaplain of the English forces, by virtue of a licence or permission from General Sir James Craig, the commander of the British forces at the said colony.

The libel pleaded the surrender of the Cape to the British forces in 1795, and the terms of capitulation, "that the inhabitants of the Cape should preserve their prerogatives and the exercise of public worship which they at present enjoy:" and that the laws of the United Provinces, which were in force at that time, had never been repealed or altered. It then set forth the law of Holland* respecting marriage,

* The fourth article of the libel pleaded, "that in and by the laws of the United States prevailing in the said settlement or colony, every marriage between persons who were respectively of the religion established by law within the said settlement or colony, must be celebrated in the parochial church of the parish in which one of the said persons resided, by the priest or minister thereof, otherwise the same would be void and of no effect: that in and by the said laws, every marriage between persons both or either of whom were dissenters from the religion established by law within the said settlement or colony, must be so solemnized or contracted before a magistrate at his ordinary place of session, otherwise the same would be void and of no effect; and the party proponent doth further allege and propound that in and by the said laws no legal and valid marriage could be had or solemnized within the said settlement or colony, either between persons who were respectively of the religion by law established, or both or either of whom were dissenters from the same, without due publication of banns three several times, or without a licence or dispensation from the same, granted by the supreme authority of the States, in whom the power of granting such licence or dispensation was exclusively vested, and that such licence or dispensation was never granted by the said supreme authority, for more than one or two of the said necessary publications of banns: that in and by the said laws, no man under the age of thirty years could lawfully contract marriage without the consent of his parent or parents, if living, first had and obtained, or if dead, of his guardian or guardians lawfully appointed; and that no woman under the age of twenty-five years could lawfully contract marriage without the consent of her parent or parents if living, or if dead, of her guardian or guardians lawfully appointed; and that all marriages where the man was under the age of thirty years, or the woman under the age of twenty-five years, had and solemnized without the consent of the parents or parent, if living, or if dead, of the guardian or guardians lawfully appointed of the party so under the age of thirty or twenty-five years, were absolutely null and void to all intents and purposes in law whatsoever; and that no difference or exemption whatever was made or allowed for or on account of any person or persons whatever,

[372] and alleged that between persons both, or either of them, dissenting from the religion established by law, marriage must be solemnized or contracted before a magistrate, or otherwise the same would be null and of no effect; and that no exception was allowed for persons being strangers or foreigners. It then pleaded the principal circumstances in the situation of these parties, "that the wife was born at Fort Saint George, in India, in November, 1777, and Mr. Ruding in 1774, in England: that they were resident at the Cape in September and October, 1796;" and prayed that the marriage [373] being had in a private house, not in the parochial church, without banns or licence, and without consent of parents as required by the law of Holland, might be pronounced to be null and invalid.

The admission of the libel was opposed by Dr. Jenner and Dr. Phillimore, who submitted that though the principle of *lex loci*, which was assumed in the libel, might be very just, as an affirmative position; it would not follow that the converse of that proposition was true, that no marriage contracted in a foreign country could be good unless it was solemnized according to the law of the place: that the general principle could not apply to persons being at the Cape, as British subjects, under the protection of the British forces then in possession of the settlement, by virtue of the recent surrender; that such persons must be supposed to contract with reference to the law of their own country, according to the distinction maintained even by Huber,* and admitted by Lord Mansfield in the case of *Robinson v. Bland* (2 Burrows, 1077), that marriage is to be considered not so much with respect to the *locus contractus* as of the place where it is to be exercised. That the terms of the capitulation might preserve to the inhabitants the enjoyment of their former laws, but it would be unreasonable to impose them as paramount authority on all English subjects who might be with the British army in the condition of conquerors; that in Gibraltar, in the East Indies, and in other places, the exercise of particular religions is reserved to inhabitants; yet the marriages of English [374] subjects in those places, under the English laws, had never been disputed.

In support of the libel Dr. Lushington and Dr. Dodson contended that it had been established by the highest authority that, in conquered countries, the laws remained in force till altered by competent authority (*Calvin's case*, 7 Coke's Rep. 17, 18). That the authority of the laws, so continued, was binding on all persons; and there was no distinction as to contracts between natives and strangers, except as to property situated in another country.† That it had been laid down in this Court, in the recent case of *Dalrymple v. Dalrymple* (vid. supra, p. 54), that all persons contracting marriage are bound to celebrate such marriage according to the *lex loci*: it had been so held in older cases, in *Compton v. Bearcroft* (Deleg. 1769), and in *Ilderton v. Ilderton* (2 H. Bl. Rep. 145); and the distinction now contended for, as to persons in the character of conquerors, could not be maintained. In *Burn v. Farrar* (vid. ante, p. 369), which was a case of British subjects married in France by licence, and permission of the Duke of Wellington, the Court admitted the libel; but intimated that it was a question of moment in which it was not disposed to proceed further in the absence of the husband, who was said to be gone to South America. If that marriage could be held good, it must be owing to the particular situation of the British armies in France: there was no conquest, and no [375] natural communication with the civil authorities, nor opportunity of resorting to the tribunals of the country. In this instance such a plea could not be advanced, as the laws had been recognized; and there was a special provision in those laws for the case of strangers and dissenters from the religion of the place, by which the celebration of this marriage might have been had as easily as by the mode which had been adopted. The principle of resorting to English law would carry with it a great inconvenience, as the law so imported would be, not the present law of England, but such as had been in force seventy years ago. The case of British subjects in India was peculiar and *sui generis*; as they were

being foreigners, or in itinere, or otherwise; but the same were binding upon all persons whatever desirous of contracting matrimony within the said colony."

* *Prelectiones Juris Civilis. De Conflictu Legum*, l. 1, tit. 3, § 10.

† *Campbell v. Hall*, 1 Cowper, 208. On that subject see also 2 P. Wms. 75, and the exception therein stated, "unless it be contrary to the law of England, or malum in se, or an omitted case." And the very able argument of Mr. Nolan upon it in the case of *Governor Picton*, St. Tr. vol. 30, p. 833 et seq.

exempted from the law of the country, and lived as persons in factories, under the faith of treaties and the provisions of sundry charters and acts of parliament. In the case of *Middleton v. Janverin* (vid. post, p. 437) a marriage solemnized in Flanders, but not according to the *lex loci*, had been set aside; and it was submitted on those authorities that this marriage, being had without publication of banns, and without a licence from any competent authority, or according to the laws of Holland, was null and void.

In reply, Dr. Jenner and Dr. Phillimore. The proposition advanced on the other side would amount to this, that officers serving in the British forces at the surrender of the Cape would be instantly subject to the laws of the conquered country in all cases and in all transactions even between themselves, which would be a manifest absurdity. That the general principle of the *lex loci* could not [376] be applied universally as a negative proposition. It necessarily contained in it many qualifications and exceptions as with respect to polygamy and other customs, which could not be reconciled to the laws and the religion of this country. The present case also necessarily formed another exception. The authority of the decision in *Campbell v. Hall* referred to persons settling in a foreign colony, and was not applicable to the question before the Court. Military persons and others accompanying the military occupation are to be considered in a different point of view; with respect to such persons Voet (in Dig. lib. 23, tit. 2) and Huber admit the distinction that they must be understood to contract according to the laws of their own country; as an exception founded on the nature of their situation. In *Compton v. Bearcroft* the question did not turn on the validity of the marriage by the law of Scotland, because nothing appeared respecting that law; the libel pleaded only the marriage act and the nullity of the marriage as alleged, contracted by persons going to Scotland to celebrate a marriage there in evasion of the law of their own country. The Court held that the marriage act in its terms did not apply to Scotland, and could not be extended on the principle of evasion. On that ground it did not sustain the libel; but gave no opinion on the effect of the law of Scotland on that marriage, as that question had not been raised in the pleadings.† In *Dalrymple v. Dalrymple* the [377] parties were inhabitants of the country, and one a native inhabitant. If Mr. Ruding had married a Dutch lady, it might perhaps have imposed on him an obligation to conform in such marriage to the laws of the settlement; and a departure from them might have been fatal. In *Middleton v. Janverin* the marriage was designed to be according to the law of Austrian Flanders without any intention to adhere to the British law.

Court. Could it be laid down conversely that all marriages abroad according to the British law would be good?

Dr. Jenner. I will not undertake to offer an opinion on that point; as I do not feel myself called upon to maintain that proposition; at present it may be sufficient to say that there are no cases which establish the contrary: the present case rests on special grounds; the impossibility of subjecting all individuals accompanying a conquering army to the laws of the conquered country. Among other requisites of the Dutch law is the consent of parents, which must in almost all such marriages be impossible to be obtained, as it was peculiarly in the present instance from the circumstances of the case.

[378] *Judgment*—Lord Stowell.* This is a suit brought by Walter Ruding, Esq.,

† It appears from the argument in *Compton v. Bearcroft* that soon after the Marriage Act many instances had occurred of persons going into Scotland to evade the restrictions of that Act. The cases of *Bedford v. Varney*, 1762, before Lord Northington, and *Brook v. Oliver* at the Rolls, before Sir Thomas Clarke, 1759, were mentioned, being cases of bequests, dependent on the validity of such marriage, in which it had been contended that the marriage was not valid: but the objection was overruled, and the points in those cases adjudged accordingly. It was said also that Lord Northington must have been well acquainted with the spirit and intention of that act, as he had been much concerned in procuring it.

The notion of impeaching those marriages, on the ground of evasion stated in the libel, is there supposed to have proceeded from the observations of Lord Mansfield in *Robinson v. Bland*, as to the exception that might be admitted in such cases on that principle as suggested by Huber.

* On 14th of July, Sir Wm. Scott was created a peer of the United Kingdom of

against Jemima Claudia Smith, for the purpose of praying this Court to pronounce null and void his marriage had with that lady under the following circumstances:— She was born at Fort St. George, in the East Indies, in the month of Nov., 1777. His birth took place at Kineton, in the county of Warwick, on the 13th day of May, 1774. In September, 1796, she was at the Cape of Good Hope; the Cape had surrendered a year before: for what purpose she came thither, or how long she meant to remain, does not appear. At the same time Mr. Ruding came thither also, in his way to the East Indies, being at that time a captain in the 12th Regiment of Foot. On the 22d of October, 1796, they were married by the chaplain of the British garrison, under the authority of a licence granted by General Craig, the commander in chief of the British forces in that country. When the marriage was performed Mr. Ruding was of full age; but the lady was under the age of nineteen. The consent of parents or guardians, required by the Dutch law then generally prevailing at the Cape, was not obtained, as regarded either of the contracting parties. Her father had died some years before, and her mother had married a second husband; and no appointment of guardians had taken place. It is contended by the husband that by the Dutch law at that time in force at the Cape [379] this marriage was null and void: and on that ground he seeks the aid of this Court to pronounce a sentence declaratory of its nullity.

The case of facts which I have stated, and the Dutch law under which, if applied to these facts, the marriage is to be invalidated, are pleaded in the libel; and I think that there is little doubt that the Dutch law, with respect to persons to whom it really applies, is fairly represented, and would be so proved if the libel was admitted. As little doubt is there that the facts of the case would be established by clear proof; but the real question is whether the Dutch law so pleaded ought to govern entirely and exclusively this case of fact applying to these individuals? For if it ought not, the libel, which rests the case upon it, ought not to be admitted.

In order to maintain that the Dutch law ought to govern the case, the party pleads first an article in the capitulation under which the Dutch colony was surrendered to the British arms. That stipulation covenants that the inhabitants shall preserve the prerogatives which they enjoy at present. The meaning of this article, be it what it may, for the term used “prerogatives” is sufficiently indefinite and obscure, can never be extended to the British conquerors, *ex vi terminorum*. They are the grantors, not the grantees. They were not in the enjoyment of any prerogatives whatever under the Dutch law; they had nothing under it which they could wish to preserve. It is impossible that the Dutch could intend to stipulate for them. It has therefore, I think, been nearly admitted that as to the British conquerors this article has no intelligible application; consequently, if the Dutch law binds them, it must be by some other obligation, by which, independent of this article of capitulation, [380] the Dutch law imposes itself upon them. In order to bring it a little nearer, after pleading in the following articles what the Dutch law of marriage is, it is stated also, “that that law binds all persons whatever within the colony, foreigners as well as natives, for that their laws say so, and that their learned lawyers will support that doctrine, and that their Courts will enforce it.” Now if that be true, that the law binds the British conqueror immediately upon the capitulation (there being no express covenant to that effect) it must be either from some known rule of the law of nations, which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of England, which imposes such an obligation upon the British conquerors of the possessions of the enemy; for clearly the Dutch law, taken by itself, cannot directly and by its own force bind them. Dutch authority could not impose it, for Dutch authority had ceased; and a Dutch Court, taking upon itself to force this law upon British parties only and in transactions purely British, might be thought to put forward no very just or moderate pretension; unless some authority superior to it had imparted to it a force which it did not itself directly possess. Such an authority, if it exists at all, must be found either in the law of nations or in the British law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of nations. It sometimes happens that the conquered are

Great Britain and Ireland, by the title of Baron Stowell, and on 14th of August resigned the chair of the Consistory Court. He was succeeded by Sir Christopher Robinson, LL.D., His Majesty's Advocate General.

left in possession of their own laws—more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they settle in the country, are content to adopt for their own use such part of the laws prevailing before the conquest as they [381] may find convenient under the change of authority to retain. I presume that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned; and I am yet to seek for any principle derivable from that law which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, and opinions, and habits of the conquerors: at any rate they can be but imperfectly understood; and that they should all of them instantaneously attach and continue obligatory upon them till their own Government had time to learn them, and select and correct them, is a proposition which I think a professor of general law would be inclined to consider cautiously before it could be unreservedly admitted.

But it is argued to be the doctrine of the law of England; if so, it is not the less hard, as the municipal code of our country is generally admitted to be more liberal and more indulgent than the codes of most other countries. It would be a most bitter fruit of the victories of its subjects, if they were bound to adopt the jealous and oppressive systems of all the countries, which they subdued, and to groan under all the tyranny,*¹ civil and ecclesiastical, of those systems, till their own Government, occupied by the pressure of existing hostilities, had time to look about to collect in-[382]formation, and to prescribe rules of conduct more congenial to their original habits. To learn what the laws of a country are is not the work of a day, even in pacific times, and to persons accustomed to legal enquiries; and to construct a code, fit for such a new and mixed situation of persons and things, demands, not without reason, a very serious tempus deliberandi; and conquerors are, certainly, not the last men who are entitled to the protection of their country under new grievances.

I am perfectly aware that it is laid down generally, in the authorities referred to,*² “that the laws of a conquered country remain till altered by the new authority.” I have to observe, first, that the word remain has, *ex vi termini*, a reference to its obligation upon those in whose usage it already existed, and not to those who are entire strangers to it, in the whole of their preceding intercourse with each other. Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change. This very libel furnishes instances of this sort. In the third article it is stated “that dispensations from the publication of banns must be had from the authority of the States of Holland.” That, [383] I must presume, could not be continued during the existence of the war, and the extinction or suspension of the sovereignty of that nation. But, secondly, though the old laws are to remain, it is surely a sufficient application of such terms “that they shall remain in force,” if they continue to govern (so far as they do continue) the transactions of the ancient settlers with each other, and with the new comers. To allow that they shall intrude into all the separate transactions of these British conquerors is to give them a validity, which they would otherwise want, in all cases whatever.

It is certainly true that in *Hall and Campbell* that most eminent Judge, Lord Mansfield, a person never to be named but with accompanying expressions of reverence, has laid down the following proposition:—“That the law and legislative government of every dominion equally affects all persons, and all property, within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privileges distinct from the natives.” Huber, too, speaking upon general principles, had before promulgated the same doctrine: “*Pro subjectis imperio habendi sunt omnes, qui intra terminos*

*¹ See on this point the argument in the case of *Governor Picton*, St. Tr. vol. 30, p. 833 et seq., and note *supra*, p. 374.

*² *Calvin's case*, 7 Coke's Reports; and *Hall and Campbell*, Cowper, p. 208.

ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur" (De Conflict. leg. l. 1, t. 3, § 2). But to such a proposition, expressed in very general terms, only general truth can be ascribed; for it is undoubtedly, subject to exceptions.

[384] It is not to be said that ambassadors and public ministers are subject to the whole body of the municipal law of the country where they reside. They belong, in great part, to the country which they represent. Even the native and resident inhabitants are not all brought strictly within the pale of the general law. It is observed by the learned Dr. Hyde that there is in every country a body of inhabitants, formerly much more numerous than at present (and now generally allowed to be of foreign extraction) having a language and usages of their own, leading an erratic life, and distinguished by the different names of Egyptians, Bohemians, Zingarians, and other names, in the countries where they live: upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes; and the matrimonial law hardly, I presume, in fact, any where at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects under the protection of the general law, are, in many respects, governed by institutions of their own, and particularly in their marriages; for it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions in that matter to the universality of that rule, which makes mere domicile the constituent of an unlimited subjection to the ordinary law of the country. The true statement of the case results to this, that the exceptions, when admitted, [385] furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and by that law only, as has been done in the cases that were determined in this Court on those very principles (*vid. supra*, vol. i. pp. 216, 324). If a rule of that law be that the fact of a witness to the marriage having eaten prohibited viands, or profaning the Sabbath-day, would vitiate that marriage itself, an English court would give it that effect when duly proved, though a total stranger to any such effect upon an English marriage generally. I presume that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the ritual of the Dutch Jews established in Holland.

What is the law of marriages in all foreign establishments settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz—and in the factories in the East; Smyrna, Aleppo, and others? in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek Church, but to the rubric of the Church of England, when he contracts a [386] marriage with an English woman.* Nobody can suppose that whilst the Mogul Empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shewn to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, upon their own canons, without any reference to Mahometan ceremonies. There is a *jus gentium* upon this matter, a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances; and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong: I am not aware of any judicial recognition upon the point; but the reputation, which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment.† In the case

* A register of English marriages celebrated at St. Petersburg is transmitted to the registry of the Consistory Court of London.

† *Vide supra*, vol. i. p. 136. There has been no other decided case of that

which has now occurred—[387] the case of a conquering force, stationed in a conquered country or colony, for the purpose of enforcing the reluctant obedience of the natives, and composing, for the present, a distinct and immisceable body—can it be maintained that the success of their arms, and the service of vigilant control in which they are employed, lays them at the feet of the civil jurisdiction of the country, without any exception whatever? In a former case (vid. supra, *Burn v. Farrar*, p. 370) the Court intimated its opinion [388] (for the case never reached a decision) that the law of France would not apply to an officer of the English Army of Occupation marrying an English lady; on the ground that at that time, and under such circumstances, the parties were not French subjects, under the dominion of French law; and surely the condition of a garrison of a subdued country is not more capable of impressing the domestic character, and all the obligations it carries with it, than the situation of the Army of Occupation at that time in France.

Much of the order of a society so peculiarly placed depends upon a discreet application of general principles to particular institutions; this can hardly be specified beforehand. But that the whole mass of law, formed for another state of things, and for a status personarum widely different, is to be immediately forced down upon these foreign guardians, in their own separate transactions, and without any reserve or limitation, is a proposition much too inconvenient in its consequences, to be perfectly just in its principle.

The time of this transaction is to be considered. The marriage took place at no great distance of time from the compelled surrender. This case therefore has no resemblance to the case of Ireland, the Isle of Man, the Plantations, or even Minorca, where recognised civil governments had been established, and a permanent system introduced, of which all must be supposed cognizant. The Cape was conquered, but not ceded; and it remained for a treaty of peace to decide to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established [389] in its place. The character of the individuals is likewise to be considered. The husband goes there, not as a volunteer or a settler, by intention of his own, or there to remain; but in the character of a British soldier, in the prosecution of a further voyage directed by British authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live. What the legal case of persons engaging in such concerns would be I am not called upon to inquire; much less am I disposed to determine. The party principal is a military servant of the British government, sent upon a public errand elsewhere, and though in itinere, is not so upon any movement of his own. Whatever a Dutch Court might determine upon the general case of a foreigner, or even of a passing traveller, however just in such cases, has no pertinent application to the present.

Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a

description, of which any trace can be discovered. In the argument on *Harford v. Morris*, the case of *Lacy v. Dickinson*, Consist. 1769, was mentioned, in which the parties, being both English subjects, who had resided at Amsterdam, went to Paris, and were married by leave of the Dutch Ambassador in his hotel, and by his chaplain, in the absence of the English Ambassador. They came afterwards to England, and the wife brought a suit of jactitation, in which Mr. Dickinson justified under the marriage, as alleged. In reply, the wife pleaded the laws of Holland, "that marriages solemnized between the subjects of their High Mightinesses, or others, in a house of an Ambassador of the States General in foreign countries, between the subjects of the States General, or others, unless the parties had been first contracted by the law of Holland, and such contract duly registered, and unless banns be duly published in Holland, before the performance of the same, is null and void, to all intents and purposes." It pleaded also "that, by the laws of France, a marriage solemnized, not in facie ecclesiæ, and on publication of banns, and by the priest of the church of the parish where the parties live, and where they are domiciled, unless by special licence and faculty, is null and void." That cause went no further, owing to the death of the husband. The case was cited in that argument to shew that the *lex loci* had been distinctly pleaded as the ground of nullity, and the allegation admitted to that effect. It is noticed here, as shewing on what principles a marriage, celebrated in an ambassador's chapel, was pleaded, and what was opposed to it on the other side.

question in an English Court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England upon that account; or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights, which do not belong, in any such extent, to parents living in England; and of which the law of England could take no notice, but for the severe purpose of this disqualification? The Dutch [390] jurists, as represented in this libel, would have no doubt whatever that this law would clearly govern a British Court: but a British Court might think that a question not unworthy of further consideration, before it adopted such a rule, for the subjects of this country. In the article of the libel which follows, it is alleged that such a marriage would be declared by Dutch tribunals and Dutch jurists, not only null and void in Holland and the colonies, but likewise in this kingdom, and in every other country. I should presume that this is a claim of universal jurisdiction, which Dutch jurists, and Dutch tribunals, would not make for themselves. In deciding for Great Britain upon the marriages of British subjects, they are certainly the best and only authority upon the question, whether the marriage is conformable to the general Dutch law of Holland; and they can decide that question definitively for themselves and for other countries. But questions of wider extent may lie beyond this: whether the marriage be not good in England, although not conformable to the general Dutch law, and whether there are not principles leading to such a conclusion? Of this question, and of those principles, they are not the authorised judges; for this question, and those principles, belong either to the law of England, of which they are not authorised expositors at all, or to the *jus gentium*, upon which the Courts of this country may be supposed as competent as themselves, and certainly, in the cases of British subjects, much more appropriate judges.

It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good every where else; but they have not *à converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country, that has silently permitted such marriages, and of the other, that has silently accepted them, the Courts of this country, I presume, would not incline to shake their validity, upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations.

The libel here states a case of marriage as nearly entitled to the privileges of strict necessity as can be. The husband was a person entitled, by the laws of his own country, to marry without consent of parents, or guardians, being of the age of twenty-one; but by the Dutch law, he could not marry without such consent till he is thirty years of age. Now, I do not mean to say, that Huber (*De Conflict. Leg. l. i. tit. 3, s. 12*) is correct in laying down as universally true, "*that personae qualitates alicui in certo loco jure impressas, ubique circumferri, et personam comitari*"—that being of age in his own country, a man is of age in every other country, be their law of majority what it may; yet it is not to be laid out of the case that the Dutch law would impose, in this respect, a very unfavourable disability upon the British subject; and it was one which, in the situation of this individual, it was extremely difficult, indeed, almost impossible for him to remove, even supposing that the Dutch law contemplated the prosecution of parental rights of British subjects living in England. His father lived in England, and he was pursuing his prescribed course to the East Indies for the military service. The lady was a little younger, but her father had died in the East Indies, and her mother was married again, and no guardian had been appointed. It would puzzle the person most versed in that most difficult chapter of general law, the *conflictus legum*, to say how a marriage could be effected, under such circumstances, in a manner satisfactory to the Dutch requisitions. Under such difficulties as regarded the Dutch law, the marriage naturally enough was

not solemnized with any reference to that law, but under a formal licence from the British Governor, and by the ministration of an English clergyman, the chaplain of the English garrison. The Crown, it is admitted, has the power of altering all the laws of a conquered country. This is an act passing under the authority of the representative of the British Crown, and between British subjects only, in which Dutch subjects have no interest whatever, for the parties were no settlers there. It is to be presumed that the representative was not acting without [393] the knowledge and permission of his government, if that permission was absolutely necessary to legalize that act. It was not so in my opinion, unless the Dutch law involved such persons in its obligations; for otherwise no Dutch law was invaded by the act, though the sanction of government might be requisite for the purposes of order and notoriety.

It is therefore, under all these circumstances that I am called upon to dissolve a marriage of twenty-five years' standing, upon a ground of nullity, which is alleged to have existed in its formation, though the vinculum has remained untouched, by either party, during the whole time. I know that, in strict legal consideration, I am to examine this marriage in the same way as if it had taken place only yesterday. It is likewise not improbable that the stability of many marriages may depend upon the fate of this; for, doubtless, many have taken place in a way very similar. But I know that I must determine it upon principles and not upon consequences. Authority of former cases, there is none: the decision in *Middleton and Janverin* (vid. infra, 437) turned upon a ground of impeachment, that was directly the reverse of what is attempted in the present case; for the ground there was, that it was a bad marriage under the *lex loci*, to which it had resorted: so in *Scrimshire v. Scrimshire* (vid. infra, 395), marriage celebrated according to the French ceremonial, and by a priest of that country, but totally null and void, as clandestine under its law: the ground here is that it did not resort at all to the *lex loci*.

[394] In my opinion, this marriage (for I desire to be understood as not extending this decision beyond cases including nearly the same circumstances) rests upon solid foundations. On the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to this British transaction—upon the whole country being under British dominion—and upon the other grounds to which I have adverted; and I therefore dismiss this libel, as insufficient, if proved for the conclusion it prays.

[395] CASES ON FOREIGN MARRIAGE REFERRED TO IN THE
PRECEDING JUDGMENT.

SCRIMSHIRE v. SCRIMSHIRE.* Consist. 29th July, 1752.—Validity of marriage of British subjects contracted abroad, how far considered, by the law of England, to depend upon the law of the country where it is celebrated. Marriage held to be null and void in this case.

[Referred to, *Sottomayor v. De Barros*, 1879, L. R. 5 P. D. 100; *Ogden v. Ogden*, [1908] P. 63.]

This was a suit for restitution of conjugal rights, in which the validity of the marriage was denied, as being a foreign marriage, not celebrated according to the laws of the country in which it was contracted. The question appears to have been then brought, for the first time, to judicial determination in the Ecclesiastical Court; and the effect of that decision, in legal authority, has been the subject of much discussion in subsequent cases. It is introduced here, with the two following sentences on the same subject, as elucidating the references to former authorities, on this important subject, in the preceding case.

Judgment—*Sir Edward Simpson*. This is a case, *primæ impressionis*, and of great importance, not only to the parties, but to the public in general. The suit is brought by Miss Jones,† for restitution of conjugal rights. She pleads a marriage in France,

* This case is printed from a MS. note of Sir Edward Simpson, communicated by Dr. Swabey.

† This lady was the daughter of Theophilus Jones, Esquire, Accountant-General of the Bank of England.

clandestine and forbidden by the laws of both countries, with this difference that, by the laws of France, such marriages are, in all cases, absolutely null; whereas, by the laws of England, they are only [396] irregular, but not null unless under special circumstances that warrant the Court to put that construction upon them. An allegation has been given in on the part of Mr. Scrimshire, which pleads that he was drawn in by surprise and terror to marry; that the marriage was celebrated in France; that by the laws of France the marriage of minors under twenty-five, unless with the consent of parents, is null and void; and that marriage can only be legally celebrated in that country by the proper priest, licensed to marry and exercise his functions within the jurisdiction where the parties live: that he was a minor, about eighteen; that Miss Jones was about fifteen: that the marriage was solemnized in a private house, by a priest not authorized, and without the consent of parents: that, under these circumstances, the marriage was null by the laws of France. A sentence of the Parliament of Paris, declaring the marriage null, is also pleaded, not as a bar to entering into the question in this Court, whether the marriage be good or not, but as evidence of the law of France, which may be material for the consideration of this Court in determining whether this be a good marriage by the law of England or not.

Before I enter into the merits of the case I shall take notice of some preliminary objections that have been made by the counsel. Upon the return of the citation *viis et modis*, on the 23d of June, 1749, Mr. Bogg appeared for Mr. Scrimshire. On the 26th October, 1749, a libel was given in by Miss Jones, and admitted. On the same day, Mr. Bogg exhibited a special proxy, and contested suit negatively. And it has been insisted [397] that by such absolute appearance, without protest, he had submitted entirely to the jurisdiction of this Court; and that the matter should be determined by the laws of this country, without any regard to the laws of France; and that he had waived all right to any benefit that might be derived from the sentence, which has been passed on this marriage in France.

It is further insisted that, after an absolute appearance, he had alleged the sentence in France to be a bar to any further proceedings; and that the Court having overruled that plea, the sentence of the Parliament of Paris and the French laws were entirely out of the case; and that the question before the Court, whether this is a good marriage or not, ought to rest solely on the English law, with respect to clandestine marriage, without any regard to the French law on that subject. This is the inference made by counsel. But, I apprehend, these consequences, as drawn by them, will not follow from Mr. Bogg's absolute appearance, nor from the Court's rejecting the plea offered by him as a plea in bar.

This is a cause for the restitution of conjugal rights. Mr. Bogg appears to the citation, &c. and denies the marriage. This surely is not a waiver of his client's right under the French law, but rather an assertion of it. The process is for restitution of rights; and the marriage being denied, a question arises incidentally, whether it is a marriage or not—to determine whether the party is entitled to restitution or not, under the marriage which has been pleaded. Mr. Bogg pleads a sentence at Paris, in bar to entering [398] further into the question of a marriage or not. This surely is far from waiving any right under the sentence, for he insists upon the force and effect of the sentence. The Court was of opinion then, and still is, that a foreign sentence alone could not, of itself, be a bar to entering into a consideration of the question, whether this marriage between English subjects was good or not by the law of England? The Court thought, however, that such sentence was proper to be pleaded, as a circumstance, or a fact, to make evidence of the law of France, with respect to the question here, on the validity of a marriage celebrated in France. Accordingly, the sentence was pleaded, and admitted in that light; and in that light it seems to be very properly before the Court; as I think the laws of France are very material to be considered, in determining, even by our law, on the validity of a contract of marriage had and made in France. So that the Court, by rejecting the sentence when pleaded in bar, has not determined that the sentence in France, when pleaded as a circumstance, is of no avail. Neither has Mr. Bogg waived all benefit of the sentence, by appearing absolutely, and pleading the sentence as a circumstance, which is evidence of the law of the place where the marriage was had, and will, in my opinion, be material in considering the points on which the case depends.

The general questions are two: 1st, whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage, in such a manner as

the laws of this country would deem to constitute marriage, if there was [399] nothing else in the case but a question on the fact of the marriage. 2dly, whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated, and pronounced to be good, being solemnized in France, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the law was so; but insisted that it ought not to be a rule of determination in this cause.

As to the fact of marriage, it is to be observed that it is a marriage between minors—that it is a clandestine marriage in a private house—not by the regular priest; that it is unfavourable and discountenanced by the laws of both countries: and if there had not been a special act of grace, none of the persons present at the marriage could have been, in this case, legal witnesses to prove it; since it is the constant practice in Ecclesiastical Courts to repel the testimony of persons present at clandestine marriages, till they have been absolved. Persons present at such marriages are excommunicate ipso facto: and in our Courts it is not thought necessary to have a declaratory sentence of an excommunication ipso facto, for the Court can ex officio take notice of it. The practice on this point has been confirmed by constant use, under the received maxim that *lex currit cum praxi*; and it has been so determined lately by Dr. Andrew in the case of *Collis*.

It is to be observed that this marriage was performed by a Romish priest, according to the Roman ritual. The Romish Church acknowledges several orders; though bishops, priests, and deacons, corresponding to those orders in the Church [400] at Rome, are only allowed by us; and in the form of making and consecrating bishops, 3 & 4 Edw. 6, c. 12. 5 & 6 Edw. 6, c. 1, s. 5. 13 & 14 Car. 2, c. 4, it is declared that no man “is to be accounted or taken to be a lawful bishop, priest, or deacon, or suffered to execute any function, except he be admitted thereto, according to the form following, or hath had formerly episcopal ordination and consecration.”

Bishop Gibson observes that this last clause was designed to allow Romish converted priests, who had been before ordained by a bishop, that such priests might be received without reordination; namely, that they might be received to exercise the functions of a priest, and to do the duties of the English clergy—but not to allow them to celebrate marriage according to the Roman ritual; for by the law of this country, it is, I apprehend, prohibited under severe penalties, for a Roman Catholic priest to be in this country, and to exercise any part of his office as a Popish priest in this kingdom.*¹ But as a priest Popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a Popish priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a priest. But upon what foundation a marriage after the Popish ritual can be deemed a legal marriage, is hard to say. Indeed the canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to English rites; but that contract, or *ipsum matrimonium*, does not convey a legal right [401] to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a Popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract that is considered by the canon law as *ipsum matrimonium*?

There may be other instances, but I have not met with any but that of *Arthur v. Arthur*,*² where a marriage by a Popish priest, by the Roman ritual, has been pronounced for: but that was a marriage in Ireland between parties, both Catholics, where the laws with respect to Papists are different; which laws, as the laws of the country in which the contract was made, the Court would respect. And in that case there was consummation, that purified any condition in the contract. There can be

*¹ 11 & 12 W. 3, c. 4, s. 8. Repealed 18 G. 3, c. 60. 31 G. 3, c. 32.

*² This was a case of appeal from the Consistorial and Metropolitan Court of Dublin (Deleg. 24 June, 1720) in a suit of restitution of conjugal rights on the part of the wife, in which the lawfulness of the marriage was denied on the other side, “as contrary to the laws, statutes and canons, and the provisions of the Act of Parliament (6 Anne, c. 16. See also 12 G. 1, c. 3, 19 G. 2, c. 13) in Ireland, for the prevention of clandestine marriages of minors of certain estate and condition,” &c. The Court below had pronounced the libel of the wife not proved; but the Delegates reversed that sentence and decreed to the effect of her prayer.

no doubt but that a marriage here by him who is in allowed orders, according to the English ritual, would be good by our laws. But I much doubt whether a marriage in England by a Romish priest† after the Romish ritual would be deemed a perfect marriage in this country: the act of Parliament having prescribed the form of marriage in this country and changed that condition, in the con-[402]-tracting part in the Roman ritual, "if Holy Church permit," to "according to God's Holy Ordinances;" and Acts of Parliament having prohibited to Roman Catholic priests the exercise of their functions. And I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, &c. How can a bishop try or certify such a marriage? Can he certify that English subjects, residing in England, were lawfully married according to the laws of England, if they were not married according to the rites prescribed by Act of Parliament for marriages in this country? Would a contract only by the intervention of a Romish priest, or any priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract.

What I have said relates only to marriages in England by Popish priests. For there can be no doubt but a marriage properly celebrated abroad by a Popish priest, after the Roman ritual, would be deemed here a good marriage; for I apprehend that by the law of England marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law that, if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as felony; * therefore a marriage in France is deemed a good marriage, though not agreeable to our law, for in matrimonial causes all laws take notice of the law of other countries.

As to the proofs relating to the asserted marriage in the present case it is not necessary to state them particularly. It is in proof from the [403] witnesses, and the answers of Miss Jones, that the parties became acquainted in June, 1741; that Mr. Scrimshire went two or three times afterwards to France and visited her; that he was intimately acquainted with her, had great attachment to her, and expressed a great desire to marry her. He proposes marriage, buys a ring, and applies to persons to get a priest to marry them, and declares his intention to marry. Three witnesses speak to the fact of the marriage, and all of them swear that it was free and voluntary. He goes home and returns to be married, which shews that it was done voluntarily. The paper, which is all of his own handwriting, and which is proved by Keating, the only surviving witness, to be free and voluntary, owns her to be his wife. He claims her two or three days after the marriage, owns her to be his wife, but desires that it might be kept secret. He made declaration to Mr. Asgel in 1744 that, if it was to do over again, he would marry her. In June, 1749, there is a recognition, when he seriously owned her to be his wife to her brother and Major Blagney. There were also many declarations on her side, and there is not a tittle of proof of any force or terror having been practised upon him, though it was pleaded.

The witnesses to the marriage indeed are not of the fairest character. The general character of the priest is bad. There has been a sentence against Macgrah, condemning him to the galleys. They were all present at a clandestine marriage; which in some measure affects their credit, and would have gone to their competency, had it not been for the act of grace. They differ in some circumstances. The priest says "that it was after [404] the Roman ritual." Macgrah and Keating and Jones say "that it was after the English ritual." The form is pretty much the same, they might mistake, but I am inclined to think that it was after the Roman ritual. Macgrah says "the priest set out for Bologne before Macgrah, and he did not see him again till he came into the room." The priest says "they set out together and arrived in the evening. That Macgrah left him and returned in three hours to the inn, and carried him to Mrs. Dunbar's house." Macgrah says "Bagot gave the priest five guineas." The priest says "Macgrah did this." Macgrah says "Cummins asked the parties if they continued in the resolution to marry." Keating says "that Bagot asked that question." Cummins says "Macgrah asked it," and

† But see the proof of marriage by a Popish priest of the Imperial Envoy, in *Fielding's case* for bigamy, A.D. 1706. State Trials, vol. 14, p. 133, 4, et seq.

* Kelyng, 79, 1 Siderfin, 171, vid. infra, p. 416.

there are some other differences. But yet, on the whole evidence taken together, there seems to be full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest; without which undoubtedly by our law it could only be a contract. The priest swears "that he was ordained a priest, and is so, and he is reputed as such." And though his orders are not produced, yet I apprehend that this evidence is sufficient to make legal proof of it; in which I am warranted by the determination in *Arthur's case*, where a marriage by a Popish priest was pronounced for, it having been sworn "that he was ordained and reputed so."

By the particular municipal laws of this country, a clandestine marriage by a Popish priest after the English ritual is not void, though irregular, though the priest and the parties marrying and present at it [405] may be liable to punishment for a breach of the law. But I am not satisfied, as I have before intimated, that a marriage in this country by a Popish priest after the Roman ritual could be deemed a good and legal marriage; especially where there has been no consummation. But as this marriage was had abroad, where the Roman ritual is in use, I should have had no doubt in pronouncing for it, had there been evidence that it was a marriage agreeable to the laws of that country.

But the great difficulty arises on the second question from the marriage being celebrated in France where, as it appears from Young's evidence, and the sentence of the Parliament of Paris, such marriage is null by the laws of France. It has been much insisted on, however, that the laws of France are of no consideration in this case, the parties being both English subjects, and not domiciled in France, which alone, as is contended, could subject them to the French laws.

The general principles which have been referred to on the subject of domicil are that a minor son is domiciled where his father lived, until the son comes of age, or settles in another kingdom; that domicil by birth is presumed to continue till the contrary is proved; that he only is said to have changed his domicil, "*Quando quis re & facto animum manendi declarat;*" and that "*domicilium non procedit, si ille haberet animum revertendi;*" and, therefore, "*Qui studiorum causa aliquo loco morantur, non domicilium ibi habere creduntur;*" that minors who may be with a mother or guardian in another country, or may be carried there by a mother's orders, cannot be said to have an intention to change their domicil, or to have a mind to be domiciled there; and "*requiritur neces-[406]-sario animus ut domicilium acquiratur, et domicilium ex animo contrahitur, et pendet ex animo.*"*

With respect to Miss Jones, it is contended that she is by birth English, and that her father is now living; that she has no estate in France, and is to be considered as domiciled in the country where her father lives; that there is no proof shewing any intention on her part to change her domicil; that she only went to France to visit a relation by order of her father, and for education; and had been there about eighteen months; and, being a minor, could have no *animus manendi* longer than her father would permit, particularly at the house of her aunt Mrs. Dunbar, where she was only a lodger; that she must be considered on principles of legal construction as being there for temporary purpose only, and with the *animus revertendi*.

With respect to Mr. Scrimshire, it is said that he was also a minor, by birth domiciled in England where his father died; that he had no estate in France and is to be presumed to be domiciled in England, the contrary not being proved; that he had gone to France on several occasions to visit his mother who had been living in France about two years and a half, and the last time he went, about fourteen days before this marriage, in order to proceed to Angiers for education; that the *animus revertendi* was to be presumed as to him as much as any traveller, and there was no act done by him or declaration which shewed that he had an intention to stay there, or any thing from [407] which such an intention can be inferred. The mother, as guardian, could not, by obliging him to live with her, effect a change of his domicil, since there could be no *animus manendi*, if it was done by order and constraint; and "*ex animo domicilium contrahitur.*" On these representations it is insisted that both parties being subjects of England, born here and sent over to France for education, and not having any estate on which the marriage in France could operate there, a

* C. 10, 39, De Incolis, &c. l. 2 and 7.

D. 50, 1, Ad Municipalem & de Incolis, l. 27, § 1, and many other authorities, especially Mascardus et Probationibus, conclus. 534.

residence such as there appeared to be could not give a foreign Court any jurisdiction; for that if it did, the consequence would be that the right of English subjects must be tried by foreign law, and the estates of English subjects lying in England must be governed by French law, which is not to be endured. This was, in general, the purport of the argument for Miss Jones. But I apprehend the case in judgment before me does not turn or depend on the mere question of domicil. The question before me is not whether English subjects are to be bound by the law of France; for undoubtedly no law or statute in France can bind subjects of England, who are not under its authority; nor is the consequence of pronouncing for or against the marriage, with respect to civil rights in England, to be considered in determining this case. The only question before me is, whether this be a good or bad marriage by the laws of England; and I am inclined to think that it is not good.

On this point I apprehend that it is the law of this country to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or [408] bad, according to the laws of the country in which they are formed; and whether they are not to be construed by that law? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision. By the general law, all parties contracting gain a forum in the place where the contract is entered into. All our books lay this down for law; it is needless at present to mention more than one. Gayll, lib. 2, obs. 123, says, "*In contractibus locus contractus considerandus sit. Quoties enim statutum principaliter habilitat, vel inhabilitat contractum, quoad solemnitates, semper attenditur locus, in quo talis contractus celebratur, et obligat etiam non subditum.*" And again, lib. 2, obs. 36, "*Quis forum in loco contractus sortitur, si ibi loci, ubi contraxit, reperiatur; non tamen ratione contractus, aut ratione rei, quis subditus dicitur illius loci, ubi contraxit, aut res sita est; quia aliud est forum sortiri, et aliud subditum esse.*" "*Constat unumquemque subijci jurisdictioni judicis, in eo loco in quo contraxit.*"

This is according to the text law and the opinion of Donellus and other commentators. There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country. So long as they resided there, each party might sue the other and bring the case before that jurisdiction, to be determined by the law of France. And this cause seems to have [409] been begun very properly in France against Miss Jones, while she was resident in France, and subject to that forum, in order to have it tried by its proper forum. For it appears that Mrs. Scrimshire, the mother of the minor, protested of the nullity of the marriage, by a protest, in which she gives a large account of the transaction, on the 3d March, 1744; and this protest was personally notified to Miss Jones in France.

It appears further that Mrs. Scrimshire, having had notice that some affidavits and a certificate of marriage were enrolled in an office in France on the 13th March, 1744, petitioned the seneschal, setting forth the protest and clandestine marriage, and the enrolment of the affidavits, acts, and certificate; and prayed to have the acts, &c. communicated to her, in order that she might draw such conclusions from them as might be lawful, in the proceedings to be had in regard to her son; and that the acts might be brought to be inspected by the judge for that purpose; and declared her intention to prosecute the parties for the raptus seductionis, as it is termed in the laws of France. On the 14th March this was likewise notified personally to Miss Jones, and in her answer she admits that she had such notice.

A proctor appears there for Miss Jones, and alleges that she was a minor, and not properly cited, being a foreigner. His objection was overruled; and I must suppose lawfully. The seneschal orders the acts, &c. to be delivered to Bagot: he giving security to produce them on an appeal. From this sentence Mrs. Scrimshire appeals to the official of Bologne, and sets forth the decree, and that she is materially interested to cause the marriage to be annulled; and prays that the acts may be [410] brought into Court, which are necessary to prove the marriage fraudulent, for the purpose of annulling it; and protests of presenting a petition to him for that purpose. The official inhibits the seneschal from delivering out the papers; but the official

having only authority over the seneschal, and to try the validity of the marriage, and not having criminal jurisdiction, it was thought proper to drop that proceeding by the advice of counsel, and to proceed before the Parliament of Paris, where effectual justice could be done, by securing the papers, and punishing the parties guilty of the raptus seductionis, and the marriage might also be annulled. On the 18th April, 1744, an appeal was accordingly interposed "from the sentence of the seneschal at Bologne, and from the celebration of marriage."

All this appears from the proceedings; and I am to presume that it was agreeable to the laws of France. The criminal proceedings for the raptus seductionis lasted from the 18th April, 1744, to the 27th February, 1749. On which last day, the French subjects, who had been privy to this transaction, were condemned to the galleys; and Miss Jones and others were banished for five years. And on the 26th of August, 1749, the marriage was annulled.

It has been much insisted in argument that a citation was taken out here in June, before the sentence at Paris, and that an absolute appearance was given by Mr. Bogg then. But it is to be observed that issue was not joined till the 26th October, 1749, after the sentence, and that the appeal to the Parliament of Paris was in April, 1744. And I do not apprehend that the mere appearance given here by Mr. Bogg, before the sentence in [411] France, is, in point of law, a waiver of proceedings in France, or of the law of France, or an electing of another Court.

The suit here is for restitution of conjugal rights, and a sentence in France is not of itself a bar to such suit. It is only evidence of what the French law is, by which the Court is to try the validity of the marriage or contract. If there had been no sentence in France, the party might have shewed that it was not a good marriage by the laws of France; and he might equally have denied the marriage, whether there had been proceedings and sentence or not at Paris; as I take it to be clear that both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage, or not, according to the laws of that country, which is still more strongly shewn in this case, by inserting the words, if Holy Church shall it admit.

I must observe also that the suit was commenced against Miss Jones, concerning the marriage in France, before she left that country; for, from the beginning, the proceedings by Mrs. Scrimshire were in order to annul the marriage: and though Miss Jones left France before the direct question on the marriage was brought before the Court in France, yet she was there during the time when Mrs. Scrimshire was taking proper steps to annul the marriage, and, on that account, I must consider [412] the cause as begun against her before she left France, and when undoubtedly, by her residence and marriage, she was subject to the jurisdiction of that country. She ought, therefore, to have staid in France, to have defended her rights there. She might have done so, notwithstanding the war. And there have been instances of persons doing so in this country.

As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, "*ad aliud examen*," to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.

This subject is much discussed by Sanchez,* to the following effect, that as to the maxim or general rule, "*Ut non teneantur peregrini legibus et consuetudinibus loci per quem transeunt*," this rule has exceptions; "*1st, Quoad contractuum solemnitatem; nam quicumque forenses, [413] et peregrini tenentur servare solemnitates in*

* De Matrim. lib. 3, De Clandestino Consensu. disput. 18, § 10.

contractu requisitas legibus et consuetudinibus oppidi in quo contrahunt; ratione enim contractus quilibet forum sortitur in loco contractus; hinc est contractum absolute initum, censi celebratum, juxta consuetudines et statuta loci in quo initur. Quod ita provenit, quia contractus sequitur consuetudines et statuta loci in quo celebratur." And a case (*ibid.* § 27) is put, as to inhabitants of a place where the decree of the Council of Trent, for avoiding clandestine marriages, is not received; suppose from England they go to places "per modum transitus, ubi obligat decretum," and marry there according to the laws of their own domicil. Some think that such marriage is good in the case of strangers, as agreeable to their own laws, to the law of the country in which they are domiciled, though not to the law of the place where they are married. But Sanchez thinks the marriage void, because it wants the solemnities, "quæ petunt leges loci ubi contractus initur; et quoad solemnitatem adhibendam in contractibus, solæ leges loci in quo contractus celebratur inspiciuntur." These authorities fully shew that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received.

The cases mentioned in the French advocate's opinion, as well as that quoted by Dr. Pinfold, from the *Journal des Audiences*, lib. 1, c. 24, establish this principle. It is likewise said that if the inhabitants of a country where clandestine marriages [414] are forbid go to a country where they are allowed, and marry there in transitu, the marriage is good; "peregrinos a domicilio absentes non teneri legibus illius, si contrarii vigeant in loco ubi reperiantur." According to this authority also it is plain that the laws of the country where a marriage is celebrated are to be the rule by which the validity of it is to be tried.

Voet *¹ also puts the point in the same manner. "Qua solemnitate, quibus modis, contractus quisque celebrandus sit, quando solemniter initus ac perfectus intelligatur, ex lege loci in quo contractus celebratur adjudicandum est; non vero ex statutis regionis illius, ubi sitæ sunt res immobiles, circa quas, primario, aut per consequentiam, contractus versatur." Mynsinger † also may be cited to the same effect.

And a case is stated of a French man of Paris and a minor going to Lorrain and marrying there according to law; the wife has a child, and then leaves Lorrain and goes to Paris and claims her husband. His friends institute a criminal prosecution to annul the marriage for want of consent of parents. One Court thought this marriage the raptus seductionis; but on an appeal the Parliament reversed that determination.

[415] So in Holland, Voet says, *² if an inhabitant of Holland contract a marriage in Flanders or Brabant, with a woman of the country, observing those rites which by the laws of Flanders or Brabant are required, it would appear that such marriage would be deemed good in Holland, "eo quod sufficit in contrahendo adhiberi solemnia loci illius, in quo contractus celebratur, etsi non inveniantur observata solemnia, quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo prescripta sunt." And the States of Holland have given two sentences in that manner. His own opinion however is that the marriage was bad, not upon general principles of law, but on account of a particular and positive law in Holland, which makes all marriages whatever of Dutchmen, wherever they be, void, unless the banns are published in Holland.

As to the practice of England, there is the case quoted by Dr. Paul of Miss Fairfax, daughter to Lord Fairfax, who was publicly married to Lord Abergavenny at Paris, she being a minor, and not having her mother's consent. A suit was instituted before the Parliament of Paris to annul the marriage; and it was annulled. She came to England and was maid of honour to King James's Queen, and was after-

*¹ Voet, in *Dig.* lib. 23, tit. 2, n. 85, fol. 55.

† *Singul. Observat.* cent. 5, obs. 20, n. ult. "Si quis in loco aliquo actum gerens, neglectis loci illius solemnibus, adhibuerit ea quæ vel domicilii vel rei sitæ statuta requirant, sive diversa illa sint sive pauciora. Ita gesta nullius fore momenti pronunciat, sive actum gerens extra domicilii locum servaverit solemnia domicilii, sive ea quæ requirebantur in loco rei immobilis sitæ."

This passage appears to be an abstract of the substance of the chapter, and not an extract from Mynsinger.

*² Voet, in *D.* lib. 23, *De Ritu Nuptiarum*, tit. 2, n. 4, fol. 20.

wards married to Sir Charles Carter; and Lord Abergavenny married Lord Bellasis' daughter. This shews that in marriages abroad by English subjects, the English law takes notice of the foreign law. For if the French sentence in that case was not to be taken notice of here, they might both have been prosecuted for [416] bigamy, and the children of the second marriage would have been bastards.

Kelyng also lays it down, that if a man marries in France and afterwards here, his first wife being living, he may be prosecuted for felony. And for this reason—because the law takes notice of foreign marriage.*

So where a foreign issue which is local arises, it may be tried here by a jury, according to the laws of the foreign country; and upon nihil debet pleaded the laws of that country may be given in evidence (2 Salk. 651. 6 Mod. 195, S. C.).

Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books—the practice of nations—and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and [417] that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *jus gentium* is part.

All nations allow marriage contracts; they are "*jus gentium*," and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries—that is, the law where the contract is made. By observing this law no inconvenience can arise; but infinite mischief will ensue if it is not. For instance, supposing this marriage should be declared good, might not Mr. Scrimshire nevertheless go into France and marry another woman there, the first marriage being null there: he might come into England after his marriage in France, and live here, and could not be prosecuted for [418] bigamy, according to Kelyng; for the felony, being done abroad, could not be tried here. The consequence of which would be that he might have two wives, and might have lawful issue by both in different places. His children in France would be bastards in England, but would be legitimate in France, and might inherit there; and the children by Jones would be legitimate in England, but bastards in France, and would not inherit there. The French woman that he married in France would have no right to English effects, for Jones is the lawful wife here. Jones would have no right to French effects, for she is not the lawful wife in France. And if, as it may happen, after they have had children, both should go to France, and should marry again, and have children in France—what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries?

* This question was moved to me at the Old Bailey, a man marrieth two wives, one in France and another in England, whether he may be indicted and tried for that felony here in England; and I took this difference that if his first marriage was in France, and the second marriage which maketh the felony was in England, then I was of opinion that he might be indicted and tried here for it, and the jury might on evidence find his first marriage in France, being a mere transitory act, and having nothing of felony in it; and our juries usually find such transitory acts, though they are done in a foreign nation; but if the first marriage was in England, and the second in France, then I was of opinion that he could not be tried for it here; because the act which made the felony was done in another kingdom, and felonies done in another kingdom are not by the common law triable here in England. Kelyng's Rep. page 79.

Again—If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again, because by the French law such a marriage is not good? And what would be the confusion in such a case? Or again—Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage; undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France, and the marriage should [419] be declared null, because the man was not domiciled; he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind the matter of domicil makes no sort of difference in determining them; because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not. Neither does it make any difference, whether the cause be that of contract or marriage; for if both countries do not observe the same law, the inconveniences to society must be the same in both cases. And as it is of consequence to the subjects of both countries, and to all nations, that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed that all nations do consent to determine on these contracts, by the laws of the country, where they are made; as such a rule would prevent all the inconveniences that must necessarily arise from judging by different laws, and is attended by no manner of inconvenience, but is for the advantage of the subjects of all nations.

In the present case, there has been a sentence of the proper forum, pronouncing on the whole facts of the case, and the principles of the laws of France, as applied to them. In matters that belong to the *jus gentium*, our Courts always regard the sentences of a proper Court. As to sentences in England, by a proper Court, on a matter within its jurisdiction, without doubt they may be pleaded in bar to a suit here for the same matter.

[420] The probate of a will, or a sentence for or against a marriage in the Ecclesiastical Court, will be received in bar, where the same is attempted to be drawn into dispute at common law. But the law of this country goes farther than the sentences of our own Courts. If an Englishman makes a will abroad, and makes a foreigner executor, and has no effects in England, and the executor proves the will lawfully abroad, that probate or sentence of the proper court establishing the will, as to effects there of a man domiciled there, would be a bar to a discovery in Chancery of effects abroad.

In commercial affairs under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty; the sentences of all Courts of Admiralty are taken notice of by one another; they are obligatory by the law of nations. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. All courts of admiralty in Europe are governed by the same law—the law of nations. And it is just, by the law of nations, for nations to be aiding and assisting to each other. And therefore, as the law of England takes notice of the law of nations in commercial and maritime affairs; because all countries are interested in those ques-[421]-tions; and as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so; I am of opinion that this is the *jus gentium* of which this and all courts are to take notice.

The principle and rule of law, as laid down in our books, is—

“*Quod justæ nuptiæ solum dicuntur, quæ rite et secundum præcepta legum contrahuntur.*”

“*Quod non dicuntur conjuncti, qui contra leges juncti sunt.*”

“*Quod contra jus non sunt nuptiæ.*”

And Lindwood says,* “*Verum est quod ubi lex vel statutum resistit obligationi,*

* Fol. 155, lib. 3, tit. 9, De Locato et Conducto v. Nou Teneant et v. Obligatur.

tunc nec initur civilis, nec naturalis obligatio. Ratio est quia obligatio naturalis dicitur de jure gentium. Sed de jure gentium debemus obedire majoribus, ille ergo qui contrahit contra præcepta legum, facit contra jus gentium, unde merito non obligatur etiam naturaliter."

So that it is certain that, by the law of all countries, a contract against law has no moral or natural obligation.

Therefore, under the circumstances of this case, as here is satisfactory evidence from the proceedings and sentence in France, and from the evidence of witnesses that this marriage was celebrated in France, contrary to the laws of France, and is null, and not obligatory, either civiliter or naturaliter, by the laws of France; as there is no positive [422] law of this country, which prohibits the Court from taking notice of the jus gentium; and as the law of the country, where the contract is made, seems to me, according to the law of nations, to be the only rule of determining in these cases; I cannot pronounce for the marriage, but must pronounce against it, and dismiss Mr. Scrimshire from the suit. But under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily; and that this affair has been prejudicial to Miss Jones, who is a lady of good character: I shall, agreeably to precedent, give a sum to her nomine expensarum, and fix it at £400. The lady may be happy, I hope, in a man that deserves her better; if she does not think so, it is a great satisfaction to me that she may have the opinion of better judges.

The Court pronounced for the form of sentence porrected by Bogg, viz. "That the proctor for Sarah Jones, calling herself Scrimshire, had not fully and sufficiently founded or proved his intention, and that the said John Scrimshire ought by law to be dismissed from the instance of the said Sarah Jones as to the matters deduced and prayed by her in this cause, and from all further observation of judgment in this behalf."

[423] HARFORD v. MORRIS. 2nd Dec., 1776.—Nullity of marriage by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian: 2dly, of invalidity of the ceremony performed not according to the lex loci, sustained ultimately on appeal on the facts applying to the first point: the libel having been rejected in the Court of Arches.

[Referred to, *Field's Marriage Annuling Bill*, 1848, 2 H. L. C. 60.]

This was a case of nullity of marriage brought in the Court of Arches by letters of request from the Consistory Court of St. David's, on a marriage had abroad, as alleged, contrary to the lex loci, between a guardian and ward of very tender age, under circumstances of force or fraud as pleaded. The admission of the libel was opposed, and it was rejected; but afterwards admitted on appeal.*

Judgment—*Sir George Hay*. This cause comes before the Court in the name of Frances Mary Harford, by her guardians Hugh Hamersley and Peter Prevost, against Robert Morris, praying the Court to pronounce for the nullity of marriages, which she admits to have been celebrated, the one at Ypres in Austrian Flanders, the other at Ahrensburch in Denmark, with Mr. Robert Morris. In all cases of this nature it is highly necessary that great caution and deliberation should be observed by the Court, because of the consequences of the nullity of marriage to the parties and to the public. It is of the utmost consequence, therefore, and extremely necessary to allow of every delay that could be allowed properly, in order to bring the whole circumstances of the case before the Court.

The party Morris does not appear here under any protest but absolutely; therefore a libel has been exhibited. In that libel it is stated that Miss Harford is the illegitimate daughter of Lord Baltimore, that she is extremely young, was born upon [424] the 28th November, 1759, and was placed at a boarding-school by Morris, who was one of her testamentary guardians. It is alleged that he first frequently visited her there, wrote notes to her, and formed a scheme of marriage; carried her to public places here in England, and conveyed her at last to France, and from thence to the Austrian Netherlands, thence to Hamburg, thence to Wandsbeck and Ahrensburch

* This case is printed from a MS. of the whole proceedings collected from the documents in the cause, and from the notes of a short-hand writer, by Mr. Dodwell, a very intelligent practitioner of that time.

in Danish Holstein. The libel sets forth two marriages, one on the 21st May, 1772. He went into France the 16th of May; they had not been on the Continent above five days before they arrived at Ypres, and on the 21st of May, 1772, they were married by a chaplain in the Dutch garrison there, in the presence of two witnesses who are mentioned in the libel, and of other persons. They did not stay in that place more than one night, but went from thence to Lisle, from thence to Holland, and to Hamburg and other places, and upon the 3d of January, 1773, a marriage is pleaded to have been had at Ahrensburch, in virtue of a licence from the king of Denmark, granted upon the 5th December, 1772. That is a licence to dispense with all form, and the marriage was celebrated at a private house in the presence of four witnesses mentioned in the libel; one of these marriages was in the English language; one was a public marriage in a church; the other a private marriage by special licence in the presence of witnesses.

The libel sets forth that they were had contrary to the orders of the Lord Chancellor, and without the consent of the parent or guardians, in evasion of the laws of this realm, and contrary to the laws of those countries where they were celebrated; and upon all or some of those accounts, [425] it is prayed at the close of the libel that the Court would pronounce both marriages to be null.

The King's advocate, in arguing this case in June last, said that Miss Harford, all circumstances considered, was under force and restraint, and was not *sui juris*; that she must be considered as acting from fear and under imposition; and that on that account the marriages were void. He likewise said that she was seduced; that she was imposed upon by fraud as well as by violence; and upon that account the marriages were void; and arguments of the same kind have been used by one of the counsel to-day. The Ecclesiastical Court certainly has jurisdiction in all cases whatsoever with respect to the marriage of English subjects wherever celebrated. If celebrated in any foreign country, and it can be shewn that such marriage was contrary to the general law, to the principles that obtain everywhere with respect to marriage; that it was under force or restraint of either of the parties; that it was incestuous or liable to any other impediment under which, by the law of nations, it is not allowed to marry; upon any such objection it is proper to bring a suit of this nature before the Ecclesiastical Judge; and wherever such marriage was celebrated, it may upon such objection be set aside. The Ecclesiastical Court has complete jurisdiction to decide the marriages of English subjects by the English law; and therefore if there was any thing to shew the marriage void by the general law respecting marriages, or by any particular law of the realm, or that a marriage celebrated in evasion of the law of the realm was to be set aside, if that proposition was anywhere tenable, certainly this [426] Court has full jurisdiction to enter into the cause of nullity upon those accounts.

With respect to the behaviour of Morris, I have nothing to do with his moral conduct; he is answerable for that to his own conscience; and in other places for his breach of trust and contempt of the High Court of Chancery; and such proceedings the laws of this country may punish in a proper way; but his having used any arts or any influence whatsoever, such as entreaties or application by way of courtship to this young lady, will not, in my apprehension, affect the validity of the marriage which he has contracted with her. What is pleaded in this case? In the twelfth article it is stated "that after Mr. Morris had made use of the arts aforesaid, that is, by sending notes and cards, and making appointments, and carrying the young lady about to public places, and to dinners and to balls, and to Ranelagh, and amusements of that sort, by the arts aforesaid he seduced the said Mary Harford, falsely called Morris, from the house of Mrs. La Touche; and when he had gotten her into a coach with him, he, in violation of his duty and trust, took advantage of the infancy, ignorance, and inexperience of the said Frances Mary Harford, falsely called Morris, and by divers specious pretences and entreaties persuaded and prevailed upon her to go with him to France." When she was in France, at Bologne, as it is expressed in the thirteenth article, "she wished she was at home again;" and it is further pleaded that Mr. Morris threatened that he would kill himself if she went home again, and that terrified her." No violence to her is pleaded, but he said "that he would kill himself," unless she would stay with [427] him. The article says, "she consented;" and the question will be, whether a consent so obtained will vitiate every thing that followed? If she acted under terror at the time when this marriage was solemnized it might be a good ground to set it aside. But she goes from place to place with him;

according to the plea she goes to Ypres ; there they sign each of them a declaration which was not pleaded to be signed under any constraint. But it is pleaded that the declaration is false in fact, that it sets forth dates and an age not true, and that there was no parent or guardian ; but nothing is pleaded whatsoever with respect to force or violence used by Morris to make her sign that declaration. It must be taken, therefore, that she signed it voluntarily with regard to the marriage, where the marriage is said to be solemnized.

In what manner did they proceed after the marriage ? On the next day they went first to Lisle, then to Hamburg and other places, and were pursued by the guardians as soon as they had got information, which was by a letter he wrote himself by which they were acquainted with the marriage. The libel then states the order of the Court of Chancery upon which the guardians went abroad in pursuit of her, but without success ; and that they obtained orders from the Court of France and from the Senate of Hamburg at the time she was there ; but still they could not obtain her as she was gone to Wandsbeck in Denmark ; and she was married at Ahrensburch on the 3d of January, 1773.

With respect to what the temper or conduct of Morris was, whether exceptionable from the means used to seduce her, there is nothing pleaded that shews the lady was under any sort of constraint, [428] or that any violence was used, or that she was forced to do the acts which she now complains of. It is not stated that she is not of marriageable age. If that had appeared, the libel would be admissible certainly under the general law ; but there is no such plea. It is admitted that though she was extremely young, being born in November, 1759, she was of marriageable years. It is pleaded, indeed, that he carried this child here and there, but she was above twelve years of age and a half.

The Court is to attend only to legal objections, and not to the other conduct of the parties. Is there any legal objection with respect to the marriage ? She was of age to consent. It appears upon the plea that she did consent, and the contrary does not appear. She being of proper age, being free, and the marriage voluntary, as appears by the plea, I cannot think there is any ground in that part of the libel sufficient for me to receive it by way of laying a foundation for a sentence of nullity of marriage.

The next question is, whether by the law of England this marriage is valid ? It is stated throughout that it is a marriage without the consent of the natural mother of the party, and of the testamentary guardians and the Lord Chancellor ; and that the parties went into a foreign country to evade the laws of this realm. Whether upon that account, or any of the accounts already mentioned, it is void by the law of England, is the first question.

Parties may go out of England and marry by necessity or choice ; in either way a foreign marriage is not void upon that account by the laws of England. But it is said they go in violation of the order of the Chancellor and without the consent of parents and guardians. [429] What is the law of England that requires the consent of parents and guardians ? It is the marriage act. One of the greatest magistrates that ever appeared in this country explains it that the view of that act was to restrain the abuse that was so scandalous in this country from clandestine marriages, and to get proof of marriages, which otherwise might become uncertain ; as it is, wherever you cannot have evidence of the fact of the marriage being rightly performed, and legitimacy become uncertain. The principal view of that law was to affect such marriages. The law does, indeed, in one respect put a restraint, which was not known to the common law, upon the marriage of minors without the consent of parents ; but it does not make all the marriages of minors, even in England, void. Marriages by licence only are void for want of consent of parents and guardians. If this marriage had been in England, and if instead of going abroad the parties had been married in any great parish of this town or country by banns, would that marriage have been good or not by the laws of England ? No law says that it shall be void. It is a marriage by licence only that is void by the law of England for want of consent of the parents or guardians.

It is observed also that the act makes particular exceptions, without which the purpose of the marriage act, though an exceeding good act, might have been questioned before this time, if there had not been so many ways to avoid the restraint put upon the marriage of minors. It is provided that nothing in this act shall extend to marriages in Scotland, nor to any marriages solemnized beyond sea. Then marriages in Scotland and beyond sea by the law of England remain in the same

state [430] as if the statute had not passed. Marriage in Scotland, if not contrary to the law of England, is good, and it has been so determined.* That determination passed, not on the ground that the marriage was valid in Scotland, and that therefore it was good—nothing was laid before the Court to shew that the marriage was valid in Scotland—but because the Act of Parliament did not put any restraint upon English subjects being married in Scotland, with respect to the consent of parents. On that ground it is that those marriages are held good, not being contrary to the law of England. The same holds as to marriages beyond sea. For English subjects going abroad, or to Scotland, to marry English subjects, have an exemption from that restraint in the act. What was the case before the marriage act? Will any body say that before the act, a marriage solemnized by persons going over to Calais, or happening to be there, was void in this country, because such a marriage might be void by the laws of France, as perhaps it was, if solemnized by a Protestant priest, whom they do not acknowledge, or if in any way clandestine, or without consent; and that therefore it should be set aside by a Court in England, upon account of its being void by the law of France? No. The laws of the state to which the parties are subject must determine the marriage, unless you can shew that the law of the other country is that by which its validity is to be decided.

That brings me to the other great consideration in this case, whether the validity of these marriages, being solemnized in Ypres and Denmark, are to be tried by the laws of those countries. If they are, [431] the laws of those countries must be laid before the Court, and proved in the best manner possible; not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates, laying the ordinances of those countries before the Court. Without considering how far that law is capable of being proved in the present case, the previous question arises with respect to jurisdiction, whether the laws of that country in which the marriage is celebrated should operate, merely because it was celebrated there?

I conceive the law to be clear that it is not the transient residence, by coming one morning and going away the next day, which constitutes a residence to which the *lex loci* can be applied; so as to give a jurisdiction to the law, and cause it to take cognizance of a marriage celebrated there. It is certain that domicile, or established residence (that is, such a kind of residence as makes the party subject to the laws of that country) may have that effect; and, with respect to persons so domiciled, the laws of the country must be adhered to in contracts made there. This was the case of *Scrimshire*; all the proceedings of the Court of France were laid before the Court. I remember it, though it was a long time ago; and I was counsel for the lady. The mother of the young man was at Bologne, where they had gone *animo morandi*. It was stated in all the proceedings that they were domiciled in France; he went there to reside for purposes of education, and did reside there; and the mother continued to reside there till she obtained the sentence that was pleaded in the Consistory Court. I do not in the least call in question that determination in the Consistory Court. Every man has allowed the great and extensive knowledge of [432] the Judge; but he founded his judgment upon the sentence given in that Court, which had assumed jurisdiction and had a right to assume it; he paid all respect to the judgment, and upon that he gave his opinion that the party suing should be dismissed.

There was a sentence then in that case given in a competent Court, trying the question in a country where the parties were domiciled and settled. But what is this case? The parties arrive at Ypres the 21st, are married and go away on the 22d. And so strong is that circumstance felt that it is pleaded in the 14th article of the libel, "that neither the said F. M. Harford, nor Robert Morris, ever was a subject of the French King, nor of the Empress Queen, or of the States General of the United Provinces, nor were resident in the said city of Ypres." The counsel have argued that there was no residence, that the residence in both places was fictitious, and merely for the purpose of this marriage. Can that give jurisdiction to the Courts of Ypres and Denmark, if the residence was such as to be called no residence there, and was only for the sake of this marriage—if they were transient passengers, voyageurs, not going into the country with a view of becoming subjects of that country. And here I must observe that I do not mean that every domicile is to give a jurisdiction to a foreign country, so that the laws of that country are necessarily to obtain and

* *Compton v. Dearcroft*, Arches, 1767, Delegates, 1769. Vide *infra*, p. 444.

attach upon a marriage solemnized there; for what would become of our factories abroad, in Leghorn or elsewhere, where the marriage is only by the law of England, and might be void by the law of that country; nothing will be admitted in this Court to affect such marriages [433] so celebrated even where the parties are domiciled; but where the parties are not domiciled, and only going, I will not say to evade the laws of this country, as that is an improper expression, but to celebrate a marriage there, by the laws of this country, it shall not be affected by the marriage act, from which persons are expressly exempted that are beyond the sea. Can such a marriage then be called in question in this Court? I cannot say that any more than I can say a Scotch marriage shall be called in question, to affect the rights of so many people married under the notion of the marriage act not reaching them, where they mutually contracted themselves. If there is nothing in this case, which shews that Mr. Morris can legally be accused of violence or any misbehaviour, such as will affect a marriage—if there is nothing contrary to the laws of England, and if the laws of foreign countries (however clear) do not reach this case, because the parties are not subjects there, I cannot say that it is contrary to the law of England. There was no inhabitancy in the provinces of Flanders, nor of Holland, nor the United Netherlands, but on the contrary, they went as subjects to the crown of Great Britain, and must be considered as strangers there. The question then must depend chiefly upon this, whether according to the laws of Great Britain, by which they are obliged to regulate themselves, they have done the same as in Great Britain would be considered as a good and lawful marriage. The very plea states that it was not against the laws of Great Britain. What am I to conclude from thence? If the suit on this marriage had been brought at Ypres, or in Denmark, the Courts of those countries would not have tried it there. They [434] would have said, “we have nothing to do with you, you are not our subjects.” And so the Danish lawyer has expressed himself in giving his opinion. I am told also by the counsel that the Danish residence was as fictitious as the other; and I take it to be so; as the plea asserts that Mr. Morris falsely stated himself to be an inhabitant of Denmark, and a freeholder of Wandsbeck, where he was said to reside.

This is then a case which may be determined upon the libel; there is nothing affecting this marriage from the general law, from the *jus gentium*, and nothing contrary to the law of England. The laws of Ypres and Denmark do not reach the case; and they ought not to be pleaded upon it.

I do not say that foreign laws cannot be received in this Court, in cases where the Court of that country had a jurisdiction; or that this Court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the Court to determine by those foreign laws. I think it extremely material that a question of this nature should be determined at once. I hope it will go to the Delegates, that it may quiet every question of this sort. I must declare again, though I respect and shall do every thing in my power to carry into execution that excellent law, the marriage act, I never will interpose, as a Judge of this Court, judging according to the laws, of this country, in cases of marriage, to carry the restraints of that act further than the law intended they should be carried.

I will only add that if foreign Courts have jurisdiction, they are open. Why does not the party go to them? Every Court may determine where it has jurisdiction. If they have none, it is absurd [435] to say that the Ecclesiastical Court here should determine, by the laws of that country, which has no jurisdiction. One or the other has jurisdiction. Therefore take which you will—it is impossible for the laws of another country to be the rule of this Court. I do not say that foreign law cannot in any case be considered; but the case must be extremely clear, as clear as in that which was before Dr. Simpson in *Scrimshire's case*. There was evidence of jurisdiction assumed and exercised and for good reasons. The whole of the proceedings in France were transmitted to the Court; and when that is done, the Court will determine upon the operation and force of such sentence so introduced; but what danger would there be to the subject to make questions of this sort determinable by foreign laws? I put it upon the clear proofs which appear upon the libel itself, without taking advantage of the words of the libel, and with reference to the substantial character of the marriage there described, I cannot find any precedents which can possibly lay a foundation, for adding the law of that country, where the marriage was actually celebrated in the manner which appears in this case.

Suppose a man goes to Calais, marries there and comes away the next day, I should hold that a good marriage, according to the laws of this country. That is as much a good marriage, and as agreeable to the law, as a marriage in Scotland. I shall never think it my duty to enter into the laws of France or Denmark, to apply them in such a case as this; for all the foreign laws, as the several advocates have said, relate to subjects, and to people to be considered as subjects; and these people are not so to be considered even upon their own shewing. Upon the arguments which I have [436] heard, therefore, and upon every view which I can form of this case, there appears to be no foundation in law for this libel—and therefore I reject it.

An appeal was prosecuted to the High Court of Delegates, and a full commission was granted, consisting of three Spiritual Lords, the Archbishop of York (Markham), the Bishop of Rochester (Thomas), and the Bishop of Peterborough (Hinchcliffe): Three Temporal Lords, the Earl of Hillsborough, Earl of Galloway, and Lord Sandys: Three Judges of the Common Law Courts, Mr. Justice Willes, Sir Beaumont Hotham, Sir James Eyre: Three civilians, Peter Calvert, LL.D., Dean of the Arches; Sir James Marriott, Knight, LL.D., Judge of the Admiralty; William Macham, LL.D.

Counsel for Miss Harford, the King's Advocate, Dr. Wynne; the Solicitor General, Mr. Mansfield; Mr. Kenyon, Dr. Compton, and Mr. Dunning. For Mr. Morris, Mr. Bearcroft, Mr. Arden, Dr. Harris, Dr. Bever, Dr. Scott, and Mr. Erskine.

On the 28th February, 1781, the Court reversed the sentence of the Court below, and admitted the libel and retained the principal cause; and on the 21st May, 1784, the cause having been fully argued on the proofs, &c. the Delegates pronounced the said pretended marriage, howsoever had and solemnized, &c. null and invalid.

In *Fust v. Boverman*, Arches, 22d February, 1790, the Court (Sir W. Wynne) adverted to the grounds of that judgment, and observed: "The case of *Harford v. Morris* was that of the marriage of a girl above the age of legal consent, but taken from school by one of her guardians; it was argued on the law as void by the *lex loci*. But the Judges during the argument desired the counsel to consider whether the marriage might not be declared void on the ground of force and custody. That point was argued by order of the Court, and it is well known that the decision passed ultimately on that principle."

It had been said in argument at the bar, and was not contradicted by the Court, "that Mr. Baron Eyre was understood to have said that he felt great difficulty on the other point."

[437] MIDDLETON v. JANVERIN, FALSELY CALLING HERSELF MIDDLETON. Arches, 21st Nov., 1802.—Marriage of English subjects celebrated abroad, not according to the *lex loci*, held invalid.

[Referred to, *Ogden v. Ogden*, [1908] P. 63.]

This was a suit of nullity of marriage brought by Edmund Pytts Middleton against Martha Janverin, calling herself Middleton. The marriage was had between the parties at Furnes, in Flanders.

The case was argued by Sir John Nicholl and Dr. Laurence on the part of the husband: and by Dr. Arnold and Dr. Swabey for the wife.

Judgment—*Sir W. Wynne*. This is a suit of nullity of marriage, brought before me by letters of request from the Chancellor of Winchester, by Edmund Pytts Middleton against Martha Janverin, falsely calling herself Middleton. The facts pleaded in the libel and admitted in the personal answers of Martha Middleton are, "that Edmund Pytts Middleton, then a minor between the age of sixteen and seventeen (his father being dead, and his mother married to a second husband), was, in the month of December, 1776, sent to the town of St. Omer, in French Flanders, for the purpose of education, and of learning the French language; that he arrived at St. Omer on the 25th of December of that year, and there became acquainted with an English woman of the age of twenty-eight years, who at that time lodged and boarded at a private house at St. Omer. On the 28th of March following, they set out with two English ladies for Austrian Flanders, in order to procure a marriage, and arrived at Furnes, which was then one of the [438] barrier towns under the dominion of the empress queen, but, by virtue of the treaty of Utrecht, was at that time garrisoned by a body of troops in the service of their High Mightinesses the States General; that they arrived at an inn on Easter Sunday, and that, very soon after their arrival, one of the ladies enquired whether there was not a minister who married English persons

there, and was informed that Mr. Vanderbrugge, minister of the Dutch garrison, had married several English people there, or to that effect."

She further answers, "that although she was present when the said conversation passed, that she did not understand the same, because such conversation was carried on in the French language, which she did not understand; she says that about eleven o'clock in the morning of Easter Sunday, the 30th of March, 1777, she, with the said Edmund Pytts Middleton and two English ladies, went with the landlord of the inn as a guide to the house of Mr. Vanderbrugge, who was, as she believes, a priest or minister in holy orders of the Calvinistic or Lutheran Church; that on her arrival there, Mr. Vanderbrugge was informed by one of the English ladies that Edmund Pytts Middleton and this respondent were desirous of being married by him, and that he did celebrate a marriage between Edmund Pytts Middleton and this respondent, in a room in his house, in the presence of the two English ladies, and a man who officiated as clerk on the occasion; and she believes that such marriage was solemnized in the Dutch language, and that Edmund Pytts Middleton, the two English ladies, and herself, were then all [439] ignorant of that language; that the marriage was solemnized without any publication of banns, licence, or dispensation previously obtained, and that it was had without the knowledge of his mother or her husband, but whether he had any guardian she does not know. She says that after the solemnization of the marriage they quitted Furnes, and proceeded together to Nieuport, where they staid all night; and on the day following went to Bruges, and from thence to Lisle, and returned to St. Omer about a week after they had quitted it. She says that during the journey from Furnes to St. Omer, it was proposed by this respondent to Edmund Pytts Middleton that, on their return to St. Omer, no notice whatever should be taken by either of them of the aforesaid marriage so had and solemnized between them, and accordingly they did not take any notice of such marriage; that they never lived or cohabited together, nor owned and acknowledged each other as man and wife at St. Omer, but that each of them lived as before, apart, in their respective boarding-houses." She further says, "that she did not return to England, but remained at St. Omer until about the 31st of May, 1777, when she left that place and arrived in England on the 3d of June following; and she believes that Edmund Pytts Middleton remained at St. Omer until about the month of October, 1777, when he also returned to England; that after that he frequently visited the respondent, and at such times often earnestly requested her to keep the marriage a secret, alleging that he had reason to believe that Edmund Pytts, who was his uncle and godfather, [440] and intended to give him a considerable fortune, would be much displeased and offended at him, in case he should hear that he was married to this respondent, and therefore she continued to keep the marriage a secret from the said Edmund Pytts; and this respondent believes that about the beginning of 1780 the said Edmund Pytts Middleton went to the East Indies and has ever since resided there, and that she has always remained in England, and considered herself and claimed to be the lawful wife of Edmund Pytts Middleton; and that since he has been in the East Indies she has written and sent several letters to him there, expostulating with him on his cruel and neglectful behaviour towards her, and entreating him to remit her some reasonable maintenance as his lawful wife, but this respondent never received any answers to either of the said letters."

Mrs. Catharine Hansard, the mother of Mr. Edmund Pytts Middleton, says, "that about October, 1777, her son returned from France to England, and continued from that time until the beginning of 1780 constantly resident with her and her husband; and during that time, the defendant Martha Janverin never lived or cohabited with her son as husband and wife." Mr. Hansard deposes to the same effect.

The libel, after stating the facts of the case, pleads, "that the town of Furnes was one of the barrier towns of their High Mightinesses the States General, and that there was a church or chapel there for the use of the garrison; and further states that by the laws and ordinances of the States General in 1580, and by the resolutions [441] dated March 13th, 1656, relative to the edict published by the Emperor Charles the 5th in 1540, all of which are now in full force, it is declared 'that marriages can in no way stand valid, without the previous knowledge of the free state of the contracting parties, and without the consent of the fathers, mothers, parents or guardians of the parties, and that after publication of banns on three several Sundays in the place of the parties' domicile, or legal dispensation of such publication being otherwise procured; and that by the decree of the Council of Trent made in 1563, which is received and obeyed

as law in all the Austrian Low Countries, 'All marriages which are not solemnized by the proprius parochus, or priest of the place, where the parties or one of them, have their residence, or by some other priest with the licence of their own priest, or of their ordinary, are declared to be null and void ;' and that by the laws of their High Mightinesses, as well as of the Austrian Low Countries, the said pretended marriage of Edmund Pytts Middleton and Martha Janverin was and is null and void."

In proof that this is the law of the United Provinces, to which this garrison in March, 1777, was subject, they have examined four gentlemen, who are advocates, practising in the Court of Judicature at the Hague, and have been so for twenty years ; and they have also examined four gentlemen practising in the Courts in Austrian Flanders, both with respect to the law and the governing powers, under the circumstances pleaded in the libel ; and they conclude, "that by the laws of the United Provinces of the Low Countries, and the ordi-[442]nances of the States of Holland in 1580 and 1656, there is no doubt but that the marriage is null and void on three grounds ; first, on account of the incompetency of the minister who celebrated the same ; secondly, on the minority of Edmund Pytts Middleton ; thirdly, from the want of publication of banns."

It has, however, been said that evidence of opinion that such is the law is not that evidence of the law which the Court ought to require, but that it ought to have had an authentic exemplification of the laws and ordinances of those countries. Now, I think, to obtain that at this time of day would not be a very easy thing ; the decrees of the Council of Trent are in print, and in every body's hands ; and the particular parts of the laws, which are referred to by the advocates, are copied into their opinions ; therefore, I think there is every authentication, and every ground the Court can have, to believe that such ordinances and such laws as they mention, were actually by proper authority published, and were at the time in question valid and in force. To be sure, the best evidence would be a sentence of a Court of Judicature of those countries. In the case of *Scrimshire v. Scrimshire* (vide supra, p. 395) that was obtained ; but in this case that would be impossible, because neither of the parties resided in the place where the marriage was performed, even for a day, but came away directly ; more particularly, considering how long it is since the transaction passed, and the revolution which has taken place there, it would have been impossible to have obtained any sentence of a court of judicature on the subject.

[443] It, however, seems to me that the opinion given in this case by eight gentlemen well acquainted with the laws of those countries (and they have stated themselves, upon their oaths, to have been in official situations which they describe) is the best evidence that can be given, of what was the law of those countries at the time of the transaction ; and I am convinced by it, that by the decrees of the Council of Trent and the laws of Holland, to which this garrison was subject, the marriage in question is absolutely null and void, as is declared by those persons.

It is, however, contended that admitting the law to invalidate the marriage in those countries, yet that is not the law by which this case is to be decided in this Court. It is not the *lex loci* where the marriage ceremony is performed, which is to determine the question, but you must find out some other law, and that is declared by the counsel for Mrs. Janverin to be the law of England. Now, in respect to the *lex loci* having been adopted as a rule, I think the case of *Compton v. Bearcroft* proves it very strongly. In that case the Court of Delegates (vide infra, p. 444) affirmed the rejection of the libel which was given in against the marriage on different grounds, as I have understood, from those which were taken in the Court of Arches, and because the marriage was a good marriage in Scotland, and if all facts pleaded in the libel were proved, the marriage could not be pronounced void under the marriage act ; in which it is expressly declared that it shall not extend to Scotland. On those grounds it was, as I have understood, that the Delegates rejected the libel ; the case of that marriage was therefore determined [444] by the *lex loci*. Those persons having gone to Scotland, and been married in a way not good in England but good in Scotland, and not affected by the marriage act were considered to have contracted a valid marriage.*

* There is a difference in the account of that judgment as explained here, and supra, p. 430.

The form of pronouncing judgment in the Court of Delegates, without any

But the case of *Scrimshire v. Scrimshire*, which was determined in 1752, was a direct and positive sentence upon the merits of the case which can-[445]-not be distinguished from the present, except by the different residence of the parties. Mr. Scrimshire was a bachelor of the age of eighteen, and Sarah Jones of the age of fifteen; and being at Boulogne in France they were joined together in holy matrimony according to the rites and ceremonies of the Church of England. That cause began as a suit for restitution of conjugal rights. An allegation was given in reply, "that his mother had been in France for some time; that he, about thirteen or fourteen days before, went over to visit his mother; and there met with two Irish officers, by whose interference this marriage was procured. That in order to obtain a sentence against the marriage, a suit of nullity had been promoted by his mother at Boulogne; it went on for a short time there, but the Court refused to call in what is called the act of marriage. That in the year 1749 an appeal was [446] carried to the Parliament of Paris. That there two sentences were obtained: one in a criminal form, by which the minister and the officers were condemned for nine years to the galleys; and another pronounced the marriage to be null and void." In the suit here, the validity of the marriage was thus brought in question, and the Court pronounced against it and dismissed Mr. Scrimshire. It cannot be denied that this was a sentence which proceeded entirely upon the laws of France. If the marriage had passed in this country in the year 1752, celebrated by a priest of the Church of Rome, according to the ceremonies of the Church of England, it would then have been a good and valid marriage by the law of England; but the law of France being different it was set aside. It is said that was a single case, resting only on the opinion of one Judge, and that there was no appeal. But I also remember to have heard that the judgment was founded on great deliberation, and that Lord Chancellor Hardwicke

declaration of the grounds of the sentence, may have given rise to a different construction of the opinions of the judges on this point. The libel, which is here introduced, will shew the ground on which the nullity was originally alleged, on the principle of holding English subjects, going to Scotland to evade the provisions of the marriage act, to the consequences of that act. That appears to have been the gist of the libel and of the arguments, so far as they have been traced in a very imperfect note. When that point was overruled, and the libel deemed inadmissible on that ground,(a) in which the Court of Delegates concurred with the judgment of the Court below, it might not be material to declare whether the law of England, as explained by Sir G. Hay, or the law of Scotland, as here stated, was supposed to be operative. In this manner the difference of construction may have arisen. The libel pleaded, "The marriage act, and the minority of the lady, and want of consent, and that on 13th March, 1762, a marriage was had and performed in the dwelling-house of Thomas Huddlestein, a cook and confectioner at Dumfries in North Britain, by Richard Jameson, the minister, or pretending himself to be the minister of the English chapel at Dumfries, who then lodged in the house of Thomas Huddlestein, in whose lodging-room the marriage was so performed between Edward Bearcroft of Droitwich, in Worcestershire, and Maria Catharine Compton of Hartpur, in Gloucestershire, without publication of banns, and without any licence being had and obtained for the solemnization of the said marriage from any person having authority to grant the same, and that neither E. Bearcroft nor M. C. Compton ever was resident in any part of North Britain. But she the said M. C. Compton, in the beginning of March, 1761, went from the house of John Dalby, her testamentary guardian in Berks, to pay a visit to her brother, Sir William Compton at Henslip, in the county of Worcester, and he dying, she left that place and went to her mother at Hartpur, in the county of Gloucester, and from thence went, unknown to John Dalby and without his consent, and without the knowledge of her other testamentary guardians, with E. Bearcroft, on or about the 6th March, 1762, to Dumfries to be married; and that they were married there as aforesaid merely to evade the laws of this realm, and returned into England on the same day, and proceeded to the house of E. Bearcroft at Droitwich, and were never in North Britain but during the time of the journey, and for the purpose of the marriage." The certificate of marriage was also pleaded in these words:

(a) Arches, 16th Feb., 1767. Libel rejected by Sir George Hay, sentence affirmed by Court of Delegates, 4th Feb., 1769. Judges Delegate, Gould, J., Perrott, Baron, Aston, J., Drs. Ducarel and Clarke.

was consulted on it. In the case of *Butler v. Freeman** Lord Hardwicke is reported to have said, "that if the marriage is not good by the law of the country where it is celebrated, it is not good at all," and the reporter adds that it had been lately so determined in the Court of Delegates; but I apprehend that was a mistake in the reporter, mentioning the Court of Delegates for the Consistory Court.

Upon this ground I think the true principle to be that, if the marriage is had abroad, and is not good there, as being contrary to the laws of the country in which it is had, it is not to be held [447] good by the law of this country. It is said that there is a difference between this case and that of *Scrimshire v. Scrimshire*, that there was in that case a residence of one of the parties fully established; whereas these parties were only three days in the country where the marriage was performed; that in that case they were English subjects, with a considerable property in England, where they were to return for the enjoyment of all privileges and rights under the marriage so celebrated. But the residence of the young man had not been of fixed continuance, but was for a few days only, though his mother and family had been resident at Boulogne about two years before the transaction. The young lady had been there only eighteen months and for education; therefore I do not see that this circumstance of residence makes any substantial difference from the present case.

It is however contended that it does; and that these parties having been but a few hours in the place, that will not give the law of the place a power over them; and therefore the *lex loci* either of Flanders or of Holland will not have any effect upon the present case. Then what will? Can it be said that it will require some new rule to affect it? If this marriage is not to be judged by the laws of Flanders or of Holland, then by what law is it to be judged? The counsel say "it must be judged by the law of England." What was the law of England in 1777? that if a marriage is had without the consent of parents or guardians, or publication of banns (either party being a minor), it is null and void by the marriage act. I know no other law of England on the subject since 1753. But it is said that act cannot take effect in this case, because [448] there is an express exception that it shall not extend to Scotland, or any marriage had abroad. The reason of the exception as to marriages had abroad is perfectly clear. The act could not extend to them; for if it were held that an Englishman abroad cannot marry without the solemnities required by the act, he could not marry there at all, for it is impossible to have those solemnities observed in a foreign country. But the exception with respect to Scotland was of another kind: I am old enough to remember the passing of that act; and I recollect well that there was an intention at the time of introducing another Act of Parliament, which was to extend to Scotland; but by the Act of Union the state of religion is not to be touched, it is to remain exactly as it was, and therefore there was a difficulty arising out of the Act of Union in applying the marriage act to that country.

The only law of England as to marriage is the marriage act: it cannot by that law be said that a marriage is good which is not had according to it. It is true that a marriage had abroad is not within that act. But it does not follow from thence that it is good by the law of England. For, as I have before said, I know of no other law of England but that. And the question will be whether it be good by the law of the country in which it was celebrated. I am clearly of opinion that this marriage, which was had at Furnes, in the manner I have stated, does not amount to a valid and legal marriage. It is not so by the law of the country in which it was celebrated; it is not so by the law of this country, and therefore I pronounce it to be null and void.

"I certify that I married after the manner of the Church of England, Edward Bearcroft and Maria Catharine Compton. (Signed) J. Jameson, minister of the English Chapel at Dumfries." The prayer of the libel was "that the marriage might be declared null and void, pursuant to the said act for clandestine marriages."

* Ambler, 313; see also a similar dictum of Lord Hardwicke long before, A.D. 1744, 1 Atkyns, p. 50.

APPENDIX.

[1] THE DEPOSITIONS OF WITNESSES, AND OTHER EVIDENCE, IN THE CAUSE OF DALRYMPLE v. DALRYMPLE, supra, p. 58.

28th March, 1809.—DAME CHARLOTTE JOHNSTONE, wife of Sir John Lowther Johnstone, of Portman Square, in the county of Middlesex, Baronet, aged twenty-six years, a witness, produced and sworn.

1. To the first article of the said libel, the deponent saith that she is the sister of Johanna Dalrymple, formerly Gordon, party in this cause, and that in or about the month of March, in the year 1804, whilst the deponent and her said sister were living with their father Charles Gordon, Esq., at his house in St. Andrew's Square, in the city of Edinburgh, in Scotland, an acquaintance commenced between the articulate John William Henry Dalrymple, Esq., party in this cause (who was then a lieutenant in his Majesty's Fifth Regiment of Dragoon Guards, stationed at Piershill Barracks, near the said city of Edinburgh, in Scotland) and the deponent's said sister, by the said John William Henry Dalrymple visiting at the house of their said father, Charles Gordon, Esq., and when such their acquaintance commenced, the said Johanna Dalrymple, then Gordon, was a spinster, upwards of twenty-one years of age, and, as the deponent believes, was free from all matrimonial contracts and engagements; and he, the said John William Henry Dalrymple, was a bachelor, aged about nineteen years, and, for aught the **[2]** deponent knows to the contrary, he was also free from all matrimonial contracts and engagements; and a short time after the acquaintance of the said parties commenced, they became extremely familiar and intimate, and there appeared to be a great flirtation between them, insomuch that the deponent had no doubt but that the said John William Henry Dalrymple had made his addresses to the said Johanna Dalrymple, then Gordon, in the way of marriage, but the deponent was kept in ignorance by her said sister of her having accepted such the courtship and addresses of the said John William Henry Dalrymple for some time, and when the deponent used to ask her said sister as to her intentions in respect to her becoming the wife of the said John William Henry Dalrymple, she used to laugh it off, and never give the deponent a direct answer thereto. And the deponent further saith that though, in the month of May in the said year 1804, she did not doubt from the flirtation that was kept up between the said John William Henry Dalrymple and the said Johanna Dalrymple, then Gordon (and which she saith was carried on secretly and unknown to their respective fathers) that they had a tie upon each other from some promise entered into by them, so that neither of the parties could marry any other person without each other's permission; yet the deponent had no knowledge of the said parties in this cause having respectively signed and exchanged a written promise of marriage with each other at that time. And she further saith that in the last week of the said month of May, 1804, she went from her said father's house at St. Andrew's Square, Edinburgh, where she left her sister Johanna Dalrymple, then Gordon, and the rest of the family, to go on a visit at North Berwick, and did not return therefrom till about the middle of the month of June following, when she found the said family, and, amongst them, her said sister Johanna Dalrymple, party in this cause, at her said father's country seat at Braid, about three miles from Edinburgh; and the deponent therefore knew nothing of what passed between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, his wife, during the time she, the deponent, was so as aforesaid absent on such visit, for the said Johanna Dalrymple did not make the deponent her confidante. And the deponent also further saith that she and her said sister Johanna Dalrymple, formerly Gordon, used to sleep together in their said father's house; and that in the house at Braid aforesaid there was a dressing-room which was solely used by the **[3]** said Johanna Dalrymple, formerly Gordon (the way to which was through their said bedroom) and there was another dressing-room which was always used by the deponent; and in the latter end of the month of June, and beginning of the month of July, in the said year 1804, the deponent, from having heard it reported that the said John William Henry Dalrymple had been known to go late at night to the deponent's said father's house at Braid, and had been seen coming therefrom early in a morning, was, on talking to her said sister Johanna Dalrymple, formerly Gordon, on that subject, led to suspect that, from what her said sister said at the time, that she had sometimes concealed the

said John William Henry Dalrymple in her said dressing-room, but the deponent never saw or heard him either go into, or come out of, the said dressing-room, and never heard any noise therein which led her to suppose he was there, and never actually knew of his being therein; neither did she ever miss the said Johanna Dalrymple, formerly Gordon, from her bed during the time she was in the habit of sleeping with the deponent; and although the deponent did, nevertheless, suspect that the said John William Henry Dalrymple had at some time or times (though she knew not when) been in her said sister's dressing-room, yet the deponent never did imagine that they had consummated a marriage between them in the said house, or at any other place, nor did the deponent know or consider that they the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, had exchanged acknowledgements in writing of their being lawful husband and wife, or had contracted or bound themselves to each other according to the laws, usages, and customs of the kingdom of Scotland in respect to marriages, for the deponent never, till after the proceedings in this cause had commenced, knew or heard that they the said parties in this cause had exchanged written acknowledgements of their being lawful husband and wife, and had consummated their marriage, but on the contrary, always till very lately, conceived that they the said parties in this cause had merely entered into a written promise with each other so as to have a tie upon each other that neither of them should marry another person without the consent of the other of them: and although the deponent did very frequently (after she understood the said parties had entered into such written promise with each other) in her letters to her said sister address her as Mrs. Dalrymple, and did also prior thereto call the said John William Henry Dalrymple [4] "Brother Dal."; yet she saith she only did so jocularly, and not from a belief at that time of their being husband and wife; and even so late only as last January was a twelvemonth, when the deponent was in Scotland, and her sister, the said Johanna Dalrymple, was on a visit to her at Balinereiff, near Edinburgh, the deponent, in conversation with her said sister, took occasion to ask her when she meant to become Mrs. Dalrymple? to which she answered, "You shall never see me Mrs. Dalrymple;" or to that effect. And the deponent lastly saith that the aforesaid acknowledgement, or contract of marriage, so entered into and exchanged between them the said parties in this cause, was kept a secret by them, and they never appeared familiar with each other but when they were not in company, for when they were in company at the deponent's said father's house, the same distance was observed by the said John William Henry Dalrymple towards the said Johanna Dalrymple, formerly Gordon, as towards the deponent or any other person; and they were not, to the deponent's knowledge, generally known as to be or considered lawful husband and wife, nor does she ever recollect to have heard the said Johanna Dalrymple, formerly Gordon, at any time call him, the said John William Henry Dalrymple, her husband, or acknowledge him as such; but she thinks, and is pretty certain she hath heard him call her said sister his wife frequently; and further to the said article she cannot depose.

2. To the second article of the said libel, and to the paper-writings, marked No. 1 and No. 2, therein particularly pleaded and referred to, the deponent saith that she of course was accustomed to see her said sister Johanna Dalrymple very frequently write and subscribe her name in the course of the number of years they lived together, and thereby the deponent became well acquainted with her said sister's manner and character of hand-writing and subscription, but she does not remember ever to have seen the said John William Henry Dalrymple write, though she saith she acquired a good knowledge of his manner and character of hand-writing from having often, during the said year 1804, received notes from him, and seen letters which she hath known to have come from him. And the deponent having now carefully viewed the said two exhibits, marked No. 1 and No. 2, pleaded and referred to in the said second article, and now produced and shewn to her, she saith that she verily believes the words "and I promise the same," written in the said exhibit, [5] marked No. 1, and the superscription "J. Gordon," thereto set and subscribed, were and are of the proper hand-writing and subscription of her said sister Johanna Dalrymple, then Johanna Gordon, spinster, and from the knowledge she had as aforesaid acquired of the hand-writing and subscription of the said John William Henry Dalrymple, party in this cause, she is of opinion, and believes, that the rest of the said paper-writing, marked No. 1, and the name "J. Dalrymple," thereto set and subscribed, are of the proper

hand-writing and subscription of the said John William Henry Dalrymple, party in this cause, from the great similarity she observes in such writing and signature to his the said John William Henry Dalrymple's hand-writing; but she cannot take upon herself to say of whose hand-writing the endorsement, "a sacred promise" is. And the deponent having carefully viewed and perused the said paper-writing, marked No. 2, she saith that she is not quite so certain whether the name "J. Gordon," thereto set and subscribed, is of the hand-writing of the said Johanna Dalrymple, formerly Gordon, or whether any part of the said paper-writing is of her said sister's hand-writing, though the said signature bears some resemblance to her manner and character of subscription; neither can she, with any degree of certainty, say whether any part of the said exhibit, marked No. 2, is the hand-writing of the said John William Henry Dalrymple, party in this cause, though she thinks that the two first lines thereof, and the date and subscription thereto, "May 28th, 1804," "J. Dalrymple," bear a very strong resemblance to his manner and character of hand-writing and subscription; but she hath not the least doubt, and does verily believe, that J. Dalrymple and J. Gordon, who appear to be parties to the said two exhibits, marked No. 1 and No. 2, and John William Henry Dalrymple and Johanna Dalrymple, his wife, formerly Johanna Gordon, spinster, the sister of the deponent, and the parties in this cause, were and are the same persons, and not divers: and further to the said article she cannot depose.

3. To the third article of the said libel, the deponent saith that the marriage pleaded in the first article of the said libel on which she is examined, to have been entered into between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, parties in this cause, was so entered into as she is certain, and also (if consummated) was so consummated without the knowledge or privity of their respective parents, for it was kept wholly a secret from both families that such a marriage had been entered into, and further to said article she cannot depose, save that the said Johanna Dalrymple, formerly Gordon, continued and resided at the house of Charles Gordon, Esq., her father, and passed under her maiden name of Gordon till the proceedings in this cause were commenced: and further she cannot depose.

4. To the fourth article of the said libel, the deponent saith that she well remembers the said John William Henry Dalrymple went to join his regiment at Dunbar, in Scotland, soon after or about the time the marriage in question in this cause is pleaded to have been entered into between the parties therein, after which time the deponent had reason to suspect that a correspondence was kept up between them, the said parties in this cause; but her said sister being very secret with the deponent in respect thereto, she cannot further depose to the said article.

5. To the fifth article of the said libel, and to the several exhibits therein pleaded and referred to, the deponent knows not to depose.

6. To the sixth article of the said libel, the deponent saith she knows not to depose, save that one day happening, as she believes, sometime about the time pleaded (though she can by no means remember the time or place when or where the circumstance now about to be deposed of by her took place) she, the deponent, being with her sister the said Johanna Dalrymple, formerly Gordon, alone (whom the deponent did not then consider as married) a paper-writing was produced by her said sister, who read the same to the deponent, by which the deponent understood that the said John William Henry Dalrymple and the deponent's said sister had entered into such an engagement that they had a tie upon each other, so that neither of them could marry any other person without the consent of the other of them; but the deponent did not consider from what she heard read as aforesaid, that it was an acknowledgement or declaration of a marriage between them the said parties in this cause: and she further saith that at the time now deposed of, her said sister, Johanna Dalrymple, party in this cause, told the deponent that she wished her to be a witness to what Mr. Dalrymple had written (meaning the paper-writing which she had just then read to the deponent) and asked the deponent if she had any objection to sign such paper as a witness; to which the deponent replied that she had not the least objection to do so if it [7] could be of any service to her, and her said sister saying she wished the deponent to sign it to keep him (meaning the said John William Henry Dalrymple, party in this cause) to his word; the deponent thereupon replied that if he required that to keep him to his word he was not worth having: but the said Johanna Dalrymple continuing to urge the deponent to sign such paper-writing as a witness, and saying it would be doing

her a favour to sign the same as a witness, she, the deponent, accordingly did so, although she did not see the same written or signed together by either of the parties therein mentioned: and further she cannot depose.

7. To the seventh article of the said libel, and to the paper-writings or exhibits, marked No. 10 and No. 11, to the said libel annexed, and in the said seventh article particularly pleaded and referred to, the same having been now produced and shewn to and carefully viewed and perused by the deponent, she saith that the name and word, "Witness, Charlotte Gordon," appearing subscribed and written at the bottom of the said exhibit, marked No. 10, is of her, the deponent's, own proper hand-writing and subscription, and she knows the same thereby to be the very same paper-writing by her deposed of in her deposition to the sixth article of the said libel, which paper-writing, except what the deponent so as aforesaid wrote thereon, she supposes and believes is all of the proper hand-writing of the said John William Henry Dalrymple, party in this cause: but she cannot take upon herself to say of whose hand-writing the said exhibit No. 11 is. And she lastly saith that she hath not a doubt, but does verily believe, that John William Henry Dalrymple and Johanna Gordon, who appear to have been parties to the said exhibit, marked No. 10; and John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, his wife, the parties in this cause, were and are the same persons and not divers: and further she cannot depose.

8. To the eighth article of the said libel, the deponent saith that she remembers the said John William Henry Dalrymple left Scotland with his father, General William Dalrymple, in the month of July, in the said year 1804, or thereabouts, and came to England and continued to live and reside there till about the month of July, 1805, when he went to Malta; and the deponent having, in the month of January, in the said year 1805, married her present husband, came also to live in England, and in the course of the time between her so coming to live in England [8] and the said month of July, when the said John William Henry Dalrymple went to Malta, she saw him once or twice in her own house, but she hath no knowledge of his having written the letters mentioned and alluded to in the said article to her the deponent's said sister, Johanna Dalrymple, formerly Gordon: and further to the said article she cannot depose.

9. To the ninth article of the said libel, and to the several exhibits therein pleaded and referred to, the deponent cannot depose.

10. To the tenth article of the said libel, and to the paper-writings or exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, which are particularly pleaded and exhibited in the 4th, 5th, 8th, and 9th articles of the libel, on which she is now examined, which said exhibits purport to be notes and letters, and have now been produced and shewn to and carefully viewed and perused by the deponent. She saith she is of opinion, and believes that the initial letters "J. D." to the said exhibits No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said exhibit No. 12, and the initials "J. D." to the said exhibits No. 13 and No. 14 and 15, and the superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, party in this cause. And that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters, was meant and intended the said Johanna Dalrymple his wife, the party in this cause, and that John William Henry Dalrymple who wrote, subscribed, superscribed, and sent the said letters, and Johanna Dalrymple, to whom the same were addressed under her maiden name of Gordon, and John William Henry Dalrymple and Johanna Dalrymple his wife, the parties in this cause, were and are the same persons, and not divers: and further she cannot depose.

30th March, 1809. CHARLOTTE JOHNSTONE.

Repeated and acknowledged before Dr. Ogilvie, Surrogate.

Pres. Mark Morley, Notary Public.

[9] ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

22nd April, 1809.—SAMUEL HAWKINS, of Findon, in the county of Sussex, Esq., aged forty-nine years and upwards, a witness produced and sworn.

2. To the second article of the said libel, and to the paper-writings or exhibits, marked No. 1 and No. 2, therein pleaded and referred to, and now produced and

shewn to the deponent, he saith that he hath been well acquainted with the articulate John William Henry Dalrymple, party in this cause, from the month of August or September, 1806, to the present time, and hath during that time frequently seen him write and subscribe his name : and hath also received many letters from him, whereby the deponent hath become well acquainted with his manner and character of hand-writing and subscription. And having now carefully viewed and perused the paper-writing or exhibit, marked No. 1, and the endorsement thereon of the words "a sacred promise," he saith that he can and does, without the least doubt or hesitation, depose that he verily and in his conscience believes the words "I do hereby promise to marry you as soon as it is in my power, and never marry another;" and also the name "J. Dalrymple," written and subscribed in the said exhibit, marked No. 1, were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, party in this cause. And he further saith that soon after the commencement of his acquaintance with the said John William Henry Dalrymple, he the deponent had occasion to correspond with the articulate Johanna Dalrymple, formerly Gordon, also party in this cause; and in consequence thereof the deponent received a great many letters from her, written and dated from Scotland, between the latter end of the said year 1806 and the end of January last past; the last letter he received from her being dated the 28th of January, 1809, in all of which letters she subscribed herself "J. Gordon," to the best of the deponent's recollection, excepting in her said letter, in which she subscribed herself "J. Dalrymple," and the deponent invariably addressed her as Miss Gordon, excepting his reply to her said last letter, which he addressed to her as "Mrs. Dalrymple," and by his so [10] receiving many letters from the said Johanna Dalrymple, formerly Gordon, he thereby became well acquainted with her manner and character of hand-writing and subscription, though he never saw her write. And the deponent having now again carefully and attentively viewed and perused the said paper-writing or exhibit, marked No. 1, and having compared some of the said letters which he as aforesaid received from the said Johanna Dalrymple, formerly Gordon, with the words "and I promise the same," and also with the name "J. Gordon," written in and subscribed to the said exhibit No. 1, he saith that he hath not the least doubt, but does verily believe that the said recited words and signature were and are of the proper hand-writing and subscription of the same person, who so as aforesaid corresponded with the deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he also believes to be the identical Johanna Dalrymple, formerly Gordon, the party promoting this cause; but he cannot take upon himself to depose of whose hand-writing the said endorsement "A sacred promise" is. And the deponent having now carefully viewed and perused the said paper-writing, marked No. 2, he saith that he does also, without the least doubt or hesitation, depose that the words "I hereby declare that Johanna Gordon is my lawful wife, May 28th, 1804," and the name "J. Dalrymple," thereto set and subscribed; and also the three words "and I hereby" commencing the next sentence in the said exhibit, were, and are, as he verily and in his conscience believes, of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, party in this cause, and that the remaining part of the said sentence, contained in the following words, "Acknowledge John Dalrymple as my lawful husband," and the name "J. Gordon," set and subscribed thereto, were and are of the proper hand-writing and subscription of the same person, who as aforesaid corresponded with the deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he believes to be the articulate Johanna Dalrymple, formerly Gordon, the party promoting this cause; and he does therefore verily believe that J. Dalrymple and J. Gordon, who were parties to, and wrote and signed the said two exhibits, marked No. 1 and No. 2, and John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, parties in this cause, were and are the same persons and not divers: and further he cannot depose to the said article.

[11] 7. To the seventh article of the said libel and to the paper-writings or exhibits, marked No. 10 and No. 11, therein pleaded and referred to, and now produced and shewn to the deponent, he saith that having attentively viewed and perused the said exhibit, marked No. 10, he hath not the least doubt, but does verily believe, that the whole body, series, and contents of the said exhibit, and also the name "J. W. H. Dalrymple," thereto set and subscribed, were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, party in this cause,

excepting the names and words "J. Gordon," now "J. Dalrymple," appearing subscribed at the end of the said exhibit, and also excepting the name and word, "Witness, Charlotte Gordon," written at the foot or bottom of the said exhibit, which said names and word "J. Gordon," now "J. Dalrymple," he verily believes to be, and he hath no doubt were and are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, party in this cause, formerly Gordon, who corresponded with the deponent in the manner hereinbefore set forth. And the deponent having also attentively viewed the initials "J. D." and "J. G." subscribed to the exhibit or envelope, marked No. 11, he saith he doth verily and in his conscience believe the said initial letters "J. D." to be of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, party in this cause; and that the said initial letters "J. G." are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, formerly Gordon, party in this cause, who corresponded with the deponent, in the manner hereinbefore set forth, under the name of "J. Gordon," and afterwards of "J. Dalrymple," and the deponent hath not the least doubt, but does verily believe, that John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, who were parties to the said exhibits, marked No. 10, and subscribed the same, and set their initials to the said exhibit or envelope, marked No. 11, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, parties in this cause, were and are the same persons, and not divers: and further to the said article he cannot depose.

10. To the tenth article of the said libel, the deponent saith that having now attentively viewed and perused the several exhibits annexed to the said libel, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, particularly pleaded and referred to in the said article, the same [12] having been now produced and shewn to the deponent, he saith that he hath not the least doubt, but does verily and in his conscience believe, that the whole body, series, and contents of the said several exhibits, and the initial letters "J. D." to the said exhibits, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said exhibit No. 12, the initial letters "J. D." to the said exhibits, No. 13, No. 14, and No. 15, and the several superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, party in this cause, and that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters, was meant and intended the said Johanna Dalrymple, formerly Gordon, party in this cause. And also that John William Henry Dalrymple, who wrote, subscribed, and superscribed the said letters, and Johanna Dalrymple, to whom the same were addressed, under her maiden name of Gordon, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, the parties in this cause, were and are the same persons, and not divers: and further he cannot depose.

Same day. *in witness whereof I have hereunto set my hand and seal at London.* SAMUEL HAWKINS.

Repeated and acknowledged before Dr. Ogilvie, Surrogate.

Pres. Mark Morley, Notary Public.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

1st May, 1809.—ALEXANDER BRYANT, clerk to Messrs. Thomas Coutts and Company, bankers, in the Strand, in the county of Middlesex, aged thirty years and upwards, a witness, produced and sworn.

2. To the second article of the said libel, and to the paper-writings or exhibits, marked No. 1 and No. 2, annexed to the said libel, and now produced and shewn to the deponent, he [13] saith he is a clerk in the house of Messrs. Thomas Coutts and Company, bankers, in the Strand, and hath so been for about seven years come next June, and he came first to know the articulate John William Henry Dalrymple, party in this cause, about three or four years ago (according to the best of his recollection as to time) by seeing him come to the banking-house of the said Messrs. Thomas Coutts and Company, upon business; and afterwards many letters came from him written from Germany to the said banking-house, which the deponent knows were answered; and that such answers were addressed to him, the said John William Henry Dalrymple, in Germany: and he further saith that about a year ago (as well as he is now able to recollect the time), the said John William Henry Dalrymple having returned from Germany, became in the habit of coming to the said banking-

house when he wanted money, and hath from that time, down to the present time, been in the habit of so doing, and at such time he always signs drafts for the money he so draws out at the said house of Messrs. Thomas Coutts and Company, who are his bankers; and the deponent is the person to whom the said John William Henry Dalrymple hath been in the general habit of coming to on those occasions. And he, the deponent, hath thereby had occasion to see the said John William Henry Dalrymple sign his name to drafts so frequently that he hath thereby, and by seeing the aforesaid correspondence of him the said John William Henry Dalrymple with the said house, whilst he remained in Germany as aforesaid, become perfectly well acquainted with the manner and character of hand-writing and subscription of him the said John William Henry Dalrymple, and having now carefully and attentively viewed and perused the said two exhibits, marked No. 1 and No. 2, the deponent saith that he hath not the least doubt, but does verily and in his conscience believe, that the words "I do hereby promise to marry you as soon as it is in my power, and never marry another," contained in the said exhibit, marked No. 1, and the name, "J. Dalrymple," thereto subscribed, and also the words and figures "I hereby declare that Johanna Gordon is my lawful wife, May 28th, 1804," the subscription, "J. Dalrymple," and the further words, "and I hereby acknowledge John Dalrymple as my lawful husband," contained in the said exhibit, marked No. 2, were and are of the proper hand-writing and subscription of him the aforesaid John William Henry Dalrymple, whom the deponent knows to be the party in this cause, and that John William Henry Dal-[14]-rymple, who was a party to and signed the said two exhibits, and John William Henry Dalrymple, party in this cause, herein before deposed of, was and is one and the same person. And further to the said article he cannot depose.

7. To the seventh article of the said libel, and to the paper-writings or exhibits, marked No. 10 and No. 11, to the said libel annexed, and in the said seventh article particularly pleaded and referred to, the same having been now produced and shewn to, and carefully viewed and perused by the deponent, he saith that he does verily and in his conscience believe that the whole body, series, and contents of the said paper-writing or exhibit, marked No. 10, and the name "J. W. H. Dalrymple," thereto subscribed, to be all of the proper hand-writing and subscription of him the aforesaid John William Henry Dalrymple, party in this cause, the person of whom the deponent hath hereinbefore particularly deposed of, excepting the name "J. Gordon," and the word "now" subscribed and written at the bottom of the said exhibit, and also except the name and word, "Witness, Charlotte Gordon," written under it, which he does not believe to be of the hand-writing of him the said John William Henry Dalrymple, and knows not of whose hand-writing the said two names and words are, nor can he take upon himself to depose of whose hand-writing the said exhibit, No. 11, or of any part thereof, or of the initial letters "J. D." or "J. G." subscribed thereto, is or are, but has no doubt but that John William Henry Dalrymple, who was a party to the said exhibit, marked No. 10, and John William Henry Dalrymple, party in this cause, hereinbefore particularly deposed of, was and is one and the same person, and not divers: and further he cannot depose to the said article.

10. To the tenth article of the said libel, and to the paper-writings or exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, to the said libel annexed, and in the fourth, fifth, eighth, and ninth articles of the said libel, particularly pleaded and exhibited, the same having been now produced and shewn to the deponent, and he having carefully and attentively viewed and perused the same, the deponent saith that he hath not a doubt, but does verily and in his conscience believe, the whole body, series, and contents of the said several exhibits, numbered as aforesaid, and the initial letters "J. D." to the said exhibits, No. 3, No. 4, No. 5, No. 7, No. 8, and No. 9, the initial letter "D." to the said exhibits, No. 12, No. 14, and No. 15, and the initial letters "J. D." to [15] the said exhibit, No. 13, and the superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, party in this cause, hereinbefore particularly deposed of, and that the said John William Henry Dalrymple, who so wrote, subscribed, superscribed, and sent the said letters, and John William Henry Dalrymple, party in this cause, was and is one and the same person, and not divers: but further to the said article he cannot depose.

* Same day.

ALEX. BRYANT.

Repeated and acknowledged before Dr. Ogilvie, Surrogate.
Pres. Mark. Morley, Notary Public.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

6th May, 1809.—THE MOST NOBLE ALEXANDER, DUKE OF GORDON, of New Norfolk Street, Park Lane, in the county of Middlesex, aged sixty-five years, a witness, produced and sworn.

2. To the second article of the said libel and to the paper-writings, marked No. 1 and No. 2, therein pleaded and referred to, and now produced and shewn to the deponent, he saith that he hath been on terms of great intimacy with the family of the articulate Johanna Gordon (in the said libel called Johanna Dalrymple) for many years, and hath known and been acquainted with the said Johanna Gordon from her childhood, and hath frequently received visits from her, with her father and others of her family, at his, this deponent's seat, called Gordon Castle, in Scotland; and hath also been on visits to her father, and hath there been in company with her, and in the course of such his knowledge of, and acquaintance with her the said Johanna Gordon, he often saw her write and subscribe her name, and thereby became well acquainted with her manner and character of hand-[16]-writing and subscription, and having now attentively viewed and perused the said two paper-writings, marked No. 1 and No. 2, he saith he hath not the least doubt, but does verily and in his conscience believe that the words "& I promise the same," contained in the said exhibit, marked No. 1, and the name, "J. Gordon," thereto subscribed, and also the words, "And I hereby acknowledge John Dalrymple as my lawful husband," contained in the said paper-writing or exhibit, marked No. 2, and the name, "J. Gordon" thereto subscribed, were and are of the proper hand-writing and subscription of the aforesaid Johanna Gordon, in the said libel called Johanna Dalrymple, by him the deponent hereinbefore deposed of, but he cannot take upon himself to depose of whose hand-writing the other parts of the said two paper-writings or exhibits are, but he saith that he is well satisfied in his own mind that Johanna Gordon, who was a party to, and signed the said two paper-writings, marked No. 1 and No. 2, and Johanna Gordon by him the deponent hereinbefore deposed of, whom he knows to be one of the parties in this cause by the name of Johanna Dalrymple, wife of the articulate John William Henry Dalrymple, was and is one and the same person, and not divers; and further he cannot depose to the said article.

7. To the seventh article of the said libel and to the paper-writings or exhibits, marked No. 10 and No. 11, therein pleaded and referred to, and now produced and shewn to the deponent, he having carefully viewed and perused the same, he saith that he hath not the least doubt, but does verily and in his conscience believe, that the name and word, "J. Gordon (now) J. Dalrymple," set and subscribed to the said paper-writing or exhibit, marked No. 10, were and are of the proper hand-writing and subscription of the aforesaid Johanna Gordon, by him the deponent hereinbefore deposed of, and who is in the said libel called Johanna Dalrymple; but he cannot take upon himself to depose to the hand-writing of the other parts of the said paper-writing or exhibit, or of any part of the said paper-writing or exhibit, marked No. 12. And the deponent lastly saith that from circumstances which have come to his knowledge he hath not the least doubt, but does verily believe that Johanna Gordon, now Dalrymple, who was a party to and signed the said paper-writing or exhibit, marked No. 10, and Johanna Gordon, by him, the deponent, hereinbefore deposed of, and who is one of the parties in this cause, by the name of [17] Johanna Dalrymple, wife of John William Henry Dalrymple, was and is one and the same person, and not divers; and further he cannot depose.

Same day.

GORDON.

Repeated and acknowledged before Dr. Stoddart, Surrogate.

Pres. Mark Morley, Notary Public.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

7th June, 1809.—THE HONOURABLE HENRY ERSKINE, of Ammondell, advocate, aged about sixty-two years, a witness produced and sworn, deposes and says that he has practised as an advocate in the supreme Court of Session, in Scotland, since 1768, and that he has formerly held the situations of his Majesty's Advocate for Scotland, and Dean of the Faculty of Advocates; and, further, to the 11th article of the said libel he deposes and says that he has attentively perused and considered the several exhibits annexed to the libel, and that, by the law of Scotland, marriage is merely a

civil contract, and may be validly and effectually entered into without the intervention of any religious ceremony in any of the three following ways :—

1. By a promise of marriage given in writing, or proved by a reference to the oath of party followed by a copula.

2. By a solemn and deliberate mutual declaration exchanged between a man and a woman, either verbally, or in writing, expressed *per verba de præsenti*, bearing that the parties consent to take each other for husband and wife, a marriage may be formed without any copula, cohabitation, or celebration in *facie ecclesiæ*.

3. Marriage may be established by public cohabitation as man and wife alone. That such being the law of Scotland, the said exhibits annexed to the libel are, in the deponent's opinion, sufficient to establish a legal and effectual marriage between the plaintiff and the defendant in the said cause, independently of any actual celebration, copula, or cohabitation as man and wife.

HENRY ERSKINE.

[18] The same witness examined on the interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said interrogatories, this respondent answereth and saith that he believes that there is no country to be found, the law of which, on any particular subject, has not been liable to variations ; but the principles of the law of Scotland, in regard to the validity of marriage, have always been substantially the same as already deposed to ; he conceives that any apparent discrepancy that may be found in the decisions of the Court, arises not from any difficulty as to the principles, but the application of them to the facts of particular cases, as amounting, or not amounting, in the opinion of the Court, to that solemn and deliberate consent necessary to constitute marriage, and which, when proved to have been adhibited, has uniformly been adjudged sufficient *per se* to constitute a legal marriage.

2. To the second of the said interrogatories, this respondent answereth and saith that he collects, or ascertains, the law of Scotland, regarding the validity of marriages not regularly celebrated or performed, from the writings of the different authors on its law, and the train of decisions of its Courts ; upon these he forms his opinion what is the precise law of Scotland at the present day, to which he has already deposed.

3. To the third of the said interrogatories, this respondent answereth and saith that there certainly is a material difference between the legal effects of an irrevocable obligation *de futuro* to marry, and an actual marriage (whether constituted by celebration in *facie ecclesiæ*, or by an express consent *de præsenti*), which last he has already said is equivalent to actual celebration. A promise of marriage, followed by a copula, is just as effectual to produce marriage as actual celebration, or a declaration of consent *de præsenti* ; but as a copula cannot, like a written promise of marriage, be proved without the testimony of witnesses, a process at law is necessary to establish a marriage of this description where one of the parties denies its existence. In this respect, a promise and subsequent copula differ from a solemn mutual declaration of consent *de præsenti*, which requires nothing more to complete it, though, were one of the parties to desert, a process of adherence might be necessary, which it would equally be, had a marriage been celebrated in *facie ecclesiæ*.

[19] 4. In answer to the fourth of the said interrogatories, this respondent answereth and saith that he conceives this question to be already sufficiently answered. Where a man binds himself irrevocably by an obligation *de futuro* to marry, and no copula follows, then, certainly the woman, and even the man, may marry a different person, because it is the copula alone that bars the party who gives the promise from resiling. The same would be the case with mutual promises of marriage *de futuro* interchanged, but without consummation.

5. In answer to the fifth of the said interrogatories, this respondent answereth and saith that presuming the interrogatory to apply to a promise of marriage not followed by a copula, such promise may at any time be made the ground of a declarator of marriage, unless the party giving the promise shall in the mean time have married another woman, which, as I already said, he may validly do, notwithstanding the previous promise. It would be otherwise if, instead of a promise *de futuro*, a man and woman had made mutual declarations of consent *de præsenti*, for this, whether followed by a copula or not, would have constituted a marriage, as effectually as celebration in *facie ecclesiæ*.

6. To the sixth of the said interrogatories, this respondent answereth and saith that a promise of marriage, given in Scotland, followed by a copula, would not be

affected by the man's going to England, instead of remaining in Scotland. The question, whether if a man who has given a promise of marriage, and consummated in Scotland, should afterwards marry another woman, no action having presently been brought against him, on the previous promise and copula, such marriage would be good, may admit of doubt, though there could have been none, if, instead of a promise de futuro by the man to the woman, there had been mutual declarations of consent de presenti. It is in this, that the difference between the one mode of constituting marriage by the law of Scotland, and the other, chiefly consists. At the same time, the deponent knows of no case where a marriage made by a man with one woman, after he had given a promise of marriage to another woman, followed by a copula, was found to be good, though he considers that the principle, recognized in a case observed by Lord Stair, 31st January, 1675, *Blattie contra Barclay*, would support the general proposition that, though a promise of marriage and copula entitles the woman to have the marriage declared, yet it has not the same effect as a formal marriage in all respects, though, not that it might be defeated by the man's [20] marrying another woman in facie ecclesiæ, before a decree of declarator was obtained against him. But this respondent saith that where the marriage is constituted by mutual declarations de presenti, every consequence must follow equally as from the most formal marriages, and, therefore, that a marriage with another person afterwards entered into by either of the parties would be null, though no declarator had been previously obtained; and whether such subsequent marriage took place in Scotland or England, or the party contracting it was a Scotsman, or a domiciled Englishman, or possessed or not possessed of any property or effects in Scotland.

7. In answer to the seventh of the said interrogatories, this respondent answereth and saith that if a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration constitutes a lawful marriage, and not merely an obligation to marry.

8. In answer to the eighth of said interrogatories, this respondent answereth and saith that such a declaration in writing, per se, renders the marriage complete; and that the copula being before or after the declaration can have no effect on the validity of the marriage.

9. In answer to the ninth of said interrogatories, this respondent answereth and saith that if a man gives a writing to a woman, acknowledging that he is her husband, and the two parties correspond with each other in writing, calling each other husband and wife, this will constitute a marriage, and not merely an obligation to marry.

10. In answer to the tenth of said interrogatories, this respondent answereth and saith that the essence of the consent, by which alone marriage is constituted by the law of Scotland, is its being made seriously and deliberately animo contrahendi matrimonium. It is competent therefore to adduce in evidence any circumstances in the mutual conduct of the parties demonstrative that there was something intended by them when the declarations were given, different from a serious intention to contract marriage. But where the words in which the declarations are conceived are clear and unambiguous, the case must be made out by facts, completely probative of a contrary intention on the part of both the man and woman. In the case of *More contra M'Innes*, 20th Dec., 1781, the House of Lords reversed a decision of the Court of Session, which had declared a marriage founded on a written declaration by a man to a woman. But [21] that most honourable House proceeded on an opinion that there was evidence to shew that the declaration had been given and accepted of for a different purpose from that of constituting marriage. The same was the ground of judgment in the House of Lords, in the case of *Taylor contra Kello*, 16th Feb., 1786. But in neither of these cases was there any doubt expressed by the Noble Lord, who delivered the opinion of the House, that the written declarations would have been sufficient to constitute marriage, if appearing to have been given eo intuitu. Further, this respondent saith that he does not conceive that mere expressions of fear by the one party of being deserted by the other, or a desire to be married in facie ecclesiæ, though expressed by both, would, according to the law of Scotland, have the effect to prevent a previous written declaration of consent de presenti, from establishing a marriage.

HENRY ERSKINE.

The same witness examined on the additional interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1, 2. To the first and second of the said additional interrogatories, this respondent

answereth and saith that he conceives that what he formerly deposed, in answer to the second of the original interrogatories, affords a sufficient answer to both these additional interrogatories. Sir Thomas Craig and Lord Stair are two of the authors on whose authority he forms his opinion, and he believes their opinions to be equally agreeable to the law of Scotland, at the time these authors wrote, and to the law of Scotland as it now stands. He knows of no change that has taken place on the general principles of law as laid down by those learned authors, though, in applying them to different cases, there may have been a variety of opinions amongst the judges, as there necessarily will be among judges as well as jurymen in circumstantiate cases, where the doubt is as to the fact and not as to the law.

3. To the third of the said additional interrogatories, this respondent answereth and saith that he conceives the decision in the case of *Pennycook and Grinton* contra *Grinton and Graite*, 15th Dec., 1752, to have been agreeable to the principle laid down by Sir Thomas Craig and Lord Stair: that was cer-[22]-tainly a case attended with very peculiar circumstances, but consonant with these legal authorities, it could not have been otherwise decided, unless the Court, on considering the evidence, had been of opinion that the conduct of the pursuer afforded evidence that the promises upon which she founded were not of that serious and deliberate nature, as when joined with a subsequent copula, to form a consent de præsenti, which is the principle on which Lord Stair holds a copula following a promise to constitute a marriage, in the same way as a consent de præsenti, or actual celebration.

4. To the fourth of said additional interrogatories, this respondent answereth and saith that he knows of no case decided by the commissaries, since that last mentioned, where precisely similar circumstances occurred; that he has already noticed in his former deposition, the cases of *More* contra *M'Innes* and *Taylor* contra *Kello*, where the House of Lords differed from the Court of Session as to the sufficiency of the evidence of consent to constitute marriage; but he repeats that in those cases the judgments were reversed solely on this ground, that the learned judge who decided was of opinion, in point of fact, that the written declarations had not been granted with a view to constitute a marriage, but for different purposes. That the judgment of the Court of Session and the House of Lords therefore were equally consistent with what this respondent has already deposed to be the law of Scotland.

5. To the fifth of said additional interrogatories, this respondent answereth and saith that where the law in any case appears to be clear on general principles, the Court of Session are in use to disregard a solitary decision, contrary to those principles, and to decide as if no such decision had existed; but the respondent is clearly of opinion that where a series rerum judicatarum occurs, and those decisions are consonant with the opinions of the learned writers on the law, the Court of Session would be exceeding their power were they to disregard these former decisions, and he knows that it is not the practice of the Court to do so.

6. To the sixth of the said additional interrogatories, this respondent answereth and saith that he considers what he has just said as a full answer to this interrogatory, with this addition, that where the Court of Session doubt as to a point formerly decided, they usually have it heard in their presence, both on the [23] general principles that apply to the case, and upon the effect that ought to be given to former decisions.

7. To the seventh of said additional interrogatories, this respondent answereth and saith that, taking this interrogatory generally, he conceives it to be already answered; that if it imports the question whether in the witness's opinion the Court of Session are bound by the existing precedents on the law of marriage, he has no difficulty to say that they are so bound, not only from the number of them, and the uniformity of principle that pervades them all, but from their consonance with the opinions of the law-writers of the first eminence both ancient and modern.

8. To the eighth of said additional interrogatories, this respondent answereth and saith that he considers the case of *Pennycook* to be of authority, and recognized by subsequent practice as to the principle on which it proceeded, viz. that a promise cum copulâ makes a complete marriage. Lord Kaimes, in his *Elucidations*, No. 5, says, "The judges were almost unanimous that a promise cum copulâ makes a complete marriage," which is precisely the doctrine laid down by Lord Stair.

9. To the ninth of said additional interrogatories, this respondent answereth and saith that he conceives he has already answered this interrogatory.

10. To the tenth of said additional interrogatories this respondent answereth and saith that where writings sufficient per se to constitute a marriage exist, the marriage is thereby constituted, and therefore their not being produced till one of the parties has married another can have no legal effect to annul the prior marriage. At the same time, as such prior marriage, whether constituted by mutual declarations de præsenti, or by a promise of marriage and copula subsequent, rests entirely upon consent, and in every such case it must be at issue whether such consent was solemn and deliberate, animo contrahendi matrimonium, or otherwise; the conduct of the party alledging the marriage must necessarily be an important ingredient in the evidence, and his or her having withheld the writings, and kept back her claim, when aware that the other party was publicly forming a matrimonial connection, may certainly be founded on in the question of fact. But it can have no effect on the law of the case; as no act of one of the parties can dissolve a marriage, once legally constituted, by any of the forms by which the law of Scotland allows marriage to be constituted, whether by actual celebration, by mutual [24] declarations of consent de præsenti, or by promise of marriage de futuro, changed into consent de præsenti, by the intervention of a copula.

11. To the eleventh of said additional interrogatories, this respondent answereth and saith that he considers what he has just said in answers to the immediately preceding interrogatory, as a sufficient answer to this interrogatory.

12. To the twelfth of said additional interrogatories, this respondent answereth and saith that all contracts solemnly entered into according to the law of the country where the parties are resident for the time, must be binding, whether the parties are strangers or natives, or domiciled or not domiciled, in such place. That the respondent knows of no distinction between officers of the army and other strangers in this respect. And he has no doubt that were an officer of the army to live with a woman in Scotland, and pass her as his wife, it would be sufficient to constitute a marriage, unless there were circumstances of fact to shew that there had been an understanding between the parties to the contrary; for the evidence of such understanding would put an end to that evidence of consent, by which marriage by the law of Scotland is effectually constituted. But the respondent conceives that the mere allegation of the one party that marriage was not intended, and that being a stranger he was unacquainted with the law of Scotland, will not avail him. In the case of *Margaret Aitken contra Topham*, an Englishman, who, on several occasions, had acknowledged her as his wife, Topham's plea that he was ignorant of the law of Scotland, and that on the occasions when he called her his wife, he did so merely as a cover, was overruled. In that case no decision was ever pronounced, it having been discovered that Margaret Aitken was married before her connection with Topham, and that her husband was still alive.

13, 14, 15, 16, 17. To the thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth of said additional interrogatories, this respondent answereth and saith that these interrogatories appear to him to be entirely hypothetical and unconnected with the question at issue, and that he does not consider himself as at liberty to give any decided opinion, having no authorities of the law of Scotland to direct him. His own impression is that on the principle peculiar to the law of Scotland, a promise of marriage, followed by a copula, constitutes a marriage, on the footing that the promise by virtue of the copula becomes a consent de [25] præsenti; the promise and the copula, in order to constitute a marriage, should both take place in Scotland; and that where this is the case, the domicile of the parties is as much out of the question as if the marriage were celebrated in Scotland in facie ecclesiæ, which may be the case, though the domicile of both or either of the parties may be in a different country.

18. To the eighteenth of said additional interrogatories, this respondent answereth and saith that he has already deposed to the principle upon which a promise and copula constitute a marriage, viz. that to use the words of Lord Stair, "by natural commixtion, where there hath been a promise preceding, there is presumed a conjugal consent de præsenti." And therefore the respondent is of opinion that, where a promise and copula occur, neither party is at liberty to contract another marriage any more than if the marriage had been established by express mutual consent de præsenti, or even a celebration in facie ecclesiæ, which last has no stronger effect by the law of Scotland than either of the former, except that it proves more indubita-

ably that serious and deliberate consent which alone is required to constitute a marriage.

19, 20. To the nineteenth and twentieth of said additional interrogatories, this respondent answereth and saith that where the obligation or promise to marry is merely *de futuro*, and no copula has followed to convert the promise *de futuro* into a consent *de præsenti*, the party resiling can only be subjected in damages: the case would be different if there were evidence of a solemn and deliberate consent *de præsenti*, for there would be legal grounds for declaring a marriage independent of a copula.

21. To the twenty-first of said additional interrogatories, this respondent answereth and saith that he conceives that this query is already sufficiently answered, and that the doctrine of Mr. Erskine, in the passage referred to in the query, does, in the respondent's apprehension, completely establish the proposition; that to use the words of that learned author, in the passage referred to, "Both our judges and writers are agreed that a copula, subsequent to a promise, constitutes marriage, from a presumption or fiction that the consent *de præsenti*, which is essential to marriage, was at that moment mutually given by the parties, in consequence of the anterior promise." St. b. 1, t. 4, s. 6, and b. 3, t. 3, s. 42, and New Coll. No. 146. "That the same writer, the latest and not the least respectable authority in [26] the law of Scotland, speaking in the subsequent section of the constitution of marriage by the consent *de præsenti*, expressly states it as capable of being perfected without the intervention of any ceremony by the mere consent of parties declared by writing, provided the writing be so conceived as necessarily to import their present consent."

22. To the twenty-second of said additional interrogatories, this respondent answereth and saith that although a promise of marriage and copula subsequent create a legal presumption that a mutual consent was given at the moment of the copula, yet certainly it must be open to the party either to disprove the existence of the promise, or to prove *habili modo*, that it was made *alio animo*, than that of constituting marriage. That the same is the case even in mutual written declarations of consent *de præsenti*; and it was on this ground that the decisions in the case of *More and M'Innes and Taylor and Kello* proceeded. Indeed, as marriage in *facie ecclesiæ*, by the law of Scotland, is neither a sacrament nor a necessary ceremony to constitute the matrimonial union, that cases might occur where a marriage by a clergyman might be insufficient, from its being proved that anterior to the celebration the parties had interchanged written declarations that the ceremony was to be effected for a totally different purpose, and should not be binding upon either of them. But the respondent conceives that to take off the effect of a written consent *de præsenti*, or a promise of marriage followed by a copula, will require the most clear and decisive facts applicable to both the parties, sufficient to shew that the written declaration or promise was given for a purpose different from that of contracting marriage, and a proof of those facts by the most unexceptionable evidence.

23. To the twenty-third of said additional interrogatories, this respondent answereth and saith that in his opinion it matters not whether the promise has been given by the woman or by the man if a copula follows, as the promise and copula taken together amount to a mutual consent *de præsenti*.

24. To the twenty-fourth of said additional interrogatories, this respondent answereth and saith that he has already said that the doctrine that a promise of marriage with a subsequent copula does actually constitute a marriage, is not only reconcileable with the ancient authorities in the law of Scotland, including those of Sir Thomas Craig and Lord Stair, but is expressly laid down by those learned lawyers, and especially by Lord Stair. As [27] to the question whether the work of Lord Stair contains many mistakes, and whether the passages referred to are not loosely and inaccurately expressed, the respondent says that Lord Stair, like every other writer, may have fallen into errors; but he considers his Lordship as an author of the very highest authority, and, as to the passages referred to, the respondent sees neither looseness nor inaccuracy. That as to the question what degree of weight ought to be given to Lord Stair's authority, or to the editions of his works, as proving to a certainty what his opinion was, the respondent can give no answer further than that in the court, on this as well as on every other subject, the greatest deference has always been paid to Lord Stair's authority.

25, 26. To the twenty-fifth and twenty-sixth of said additional interrogatories, this

respondent answereth and saith that contracts of marriage, though merely sponsalia de futuro, are no doubt conceived per verba de præsenti, as expressed in the query, but in practice there is always superadded an obligation to celebrate the marriage with all convenient speed, which is sufficient to confine the former expression to a mere obligation de futuro. Where one of the parties therefore resiles, a claim of damages only will lie, as in the case of a promise of marriage not followed by copula; though if a copula were to follow a contract of marriage, it would become a consent de præsenti, and the marriage would be completed. That the respondent considers the expressions of consent contained in the exhibits, followed as they are by no obligation to complete a marriage by actual celebration, as a complete consent de præsenti, such as the law holds sufficient per se to constitute marriage, and therefore very different from the expressions of consent usually contained in contracts of marriage.

27. To the twenty-seventh of said additional interrogatories, this respondent answereth and saith that in his examination in chief, he has already deposed that he considers the exhibits, particularly the mutual declaration, as sufficient per se to constitute a marriage between the parties; and it is unnecessary, therefore, to add that they are of such a nature as to bar either of the parties from retracting. That the respondent considers the effect of the exhibits to be such that, in a question with any third party having an interest, a mutual retraction by the parties would be of no avail, nor could it even, as between themselves, have any effect to annul the marriage, however it might affect their patrimonial interest, as husband and wife.

[28] 28. To the twenty-eighth of said additional interrogatories, this respondent answereth and saith that the first part of it has been already answered; that as to the latter question, what would have been the defendant's remedy if the plaintiff had destroyed the exhibits? the answer is very plain, he would just have been in the very same situation with any other party to a mutual contract, where there is but one copy of the agreement and that has been destroyed by the other party, to whom the custody of it was given. The party founding upon it would be under the necessity of either proving the tenor of the writing, or establishing the existence of the agreement, by a reference to the oath of the other party; but it is impossible to suppose that because one of the parties might have destroyed the document, it shall therefore have no binding effect upon either of them.

29. To the twenty-ninth of said additional interrogatories, this respondent answereth and saith that he does not know any case before that of *M'Adam contra M'Adam*, where precisely in such circumstances a mere declaration of consent de præsenti was held to constitute a marriage per verba de præsenti. But he knows of no case where that general proposition has been seriously disputed; and it is laid down as the law of Scotland by all the authorities already referred to. Indeed the proposition taken in the abstract was scarcely disputed in the case of *M'Adam*; the argument of the party who disputed the effect of the declaration, being chiefly directed to an attempt to shew that the declaration could not have been seriously and deliberately made animo contrahendi matrimonium, and that Mr. M'Adam at the time he made it was in a state of insanity, which fact was the subject of a long proof, which would have been altogether unnecessary, if in point of law such a declaration of consent de præsenti was insufficient to constitute a marriage.

30. To the thirtieth of said additional interrogatories, this respondent answereth and saith that he conceives that he has already answered this query, by what he has said in answer to the twenty-fifth of said additional interrogatories.

31. To the thirty-first of said additional interrogatories, this respondent answereth and saith that where a marriage has taken place between a man and woman, in the way and manner which the law of Scotland authorizes, neither of the parties can marry again, and it is not in the power of one of the parties to annul the marriage by lying by, while the other contracts a [29] marriage with another. If therefore a promise of marriage, followed by a copula, does by the law of Scotland constitute an effectual marriage, it follows that the second marriage, however public and regular, would be void according to the law of Scotland, just in the same way as if the first marriage, as well as the second, had been celebrated in facie ecclesie. That the only effect which, in the respondent's opinion, could be given to the woman claiming in virtue of the promise and copula, having lain by, without objecting to the second marriage taking place, knowing it to be seriously intended, would be this; that her conduct would afford a strong piece of presumptive evidence to shew that the promise of

marriage had not been seriously made or received, and therefore was not such a promise as the law requires, when followed by a copula, to constitute a marriage. But the respondent does not conceive that this conduct on the part of the woman would, independently of other circumstances, be sufficient to take off the effect of the promise and copula; and the respondent presumes that in the case observed by Lord Stair, 31st January, 1675, *Beathie contra Barclay*, referred to in the respondent's answer to the fifth of the original interrogatories, the court must have proceeded on something more than merely the woman's having lain by, without bringing a declaration of marriage against him. The man, in that case, does not appear to have married another; nothing more was found than that the presumptive *pater est quem nuptiæ demonstrant* did not take place as if there had been a formal marriage, so that the woman was bound to prove a copula after the date of the promise.

The same witness examined on the further additional interrogatories, given on behalf of John William Henry Dalrymple, Esq. the other party in this cause.

1. To the first of the said further additional interrogatories, this respondent answereth and saith that he considers the decision in the case of *Jean Campbell contra Magdalene Cochrane*, as one of a very peculiar nature, and that it could not have been decided upon the ground that the conduct of Magdalene Cochrane, in having allowed Mr. Campbell to marry another without objection, was sufficient to bar her claim to have her marriage declared. [30] Magdalene Cochrane did not alledge merely a promise of marriage and copula following, to which alone such an objection could apply; on the contrary, she expressly averred that she had been privately married to Mr. Campbell by Mr. William Cockburn, an Episcopal minister, in the presence of witnesses whom she named, so that the marriage which she alledged was every bit as regular as that which Mr. Campbell afterwards contracted with her competitor, which was also an irregular one. It was impossible that the Court could mean to find that a marriage actually celebrated with one woman could be annulled by a marriage with another, merely because the first wife had not previously taken any steps to have her marriage declared; and the respondent therefore presumes that, as Magdalene Cochrane had no writing to produce in order to prove the celebration of a former marriage, or even a promise of marriage, the Court must have refused to allow her a proof by witnesses, merely because she offered to establish facts, some of which could only be competently proved by writing, and others which were totally inconsistent with the whole of her own conduct; that if the Court proceeded on any other ground the respondent would with great deference presume to say that the decision was ill founded, and he would be warranted to say so from the subsequent decision in the case of *Pennycook and Grinton contra Grinton and Graite*.

2, 3. To the second and third of said further additional interrogatories, this respondent answereth and saith that in the case of *Elizabeth Lining contra Hamilton*, there does not appear to have been any promise of marriage; if there had, there can be no doubt that Elizabeth Lining, instead of being merely found entitled to damages, would have had her marriage declared. That with regard to the cases referred to by Lord Kilkerran, in the first of them, *Kerr contra Hislop*, there seems to have been no promise of marriage; as to the other, *Castlelaw contra Agnew, of Shenchau*, the respondent does not find it collected. Lord Kilkerran is mistaken in saying that in both cases there was a promise of marriage, for the contrary appears from the case of *Kerr contra Hislop*, as collected by Lord Fountainhall, and in the other case his Lordship says the adherence was not insisted on. That the respondent does not therefore conceive that any conclusion can be drawn from Lord Kilkerran's notice of these two cases, inconsistent with the general doctrines of law, to which the respondent has given his opinion, or tending to [31] shew that, by the law of Scotland in 1696, a promise of marriage, followed by a copula, did not constitute a marriage.

4. To the fourth of said additional interrogatories, this respondent answereth and saith that he has looked into the passage in Lord Kaimes's *Elucidations* referred to, in which he perceives that his Lordship had doubts of the propriety of the judgment in the case of *Pennycook and Grinton contra Grinton and Graite*; but with great deference to that learned writer, who very frequently indulged himself in speculations as to what the law of Scotland ought to be rather than in discussing what it really was, the respondent continues of opinion that that case, however hard it may appear, was decided upon the true principles of the law of Scotland.

22d August, 1809.

HENRY ERSKINE.

Repeated and acknowledged before me, at Edinburgh, the undersigned Wm. Coulter, Lord Provost.

In the presence of Harry Davidson, Not. Pub. and Actuary assumed.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

7th June, 1809.—ROBERT CRAIGIE, ESQ., of the city of Edinburgh, advocate, aged about fifty-three years, a witness produced and sworn, deposes and says that he has practised as an advocate before the Supreme Court of Session in Scotland since 1776; and further to the eleventh article of the said libel he deposes and says that he has attentively perused and considered the several exhibits annexed to the libel, and that according to his opinion and belief, by the law of Scotland, marriage may be completed between two persons of proper age and free to enter into such an engagement, not only by actual celebration in facie ecclesiæ, but by cohabitation as man and wife, and also by a mutual declaration of the parties to that effect; and besides this, it appears to the deponent to have been settled in the case of *Pennycook contra* [32] *Grinton*, 15 Dec., 1752, and the authorities there quoted, and the deponent believes has been since held as law that a promise of marriage followed with a copula does not merely warrant the courts of law to compel performance of the promise, but without any judicial interference constitutes that relation between the parties. But although all these are legal modes of constituting marriage by the law of Scotland, the one first-mentioned is the only one which can be deemed altogether unexceptionable, and not admitting of any proof or argument to the contrary: all the others, though affording prima facie evidence of a marriage, admit of explanation from collateral circumstances. It is held to be competent to prove that the acts were not meant by the parties to constitute a marriage, nay, it has been determined that the effect of them might be wrought off by the after-conduct of parties, at least so far as third parties are interested. These propositions the deponent considers as established by the decisions 20th December, 1781, *More contra M'Innes*; 3d March, 1786, *Robertson contra Inglis*; 16th February, 1786, *Taylor contra Kello*; 6th December, 1796, *M'Laughlane contra Dobson*; 13th June, 1801, *Napier*, not reported; and 29th June, 1751, *Campbell contra Cochrane*, not reported; but the particulars to be found in the session papers in the case of *Napier*. In the present case there has been no regular marriage, nor, as the deponent thinks, cohabitation as man and wife, in the legal sense of these words. The plaintiff's claim, therefore, on the deponent's opinion must rest on one or other of the two grounds last mentioned, viz. either a mutual declaration or acknowledgment as to the parties being man and wife; or a promise and copula: and the evidence as to the obligation or engagements of the parties which has been produced appear to be of three kinds; No. 1 of the exhibits contains a promise of marriage; No. 2 contains a mutual acknowledgment, as explicit as possible, that the parties were man and wife; in No. 10 there is an acknowledgment equally explicit on the part of the defendant, but the counter part of it by the plaintiff appears, in the deponent's opinion, to import a promise or undertaking that unless in extreme necessity (the nature of which is not mentioned) she would never avow the connection, which at least in a question with third parties might, in certain circumstances, preclude a claim on her part to the conjugal rights. In No. 14 there is a request on the part of the defendant for another declaration by the plaintiff, which, if it was sent and conceived in unqualified terms, would, in the deponent's [33] opinion, import a mutual engagement; and in the other numbers there are expressions which, the letters having been received and not rejected by the plaintiff, may (as the deponent thinks) be considered as binding on her, and therefore forming a mutual engagement. And especially if these letters could be combined and connected with letters by the plaintiff in the same or similar terms, and not counteracted by inconsistent acts or other expressions of a contrary tendency, this also, in the deponent's opinion, would be sufficient to establish a marriage: but without such letters from the plaintiff the deponent conceives it may with some justice be contended that the letters from the defendant can only be considered as a promise of marriage; and from some passages in the letters (vide particularly No. 4, 5, 12, 13, 14) there appears to the deponent some room to think that, notwithstanding the promises and declarations, and the appellations of husband and wife, and other expressions of similar import, the defendant did not consider himself or the plaintiff to be unalterably bound, but that either might withdraw from the connection and marry with another person. And there are also some passages which,

in the deponent's opinion, tend to create a belief that the plaintiff in her letters had expressed herself to the same effect; and these explanations appear to the deponent to limit and qualify, not only the letters, but also the promise and declarations, all of them being to be taken together, and the true deliberate meaning of the parties to be extracted from the whole. As to the evidence of the copula, it appears to the deponent that it had been attempted in the end of May, 1804, No. 4, but then for the first time: but from other passages in the same letter, and also in No. 5 in the deponent's opinion, it may be strongly inferred that a copula had taken place. And the arrangements as to "a room" in No. 6 and 7 go strongly, as the deponent thinks, to authorize a conclusion that a copula had taken place. From the foregoing explanation and analysis of the evidence the result in the deponent's opinion and belief is that, if the question were to be tried in Scotland, and if no other or further evidence could be obtained, the decision it is thought would be favourable to the plaintiff; but it is thought that in the circumstances of this case the courts of law in Scotland would not immediately proceed to a determination upon the evidence as it stands. As the plaintiff might compel the defendant to produce the letters written by her to him, and in general all writings that had passed between them, the courts would, in all probability, afford the necessary authority for these purposes. And if the copula has not been [34] expressly admitted in the pleadings for the defendant, they would allow also a proof on that subject.

RO. CRAIGIE.

The same witness examined on the interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said interrogatories, this respondent answereth and saith that the law of Scotland, in regard to the validity of marriages not regularly celebrated, cannot well be said in general to be doubtful and indefinite. But the application of the law to existing cases has, from the circumstances already mentioned by the respondent, becomes oft times very doubtful and uncertain.

2. To the second of the said interrogatories, this respondent answereth and saith that the law of Scotland as to marriages not regularly celebrated, depending on no express enactments, must be gathered from the authorities of writers on the law, and the decisions of the courts of law in Scotland; and, upon an observation of those authorities and precedents, the respondent's opinion has been formed with regard to such marriages.

3. To the third of the said interrogatories, this respondent answereth and saith that if "by an irrevocable obligation to marry" is meant a promise unconditional and absolute on one side, or even a mutual promise with regard to a marriage in futuro, not followed with copula, this in certain circumstances may authorize a claim of damages; but if such promise to marry be followed with a copula or consummation it will, as has been already deposed to, constitute a marriage, and not merely an obligation to marry.

4. To the fourth of the said interrogatories, this respondent answereth and saith that in the case where the obligation to marry is unilateral, that is, proceeding from the man or the woman, without anything expressive of or implying a mutual obligation on the other side, it cannot be held to constitute marriage; and consequently it will not afford an effectual bar to a marriage with a third party.

5. To the fifth of the said interrogatories, this respondent answereth and saith that in all cases the right to have a marriage declared must depend upon the reciprocal obligations of the [35] parties at the time when the right is to be enforced in a court of law, both of them being bound to perform, or neither.

6. To the sixth of the said interrogatories, this respondent answereth and saith that as a promise to marry a particular woman followed by a copula or consummation in Scotland is held to constitute marriage, it must prevent the man from marrying another woman, and the woman from marrying another man, either in England or any other place; and this, whether the marriage has been declared binding in the courts of law in Scotland, or not: and if the parties are thus effectually married, no marriage afterwards taking place, in England or elsewhere, can, in the respondent's opinion, be binding, or followed with any legal effects; although exceptions occur in such cases as those of *Campbell* and *Napier*, formerly mentioned by the respondent, where, in consequence of long silence, or taciturnity, as it is called in Scotland, in asserting the conjugal rights, a party has been held to be barred from claiming those rights in a question with another party, who, by reason of that silence or taciturnity,

has been led to form a matrimonial connection with the husband or wife of the party so silent or delaying.

7. To the seventh of the said interrogatories, this respondent answereth and saith that a declaration in writing given by a man to a woman, or vice versa, without a counter declaration on the other side, can, in general, be held only as implying a promise of marriage; at the same time, if the party to whom the declaration is addressed shall acquiesce in the declaration, or shall by his or her acts and deeds indicate acquiescence, this, without an express written declaration, may be considered as equivalent to a mutual declaration, which, if deliberately given, will be sufficient to constitute a marriage.

8. To the eighth of the said interrogatories, this respondent answereth and saith that the question whether a copula prior to a promise will constitute a marriage, or only an obligation to marry if a promise follows, has not, so far as the respondent knows, been precisely determined; and the result, in the respondent's opinion, would be somewhat doubtful; though he rather thinks that it would not defeat the ordinary effect of a promise of marriage followed with a copula, that there had been a copula preceding such promise.

9. To the ninth of the said interrogatories, this respondent answereth and saith that the mutual declarations of the parties, if clear and in words de presenti, will, in the deponent's opinion, as formerly stated, constitute marriage, and not merely an ob-[36]-ligation to marry; or if the parties should correspond with each other, calling themselves husband and wife, this also will, in general, be held sufficient.

10. To the tenth of the said interrogatories, this respondent answereth and saith that although in the case last above stated the law in general stands as he has said, such mutual declarations may be counteracted by other writings of a contrary tendency, or by acts and deeds of the parties affording real evidence to the contrary; and in all those cases the declarations of the parties must be taken with all the attendant circumstances; and if there is reason to conclude from the expressions used by them, that both or either of the parties did not understand that they were truly man and wife, or that the declarations were intended for a particular purpose, and not with the view of constituting the irrevocable union of marriage, all this will enter into the question whether the parties are married or only under an obligation to marry. But it is almost impossible to say, a priori, in what manner, and to what extent, in all circumstances, these qualifications or limitations are to operate. RO. CRAIGIE.

The same witness examined on the additional interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said additional interrogatories, this respondent answereth and saith that the passages here referred to in Sir Thomas Craig, cannot be held as proof of the law of Scotland, unless so far as they are supported by the decisions of the courts of law, or the general and concurring opinions of contemporary lawyers. The passages, however, referred to, so far as applicable to the state of the parties in this cause, do not appear to differ much, or in substance, from what is now held to be law; neither does it appear to the respondent that the law of Scotland, as to what constitutes a valid marriage, has been materially altered since the time of Sir Thomas Craig.

2. To the second of the said additional interrogatories, this respondent answereth and saith that the observations immediately before made, appear to him to be applicable to this interrogatory, as well as to the preceding one.

3. To the third of the said additional interrogatories, this [37] respondent answereth and saith that the decision here referred to appears to this respondent to be agreeable to the authorities there mentioned. It is expressly stated in the report of the case by the faculty that the cause was decided on the general point, and the respondent has been led to consider the law as fixed, although he cannot, at this time, mention any particular case in which the same decision was, in terminis, given. And upon the principles there laid down, it appears to this respondent, that no bona fides on the part of a woman entering into a marriage with a man already legally married, according to the principles of the decision, could annul the former marriage, or render the marriage entered into by her a legal or valid one.

4. To the fourth of the said additional interrogatories, this respondent answered and saith that he has no recollection of any case similar, or nearly similar, to that of

Pennycook; but, as he has already stated, he has considered, and still considers, that decision as a precedent, the authority of which ought not to be questioned.

5. To the fifth of the said additional interrogatories, this respondent answereth and saith that in those cases where there are no express enactments, the Court of Session is in general much governed by precedents; and where a determination has been given upon a general point of law, after an argument at the bar, or in printed pleadings, it is not usual for the Court to pronounce an opposite judgment. The respondent, however, understands that it is not one decision, unless it has been long acquiesced in, but a succession of them, or series rerum judicatarum, that makes or ascertains what is law: and he has no doubt that there are instances in which the Court of Session has deviated from what was formerly decided, although he believes it will be found upon examination that these deviations are much more rare than is sometimes thought; what has been considered a deviation, not being truly such, but arising from a proper discrimination of cases, which, at first sight, appear to fall under the principle of a particular decision, but which are, and ought to be, regulated by a different one.

6. To the sixth of said additional interrogatories, this respondent answereth and saith that in those cases where the principles of former decisions are considered to be doubtful, and where they are not understood to have acquired the force of precedents, or where a doubt has been entertained whether the principles of prior adjudications can with propriety be applied to the circum-[38]-stances of existing cases, it is the practice of the Court of Session to appoint a hearing in presence; and counsel, in such cases, are permitted in general to argue upon the soundness of the principles of law which appear to have governed the decision of former cases, as well as upon the application of those principles to the case before the Court; but in this a due regard is always paid to the date of the decisions, their uniformity, and to the effect that has been given to them in practice, although there has been no second determination in the same, or nearly in the same circumstances.

7. To the seventh of the said additional interrogatories, this respondent answereth and saith that this interrogatory appears to him to be already answered.

8. To the eighth of the said additional interrogatories, this respondent answereth and saith, as he has already stated, that the case of *Pennycook* appears to him to have been well decided at the time, and also corroborated by the subsequent practice.

9. To the ninth of the said additional interrogatories, this respondent answereth and saith that the Court of Session, though not absolutely debarred from reviewing the principle of the decision in the case of *Pennycook*, would, in this respondent's opinion, most reluctantly entertain any argument that could be raised against the authority of the decision; and, in this respondent's opinion, it would be most unsafe, as well as unusual, at this time to listen to any such argument.

10. To the tenth of said additional interrogatories, this respondent answereth and saith that as the writings necessary in order to establish a marriage not celebrated in a formal manner require no publication in any record, they must be judged of according to their import when they are produced; although they may not have been generally, or publicly heard of, till one of the parties has intermarried with some one else.

11. To the eleventh of said additional interrogatories, this respondent answereth and saith that holding a promise of marriage followed by copula to constitute the relation of marriage, and not merely an obligation to marry, according to the principles laid down in the case of *Pennycook*, this respondent thinks no after marriage, however formally celebrated, could annul the former one, or render the second marriage valid. But in judging whether there has been a serious and deliberate promise of marriage, it will properly enter into consideration, that one of the parties deeming himself not married has entered into a formal marriage [39] with another person, because it is not probable that a party knowing or believing himself already married, will enter into a second engagement of the same kind; and where the woman, having at one time acted in such a manner as to infer a legal presumption of marriage, has concealed her state in such a manner as to induce another bona fide to enter into a marriage with the man with whom she had previously formed such a connection, the decisions in the case of *Campbell* and *Napier* go some length to shew that the circumstances here mentioned will be of importance.

12. To the twelfth of said additional interrogatories, this respondent answereth

and saith that the subject of this interrogatory, as well as some of the following ones, appears to this respondent to be inapplicable to the point, or article in the libel on which this respondent understands himself to be examined. And it further occurs to this respondent that the defendant, during the early part of his correspondence with the plaintiff, having been in Scotland for more than forty days, would, by the law of Scotland, be considered as domiciled there; and in the matter of contracts or obligations, subject to the law of Scotland in the same manner as if he had been born in Scotland, or had resided in it from his birth. And if truly married to the plaintiff, according to the law of Scotland, while residing and domiciled in that country, the circumstance of the defendant's going back to England, and there marrying Miss Manners publicly before the present action was instituted, could not, in this respondent's opinion, have any effect upon the previous marriage in Scotland.

13. To the thirteenth of said additional interrogatories, this respondent answereth and saith that if an officer, or other person, engaged in military service in Scotland, being an Englishman by birth, and generally domiciled in England, were to have such intercourse with a woman in Scotland, as by the law of Scotland is sufficient to constitute marriage, this would bind such person in the same manner as if he were a Scotsman, or generally domiciled in Scotland. But, in judging of the nature and effects of such intercourse, it would, in this respondent's opinion, justly enter into consideration that in England cohabitation as man and wife is not, in all cases, held to constitute marriage; although it may, in certain circumstances, create a presumption of a previous celebration; and consequently, that an Englishman accustomed to the law of England, might cohabit with a woman in Scotland, and allow her to take his name, without intending to marry her: and although an Englishman, after cohabiting with [40] a woman in England, and allowing her to take his name, were to bring her down to Scotland, and conduct himself there in the manner already stated, this would not, in the opinion of this respondent, in every case constitute a marriage. This, however, would be no exception to the general rule as already stated by this respondent, but truly a judicious application of it to the circumstances of the case: the law in all cases, not attending merely to the external act of cohabitation, but looking to that which is alone decisive, viz. the full and deliberate intention and consent of both parties to become man and wife, which may be inferred from cohabitation, but not necessarily, nor in all cases without exception.

14. To the fourteenth of said additional interrogatories, this respondent answereth and saith that a promise of marriage made in England, followed by a copula in Scotland, would, in this respondent's opinion, be sufficient for obtaining a decree declaring the marriage in the Courts of Scotland, if the parties were to be found there.

15. To the fifteenth of the said additional interrogatories, this respondent answereth and saith that if a promise of marriage made in Scotland were to be followed by a copula in England, this, if the parties were afterwards found in Scotland, would, in this respondent's opinion, be sufficient for obtaining a decree in the Courts of Scotland.

16. To the sixteenth of the said additional interrogatories, this respondent answereth and saith that marriage by the law of Scotland, being considered merely as a contract, and requiring only the deliberate consent of both parties for its completion, it would seem to be enough for obtaining a decree in the Courts of Scotland that the parties had in any place, or at any time, expressed their deliberate consent, *de presenti*, to be married. It is a different question, however, whether in the circumstances here stated, as well as in those mentioned in the two preceding interrogatories, the Courts of England, or any other foreign country, where marriage is not completed by consent merely, but in general requires some formal celebration, would so far yield to the law of Scotland as to give the same decision.

17. To the seventeenth of said additional interrogatories, this respondent answereth and saith that in the case here mentioned, as the letters written by the Englishman would not *per se* constitute marriage, but would in general require to be confirmed by letters of the same kind written by the woman in Scotland, the [41] agreement could not be considered as mutual, till the last mentioned letters were received, and consequently it would seem that the marriage could not be said to have been contracted in Scotland. In such a case, however, it appears to this respondent that the Courts in Scotland, without regarding the *locus contractus*, would find the marriage binding, if the question could be effectually tried there.

18, 19, 20. To the eighteenth, nineteenth, and twentieth of the said additional

interrogatories, this respondent answereth and saith that in general where there is only an obligation to marry, the parties may retract without being liable in damages : and where damages are due, it is not in consequence of the obligation to marry, but either from the manner in which the treaty has been broken off, as where it is attended with circumstances in some degree injurious to one of the parties (see the case of *Johnson against Paisley*, 21st December, 1770), or where, in contemplation of the marriage, expences have been incurred.

21. To the twenty-first of said additional interrogatories, this respondent answereth and saith that the law being now fixed, it does not appear to be of importance to discover the grounds on which it was at first established, although this respondent has no doubt that they are nearly as stated by Mr. Erskine : and that in this, as well as in many other cases, the law presumes the parties to have intended that which in the circumstances of the case was proper and becoming, and at the same time deducible from their actings ; or, in other words, the law in such cases justly holds that persons having formed a connection, the object of which was marriage, would not proceed to consummate unless with the same view.

22. To the twenty-second of said additional interrogatories, this respondent answereth and saith that the presumption here mentioned cannot be said to be a *præsumptio juris et de jure*, because it might, in this respondent's opinion, in certain circumstances, be obviated by contrary evidence, e.g. if the man and woman were, previously to the copula, to interchange written declarations of their having determined not to marry each other. But it is a presumption of law so strongly established, as not to be obviated unless by evidence of the nature here suggested.

23. To the twenty-third of said additional interrogatories, this respondent answereth and saith that a promise of marriage followed by a copula, appears to this respondent to constitute marriage upon both parties equally and in general, as the respon-[42]-dent has formerly deposed, the obligations of the parties must be mutual or none at all.

24. To the twenty-fourth of said additional interrogatories, this respondent answereth and saith that he has already stated his opinion as to the decision in the case of *Pennycook* ; and as to the authority of Lord Stair, and the respect that is due to the different editions of his *Institutes*, this respondent, although greatly doubting the propriety of this interrogatory (as well as of some of the preceding ones), saith that Lord Stair has been always considered as a writer of great authority in Scotland ; it is to be observed however that the different parts of his *Institutes* were composed and published at different periods, and the fourth book was not printed till long after the other three ; Lord Stair too being actively engaged in the political world as well as in the line of his profession, could not bestow that attention upon his publications, or in revising them, that was necessary for rendering them perfectly correct in all respects ; and the manuscripts from which the different editions have been made out appear to differ in some instances from each other ; nor is there any edition so correct and authentic, as to prove to a certainty what his Lordship's opinion was, although that published in 1759, chiefly by the care of the late Sir William Pulteney, is deemed far preferable to the rest.

25. To the twenty-fifth of said additional interrogatories, this respondent answereth and saith that the common stile of a contract of marriage in Scotland may, at first sight, appear to import a consent to marriage *de præsenti*, the parties declaring their acceptance of each other for lawful spouses, or using words to that effect ; but these expressions are uniformly held in the practice of Scotland, not to constitute marriage, but *espousals* only, or *sponsalia*, as known in the civil law. The passages of the exhibits formerly referred to by this respondent are, in his opinion, conceived in different and stronger terms, denoting that the plaintiff and defendant were "man and wife ;" and in the manner and to the extent already stated by this respondent must, in this respondent's opinion, be held to constitute a valid marriage.

26. To twenty-sixth of said additional interrogatories, this respondent answereth and saith that what has been said by him in answer to the immediately preceding interrogatory, appears to be a sufficient answer to this one also.

27. To the twenty-seventh of the said additional interrogato-[43]-ries, this respondent answereth and saith that this interrogatory appears also to be already answered by this respondent, when examined in chief.

28. To the twenty-eighth of the said additional interrogatories, this respondent answereth and saith that this interrogatory appears also to be already answered,

unless so far as it has been asked, what would have been the defendant's remedy if the plaintiff had destroyed the exhibits? to which this respondent answereth and saith that in the case here supposed, the defendant's remedy would have been the same as in the case of a marriage ascertained by a regular certificate of a clergyman, or justice of the peace, but which certificate has been afterwards destroyed by one or other of the parties; the parties desirous of having the marriage fulfilled suffering in both cases from want of proof, and not from any defect of right. In both cases, however, the writings so destroyed might be restored by the remedy of an action for proving the tenor of their contents, and the manner of their being destroyed could be satisfactorily established.

29. To the twenty-ninth of said additional interrogatories, this respondent answereth and saith that he does not know of any case before that of *M'Adam*, in which it was in terminis decided that a mere declaration of consent to marry per verba de præsenti, was sufficient to constitute marriage rebus integris: but the proposition appears to this respondent to be established by the general and concurring opinion of all the accredited writers on the Scot's law; and where the declaration is not to be proved by witnesses, but by written evidence, it appears to this respondent to be incontrovertible. In the case of *M'Adam*, the difficulty appears to have arisen, not so much from any doubt as to the principle here laid down, but from the particular circumstances of the case, the parties having previously lived in a state of concubinage, and the declaration by Mr. *M'Adam* given in a very abrupt manner, and immediately followed by his death by suicide.

30. To the thirtieth of said additional interrogatories, this respondent answereth and saith that he has already mentioned the effect of contracts of marriage to be different from that which is stated in the beginning of the interrogatory. The effect of a contract of marriage, when followed by a copula, is to make the parties husband and wife in the same manner as a promise of marriage followed by a copula; the only difference being that in the former case the promise is proved by a formal writing, [44] whereas, in the other case, it may be proved either by other not so formal writings, or by the oath of party, or by acts and deeds inferring an engagement to marry.

31. To the thirty-first of the said additional interrogatories, this respondent answereth and saith that it has been generally held, since the decision in the case of *Campbell*, that those circumstances which would be deemed sufficient to constitute a marriage, in a question between a man and a woman, having exchanged a promise of marriage, and afterwards known each other carnally, might not be sustained to the same effect, where the question arose between one of the parties and a third person, who, in consequence of a studied concealment of the connection, had been led to enter into a formal and regular marriage. One reason for this is to be found in the impropriety of concealing such an engagement, by which third parties may suffer an irretrievable injury; but another reason, and one more consistent with the law of Scotland with regard to marriage, appears to be that in the case of marriages not regularly celebrated, but to be gathered from the words or actings of the parties, every circumstance of their conduct is to be duly weighed, in order to ascertain whether a deliberate promise or consent was given, and whether in the opinion and intention of the parties themselves the irrevocable union of marriage had been formed. In this view the concealment of the connection, especially when continued for a great length of time, and in circumstances where the party was called upon to avow the marriage if it had truly taken place, must go far to shew that there was no marriage, nor a serious intention to marry in any of the parties.

ROBERT CRAIGIE.

The same witness examined on the further additional interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said further additional interrogatories, this respondent answereth and saith that he had formerly adverted to the case here noticed, which, after the date of the report by Falconer, underwent a full consideration in the House of Lords, and afterwards in the Consistorial Court of Scotland, having been finally decided on the 29th June, 1751; and having also more largely adverted to the decision in his answer to the thirty-first [45] additional interrogatory, he thinks it only necessary to add that, supposing the evidence of the marriage in this case to depend upon the exhibit, No. 10, and also supposing that the circumstances in the case of the plaintiff were in other respects similar to that of *Cochrane*, the decision in the case last

mentioned would certainly be of importance, but to what extent it seems impossible at this time to say.

2, 3. To the second and third of the said further additional interrogatories, this respondent answereth and saith that the case of *Kerr and Hyslop*, as reported by Fountainhall, 15th July, 1696, appears to this respondent to be quite different from the present one, and in that of *Castlelaw* against *Agnew*, which is fully stated in the printed papers, in the case of *Linnen* against *Hamilton*, 19th December, 1748, the judgment of the commissaries, which was affirmed in the Court of Session, was that the defender's oath did not prove a direct promise of marriage, previous to the connection acknowledged by him: and in the case of *Linnen*, where also there was a reference to oath, the defender was on similar grounds freed from the conclusions of the action instituted for establishing a marriage, but in a separate action subjected in damages on account of his "having enticed and seduced the pursuer to yield to his embraces;" and none of the decisions, in this respondent's opinion, prove that a serious promise of marriage, followed by a copula, was not then held in law as equivalent to marriage.

4. To the fourth of the said further additional interrogatories, this respondent answereth and saith that this respondent has now and formerly read the passage referred to in Lord Kaimes' *Elucidations*, and has attended to what is there said upon the case of *Pennycook*; and although this respondent holds that this interrogatory is irregular, if not incompetent, he thinks it proper to say in explanation that the publication here referred to, seems to have been meant by the author, not so much to point out what the law was, but what in his opinion it ought to be (see preface). And the observations on the subject of marriage, though plausible and ingenious, do not seem to be founded in the law of Scotland. There is no ground for saying that the priest's blessing is, or ever was, in Scotland (at least since the æra of the Reformation in 1560) deemed indispensable, though it is the most regular mode of constituting marriage. The act of 1503 was intended to regulate the proceedings in the matter of terce, by allowing a woman, who had been by common reputation held as a wife, to obtain possession of the legal allowance out of the lands in which her reputed husband died infeoffed, until it was determined in the courts of law that the parties had not been married. The decisions mentioned by Balfour, and afterwards by Spottiswood, must have been attended with peculiar circumstances, and as stated by these writers appear to be erroneous, and would not be repeated at this time. In the case of *Craig*, in 1628, it is probable the decree of the commissaries had been given in absence (by default), and therefore still subject to review; and the parties, as this respondent thinks, must have considered it in that light. And the reasonings by Lord Kaimes, as to the effect of a promise of marriage, followed by a copula, appear to be quite inconclusive, and at this time would not be listened to. Indeed, although in some of the later adjudged cases, with regard to marriage, this publication has been referred to, this has been done very slightly, and it has been hardly, if ever, adverted to upon the bench; and although containing some information that is not to be found elsewhere, and much acute and plausible remark, it was never in this respondent's opinion and belief considered as of authority in the Courts of Scotland.

7th August, 1809.

ROBERT CRAIGIE.

Repeated and acknowledged at Edinburgh, before me the undersigned Wm. Coulter, Lord Provost.

In the presence of Harry Davidson, Not. Pub. and Actuary assumed.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

7th June, 1809.—ROBERT HAMILTON, ESQ., of the city of Edinburgh, advocate, aged about forty-five years, a witness, produced and sworn, deposes and says,

That he has practised as an advocate before the Supreme Court of Session in Scotland, since 1788; and that he has held the situation of Professor of the Law of Nature and of Nations, [47] in the University of Edinburgh, since 1796; and further to the eleventh article of the said libel he deposes and says that he has attentively perused and considered the several exhibits annexed to the libel, and that he is of opinion these exhibit and furnish ample grounds for establishing a marriage between the parties in this cause by the law of Scotland, and that such marriage is thereby established. That in giving this opinion he takes it for truth, as averred in the libel, that a copula or concubitus has taken place, and there appears indeed to be presumptive

evidence of it from certain expressions in the defendant's letters (No. 4 and No. 7); holding this, therefore, to be a fact, there appear in this case to be two grounds which constitute a valid marriage by the law of Scotland: first, it appears from the exhibits, No. 1 and No. 2, the last dated 28th May, 1804, that mutual promises of marriage were interchanged between the parties; that these were followed by concubitus or a copula which, in the deposer's opinion, constitute a marriage by the law of Scotland. That this was the state of parties is confirmed by Mr. Dalrymple's letters, from No. 3 to No. 9 inclusive, the tenor and strain of which, and various expressions used therein, denote that Mr. Dalrymple conceived he had entered into the fixed relation of marriage with Miss Gordon: deposes that besides the above there is a second ground by which in the deposer's opinion an effectual marriage betwixt these parties has been constituted according to the law of Scotland; by the annexed exhibit, No. 10, dated 11th July, 1804, the defendant declares and acknowledges Miss Gordon to be his lawful wife, and in this declaration Miss Gordon concurs by her engagement of the same date; and although she thereby promises that nothing but the greatest necessity shall force her to declare her marriage, that does not appear to the deponent to weaken the case; the reason for concealing their marriage being, in his opinion, sufficiently accounted for by the subsequent letters, No. 13, 14, and 15, from the defendant to the plaintiff; deposes that the above written declaration of the parties expressed in unequivocal terms, and it must be presumed deliberately made, in his opinion, independent of all other circumstances, constitutes an effectual marriage; for he holds that according to the law of Scotland a marriage is completely established where consent is deliberately given; more especially, when expressed in a written acknowledgment or declaration per verba de presenti, bearing that the parties are eo-ipsa husband and wife: the deponent is of opinion that such a declaration constitutes a marriage by the Scot's law; though there [48] should be no concubitus; but that point does not here come into question, as he holds, according to the statement in the case, that concubitus or a copula has taken place. And he must further observe that the constitution of a marriage betwixt these parties as above mentioned is confirmed by various expressions in the defendant's letters to the plaintiff, subsequent to his declaration, namely, Nos. 12, 13, 14, and 15; in which, besides addressing her as his wife and subscribing himself as her husband, he expressly refers to the connection that has been established, pointing out at the same time the necessity that existed for its being concealed. Deposes that in giving this opinion he has paid attention to the writers upon this branch of the law, and to the various reported cases which are consequently well known. But his opinion upon this point has been much confirmed by a decision pronounced by the Court of Session upon the 13th June, 1792; *Elizabeth Ritchie* against *James Wallace*, which has not been reported. The deponent was counsel in that case for Elizabeth Ritchie, and has recently refreshed his memory by perusing the printed pleadings now in his possession. The circumstances were shortly as follows:—Elizabeth Ritchie became pregnant to Wallace, who, some months after, gave her an acknowledgment in his handwriting in these terms: "January, 1785, I, James Wallace, son to John Wallace, of Wallace Grove, do hereby acknowledge that you, Elisabeth Ritchie, daughter to Alexander Ritchie in Dumbrey, is my lawful wife; and will solemnize the marriage regularly between us in the terms of the rules of the Church, as soon as convenient for us; and I am your loving husband, signed, James Wallace. To Elizabeth Ritchie. Witness, Janet Telfer." Wallace denied his ever having written this acknowledgment, but it appeared from various circumstances to be genuine: Elizabeth Ritchie founded on it as a declaration de presenti, constituting a marriage, which conclusion in point of law Wallace controverted; but the Court, by a majority of six Judges to three, as appears from the deponent's notes upon the papers, sustained the sentence of the commissaries, which had found the acknowledgment libelled upon, relevant to infer marriage betwixt the parties.

R. HAMILTON.

[49] The same witness examined on the interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said interrogatories, this respondent answereth and saith that the law of marriage in Scotland has for a long period been clear and decidedly fixed. It is laid down by Lord Stair (edition 1681, pages 30 and 76, and edition 1693, pages 25 and 424) that marriage consists in the present consent, whether that be by words expressly, or tacitly by cohabitation or acknowledgment, or by natural commixtion, where there has been a promise or espousals preceding; for therein is

presumed a conjugal consent *de præsenti*. This was the law then, and the deposer holds it to be the law at this day, and is of opinion that it has not been shaken or altered by any of the cases that have since occurred, such as those of *M'Innes* against *Moore*, *White* against *Hepburn*, *Taylor* against *Kello*, *M'Laughlan* against *Dobson*, or *M'Gregor* against *Campbell*, which were all involved in special circumstances; whilst, on the other hand, the law as laid down by Lord Stair and Erskine, book 1st, tit. 6, § 2, 3, 4, 5, has been recognized and confirmed by various cases; particularly by those of *Inglis* against *Robertson* in 1786, *Ritchie* against *Wallace* in 1792, of *Edmonstone* against *Cochrane* in 1804, and *Walker* against *M'Adam* in 1807.

2. To the second of the said interrogatories, this respondent answereth and saith that the Scots law of marriage is ascertained and rests, 1st, upon legal principles in respect it is a consensual contract; 2dly, upon the authority of our law-writers referred to; 3dly, upon the judgments pronounced by the Court; and it is upon these that the respondent has formed and given his opinion.

3. To the third of the said interrogatories, this respondent answereth and saith that there certainly is a material difference betwixt an obligation or promise to marry and an actual marriage; a promise of marriage, *rebus integris*, may be resiled from; but if followed by a copula or consummation, a marriage, as formerly mentioned, is thereby constituted.

4. To the fourth of the said interrogatories, this respondent answereth and saith that an irrevocable obligation, by which he understands a written promise to marry delivered to a woman, will not be in all cases binding upon or tie up the woman from marrying another man. In the event of such a promise there is *rebus integris* no marriage, so that either party may draw back, [50] leaving it to the party injured to seek such redress as the law will afford by an action for breach of promise.

5. To the fifth of the said interrogatories, this respondent answereth and saith that he conceives that a woman who has received such a promise is entitled to call upon the man in the proper Court at any subsequent period to fulfil it; but as such a promise, provided matters were entire, would not constitute a marriage, the man might draw back, leaving to the woman her action for breach of promise: circumstances might no doubt occur which might take away the woman's right to demand the enforcement of the man's promise to marry, if, for instance, she was herself to marry another man, or if she was unequivocally to concur in, or consent to, the man's marrying another. This answer is given upon the supposition that there has been a promise merely, but *de facto* no marriage; for if that promise has been followed by a copula, a marriage is thereby constituted which no circumstances or length of time can annul; and which the woman accordingly may at any subsequent period demand to be declared in the proper Court. If a man has made a promise, and is uncertain from the circumstances which have occurred whether or not he has involved himself in a marriage, his remedy is by an action of jactitation of marriage, or of "putting to silence," as we call it in the Consistorial Court, the result of which will decide whether he is bound or free.

6. To the sixth of the said interrogatories, this respondent answereth and saith that he is of opinion that as a promise of marriage to a particular woman, followed by a copula, both events occurring in Scotland, constitutes a marriage by the law of Scotland, the man to whom these circumstances applied must be held as married in whatever country he may go to; and that he could not legally marry another woman in England or any where else. If such a man, from the woman's not insisting, was in dubiety as to the state he was in, his proper course would be to bring an action of putting to silence as above mentioned.

7. To the seventh of the said interrogatories, this respondent answereth and saith that a declaration in writing given by a man to a woman that she is his lawful wife, is not merely an obligation to marry, but is, when attended with the woman's acceptance and consent *de præsenti*, the valid constitution of a marriage.

8. To the eighth of the said interrogatories, this respondent answereth and saith that in the case supposed of a copula or [51] consummation, either before or after such a declaration, a marriage, it is thought, would certainly be constituted, nor would the circumstances mentioned constitute an obligation only upon the man to complete the marriage.

9. To the ninth of the said interrogatories, this respondent answereth and saith that a declaration in writing, such as here supposed, constitutes, as already observed,

a marriage, not merely an obligation to marry, and a correspondence such as is figured, as it would evince the understanding and belief of the parties, would confirm the idea as to the existence of a marriage between them.

10. To the tenth of the said interrogatories this respondent answereth and saith that if the man or woman who had given and received a declaration of a marriage, should thereafter express doubts as to the validity of such a declaration to constitute a marriage, or fears of being deserted, such expressions would, no doubt, be taken into account in explaining the intention of the parties at the time the written declaration was made; but unless such expressions indicated and inferred that there had been no marriage in view, intended, or entered into, so that the declared consent was thereby controverted and overruled, the deponent is of opinion that the expression of such doubts or fears by either party, which might be the result of misconception, could not destroy the effect of an explicit acknowledgment or declaration of a marriage. But it is hardly possible to answer this query pointedly, or in more precise terms, unless the circumstances or expressions alluded to were more particularly detailed.

R. HAMILTON.

The same witness examined on the additional interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said additional interrogatories this respondent answereth and saith that he is of opinion that Sir Thomas Craig, lib. ii. dig. 18, § 17, et sequent., where he treats of legitimate and illegitimate children, has delivered substantially what he is bound to presume was the law of Scotland, as to marriage at the time he wrote; according to that author it appears that the essentials of a marriage existed, provided sponsalia, or a promise, had preceded a concubitus or consummation. It has [52] indeed been conjectured, from what Craig says of the case of *Edward Younger*, that such circumstances conferred only a right of action to have the marriage solemnized, and he accordingly mentions that to that effect the mother had prevailed before the commissaries; but it appears from what immediately follows that though Younger had refused, these Judges nevertheless held that there had been a valid marriage, and gave effect to it accordingly. This proceeding seems to be very little different from the present law and practice, where a marriage constituted by a promise and copula requires, like other irregular and clandestine marriages, a declarator as judicial evidence of the fact. And whatever upon this point may have been Craig's idea, the respondent is of opinion that the law of Scotland has for a long period acknowledged that a promise followed by a copula does not merely furnish grounds for enforcing marriage, but does actually constitute one. That Craig treats of other points, namely, what effect is to be given to a marriage while a prior one has been entered into and is subsisting, and gives his opinion that the bona fides of one of the parties, though not sufficient to confirm the marriage, will nevertheless be effectual to legitimate the offspring, though not so if both parties are in the knowledge of the prior marriage; but the respondent doubts very much if children born in such circumstances could ever be regarded as legitimate, and is of opinion that by the law of Scotland as it now stands they would not. He further answereth that Craig is not upon points of this nature of the highest authority in the law of Scotland; they are not those upon which he professedly treats, and his opinions have not the same weight as those of Lord Stair and other subsequent writers.

2. To the second of the said additional interrogatories, this respondent answereth and saith that the doctrine laid down by Lord Stair in the passages referred to in this query must be presumed to have been agreeable to the law of Scotland in 1693, when the edition referred to was published. That it is further upon the whole agreeable to the law of Scotland as it stands now, except that it appears to be now more firmly established that a promise and subsequent copula constitute a valid marriage. That more particularly, and in answer to that part of the query, viz. if the law of Scotland has changed since the time of Lord Stair, and if so, what has introduced such change? the respondent answereth and saith it appears to him, that with a very few exceptions of dubious import, the law of Scotland that a promise, followed by a copula, constitutes a marriage, has come to [53] be permanently fixed and established. For it appears that both Sir John Nisbet, of Dirleton, who was advocate to King Charles the Second, and Sir James Stewart who was advocate to King William and Queen Mary, were of opinion (voce Sponsalia) that a promise, followed by concubitus, made an effectual marriage. Two cases are reported in the Dictionary of Decisions,

vol. ii. page 288; the first, 19th July, 1670, *Cockburn*, the second, 19th February, 1732, *Harvie*, which seem to infer that a promise of marriage and subsequent copula made an effectual marriage: the case 15th July, 1696, *Hislop* contra *Kerr*, reported by Fountainhall, and referred to in the case, 1st December, 1749, *Linning* contra *Hamilton*, appears no doubt to be somewhat adverse to this doctrine; but the respondent observes that this was not an action for declaring a marriage but for damages, and therefore he thinks, it to be presumed the woman *Hislop* was conscious that she could not establish such a promise of marriage as would enable her to prevail in an action of that nature, which idea is countenanced by the circumstances and opinions stated in the report. That this is not at any rate a decision that a promise and subsequent copula did not constitute a marriage; and although it had, the respondent does not think it could be held sufficient to over-rule the prior and subsequent adjudged cases and authorities. That the other case of *Agnew*, referred to in the decision of *Linning* contra *Hamilton*, instead of being adverse, seems to confirm this doctrine. That the respondent has examined the printed pleadings in the case of *Linning* (Sessions Papers in Advocates Library, Kaimes' remarkable decisions, No. 100), and from these it appears that Castlelaw, the woman, insisted against *Agnew* for a marriage, and in support of it alleged a promise and subsequent copula: no doubt appears to have been entertained of the relevancy of these grounds, but she failed in the proof; for having referred the promise to *Agnew* himself, he swore negative, upon which the commissaries found "that the defender's oath does not prove a direct promise of marriage previous to the concubitus;" and therefore assoilzied from the process of adherence, &c. To this sentence the Court of Session, upon the 1st January, 17¹⁹/₂₀ adhered: so that, foiled in her action for a marriage, she was contented to take, and *Agnew* to pay damages. That the case of 1st December, 1749, *Linning* contra *Hamilton*, and various other cases subsequent, appear to affirm the legal doctrine as to a promise and subsequent copula: the pursuer's action in that case, which was at first for a marriage, was chiefly founded upon the allegation of a promise of marriage [54] followed by a copula; which infers that such grounds were relevant: upon a reference to oath the defender denied the promise, which ended the question of marriage, so that the pursuer proceeded in her action of damages. But if the promise had been proved scripto vel juramento, the respondent has not a doubt that the pursuer *Linning* would have prevailed in establishing the marriage; that then came the case, *Pennycook* and *Grinton* contra *Grinton* and *Graite*, where the question was expressly decided; and the same doctrine is confirmed by the case 26th November, 1755, *Smith* contra *Grierson* in the Faculty Collection, from the report of which it is clearly to be inferred that a promise and copula sufficiently constituted a marriage by the law of Scotland; the only legal point which occurred being as to the mode in which the promise was to be proved, which it was found could be done only by the defender's writing or his oath. That the same doctrine seems to be taken for granted in the argument on the case 20th December, 1781, *M'Innes* contra *More*, where it is stated as one of the modes of constituting a marriage. It is likewise inferred in the case 18th November, 1785, *White* contra *Hepburn*; and in the case, 13th June, 1792, *Ritchie* contra *Wallace*, referred to in the respondent's deposition in chief; the respondent observes from the notes of the Judges opinions that the late Lord Justice Clerk M'Queen stated a promise and copula as one of the modes of constituting a marriage. In the case of *Kennedy* contra *M'Dowell*, decided in 1800 but not reported, the pursuer's chief ground of action for establishing a marriage was a promise and subsequent copula: but though she failed in establishing these precise circumstances, and a consequence in making out her marriage, no doubt the respondent understands, was entertained by the commissaries or the Court of Session, as to the relevancy of a promise and subsequent copula to constitute a marriage. That in the argument in the case 15th May, 1804, *Edmonstone* contra *Cochrane*, and in that of March 4th, 1807, *Walker* contra *M'Adam*, it is stated and avowed by both parties that a promise and subsequent copula was one of the modes of constituting a marriage by the law of Scotland. That these are the authorities which in the respondent's opinion appear to have confirmed the law of marriage, as laid down by Lord Stair.

3. To the third of the said additional interrogatories, this respondent answereth and saith that he is of opinion that the decision in the case of *Pennycook* contra *Grinton*, 15th December, 1752, if an extension of the doctrine laid down by Sir Thomas [55] Craig was nevertheless agreeable to that laid down by Lord Stair, and

to most, if not to all, of the previous authorities the respondent is in the knowledge of, and which have been noticed above; it farther appears to him from the report that this case was decided upon the general point, and that whether the woman, namely, Graite, had been in *bonâ fide* or not, that the decision would have been the same as was given, and her marriage consequently annulled.

4. To the fourth of the said additional interrogatories, this respondent answereth and saith that he has already mentioned the cases he is in knowledge of which seem to apply to the present question, but others may have occurred in the Commissary Court.

5, 6, 7. To the fifth, sixth, and seventh of the said additional interrogatories, this respondent answereth and saith that the Court of Session is not, he conceives, bound by former decisions, if these are in principle iniquitous or unjust; if doubts are entertained of any point of law or decision as to its being unsound or not to be followed as a precedent, the court is certainly at liberty to review it either by a hearing in presence, or in some such solemn manner, so as by a deliberate judgment to fix the point in future.

8, 9. To the eighth and ninth of the said additional interrogatories, this respondent answereth and saith that he is of opinion that the case of *Grinton* is one of authority, fixing the general point as the report bears "that it was held for law that a promise of marriage followed by a copula made from that moment an actual marriage." The principle there laid down appears moreover to be confirmed by the discussion that has occurred in the various cases already mentioned; and although the court might no doubt order a hearing in presence for reviewing the principle of that decision, the respondent would doubt very much, and would indeed have little expectation of its being altered.

10. To the tenth of the said additional interrogatories, this respondent answereth and saith that writings produced by a party asserting a marriage, though after the other party has intermarried with another, will, nevertheless, the respondent conceives, receive such effect as is due to them upon their own merits.

11. To the eleventh of the said additional interrogatories this respondent answereth and saith that he conceives that in the case supposed in this query, the pretensions of the party who had [56] ostensibly intermarried with a person previously married, in consequence of a promise followed by a copula, would not be sustained, and of course, as the first would be a valid marriage, the second formed connection would not be regarded.

12. To the twelfth of the said additional interrogatories, this respondent answereth and saith that he conceives that the defendant, being a domiciled Englishman in Scotland upon military service, did not impede his contracting, while in Scotland, a valid marriage by the law of Scotland, and if he contracted such a marriage in Scotland, either by mutual declaration *de præsenti*, or by a promise and subsequent copula, his publicly marrying Miss Manners in England, before the present action was instituted, can have no effect upon the validity of his previous marriage.

13. To the thirteenth of the said additional interrogatories, this respondent answereth and saith that officers on military service in Scotland, though in relation to questions of succession they may be held domiciled Englishmen, may, without any solemnization or contract of marriage, form connections with women which will be a marriage, namely by declarations of marriage *de præsenti*, by a promise and subsequent copula, and by the other modes in which an irregular marriage in Scotland is constituted.

14, 15, 16. To the fourteenth, fifteenth, and sixteenth of the said additional interrogatories, this respondent answereth and saith that as the cases pointed out in these interrogatories have not, so far as the respondent knows, ever occurred or been decided, he cannot venture to give a positive opinion upon them; if the parties were domiciled in Scotland, he is inclined to think that in either case supposed a marriage would be constituted. But he entertains great doubts and uncertainty as to what might be the result if the parties were in no respect subjected to Scottish domiciliation.

17. To the seventeenth of the said additional interrogatories, this respondent answereth and saith, that letters by a domiciled Englishman in England, to a woman in Scotland, expressing consent to a marriage *de præsenti*, would not, the respondent apprehends, be sufficient to constitute a marriage by the Scots law, but that such letters would assuredly be taken into account as evidence of a marriage asserted to be contracted in Scotland.

18. To the eighteenth of the said additional interrogatories, this respondent answereth and saith that he is not aware of any [57] distinction in the law of Scotland between a marriage actually constituted, and a promise of marriage followed by a copula, which he conceives to be the import of this query, in relation to "an obligation to marry which cannot be retracted in respect that *res non sunt integræ*," these last circumstances, as already so often mentioned, constitute a valid marriage, awaiting, like all other irregular and clandestine marriages, a declaratory sentence of the Consistorial Court (but with retrospective operation), as the appropriate judicial evidence to the effect. That the respondent therefore thinks that all such irregular and clandestine marriages stand upon an equal footing, and that in relation to them there is no obligation of an intermediate class, leaving both parties at liberty to contract another marriage, and that such intermediate obligation is referable only to a promise of marriage without a copula, which *rebus integris* may be resiled from.

19. To the nineteenth of the said additional interrogatories, this respondent answereth and saith that he conceives that, by the law of Scotland, an obligation or promise to marry may be retracted or departed from, *rebus integris*, as already noticed, leaving to the party injured their action of damages. That he does not understand that, by the law of Scotland, damages in such cases would be allowed abstractly for the breach of promise and consequent affront; but if the party injured can shew actual loss or damage incurred in consequence of the retraction of a promise, a compensation upon that account will be allowed.

20. To the twentieth of the said additional interrogatories, this respondent answereth and saith that it appears to be anticipated, the respondent having given his opinion that where a promise of marriage has been made and a copula has followed, a marriage is thereby constituted; so that in the event of retracting payment of damages will not suffice.

21. To the twenty-first of the said additional interrogatories, this respondent answereth and saith that he is of opinion that, in holding a promise and subsequent copula to be the constitution of a marriage by the law of Scotland, the equitable and moral principle is taken deeply into account; but he does not imagine that this is the only ground for holding that these circumstances constitute a marriage; that the inferred consent never is, he conceives, to be lost sight of: and it appears to him that Mr. Erskine in the passage referred to, b. i. t. vi. s. 4, though he does not state the law of marriage so fully as might be, yet nevertheless states it with truth and correctly.

[58] 22. To the twenty-second of the said additional interrogatories, this respondent answereth and saith that if a promise of marriage has been legally proved, *scripto vel juramento*, and a copula has followed, the respondent is not aware of any means by which the essentials thereby established in constituting a marriage (whether it is the presumed consent *de præsenti*, or the moral principle that is considered) can be rebutted; if these facts are proved, a marriage is fixed; so that there is in his opinion an end of the question.

23. To the twenty-third of said additional interrogatories, this respondent answereth and saith that where a woman has given a promise of marriage, and a copula has followed, and the man alleges a marriage, and of consequence a consent upon his part, *eo momento* a marriage, the respondent thinks is established: but if it is the woman who alleges a marriage, there will be this defect in the case supposed to constitute a marriage, namely, that the man has not promised or consented: and in these circumstances it is accordingly thought that as there would be a lack of mutual consent to marry, there would of course be no marriage. That the respondent must however observe that, as he does not know of any such case having been decided, he gives this opinion with caution; and it at the same time appears to him that the discussion of these hypothetical cases evinces that the consent of parties is in all these and similar circumstances one of the main and ruling principles for deciding a question of marriage.

24. To the twenty-fourth of the said additional interrogatories, this respondent answereth and saith that he is of opinion that this doctrine, as to the constitution of marriage, is not radically contradictory to the substance of the doctrine stated by Sir Thomas Craig. If there is any difference it rests, not upon the essentials in the constitution of a marriage, but in the form merely of declaring it, and whether or not a previous action is necessary. But the doctrine stated is, the respondent con-

ceives, agreeable to the authority of Lord Stair, which is justly considered as of great weight in the law of Scotland. The work of that author does perhaps contain some errors, but it is more to be depended on than that of any other; and if there is any omission in the passages in his work, relative to the law of marriage referred to, it is in not adverting to the moral principle assuredly to be taken into account, in judging of, and holding a promise and subsequent copula to be the constitution of a valid marriage. Lord Stair, it is true, does not refer to any case in support of the above position, excepting that of *Younger* be considered as one (vide edition [59] 1693, page 426). But the respondent conceives that his opinion is sanctioned by the soundness and equity of the principle, and the analogy which the case bears to the constitution of a marriage by mutual consent *de præsenti*, and independent of these views Lord Stair probably had the canon law in his eye, by the *Decretalia Gregorii*, of which, lib. 4, tit. 1, cap. 30, it is said, “*is qui fidem dedit mulieri super matrimonio contrahendo carnali copulâ subsecutâ, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur, etc.*” The opinion of this author is accordingly entitled to much consideration, and no doubt, it is conceived, can be entertained of the fidelity with which that opinion has been transmitted, as it is contained in the two first editions of his work, both of which were printed in his own lifetime: the second in 1693, professing to be a correction of the first, in 1681, by his Lordship himself.

25, 26. To the twenty-fifth and twenty-sixth of the said additional interrogatories, this respondent answereth and saith that contracts of marriage entered into in Scotland bear in general, and it is probable uniformly, that the parties accept of each other for their lawful spouses, or, as Dallas has it, page 724, *et sequen.* for their lawful future spouses; importing thereby consent *de præsenti*: but then these contracts further bear that the parties are to solemnize such marriage in the face of the Church, and thence it is held, *Erskine*, p. 90, that such contracts do not constitute a marriage, but may be resiled from, leaving to the party their action of damages for any loss that may have been sustained in consequence thereof. Such contracts are usually subscribed in presence of the relations of the party, who most frequently also subscribe it as witnesses; but they are entirely different and altogether distinct from the exhibits annexed to the present case, which, in the respondent's opinion, constitute a clandestine though an efficient marriage, excluding in their intention such formal preliminary which is of a public nature, and in like manner all ceremonies and solemnities in the face of the Church: as such declarations constitute, as the respondent conceives, an effectual marriage instantan, they cannot be retracted, and much less so if, as is stated to be the fact in the present instance, there has been a copula or concubitus.

27. To the twenty-seventh of the said additional interrogatories, this respondent answereth and saith that he is of opinion that in consequence of the exhibits annexed to the libel, namely, the promise to marry and the mutual declarations of marriage *de præsenti*, which were given, and if it be the fact, as is affirmed, [60] that concubitus followed, neither of the parties could retract or free themselves from a marriage, independent altogether of any actual celebration of it.

28. To the twenty-eighth of the said additional interrogatories, this respondent answereth and saith that he is further of opinion that, by these exhibits and the alleged copula (which if it is denied must be proved), the plaintiff was bound to the defendant in a valid marriage; it was consequently in his power to claim her as his wife, and to require her adherence; and in the event that the plaintiff had destroyed the exhibits in her possession, if the defendant had in his possession a duplicate of the mutual declaration, that would be sufficient to prove and constitute the marriage; and if he had not such duplicate, he would have been entitled to her oath as to the prior existence of such exhibits, and to the import of them whether they did not contain a promise of marriage and declaration *de præsenti* of such an engagement: either of which being established in the affirmative, would, in like manner as now that they are in existence, constitute a marriage.

29. To the twenty-ninth of the said additional interrogatories, this respondent answereth and saith that he has either now or formerly noticed all the cases appearing to be material and applicable upon the law of marriage, which he is acquainted with. In the case of *Ritchie contra Wallace*, in 1692, which was decided upon a declaration *de præsenti*, matters were in certain respects entire, the copula having preceded the acknowledgment; but this circumstance was not held as altering the case, or as diverging it from the rule of law that the mutual consent of parties declared *præsenti* constituted a marriage.

30, 31. To the thirtieth and thirty-first of the said additional interrogatories, this respondent answereth and saith that if parties were to enter into a contract of marriage, and a copula or concubitus was thereafter to take place, so that matters were not entire, a marriage it is thought would be constituted, in like manner as in the case where there had been a promise and subsequent copula; and as a valid marriage would in these circumstances be constituted, so the respondent does not imagine that any subsequent connection of that nature, which the man might attempt to form, could have the result of an effectual marriage. That the woman clandestinely married might be highly to blame in concealing or seemingly foregoing her right, but that conduct could not justify or excuse the man, or place him absolutely in bonâ fide to contract a second marriage; nothing could place him in security, and consequently in bonâ fide, but a decree of putting [61] to silence in an action of jactitation of marriage; and although a grievous misfortune might thus fall upon an innocent woman who had been ensnared by the falsehood of the man, no feeling for her mischance can, in the respondent's opinion, be set up to overturn a marriage previously constituted, and to bastardize the issue, if any, in favour of what was from the first, in consequence of the man's incapacity to contract, a legal marriage, nothing more, however much the injured female might deserve commiseration, than an illicit connection.

R. HAMILTON.

The same witness examined on the further additional interrogatories, given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said further additional interrogatories, this respondent answereth and saith that he has paid particular attention to the case reported by Falconer, 28th July, 1747, *Campbell contra Cochrane*, and to the ultimate result in that case subsequent to the point reported. The point adjudged by the Court of Session is thus noticed by Falconer in his Index, voce Fraud:—"A woman alleging a private marriage with a person deceased, who during his life had lived publicly with another in her sight, was repelled personali exceptione from proving her marriage to the prejudice of the other and her issue." The Court of Session, by interlocutor of the 28th July, 1747, remitted with an instruction to the commissaries "to find that Mrs. Kennedy was barred personali exceptione from being admitted to prove that she was married to M. Campbell, of Carrick, before he was married to Mrs. Jean Campbell;" so that the sentence of the commissaries who had allowed Mrs. Kennedy to prove her marriage was altered; but this point was appealed to the House of Lords, and upon 6th February, 1748, the interlocutor of the Court of Session was reversed, and that of the commissaries, which had allowed a proof, sustained: that the deposer has found this to be the fact from the appeal cases of these parties appointed to be heard in March, 1752. It is indeed said in the case of Mrs. Jean Campbell that the interlocutors complained of were reversed by consent of her counsel, but it is however certain that the question returned to the Court of Session and the commissaries, when the interlocutor allowing Magdalene Cochrane or Kennedy a proof of her [62] marriage, was followed out, a proof accordingly taken, and upon the 25th January, 1751, the commissaries found that Mrs. Magdalene Cochrane had not proved her prior marriage libelled, and therefore dismissed her process, and found in favour of the marriage of Mrs. Jean Campbell and the legitimacy of her daughter. This sentence was also submitted to the Court of Session, and thereafter was appealed to the House of Lords, and was affirmed. That in adverting therefore to this case, it must be remembered that the point reported by Falconer, namely, that Mrs. Cochrane was barred personali exceptione did not ultimately stand, she being allowed to prove her marriage; and this, the deposer conceives, is agreeable to the law of Scotland as it now stands. Mrs. Cochrane, as the commissaries found, did not prove her prior marriage, and though the circumstances in which she was placed appear from the appeal cases referred to to have been extremely hard, those, on the other hand, which in the respondent's apprehension were the most adverse to her (supposing they are correctly stated in the cases), were that Mrs. Cochrane had by her conduct upon different occasions several years subsequent to her alleged marriage treated Mrs. Jean Campbell as Captain Campbell's wife, thereby acknowledging her as such. That the respondent is aware that this fact might have had much weight in the comparative estimation of the proof brought by the parties, in so far as it might perhaps from thence be inferred that such conduct betrayed a consciousness upon Mrs. Cochrane's part that she was not Captain Campbell's wife. The respondent conceives that the decision

upon the first point in the above case is so far applicable to the present one, that the plaintiff is not barred personali exceptione from proving her alleged prior marriage with the defendant: but it is impossible for him to say whether the decision upon the second point in the above case is in any respect applicable to the present question, as he is not put in possession of all the circumstances that may have taken place between the plaintiff and defendant subsequent to her alleged marriage, and in particular, he does not know whether or not she has acknowledged Miss Manners as the defendant's wife.

2, 3. To the second and third of the said further additional interrogatories, this respondent answereth and saith that as he has adverted to the cases referred to in his answer to the second of the additional interrogatories, it is only necessary to observe further that these cases do not, in his opinion, prove that either in the year 1696 or 1749, a marriage resting upon a promise [63] and subsequent copula could be defeated by another marriage entered into by the man as a medium impedimentum; and it further appears to him that the decision upon the first point in the case of *Campbell contra Cochran* is adverse to that doctrine.

4. To the fourth of the said further additional interrogatories, this respondent answereth and saith that he is well acquainted with this article of Lord Kaimes's *Elucidations*, but though it is like all that author's writings, an ingenious argument, it is in some places incorrect; particularly where he says that a low woman may succeed in proving a promise cum copula, by witnesses of her own rank, which is not the law, as his Lordship may have known from the case, 26th Nov., 1755, *Smith contra Grierson*. That it is impossible for the respondent to say whether the circumstance of the subsequent marriage with Graite being a clandestine one, had, as Lord Kaimes insinuates, weight with the judges; nothing of that kind appears from the report, which, as already mentioned, bears that the case was taken up entirely upon the general point: and as the respondent holds it to be fixed law that a promise and subsequent copula constitute a marriage, he does not think that Lord Kaimes' argument in a case similar to that of *Grinton* would be successful.

15 August, 1809. *Memorandum of the evidence taken at the trial of the cause of Mrs. Dalrymple v. Wm. Coulter*. R. HAMILTON.

Repeated and acknowledged at Edinburgh, before me the undersigned Wm. Coulter, Lord Provost.

In the presence of me, Harry Davidson, Not. Pub. and Actuary assumed.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

7th June, 1809.—DAVID HUME, ESQ., of the city of Edinburgh, advocate, aged fifty-two years, a witness, produced and sworn, deposes and says that he has practised as an advocate before the Supreme Court of Session in Scotland since 1780, and that he has occupied the Chair of Professor of Scots Law, and read lectures as such in [64] the University of Edinburgh since December, 1786; and further to the eleventh article of the said libel, he deposes and says that he has attentively perused and considered the several exhibits annexed to the libel, and that in the law of Scotland marriage is considered as an ordinary civil contract which is completed by the interposition of the consent of parties, provided this take place unequivocally, seriously, and deliberately, and with a genuine purpose immediately to establish the relation of husband and wife, and not to engage only, or betroth themselves to marry at some future time. That a marriage may thus be effectually made in Scotland, without the form of celebration by a clergyman, and without the use of any precise ceremony or solemnity even of a civil nature, and in any way wherein the explicit and mature consent of parties is gravely exchanged. That with respect to the evidence of the proper matrimonial consent having passed between the parties, the practice of the law of Scotland is not limited by strict or scrupulous rules, but allows the fact to be vouched or inferred in sundry modes of evidence, by public cohabitation, under the character, or, as it is termed, the habit and repute, of man and wife: by writings of mutual acceptance as spouses de presenti, by mutual written declarations or acknowledgments of marriage, by a series of letters, such as in their contents and mode of address and subscription either express or virtually imply an acknowledgment of marriage; by verbal declaration also before a magistrate, or made on some suitable and serious occasion before creditable witnesses called by the parties for that purpose. That whether the writings executed by the parties are in the form of mutual and present acceptance of each other as spouses, or in that of a declaration

of marriage as already made, is no wise material; for still such writings are evidence under the hand of parties, and to each against the other, that the just matrimonial consent has passed between them in substance though not in form: the voluntary execution of such declarations is a virtual consent of the parties as at that date to stand in the relation of married persons. That, more especially, regard is paid to declarations or acknowledgements of marriage, whether oral or written, where it appears that they have been followed with or accompanied by the parties' carnal knowledge of each other: not that such intercourse is regarded as the seal or accomplishment of the contract or indispensable to its validity, but as a material ingredient of evidence to shew that it was meant and understood between the parties, that they were actually man and wife from that time, and not engaged or under promise only. That it is [65] however carefully to be observed with respect to all these several modes of evidence, whether oral or written, that they are liable to be controuled and expounded by other writings, if such there be of a contrary import, which have passed between the parties, or by facts and circumstances of a different tendency in the after conduct and proceedings of parties, whereby it becomes necessary for the judge to take a complex view of the whole case, and to determine, on the whole series of evidence and circumstances, whether, by the writings and acknowledgements which passed between the parties, they did or did not truly intend to become man and wife, and did or did not consider themselves as being in that relation to each other. That, among other circumstances which weigh in this point of view, the absence of this carnal intercourse is always one of some moment; but that although unfavourable to the plea of marriage, this circumstance, in the deponent's opinion, is not of itself decisive, but may be made amends for by the other evidence in the case, and more especially where reasonable motives of prudence or the like can be assigned for such forbearance. That, in illustration of the general principle above-mentioned, the deponent may take notice of the following judgments which appear in the printed Collection of Reports, the case of *Inglis and Robertson*, 3d March, 1786, the case of *Edmonstone contra Cochran*, 15th May, 1804, and the case of *M'Adam contra M'Adam*, 4th March, 1807, whereof the last was a case of mere verbal declaration; and that the deponent has had occasion to observe sundry other judgments to the same effect, which have not been reported: the case of *Peggy Ferguson contra David M'Kie* (2d August, 1781), being a case of verbal declaration, that of *Elizabeth Richardson contra John Irving* (3d August, 1785), that of *Elizabeth Ritchie contra James Wallace* (13th June, 1792), and that of *Sibella Atkinson contra John Brown* (6th July, 1787), being three cases of written declaration. That the deponent does not consider the judgment of the House of Lords in the case of *More and M'Innes* (25th June, 1781), nor the judgment of that House in the case of *Taylor and Kello* (16th Feb., 1787), as in anywise to the impeachment of the leading principle of the law of Scotland respecting the constitution of marriage, for in both instances the judgment of the House of Lords is expressed in cautious and detailed terms, such as save the principle, and rest the decision on the particular circumstances of these cases, as yielding evidence in the case of *More*, that his declaration was meant as a blind only to the world to protect the woman during her pregnancy; and in *Taylor and Kello's case* that [66] the writings were not intended by either party, or understood by the other as a final agreement. That the deponent regards in the same light the case of *M'Laughlane and Dobson*, 6th December, 1796, where the conduct of parties had been variable and contradictory, and no carnal intercourse had taken place: deposes that, by the law of Scotland, marriage may also be effectually contracted by means of a mere promise of marriage subsequeute copulâ, the law presuming in these circumstances (such is the language of systematic authors and recognized in practice) that the carnal intercourse is accompanied with the exchange of the proper matrimonial consent *de presenti*, and takes place in reliance on it. That agreeably to this principle the effect of copula following on a promise is not merely to bind the promise and beget an effectual obligation to marry, but to make an actual marriage from the time of the copula, to the effect of disabling both parties from contracting any other marriage; and that in the case of *Pennycook contra Grinton and Graite* (15th Dec., 1752) a marriage celebrated by a clergyman, and followed with procreation of a child, was annulled accordingly in respect of the man's prior marriage to another woman, the pursuer, which was constituted by promise and copula only; that, applying these principles to the present case, the deponent is of opinion that the mutual acknowledgment of marriage in the exhibit, No 2, and the renewed acknowledgment in the exhibit,

No. 10, accompanied with carnal intercourse between the parties proved or admitted, and the various acknowledgments express and implied in the defendant's several letters, the other twelve exhibits, do constitute a valid and effectual marriage by the law of Scotland. The said exhibits, No. 2 and No. 10, being evidence under the hand of the parties, and to each against the other, that the proper matrimonial consent making them immediately man and wife, had passed between them; and these writings being themselves virtually and in substance the exchange of such consent *de præsenti*. That the deponent does not discover any sufficient grounds for considering the said declarations, No. 2 and No. 10, otherwise than as serious and deliberate, and intended immediately to establish the relation of husband and wife between the parties; and more especially this purpose and understanding of the parties may be inferred from the circumstances, if proved or admitted, of carnal intercourse having taken place in pursuance of those declarations; and, further, that the series of letters from the defendant bearing repeated and strong acknowledgments of marriage, both express and implied, mark a settled resolution and habit of mind on the [67] subject, and not a transient or wavering purpose only; that the deponent observes that in some of the letters, especially in Nos. 5 and 6, some expressions are interspersed which may seem to savour, in some measure, of an understanding on the defendant's part, that he was under promise or engagement only, but these are outweighed by earnest and more pointed contrary declarations in the same and other letters, and more especially by very serious ones in Nos. 13 and 14; and, further, that these loose and equivocal words seem to relate to the defendant's promises and engagements to make a public acknowledgement of his marriage as soon as might be, and are also probably accounted for on this footing, that the marriage was private, and the documents of it under the power of the plaintiff, and that the parties were imperfectly instructed in the law of the case, so as not to know whether it might not be possible to dissolve and undo the connection by mutual consent, or by the plaintiff's destroying the written evidence of it in her possession. But that on the whole series and contents of the letters, they do appear to the deponent not to invalidate or counteract the declarations, No. 2 and No. 10, but rather to vouch the defendant's understanding that he was irrevocably married thereby, and his consent so to be, if the law permitted it to be done in that fashion. That the deponent however thinks it proper to add that, if a process of declarator of marriage at the plaintiff's instance, and grounded on these several documents, were depending in the Consistorial Court of Scotland or in the Court of Session there, the course of proceeding would be to compel the defendant Dalrymple the husband, to produce the letters by him received from the plaintiff in return, and if such letters were produced and were found to contain assertions on her part of her freedom from the matrimonial tie, and an explanation of her understanding of the mutual acknowledgments of parties as having always been to promise and contract *de futuro* only—this might be sufficient to apply and expound these acknowledgments accordingly. That, on the other hand, if the defendant being called on to produce the plaintiff's letters, upon oath denied his receipt or possession of any such, or alleged that he had lost or destroyed them, the case would then be determined on the documents exhibited for the pursuer. Further, this deponent deposes and says that the mutual promise of marriage contained in the exhibit, No. 1, being *de futuro* only, is not of itself sufficient to make a marriage by the law or Scotland, of even to beget a valid obligation to marry; but that the said [68] written promise, followed with carnal copula, proved or admitted, is sufficient in the law of Scotland to constitute a valid marriage from the date of such copula, so as effectually to disable both parties from contracting any other marriage, and this independently of the effect of the said exhibits, No. 2 and No. 10, as an exchange or an evidence of the proper and present matrimonial consent. That the said exhibits, No. 2 and No. 10, supposing them not sufficient documents of an immediate marriage, are however certainly at least equivalent to a renewed promise of marriage, and if followed either of them with copula proved or admitted, do in like manner constitute a marriage independently of the promise, No. 1.

DAVID HUME.

The same witness examined on the interrogatories given on behalf of John William Henry Dalrymple, Esq. the other party in this cause.

1. To the first of the said interrogatories, this respondent answereth and saith that he considers the constitution of marriage by the consent of parties seriously and

de præsenti interposed, as a genuine article of the common law of Scotland, from the period at least of the Reformation, and that he is not acquainted with any evidence of the priest's blessing having been reckoned indispensable in Scotland (though it was regular and laudable) even in the Catholic times. That the only variation of practice the deponent knows of is that, for the last twenty years or thereby, there has been somewhat a greater readiness in the Court to admit evidence in controul or explanation of the written declarations of parties.

2. To the second of the said interrogatories, this respondent answereth and saith that the law on this head is to be collected from the works of those authors who have written concerning the law of Scotland, and from the decisions of the Court of Session, and of the House of Lords in cases of marriage; and that the deponent has formed his own opinion on these grounds accordingly.

3. To the third of the said interrogatories, this respondent answereth and saith that no such thing is recognized in the law of Scotland as an irrevocable obligation to marry; [69] that to be at all available, the consent to marry must be de præsenti, and the most solemn promise of marriage de futuro under the hand even of the party, not only is not effectual to compel solemnization of marriage, or to authorize a decree of declarator of marriage in case of refusal to solemnize, but is not even a ground of action of damage in solatium of the disappointment, though it may ground a decree for such actual and patrimonial damage (the expence, for instance, of wedding-clothes and the like), as the complainer can shew in the case. That though parties are thus at freedom rebus integris, to fulfil or desert their promise of marriage, yet when copula follows in reliance on such promise, the law infers and presumes the exchange of the proper consent de præsenti, as at the time of the copula, and thus holds the parties are married from thenceforward, and disabled from contracting any other marriage.

4. To the fourth of the said interrogatories, this respondent answereth and saith that he has already said that rebus integris the most express promise of marriage is always revocable on either side, and in no wise hinders either party from contracting marriage with some other person.

5. To the fifth of the said interrogatories, this respondent answereth and saith that it is substantially answered in the answers to the third and fourth interrogatories, and that the promise becomes void by the repentance of the party promiser, though he or she may not be able to allege any change of circumstances in justification or excuse.

6. To the sixth of the said interrogatories, this respondent answereth and saith that he cannot well make an answer in matter of law, in terms so broad and indiscriminate as the interrogatory seems to require, but with respect to the effect of a promise and copula taking place in Scotland, and with a woman native of Scotland and domiciled there, that in his opinion there is no room for distinguishing in favour of the man on the ground merely of his being a domiciled Englishman, and not possessed of any property or effects in Scotland, nor on the ground merely of his afterwards marrying another woman in England. Further deposes that he cannot give it as his opinion that, in a competition between a marriage made by promise and copula in Scotland and a marriage made afterwards regularly by the man in England, the validity of the former depends on the circumstances of the first wife having previously obtained a decree of the Court declaring her marriage; and that it would not be just that any such prejudice to the right of the first wife should [70] follow on her delay to ask such decree, which delay may be owing to her entire reliance on the man's honour, or may be in compliance with his injunctions, or be matter of agreement between them for prudential reasons. That, when obtained, such decree of declarator publishes only, and executes, and does not form the relation, and thus the decree draws back and attaches to the date of those facts that are the substance and bottom of the case, and on which the law grounds its presumption of a consent de præsenti. Deposes and says that one question of some difficulty may however be imagined in the case of the first wife being in the certain and special knowledge of the man's addresses afterwards to another woman, and by her silence and course of conduct decidedly acquiescing in his second marriage; and certainly in any case where the first marriage is doubtful, and matter of inference only from a number of collateral particulars, such acquiescence will go far against the woman, not as a renunciation of the state of wife, or a bar in limine to her claim, but as matter of real evidence that she never had intended or understood herself to be the man's wife; and on this ground,

in some measure, went the ultimate judgment in the case of *Napier contra Napier* (Nov., 1800, and June, 1801), where a marriage regularly celebrated and followed with the procreation of many children was attempted to be set aside in respect of the man's alleged prior marriage, made by cohabitation only with another woman under the character of wife, which woman had acquiesced for years in the second marriage, though dwelling in the same town with the other parties: but that in the case of an explicit written promise of marriage followed with copula, which is not of the same ambiguous description, the deponent sees great difficulty in the way of sustaining the plea of personal objection as in bar of the first wife, whose state once duly contracted is immutable, and cannot even expressly be renounced, and much less by any sort of implication; and this difficulty increases in the case of there being issue of the first marriage. That it is true the plea of personal objection was sustained in the Court of Session in the case of *Campbell of Carrick*, 28th of July, 1747, where the first wife had lived for years in the neighbourhood and in the society of the second, but that judgment was reversed in the House of Lords, and the parties were sent to proof upon the case. That, upon the whole, in the case of the man contracting a second marriage in England while the first wife continued to reside in Scotland, and is thus presumably ignorant, or has had an imperfect knowledge of the man's addresses, the deponent sees no sufficient [71] reason, and knows no authority, for sustaining the plea of personal objection against the woman.

7. To the seventh of the said interrogatories, this respondent answereth and saith that such a declaration, if direct and explicit, is good evidence against the man under his own hand, that the proper matrimonial consent making the woman his lawful wife has already passed between them, as well as in substance, the delivery of such consent to the woman is the expression of his present consent to stand to her in that relation, and that it thus makes an immediate marriage.

8. To the eighth of the said interrogatories, this respondent answereth and saith that copula following on such a declaration, which is more than equivalent to a promise, is in that point of view sufficient to make a marriage by promise and copula; and that consummation accompanying such a declaration, whether before or after, is a powerful ingredient of evidence in confirmation of the declaration, as importing an immediate marriage, and not an engagement only.

9. To the ninth of the said interrogatories, this respondent answereth and saith that as a marriage may be effectually constituted by means of a series of letters, as between husband and wife, so when such a correspondence follows on a written declaration of marriage, those two modes of evidence mutually strengthen each other, and take the case out of the notion of a mere engagement to marry.

10. To the tenth of the said interrogatories, this respondent answereth and saith that it has already been said in his deposition in chief, that written declarations of marriage, how explicit soever, are liable to be controuled and expounded by the correspondence of parties, or by evidence in the conduct and behaviour of parties tending to shew that it was not their meaning, nor was it so understood or agreed between them, that they were actually married. Further, this respondent saith that such questions are very nice and circumstantial, and require a studied attention to all the expressions used by the parties in their letters, and all the possible meanings of those expressions and the motives of parties to use them. That the respondent would not consider it as materially shaking a declaration of marriage, that the parties in their letters alluded to a purpose of future public celebration, this being matter of decency, and for better repute in the world, as well as for the quiet of the woman's mind, who, though fast bound in law, may still feel humble and uneasy as long as the priest has not done his office. That neither would the [72] deponent consider it as materially shaking a declaration of marriage that either party afterwards expressed fears of desertion, the evidence of the marriage in such cases being under the power of the parties, and liable to accidents, and they uncertain in some measure, concerning the decision of the law upon their case, no matter how positive and serious their purpose may have been to be instantly married by the writing they exchanged.

DAVID HUME.

The same witness examined on the additional interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said additional interrogatories, this respondent answereth and saith that these five sections of Sir Thomas Craig's *Treatise de Feudis* appear to

the respondent to contain a good deal of desultory discourse concerning marriage and legitimacy, and that sundry somewhat rash opinions are given there upon speculative points, which had not been tried in Craig's time, and remain untried still, and are nice and open to difference of opinion. That Craig is however good authority for the case of *Edward Younger*, related in the nineteenth section, being a decision given in his own time on the matter of marriage contracted by promise subsequente copulâ; and although it appears that the course taken in that instance, and probably the usual course taken at that time was that the Court gave decree for solemnization of the marriage, yet, in the respondent's opinion, this was directed by the Consistorial Court out of regard to civil order and decency, and for the sake of notoriety only, and not upon the notion that the state of parties was not already irrevocably fixed by the promise and copula: and, indeed, that in Craig's own opinion, neither the solemnization nor the decree for it was indispensable; and that the marriage was truly made by the promise and copula themselves, appears from the opinion he gives at the head of the nineteenth section, viz.: that a child is lawful who is procreated after contract of marriage and proclamation of banns, if the father die before the appointed day of marriage. That to the respondent, the notion of decreeing to solemnize a marriage, that is to say, compelling a person to [73] give his consent out of love and affection, to live all his days with a certain woman, appears somewhat strange. That the decree cannot command the will of the man, and there is no species of diligence by which it can be carried into execution; and if the man is thus to be married in the end, without the help of a true and real consent de præsentî, and by means of a feigned and presumed consent, it is more reasonable to apply that presumption to the time of the promise and copula, which are the bottom and make the justice of the case, than to the date of the decree which does but publish and declare these facts; that the form of decreeing for celebration has therefore been laid aside in later times, as an unmeaning and unnecessary circuit, and this change of practice this respondent considers as one in point of form, and not in the substance of the thing.

2. To the second of the said additional interrogatories, this respondent answereth and saith that Lord Stair's exposition of the grounds of the law of Scotland respecting marriage by promise and copula, appears to the respondent to be sound and correct, viz. that it proceeds on the presumption of things passing at the time of copula out of the state of promise de futuro, into that of actual marriage by consent de præsentî. That this, as the respondent understands, is the established doctrine now, equally as it was in Lord Stair's time, and according to the respondent's notes of the opinions of the judges in *M'Adam's case*, the law was so delivered by Lord Meadowbank (13th Nov., 1806), "The notion of law is that copula is the consummation of a consent de præsentî, which is thence presumed. It is not on the notion of barring locus penitentiae." That it is plain that Lord Stair himself did not understand his doctrine to be inconsistent with that of Craig; for in the latter of the two passages referred to in this query, he founds upon Craig's authority, and the case of *Edward Younger*, and this in connexion with his own principle of a presumed consent de præsentî. That in like manner, in the former passage (book i. tit. iv. § 6), and still in confirmation of his own principle, Lord Stair takes notice of a case in Nicholson's Collection, where the like course was taken of decreeing for celebration on the grounds of the man's written acknowledgments of marriage and his procreation of children; that the respondent, understanding that in both instances the decree for celebration was given out of regard to order and example only, does consider the authority of Craig as no wise inconsistent with the principle or reason assigned by Stair.

[74] 3, 4, 5, 6, 7, 8, 9. To the third, fourth, fifth, sixth, seventh, eighth and ninth of the said additional interrogatories, this respondent answereth and saith that the case of *Grinton and Graite* was argued by counsel of great eminence, and when very able judges sat on the bench; and the deponent has always considered that judgment as having been deliberately given, and upon the general question of law, and not in respect of any specialty favourable to the woman pursuer (such as the nonproclamation of banns), and as decisive therefore of the proper character and effect of a marriage made by promise and copula. That if the like question were to occur again in the Court of Session, the judges in his opinion ought not, and, as far as the respondent can judge, would not think themselves at freedom to depart from that precedent, or to reconsider the question on a hearing in presence or in any other shape. That the

only case, so far as the respondent knows, in any degree of a similar nature, which has since been tried, is that of *Napier* contra *Napier* already referred to, in November, 1800, and June, 1801; but here the prior marriage was to be inferred from a cohabitation of a very ambiguous kind, between a soldier and a woman who followed the regiment, and which had ceased for five or six years before the second and public marriage; and that for upwards of twenty years that the second wife lived (in which period she bore seven children) no claim was made by the alleged first wife, though dwelling in the same city with the couple, and the question of legitimacy was only brought forward at last, at the instance of a child, after death of both women; that in these circumstances there seemed to be strong presumptive grounds of evidence against the first marriage, and on that footing the case was finally decided against the claimant, though the first interlocutor was the other way, and bastardized the whole issue of the second marriage.

10, 11. To the tenth and eleventh of the said additional interrogatories, this respondent answereth and saith that he cannot make an answer to these queries further than he has formerly done, without a much more specific and detailed case, laying before him the whole history and particulars of both connections, and the situation and conduct of all parties; that, according to the circumstances, the previous non-production of the writings by the party who founds on them may or may not be a matter unfavourable to that party in the way of presumptive evidence, and that so it may also be as to the failure of such party to prevent or protest against the man's contracting of a second marriage.

[75] 12. To the twelfth of the said additional interrogatories, this respondent answereth and saith that he can give no opinion on this query, unless it were stated to him how far the plaintiff was in the special and certain knowledge of the defendant's intention to marry Miss Manners, and wilfully and inexcusably forbore to give notice of the impediment; and that even in the case of such wilful forbearance, the respondent, as he has already answered, finds it very difficult to enter into the notion of renunciation of the state of wife, if once contracted in a plain and unambiguous way, as by exchange of acknowledgments, or by a written promise followed with copula. That if unattended with explicit acquiescence on the part of the plaintiff, the circumstance of the defendant having been in Scotland on military service, and having afterwards publicly married Miss Manners before the commencement of this action, could only be of weight as founding an inference, and this by no means a conclusive one, that the defendant had not thoroughly understood his situation with the plaintiff.

13. To the thirteenth of the said additional interrogatories, this respondent answereth and saith that he is not acquainted with any case of this description, and that the decision to be given on any such cannot be matter of general rule, but must depend on the nature and circumstances of the connection of parties, the nativity of the man being one circumstance to be weighed along with others.

14, 15, 16. To the fourteenth, fifteenth, and sixteenth of said additional interrogatories, this respondent answereth and saith that such cases might occur, attended with a great diversity of other circumstances, according to which the decisions might be also different.

17. To the seventeenth of the said additional interrogatories, this respondent answereth and saith that a series of such letters written, as in this case, from England to a woman in Scotland, and by a person who had been in Scotland, and had written the like letters while there, would be good evidence of marriage against him, more especially if, while in Scotland, he had also given written promises and acknowledgments of marriage, and might reasonably be presumed not to be quite ignorant of the custom of Scotland respecting marriages.

18, 19, 20. To the eighteenth, nineteenth, and twentieth of the said additional interrogatories, this respondent answereth and saith that he does not understand that there is any such thing known in the law of Scotland, as an irrevocable engagement or [76] obligation to marry, and that no damages are even given in solatium of a disappointment by breach of engagement to marry how solemn soever, but damages only in reparation of patrimonial loss actually sustained by the party on such an occasion; the principle of the Scotch practice being that the will of parties ought to be quite free and unbiassed at the moment of contracting this indissoluble union; that where an engagement to marry is followed by knowledge of the woman's person,

things pass into a state of actual marriage, and that he is not acquainted with that intermediate condition of obligation which is alluded to in this query.

21. To the twenty-first of the said additional interrogatories, this respondent answereth and saith that certainly the rule of the law of Scotland respecting promise and copula is recommended by the evident and substantial justice of such a decision ; but that, in the respondent's opinion, the rule is founded also in a just construction of the conduct and purpose and state of mind of the parties ; and on that ground it is that the doctrine has been recognized in the law, and is presented in the works of authors. That, in the deponent's opinion, where copula follows between parties who have exchanged promise of marriage, this act has relation to and is under the seal of that contract, and is truly the implement and execution thereof in its most essential particular, the possession of each other's person, whereby matters pass, and are by the parties meant to pass out of the state of a promise de futuro, into that of an executed promise or present marriage, whereof they have entered on the rights and duties. That in nature, this is what does and must pass in the minds of parties so situated, and on such an occasion ; that the woman making delivery of her person in pursuance of the previous engagement does eo ipso recognise the man de præsenti as her husband, of which character she admits him to the privileges, as he, on the other hand, claiming and taking these privileges in pursuance of his promise, substantially professes that character, and agrees de præsenti to bear it. That in the passages referred to in this query, this doctrine is distinctly delivered by Erskine, as relative to the case of copula following on a regular contract of marriage ; and the deponent sees no reason and knows no authority for distinguishing in this article between a regular contract and a written promise if precise and explicit.

22. To the twenty-second of the said additional interrogatories, this respondent answereth and saith that he will not presume [77] to say (no such question having been tried) that in no circumstances and by no mode of evidence can the presumption of a present consent be overcome, but he thinks it is clear that only the most pointed and convincing evidence shall prevail against the presumption.

23. To the twenty-third of the said additional interrogatories, this respondent answereth and saith that he does not think it necessary to answer a question which appears to be fanciful and strange, and not to have any relation to the natural and ordinary course of things.

24. To the twenty-fourth of the said additional interrogatories, this respondent answereth and saith that he considers Lord Stair as by far the ablest and most profound of the writers on the law of Scotland, and his Institute as a work of higher authority than any of the other systems of that law, not excepting Sir Thomas Craig's work *De Feudis*. That the respondent does not discover any looseness of thought or inaccuracy of expression in the passages of Stair referred to, but rather precision in both respects ; and that the doctrine delivered by Stair on the point in question appears to the respondent not to be in opposition to that of Craig, whom in one of the passages he expressly refers to ; and that the difference between Craig and Stair is in this only, that Stair assigns the reason and principle of the rule which is in his ordinary practice, and one of the recommendations of his work. That both Craig and Stair do mention judgments that had been given, sustaining marriage by promise and copula, and that the respondent knows no authority more competent than Stair to explain the true grounds of those judgments ; and that in these circumstances he must consider Lord Stair's dictum as good evidence of the tenor and meaning of the law.

25, 26. To the twenty-fifth and twenty-sixth of the said additional interrogatories, this respondent answereth and saith that a contract of marriage in Scotland is a solemn deed, and executed generally in presence of the relations of parties, and that it bears by common style a declaration in words as strong as those of any of the exhibits ; that the parties de præsenti do take one another for man and wife, but that the parties are nevertheless not held to be married thereby, because the contract also bears by common style a clause obliging the parties regularly to solemnize the marriage, from which, joined with the whole other circumstances ordinarily attending such contracts, it is made evident that there was no purpose of dispensing with the ceremony, and that the contract was a preparation for it only ; that these [78] reasons are in no ways applicable to writings such as the exhibits, No. 2 and 10, which are given in circumstances of an opposite description, and for the purpose of superseding

the ceremony, where it is found impracticable or ineligible. That in his answers to the interrogatories in chief, the respondent has already given his opinion as to the power of the writings, No. 2 and 10, to make an actual and irrevocable marriage, more especially when followed by a series of acknowledgments in the defendant's letters; and the respondent has also signified his opinion of the view which ought to be taken of the matter of carnal intercourse between the parties, as a circumstance of evidence only, to mark their serious resolution to be immediately married, and not as the seal or completion of the contract.

27. To the twenty-seventh of the said additional interrogatories, this respondent answereth and saith that in his opinion the writings No. 2 and No. 10 were sufficient irrevocably to fix the parties as man and wife, unless it can be clearly shewn by other evidence that they were not so meant and understood by the parties.

28. To the twenty-eighth of the said additional interrogatories, this respondent answereth and saith that by the mutual acknowledgment No. 2, and the mutual acknowledgment No. 10, more especially when attended with carnal intercourse, the plaintiff was irrevocably married to the defendant, and in a process of declaration of marriage he might have compelled her to exhibit those writings, if extant, and to take her oath as to her possession of them or her knowledge where they were to be found: or in case of her having destroyed the writings, she might in like manner have been put to her oath as to that fact, and evidence would have been admitted in the process of declarator, as to her former possession of these writings and the tenor and import thereof.

29. To the twenty-ninth of the said additional interrogatories, this respondent answereth and saith that in the case of *David M'Kie and Peggy Ferguson*, 2d August, 1781, marriage was declared on evidence of a present and mutual acceptance as spouses, which followed on their having been in bed some hours, and after which they separated and did not meet again before the commencement of the process; that in the case of *William Cowan contra Janet Hart*, 20th January, 1802, being a question concerning a widow's provisions, marriage was held to be effectually constituted by the act of parties, in going before a justice of the [79] peace and declaring themselves married persons; that in this instance, as in *M'Adam's case*, the parties had previously cohabited, and children had been begotten, but no change moved on the declaration, nor was any child afterwards begotten to make room for the plea of *res non sunt integræ*; that the judgment of the Court of Session, in the case of *Taylor and Kello*, 16th February, 1799, where no carnal intercourse had taken place, is also an acknowledgment of the principle that consent *de præsenti* does of itself make a marriage, and the respondent has already said that the reversal of this judgment is no wise to the impeachment of that principle, as the House of Lords proceeded upon circumstances of real evidence, in exposition of the true meaning and intent of the mutual written acceptances, as something different from what it imported on its face. That in the case also of *Elizabeth Ritchie contra James Wallace*, 13th June, 1792, the declaration of marriage, which was the ground of judgment, was given at the close and not at the outset of the connection of parties.

30. To the thirtieth of the said additional interrogatories, this respondent answereth and saith that a contract of marriage, however expressed, must be equivalent to a promise of marriage, and when followed with carnal intercourse it makes a marriage, for the same reason as a promise given in some less formal writing, or proved only by oath of party.

31. To the thirty-first of the said additional interrogatories, this respondent answereth and saith that this question is put too generally, and without the statement of a sufficient case. That to make way for such a plea, in protection of the regular and public marriage, it will be necessary to suppose these things; that the former woman has special and certain knowledge of the man's addresses to another; and this in such a way as must impress her with a belief of his serious resolution on the subject, which can hardly be without communication from himself; that she be so situated that she may easily and conveniently make her claim, and is not withheld by any reasonable motive from doing so. That she be allowed full time and opportunity to bring forward her claim, and that she have access to advice for the regulation of her conduct. That even where all these circumstances concur, the effect of the woman's silence must in a great measure depend upon the strength and clearness of the documents of her own prior contract, such conduct being a material

ingredient of presumptive evidence against her, where her marriage is to be inferred from equivocal or ambiguous writings, and sufficient probably [80] in these circumstances, and as matter of presumptive evidence, to cast the balance against her; but with respect to a case of the opposite description, the respondent can only say that the question, even when attended with all these favourable circumstances for the regular and public marriage, is one of great delicacy and nicety, more especially if the woman claiming have a child by the man, and if her acquiescence is not long continued after his marriage; and that considering this as at present an unsettled question, the respondent cannot go the length of giving it as his opinion that a case may not occur in which the posterior public marriage ought to be found void; that more especially he hesitates to give any such opinion, as the law of Scotland holds out to every person who knows or suspects that he is liable to any such claim, the means of coming to a certainty of his condition, viz. by calling the suspected claimant in a process of declarator of putting to silence, of the nature of an English process of jactitation of marriage, and thus compelling her to advance her claim and have it tried, or else submit to have a decree given, finding that it is a groundless claim, and shutting her mouth for the future. That more particularly with relation to the present case, the respondent is of opinion that this was the due and proper course to be observed by a person who had granted such acknowledgments of marriage as the exhibits Nos. 2 and 10, or such a promise of marriage as the exhibit No. 1, if followed with copula, or who had written such a series of letters as the other exhibits in this case; and that thus circumstanced the defendant could not warrantably rely on the silence of the plaintiff as putting his public marriage out of the reach of challenge. That in the respondent's opinion the public marriage in all such cases ought to operate, not as a bar in limine, or ground of a plea of personal objection, but as matter of presumptive evidence along with the other circumstances of the case.

DAVID HUME.

The same witness examined on the further additional interrogatories, given on behalf of the said John William Henry Dalrymple, the other party in this cause.

1. To the first of the said further additional interrogatories, this respondent answereth and saith that the case there mentioned [81] was a very unfavourable one, for Mrs. Cochrane, inasmuch as she had acquiesced in the man's marriage to another for a period of twenty years, during which she had lived in their neighbourhood and society, and even sometimes in family with them; and inasmuch as she brought forward her claim after the man's death only and for the sake only of a patrimonial interest as his widow; that for these reasons he does not think that the decision in that instance would be a rule for the present case, even if the judgment had not been altered on review; but that the judgment was reversed in the House of Lords, who sent back the case to the Court of Session, with an order to repel the plea in bar, or plea of personable objection, and allow a proof; which proof was taken accordingly, and on consideration of it judgment was finally given (21st June, 1751), finding "that Mrs. Magdalen Cochrane had not proven her prior marriage libelled."

2. To the second of the said further additional interrogatories, this respondent answereth and saith that he has already sworn at large on that head, in his answers to the several of the preceding interrogatories; and on considering the decision referred to in this query, he does not see any reason to alter the opinion formerly given, as to the effect of copula following on a promise; that what is said in Kilkerran, respecting *Hyslop's case*, appears to the respondent not to be the opinion of the bench, or of the judge reporter, but the argument of counsel only; and besides that, much weight cannot be given to a passing expression falling from the bench, when relative to a former case and not necessary to the decision of the case in hand, in which there was no question of marriage at all, or impediment by intervening marriage.

3. To the third of the said further additional interrogatories, this respondent answereth and saith that he has perused the said decision with which he is well acquainted, and sees no cause to alter his answers to any of the preceding interrogatories, and that he agrees with the judge reporter in thinking that insinuations, or light and passing promises of marriage, are not sufficient grounds of a declarator of marriage, though followed with copula, and that every such promise to be effectual, must be serious, deliberate, and explicit.

4. To the fourth of the said further additional interrogatories, this respondent answereth and saith that Lord Kaim is known to have entertained many peculiar notions on matters of Scotch law, and that his work mentioned in this query is in a

great measure a collection of these singular opinions, insomuch that at one time he meant to publish it with this title: "What is law, and ought [82] not to be law, and what ought to be law and is not law." That his opinion on the article in question has not shaken the authority of the decision in the case of *Pennycook and Grinton*, which was intended as a settlement of the question of law, and is so reported in the Collection of Decisions published by authority of the Faculty of Advocates, and was not influenced, as Lord Kaimes supposes, by the circumstance of non-publication of banns.

In the close of all, the respondent hopes he shall be pardoned for observing that although he has answered the additional and further additional interrogatories out of deference for the counsel whose names appear at them, yet still he cannot but consider them as being of an unusual and an exceptionable tenor and style, and such as are fitter for the detection of a witness who is suspected of perjury on a matter of fact, than of a lawyer called to give a professional opinion; and that if evidence concerning the law of Scotland is to be taken after this fashion, the counsel at the Scotch bar must be disposed to decline giving their assistance on any such occasion.

7th August, 1809.

DAVID HUME.

Repeated and acknowledged before me, at Edinburgh, the undersigned Wm. Coulter, Lord Provost.

In the presence of Harry Davidson, Not. Pub. and Actuary assumed.

ON THE LIBEL AND EXHIBITS GIVEN ON BEHALF OF MRS. DALRYMPLE.

7th June, 1809.—ROBERT HODSHON CAY, of the city of Edinburgh, Doctor of Laws, aged about fifty-one years, a witness produced and sworn, deposes and says that he has practised as an advocate before the Supreme Court of Session in Scotland since 1780, and that he acted as one of the judges in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland, from 1788 till 1801, since which last period he has held the situation of Judge of the High Court of Admiralty in Scotland. And, further, [83] to the eleventh article of the said libel, he deposes and says that he has attentively perused and considered the said eleventh article and the several exhibits annexed to the libel, and that he is clearly and decidedly of opinion that if the hand-writing of these exhibits, and a cohabitation of the parties in consequence thereof, were acknowledged or proven, they, together with such cohabitation (copula), would be sufficient by the law of Scotland to constitute marriage between the parties. That during the twelve years the deponent held the situation of one of the Judges of the Commissary Court of Edinburgh, as above deposed to, no decision of that court was pronounced contrary to this opinion, nor is the deponent acquainted with any decision of the Commissary Court, even as altered or corrected by the Court of Session or the House of Lords (those of *Taylor* contra *Kello*, *M'Innes* contra *More*, *Dobson* contra *M'Laughlane*, and *Anderson* contra *Fullerton*, not excepted), which appear to him, when thoroughly considered, to be adverse to the principles on which his opinion is founded.

The same witness examined on the interrogatories given on behalf of John William Henry Dalrymple, the other party in this cause.

1. To the first of the said interrogatories, this respondent answereth and saith that he is not acquainted with the laws and usages of Scotland at any period (since the Reformation was fully established at least) in which writings of the tenor of those annexed to this libel, together with a consequent and subsequent copula, would not have been held to constitute marriage.

2. To the second of the said interrogatories, this respondent answereth and saith that the law of Scotland on this subject may be collected and ascertained from the reported and recorded decisions of the courts of justice, and from the writings of authors of acknowledged and received authority; and the deponent has formed his opinion from these sources, and from the received law and uniform practice of the Commissary Court, while he had the honour of sitting on that bench, as well as from a careful perusal of all or most of the prior records of that court, which are preserved in an accessible state, together with an unremitted attention to the proceedings and decisions of the Court of Session when reviewing consistorial decisions ever since he left the Commissary Court.

3. To the third of the said interrogatories, this respondent answereth and saith that he knows of no difference between the [84] legal effects of a marriage constituted by a consent de presenti cum subsequente copula, and a marriage celebrated in facie

ecclesiæ, unless the fine or other punishment to which the former, as a clandestine marriage, may subject the parties, were to be esteemed such a difference. The distinction between a marriage constituted by a consent *de præsenti cum copula*, and by a promise *cum copula*, does not appear to the deponent to be received or adopted in our courts of justice, which, to the best of the deponent's knowledge and belief, have at no time acknowledged the passages in the *Elucidations* of a celebrated author on this subject, as being of any authority.

4. To the fourth of the said interrogatories, this respondent answereth and saith that, in his apprehension, a marriage constituted by mutual consent *de præsenti*, with a subsequent copula, would be held binding upon the woman as well as upon the man. Cases of this kind where the woman is defendant are extremely rare. That of *Taylor contra Kello* does not appear to be adverse to the deponent's opinion, for in that case no copula was proven or admitted, and circumstances occurred and were noticed in the judgment of the House of Lords, 16 Feb., 1787, and were held to negative any marriage whatever, regular or irregular, between the parties. Marriage to be binding on both parties must be constituted by mutual consent, and it is only on the consent of the woman, taken in conjunction with that of the man, that any action of adherence against her can be founded.

5. To the fifth of the said interrogatories, this respondent answereth and saith that he knows of no alteration in the situation of the man that could take away a woman's right to have a prior marriage declared; a subsequent marriage in *facie ecclesiæ* between the woman and another man might affect her right of action to have the first marriage declared, because such action could not be maintained without professing herself guilty of bigamy, which, perhaps a court of justice would not permit her to do, and *cui bono* maintain an action, which would be altogether nugatory; the second marriage affording to the first husband an unexceptionable ground for divorce.

6. To the sixth of the said interrogatories, this respondent answereth and saith that he conceives that where a marriage is constituted in Scotland by a consent *de præsenti cum subsequente copula*, that any subsequent marriage in England, or elsewhere, would be null and void, even although the Scots marriage had not been previously made the foundation of any proceedings in the courts of Scotland; and that he is not aware of any distinction in [85] this respect between a marriage constituted by consent *de præsenti cum copula* and a marriage constituted by promise *cum copula*; nor does he think the circumstances alluded to in the conclusion of the interrogatory, of a man's ceasing to be a domiciled Scotsman, could liberate him from legal obligations validly contracted prior to the alteration of his residence.

7. To the seventh of the said interrogatories, this respondent answereth and saith that he would hold a mere declaration in writing to be only equivalent to the clause in most ante-nuptial contracts of marriage, whereby the parties declare in words *de præsenti*, that they accept of one another as husband and wife, and consequently as, *per se*, only constituting an obligation to marry. But that if such written declaration were followed by habit and repute (publicly residing together, owning and acknowledging each other as husband and wife, and being so held and reputed) by subsequent copula or by actual regular celebration, that it would, in conjunction with any one of those circumstances occurring in Scotland, constitute a lawful and irrevocable marriage according to the law of Scotland.

8. To the eighth of the said interrogatories, this respondent answereth and saith that it is already answered in so far as relates to a subsequent copula, where the copula has been antecedent to the declaration; and where no such copula follows its date, some doubt may be entertained, as questions might be let in as to the views or motives of granting and accepting of such declaration, as in *More contra M'Innes*, decided ultimately in the House of Lords, by reversing the decrees of the Courts below, on 25 June, 1782.

9. To the ninth of the said interrogatories, this respondent answereth and saith that the circumstances here set forth, if attended by copula, would undoubtedly constitute marriage; if not attended by copula, would, in the respondent's apprehension, only constitute an obligation to marry, though he is well aware that some difference of opinion prevails among lawyers on this last-mentioned point, on the application of the rule *consensus non concubitus facit matrimonium*.

10. To the tenth of the said interrogatories, this respondent answereth and saith that mistakes, or doubts, or apprehensions with respect to the legal effects of what has

passed between the parties cannot affect the rights or obligations of either, which may be declared or enforced at any period, notwithstanding any intervening doubts or apprehensions on the part of either or of both.

R. HODSHON CAY.

[86] The same witness examined on the additional and further additional interrogatories given on behalf of John William Henry Dalrymple, Esq. the other party in this cause.

1. To the first of the said additional interrogatories, this respondent answereth and saith that he has not been in the habit of considering the opinions of Sir Thomas Craig as of super-eminent authority in consistorial questions. For some time previous to the assembling of the Council of Trent, the inordinate ambition of the Romish Church had induced the Consistorial Courts, then universally held by churchmen, to confound the civil effects of a mere consensual contract with the mysterious ecclesiastical effects of the supposed sacrament: these usurpations were confirmed by that council, and the consistorial law, as administered by the Church courts, from that time till the Reformation, conceived themselves bound to deny all effect whatever to such marriages as had not been duly celebrated as a sacrament. That Sir Thos. Craig wrote his treatise *De Feudis* very recently after the Reformation, at a time, therefore, when the rules and decisions on which his opinion must have been founded, could only relate to the *jus tunc prope hodiernum* of the Romish Church courts. That the respondent cannot possibly say how far his (Sir Thomas Craig's) opinions were or were not agreeable to what might be conceived to be the consistorial law of Scotland at that time, though, for the reason already given, he thinks it doubtful whether Scotland could at that time be said, with any propriety, to possess any settled consistorial law. That the courts and the lawyers of the Reformed Church have in Scotland concurred in rejecting the more modern ecclesiastical law of Rome, though they still reverence and respect the decretals which were issued before the ecclesiastical doctrines of that Church were infected with the corruptions afterwards sanctioned by the Council of Trent. These more ancient decretals are therefore quoted and acknowledged as authorities in the Consistorial Courts of this part of the United Kingdoms. That, as to the passages referred to in this query, in so far as they relate to legitimacy and legitimation, the respondent means to give no opinion, as they have no relation to the article of the libel on which he was examined, nor to the answers which he gave to the examination in chief; and with respect to the first sentence in § 21, it appears to the respondent not very [87] consistent with the more ancient canon law itself, which continues to be regarded as making a part of the law of Scotland, in which we find the following direct and unequivocal authority:—Lib. 4, tit. 1, Decret. Gregorii IX. *De Sponsalibus et Matrimonio*, “Is, qui fidem dedit mulieri super matrimonio contrahendo, carnali copula, subsecuta, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur; quia licet præsumptum primum matrimonium videatur, contra presumptionem, tamen hujus modi non est probatio admittenda.” “Ex quo sequitur, quod nec verum, nec aliquod censetur matrimonium, quod de facto, est post-modum subsecutum.” That it may further be observed that even in the time of Sir Thos. Craig, it began to be held that actual celebration was not held to be absolutely and essentially necessary, as appears from the case of *Younger* cited by him in § 19; that the changes, if any, which have taken place in the law of Scotland since Sir Thomas Craig's time, have, the respondent conceives, arisen partly from a firmer rejection of the rules of the Romish Church, and the decisions of the Romish Church courts during the times immediately anterior to the Reformation; partly from a stricter attention to the more ancient regulations of the Romish Church while it was yet untainted by the anomalies which an inordinate ambition afterwards introduced, and partly from the natural consequences of the Reformation itself, and the more enlarged notions of jurisprudence to which that Reformation gave birth. That these, perhaps, with other causes to the respondent unknown, gave rise to a series of decisions, which have fixed the law on the footing on which it now stands.

2. To the second of the said additional interrogatories, this respondent answereth and saith that he has always considered the passages in *Stair's Institutions* referred to, as much more consonant to the genius of the Protestant consistorial law of Scotland than those referred to in the preceding interrogatory; that on some particular points he is not very full nor very explicit, but, so far as he goes, the respondent thinks his opinion consistent with the law of Scotland as it stands now. By that time it had

been decided that acknowledgments of marriage cum copulâ constituted actual marriage, not a mere obligation to marry, as is at least strongly inferred from the passage quoted from Nicholson de Nuptiis in the section first referred to in this interrogatory. That the passages referred to in book iii. tit. 3, in so far as they relate to legitimacy, the respondent does not mean to speak to, but on that passage in which he says that "after contract" (by which the respondent understands an express consent de præsenti), "or [88] promise of marriage, or sponsalia, if copulation follow, there is thence presumed a matrimonial consent de præsenti, which therefore cannot be passed from by either or both parties, as having the essential requisites of marriage." The respondent may observe that it is confirmed and corroborated by another passage in the work of the same learned and noble author, book iv. tit. 45, § 19, where he says, "Marriage is proved by the sponsalia preceding, as by the contract of marriage whereby the parties oblige themselves to solemnize marriage and by copulation following, or even by antecedent promise of marriage, whatever be the way that it is obtained or granted, if copulation follow without violence; although the promise were conditional, and that the condition is no otherways purified but by copulation," (by "purified" in the Scots law idiom is meant fulfilled). This doctrine the respondent considers to be conformable to the law of Scotland, as the same has been since determined in a variety of cases.

3. To the third of the said additional interrogatories, this respondent answereth and saith that he conceives the decision in the case of *Pennycook and Grinton* against *Grinton and Graite* to have been pronounced in conformity with the rule of the ancient canonical law already quoted; with the passages to be found in Lord Stair's Institutes; with the decision in the House of Lords in the case of *Jean Campbell and her Daughter* against *Colin Campbell and Magdalen Cochrane*, pronounced 6th of February, 1748; with the subsequent decision, 23d of February, 1785; *Helen Inglis* against *Alexander Robertson*; and with the general tenor and principles of the consistorial law of Scotland. And the respondent, having mentioned the case of *Campbell* against *Cochrane*, will take the liberty of adding a few of the circumstances of that case, as collected from the records of the Commissary Court. Captain John Campbell, of Carrick, on the 9th of December, 1725, was, without previous proclamation of banns, married to Jean Campbell, by a clergyman, and a certificate of that marriage was granted, signed by the clergyman and by two witnesses; and as this marriage was private, and in so far irregular, John Campbell the husband, and afterwards Jean Campbell the wife, appeared before the proper Ecclesiastical Court, to answer for the irregularity, when they were severally rebuked for the said irregularity, and did severally enact themselves to adhere in all times coming, and to be faithful and kind one to another; by all which the labes of the irregularity was done away. After this they publicly resided together as husband and wife for twenty [89] years, and were held and reputed as such, and the other pursuer, Jean Campbell the younger, was the issue of that marriage, and was held and reputed as the lawful issue thereof. After the death of John Campbell the husband, Magdalen Cochrane obtained letters of administration in England, as his widow, with a view of obtaining the pension due as to an officer's widow. Jean Campbell and her daughter raised an action before the commissaries of Edinburgh to have found it and declared that she was the lawful widow, and the other the lawful child of John Campbell. In that action no appearance was made for Magdalen Cochrane, a proof was allowed, and it came out in evidence, not only that no claim was ever openly urged by Cochrane during the lifetime of John Campbell, but that, on more than one occasion, she, Magdalen Cochrane, had been in company with Jean Campbell and others, and heard and seen her, Jean Campbell, treated and addressed as the wife of John Campbell, while she suffered herself to be treated and addressed as the widow of one Kennedy, a former husband. After this proof was had, Magdalen Cochrane brought a cross action of declarator, in which she founded upon an alleged holograph acknowledgment by John Campbell, dated 3d July, 1724, bearing that he was solemnly and lawfully married to Magdalen Cochrane, but without mentioning the date of such marriage, and this pretended marriage having been as alleged prior to that of Jean Campbell, concluding inter alia to have it found and declared that Captain John Campbell and Mrs. Jean Campbell were never lawfully married together, and that it is false, groundless, and injurious to her to allege any such thing, &c. Both parties were assisted by most able and industrious counsel. It was pleaded for Mrs. Campbell that a formal marriage, followed by open and public cohabitation,

habit, and repute, was not, after subsisting for twenty years, to be set aside, and the children bastardized, by an alleged secret and latent marriage, though said to have been prior in date; and that therefore no proof should be allowed of such alleged prior clandestine marriage, especially after the death of the alleged husband, who alone could be able effectually to traverse such proof: and, further, that Magdalen Cochrane, by allowing the marriage to subsist openly for twenty years, nay, by suffering Jean Campbell, without contradiction, to be treated as the lawful wife in her own presence, was now barred personali exceptione from leading any proof to the contrary; these pleas were undoubtedly invincible on the supposition that what was alleged to have passed between John Campbell and Magdalen Cochrane (there being no issue from their alleged connection) only inferred [90] an obligation to marry, without actually constituting marriage between the parties. One of the pleas was urged in the following words:—Commissary Record, page 107, “A promise of marriage cum copulâ has this effect, to oblige the refractory party by a process at law to fulfil, but if, before sentence is pronounced, the refractory party be publicly married to another, the marriage is good and cannot be avoided by the allegances of the antecedent promise and copula with another.” But this, and all other pleas in bar urged to exclude Magdalen Cochrane from leading a proof to the effect, if she succeeded in that proof, of depriving Jean Campbell of the status she had openly acquired and publicly enjoyed during twenty years, was repelled by the commissaries, who, by their interlocutor, 23rd June, 1747, “Before answer allowed the said Mrs. Magdalen Cochrane a proof of her libel, and of all facts and circumstances tending to infer the marriage libelled.” Of this interlocutor, Jean Campbell complained to the Court of Session. Her bill of advocacy was refused by the Lord Arniston, 7th July, 1747; she then presented a petition against that interlocutor of Lord Arniston, praying the court “In consideration of the peculiar circumstances of this case, to find that Mrs. Magdalen Cochrane is barred personali exceptione from insisting in this declarator of her pretended marriage.” The Court of Session were of a different opinion from the commissaries, for they, by their interlocutor, 29th July, 1747, “Remitted the cause to the commissaries with this instruction, to find that Mrs. Kennedy was barred personali exceptione from being admitted to proof that she was married to Mr. Campbell, of Carrick, before he was married to Mrs. Jean Campbell,” and this remit was applied by the commissaries. Mrs. Kennedy entered her appeal to the House of Lords, complaining of this interlocutor, and the appellant’s counsel having been heard on the 6th of February, 1748, their Lordships (the counsel for the respondent being likewise heard and consenting thereto) reversed the interlocutor of the Court of Session, and returned to that of the commissaries, allowing a proof, thereby virtually finding that no degree of concealment of a marriage by both parties, and no silence, or even acquiescence of the woman in a posterior public and open marriage of the man with another woman, could bar her at any after period, even after the death of the alleged husband, from asserting her own individual rights as widow (there being no issue of her own connection), even to the effect of annulling a posterior public marriage, and depriving the widow of such public marriage of her status and place in society as such. It is [91] very true that Mrs. Cochrane (or Kennedy) failed to prove any marriage between her and Captain Campbell, and therefore Mrs. Jean Campbell was assoilized from Magdalen Cochrane’s declarator, and finally prevailed in her own. But this went on the point of fact alone, and no way touches the point of law. Upon the whole, the respondent is of opinion that the case of *Pennycook and Grinton* against *Grinton and Graithe*, though certainly a very strong case indeed, was well decided, and according to the principles of Scots law, by which a promise and copula, and multo magis a consent de præsenti, with subsequent consummation, constitutes marriage itself, not a mere obligation to marry; and consequently it follows that a woman, having by these or any other means acquired the right and status of a wife, cannot be deprived of them by any subsequent marriage between her husband and any other woman.

4. To the fourth of the said additional interrogatories, this respondent answereth and saith that cases of this kind are fortunately extremely rare, and that he does not recollect any subsequent case precisely similar in all its circumstances to that alluded to; that in the case of *Helen Inglis* against *Alexander Robertson*, the commissaries, 23rd February, 1785, found that acknowledgements, as of a past marriage in letters, were sufficient to found a declarator of marriage against the defendant, although he had been subsequently married to another woman by whom he had issue, and this,

although there was no issue of the alleged connection between the pursuer and defender; and found the pursuer and defender married persons accordingly. And this judgment was affirmed by the Court of Session, 3rd of March, 1786; the circumstance of there having been issue of the second marriage is not mentioned in the report, but was asserted on the one part and not denied on the other in the printed arguments, on which the case was determined in the Court of Session. That this case was not altogether so strong as that of *Pennycook against Grinton*, but the respondent considers the principle which regulated that decision, viz. that even promise cum copula so effectually constitutes marriage in Scotland, that its effects cannot be obviated by any conduct, consent, disclamation, or discharge by the woman, nor by any subsequent marriage by the man, to be so firmly rooted in the law of Scotland that nothing short of an act of the legislature can possibly upset it.

5, 6, 7, 8, 9. To the fifth, sixth, seventh, eighth and ninth of the said additional interrogatories, this respondent answereth and saith that the law of Scotland is fortunately like that of [92] all other countries, capable of gradual expansion and improvement, and that hearings in presence, that is, solemn arguments, are sometimes ordered with a view of applying the principles of the law to particular and unusual cases, and even sometimes to review, and, if necessary, to correct the application of immutable principles to cases and situations similar to those which had been formerly decided. But the respondent does not conceive that the Court of Session would order a hearing in presence, or betray any other symptom of hesitation, on a case of a consent to marry per verba de præsenti, proven by written evidence, the authenticity of which should be acknowledged or proven, attended by a subsequent and consequent consummation also acknowledged or proven. That it is not for him to say what the Court of Session would do in a case precisely similar to that of *Pennycook and Grinton*, but were a case similar to that in all its circumstances again to occur, it would not at all surprise him were they to order it to be solemnly argued at their bar, though he is of opinion that the ultimate decision would be similar to that formerly pronounced.

10. To the tenth of the said additional interrogatories, this respondent answereth and saith that he is of opinion that the prior latency of the writings would not be held to derogate from their effect, when afterwards made the foundation of legal proceedings.

11. To the eleventh of the said additional interrogatories, this respondent answereth and saith that he does not consider this interrogatory as at all applicable to the case stated in the libel, which appears to him to rest not on the ground of promise de futuro cum copula subsequente, but on that of marriage constituted by consent de præsenti, with subsequent and consequent consummation; though, upon the grounds repeatedly stated, he is of opinion that a subsequent marriage, however formal, would not obstruct a declarator of marriage founded on a promise with subsequent and consequent copula, also prior to such formal marriage with another woman.

12. To the twelfth of the said additional interrogatories, this respondent answereth and saith that this interrogatory does not appear to bear any direct relation to any passage in the article of the libel upon which the respondent was examined in chief, but he does not hesitate to say that the effect of any subsequent marriage between the defendant and any other woman would be weakened rather than strengthened, if that circumstance took place not in Scotland where the plaintiff lived, and where she [93] might have interfered to prevent it, but in a foreign country and at a distance from her residence.

13. To the thirteenth of the said additional interrogatories, this respondent answereth and saith that the laws and usages of Scotland would in his opinion be held as applicable to any marriage contracted in Scotland by any foreigner, whether a military officer or not, who had, previous to entering into such contract, resided above 40 days in Scotland. The law and practice of Scotland as to the forum domicilii, seem not so strictly to require the full residence of forty days in the case of a military man, as in that of a foreigner residing in Scotland in a mere civil capacity, *Lees against Parlan*, 12th November, 1709, Fountainhall, and Dictionary of Decisions, vol. i. page 326.

14, 15, 16, and 17. To the fourteenth, fifteenth, sixteenth, and seventeenth of the said additional interrogatories, this respondent answereth and saith that as they relate to hypothetical cases, which in so far as he knows have not been agitated, and which perhaps never may occur, and as the decisions in such cases, were they ever to happen,

might be materially affected by the special circumstances of each, he declines to give a decided opinion on such general statements as those contained in the aforesaid interrogatories.

18. To the eighteenth of the said additional interrogatories, this respondent answereth and saith that by the law of Scotland he understands that even a promise *de futuro cum subsequente copulâ* (*multo magis a consent de præsentî cum consummatione*) constitutes actual marriage, in terms of the thirtieth chapter of the first title of the fourth book of the Decretals of Gregory the Ninth, which, as it was complied prior to the corruptions sanctioned by the Council of Trent, is received by our Courts as an authority in matters of this kind, and in terms of repeated decision of the Scots courts, so as not to be derogated from by any act of either party, or by the subsequent regular or irregular marriage of either.

19, 20. To the nineteenth and twentieth of the said additional interrogatories, this respondent answereth and saith that, according to the law of Scotland, he knows of no obligation to marry, followed by a copula, in consequence thereof, which can according to the law of Scotland be retracted by either party or by both.

21, 22. To the twenty-first and twenty-second of the said additional interrogatories, this respondent answereth and saith that the constitution of marriage by promise and copula (which [94] does not appear to him to be the case before him) rests on the ground of the passage already quoted from the Decretals, as well as repeated decisions of the courts in Scotland, the result of which is, that the presumption of present matrimonial consent at the moment of a copula permitted and enjoyed in consequence of a prior consent, admits not of being redargued by any proof, acknowledgment, discharge, dissent, or subsequent event whatever; but does *ipso facto* constitute marriage between the parties, incapable of dissolution by any means short of those which would have dissolved a marriage regularly and publicly solemnized in *facie ecclesiæ*; that such events do not constitute a mere obligation to marry in favour of the woman, the validity of which is to depend on the future actual celebration, appears to have been very early determined, as in the case of *Younger*, mentioned by Sir Thomas Craig in the nineteenth section, referred to in the respondent's answer to the first of said additional interrogatories; likewise by the following subsequent decisions, sustaining declarators on such grounds after actual celebration had become impossible in consequence of the death of the husband; in the case of *Barclay* against *Napier*, cited by Lord Stair, b. i. tit. 4, § 6; vide also *Hope* voce *Husband and Wife*, and *Kerse*, M. S. 64; 23d February, 1714, *Anderson* against *Wisheart*, vide *Forbes*, M. S.; June 1730, *Murray* against *Smith*, vide *Dictionary*, vol. ii. page 530, where it will be found that action was sustained after the death of the husband, though the particular mode of proof offered was rejected; 28th July, 1747, *Campbell* against *Cochrane*, alias *Kennedy*, where action was sustained by the commissaries, and their judgment affirmed by the House of Lords, Falconer and Records and Appeal cases; 18th November, 1766, *Agnes Johnston* against *Smiths*; 13th November, 1795, *Anderson* against *Fullerton*; 28th November, 1801, *M'Gregor* and *Campbell* against *Campbell*, in which last mentioned cases action was sustained, but the proof of marriage afterwards failed; 20th January, 1802, *Crawford's Trustees* against *Hart*, where the widow was successful; 4th March, 1807, *Elizabeth Walker* against *M'Adam's Trustees*, where also the widow was successful. That correct legal ideas upon this subject may be formed from the usual style of decrees of adherence on the ground of promise and copula, which does not ordain the defender to celebrate marriage, but finds facts, &c. proven relevant to infer marriage as having already taken place, and finds and declares the pursuer and defender married persons, and the defender lawful wife (or husband) to the pursuer, and ordains the [95] defender to adhere to the pursuer in all time to come. That the right of action is not cut off or barred by a subsequent marriage of the defender with another appears from the decisions in the cases of *Pennycook* and *Grinton* against *Grinton* and *Graite*, where there was issue of both connections; and in those of *Campbell* against *Cochrane* or *Kennedy* already cited, and *Inglis* against *Robertson*, 23rd February, 1785, in both of which action was sustained, though there was no issue of the first connection, and though the object of both was to set aside a marriage publicly avowed, of which there was issue reputed lawful, and which such action in the last-mentioned case proved ultimately successful: that such irregular proceedings do not confer a mere right of action on the injured woman, which she might renounce, abandon, or discharge, appears from the following decisions:—The case cited by Stair, book i. tit. 4,

§ 6, from *Nicholson de Nuptiis*: the case of *Elizabeth Castlelaw* against *Agnew of Shenchan*, being a declarator of marriage on the ground of promise cum copula, in which the defender produced "a discharge granted by the pursuer to the defender, of date 25th November, 1715, whereby the said pursuer granted her to have received from the said defender, full and complete payment of all fees due to her for five years' service, preceding Martinmas 1715; wherefore she discharged the said defender of all fees due to her for the said service, and of all pretensions of marriage that she could claim of the said defender;" the commissaries, the 15th August, 1717, "found the promise of marriage, with the posterior copula or concubitus libelled, relevant to infer the conclusion of the libel, and probable by the defender's oath of verity, and found the discharge not sufficient to elide the same;" vide *Commissary Records*, page 380; and although the case was afterwards most keenly contested, the justice of this interlocutor was not afterwards disputed in the Court of Session. So also in the case of *Jean Campbell* against *Cochrane*, it came out in evidence that Mrs. Cochrane or Kennedy had not only acquiesced for twenty years in the deceased Captain Campbell's marriage with Jean Campbell, but had in public companies, during their cohabitation, herself addressed her in the character of Captain Campbell's wife, acquiescing in the designation of widow Kennedy, repeatedly applied to herself by the individuals composing the same company, yet this was found to be no bar to her action, and the judgment of the commissaries was affirmed by the House of Lords. Lastly, in the case of *Pennycook and Grinton* contra *Grinton and Graite*, Agnes [96] Pennycook at first brought an action for inlying charges, and the damages due to her for debauching and leaving her, yet this was not found sufficient to bar her from prosecuting and succeeding in a subsequent declarator, in which she was successful in establishing her own marriage and setting aside the subsequently publicly avowed marriage with Graite, of which too there had been issue. That from these authorities it follows, that the presumption of a present matrimonial consent tempore coitus, when a previous promise had been given and accepted between the parties, cannot be traversed by any proof however strong and direct; that when the woman submitted to the man's embraces, she did so, not intuitu matrimonii, or on the faith and belief that she thereby became his wife. That hence the respondent is of opinion, that if the case stated in the libel now before him rested only on the ground of a promise cum copula, instead of a mutual present consent with consummation, that it would constitute actual and indissoluble marriage between the parties. That as to the passage in *Erskine* alluded to in the interrogatory, the respondent is of opinion that it is so far defective that it does not state the presumption spoken of to be a *præsumptio juris et de jure*, not to be controverted by any evidence whatever.

23. To the twenty-third of the said additional interrogatories, this respondent answereth and saith that the case here put has, so far as he knows, never been argued or determined in the courts in Scotland, and does not appear to the respondent to have reference to the case originally put and spoken to by him.

24. To the twenty-fourth of the said additional interrogatories, this respondent answereth and saith that as his opinion does not, as has been seen, rest on the authority of Lord Stair alone, he deems it unnecessary to make any answer to this question, further than such as have been already given.

25, 26. To the twenty-fifth and twenty-sixth of the said additional interrogatories, this respondent answereth and saith that they have been already answered in substance, he having stated an opinion, in which however he is aware that many lawyers may differ, from which it may be inferred that neither a regular contract of marriage in the usual style, nor the writings in process, would in his opinion be sufficient to constitute an irrevocable marriage, unless either actual celebration, habit and repute, or carnal copulation, had followed.

27. To the twenty-seventh of the said additional interrogatories, [97] this respondent answereth and saith that those exhibits are of such a nature as, if attended with either of the three circumstances mentioned in his answer to the two immediately preceding interrogatories, would bar either party from retracting.

28. To the twenty-eighth of said additional interrogatories, this respondent answereth and saith that the plaintiff, by the exhibit No. 2, provided the handwriting thereof were acknowledged and proven, and a subsequent and consequent copula were also acknowledged and proven, would, by the law of Scotland, have been found to have contracted the indissoluble bonds of matrimony with the defendant. That, had

the plaintiff destroyed these writings, the defendant might have founded his action against the plaintiff on the counterpart of the correspondence in his own hands; and if even these had failed, might have instructed the consent by the plaintiff's oath, and the copula prout de jure, or by the plaintiff's oath.

29. To the twenty-ninth of the said additional interrogatories, this respondent answereth and saith that he cannot at this moment recollect any case, such as that referred to in this interrogatory; as the case of *Anderson against Fullerton*, though action was there sustained in particular circumstances, had it been successful, it would not in the respondent's apprehension have come up to the spirit of the interrogatory.

30. To the thirtieth of the said additional interrogatories, this respondent answereth and saith that in his apprehension every expression of deliberate and present mutual matrimonial consent, followed by copula, constitutes matrimony upon stronger and more incontrovertible grounds, well known to every lawyer, than any marriage constituted by promises de futuro, however solemn, and though also followed by copula.

31. To the thirty-first of the said additional interrogatories, this respondent answereth and saith that such second marriage would be made void, because the prior marriage being complete and valid by the law of Scotland, no second marriage could be legal while the first remained undissolved.

That before taking leave of these additional interrogatories this respondent must take the liberty to observe that in answering them he is conscious he may have committed two errors: that he may have derogated from the dignity of his profession, in submitting to the toil and disgust of answering interrogatories, which, considered as cross questions, are irregular in their structure and degrading by the insinuations they imply; and he may have betrayed the best interests of the court from which they [98] issue, by contributing to shut out the truth in time to come. Scots law, to an English court of justice, is matter of fact, and as such to be established by evidence; but the sources of the most legitimate information may be stopped if professional men, by consenting (for they cannot be compelled) to give information on a point of their own law, are to be teased and insulted by such cross interrogatories as ought only to be addressed to witnesses suspected of a desire to disguise or conceal the truth. That out of respect for the persons by whose signature these additional interrogatories have been sanctioned, and ignorant of the customs and usages of the courts in which they practise, he has given such answers as occurred to him; but as the same inducements do not occur in favor of the further additional interrogatories, he declines making any answer whatever to them.

7th August, 1809.

R. HODSHON CAY.

7th July, 1809.—ANDREW RAMSAY, ESQ., of Whitehill, advocate, aged sixty-seven years, a witness produced and sworn, deposes and says that he has practised as an advocate before the Supreme Court of Session in Scotland since 1763, and that he acted as one of the commissaries in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland, from 1774 till 1807; and further, to the eleventh article of the said libel he deposes and says that he has attentively perused and considered the several exhibits annexed to the libel, and that marriage, by the law of Scotland, may be constituted in several modes, without regular celebration by a clergyman. It may be formed by acknowledgment of the parties containing words de presenti, relevant by that law to infer marriage; by promise attended with copula betwixt the parties; and by acknowledgments in writing, clearly expressing the fact that a marriage had been formally contracted. Deposposes that he is clearly of opinion that in the present case, all of these grounds for constituting marriage, by the law of Scotland, concur. There is an acknowledgment by the parties, containing words de presenti, relevant by the law of Scotland to constitute a marriage. There is an acknowledgment in the letters of the defendant, by his signature as the plaintiff's husband, and addressing her as his wife, of his having formerly contracted a marriage with Miss Johanna Gordon the plaintiff. Deposposes, that with regard to the [99] third ground, viz. promise and copula, the promise is here proved by the writing of the defendant in No. 1 of the exhibits, he is also inclined to think from the letters of the defendant that a copula has taken place betwixt the parties, and such is the impression which a careful perusal of the letters of Mr. Dalrymple has made upon his own mind. But the deponent does not see in these letters any sufficient evidence of a copula, upon which alone the sentence of a Judge, declaring, a marriage can rest. But he

conceives that from the style of the letters, the copula, as by the laws of Scotland it is clearly probative by witnesses, may be proved in that manner; and he should think it rather prudent for the plaintiff to strengthen her cause by bringing such proof. At the same time he is clearly of opinion that without such proof the eleventh article of the libel is well founded; and he does not see in what manner it can be avoided or defeated by any defence on the part of the defendant.

ANDREW RAMSAY.

Examined on interrogatories.

1. To the first of the said interrogatories, this respondent answereth and saith that he conceives that the law of Scotland, in regard to the validity of irregular marriages, has been at all times the same, though not so definite or so well understood as it has been of late by some decisions in the Consistorial and Supreme Court.

2. To the second of the said interrogatories, this respondent answereth and saith that he has formed his opinion of what is the precise law of Scotland at the present day regarding such marriages, from the Roman law, which is the common law of Scotland; from the opinions of systematic writers, Lord Stair, Lord Bankton, and Mr. Erskine; and from the decisions of the proper Consistorial Court, which have either received the universal approbation of the country, or have been affirmed in the Supreme Court and in the House of Lords.

3. To the third of the said interrogatories, this respondent answereth and saith that he considers a promise of marriage followed by a copula or consummation, as equivalent in its legal effects to a marriage regularly celebrated, and not merely binding the party making it to marry at some subsequent period.

4. To the fourth of the said interrogatories, this respondent [100] answereth and saith that an irrevocable obligation on the part of the man to marry a particular woman, when accepted of by the woman, is binding in all cases on the said woman, so as to prevent her from contracting a marriage with another man posterior to such obligation.

5. To the fifth of the said interrogatories, this respondent answereth and saith that a woman who has received an irrevocable obligation given by a man to marry her, is entitled to have her marriage declared by a decree of the proper court. The remaining part of the interrogatory is too vague and indefinite to admit of a precise answer, but as relative to the situation of the parties, it has not suffered such alteration as to take away the woman's right to have the said marriage declared valid.

6. In answer to the sixth of the said interrogatories, this respondent saith that he conceives that the promise of a man to marry a particular woman, followed by a copula or consummation, taking place only in Scotland, will prevent the man from marrying another woman in England; such promise and such consummation will prevent the said man, although the said promise had not been previously insisted upon and declared binding at the woman's instance in the proper court in Scotland, and although the man had, at the time of such promise and such copula, been in England and not possessed of any property or effects in Scotland.

7. To the seventh of the said interrogatories, this respondent answereth and saith that where a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration, by the law of Scotland, constitutes a lawful marriage.

8th. To the eighth of the said interrogatories, this respondent answereth and saith that the law of Scotland has distinguished betwixt a copula or consummation, antecedent or subsequent to the declaration mentioned in a former interrogatory. The copula and declaration must be inseparably connected, or, in other words, must be cause and effect; a copula after such declaration will render the marriage complete, but a copula before it will not have the same legal effect, because when these two take place, the law of Scotland presumes that the copula has taken place in consequence of such declaration. The declaration and copula when thus made out, constitute a marriage, and not merely an obligation to marry.

9. To the ninth of the said interrogatories, this respondent answereth and saith that where a man gives a writing to a woman, acknowledging that he is her husband, and the two parties [101] correspond with each other, calling each other husband and wife, these facts by the law of Scotland will constitute a marriage, not merely an obligation to marry, unless it shall appear from real and undoubted evidence that no consummation had taken place between the parties, that they never had any serious

intention of marriage, or that they have both resiled from it for reasons in which they both concurred.

10. To the tenth of the said interrogatories, this respondent answereth and saith that he conceives that in the case stated in the former interrogatory, the legal effect of the declaration and correspondence will not be avoided, although either the man or the woman express their doubts as to their being completely married, and signify his or their resolutions to marry publicly, or although one or both should express fears of being deserted by the other; because the mistakes or misconceptions of either of the parties, or their visionary terrors, will not alter the status which has been before fixed unalterably by their own acts and deeds, and constituting a valid marriage, and not merely an obligation to marry.

ANDREW RAMSAY.

Examined on the additional and further additional interrogatories.

To all and each of the said additional, and further additional interrogatories, this respondent answereth and saith that, in so far as they are pertinent and bear upon the case, they appear to him to be answered by the responses to the former interrogatories, which in his opinion were framed with judgment, and a deliberate consideration of the facts as appearing from the exhibits referred to by the plaintiff, and exhausted the question which is before the Court; and that these additional and further additional interrogatories seem to be framed for the sole purpose of puzzling, perplexing, and rendering the cause inextricable, by holding it forth as resting on subtle questions of law, and a variety of decisions in former cases of marriage, which appear to him totally inapplicable to the case in hand. That having already given his evidence in chief, and answered the interrogatories put to him by the defendant to the best of his ability, he does not consider it as any part of his duty to answer these additional and further additional interrogatories, because he conceives that he has fully discharged his duty as a witness and a counsel, by opinion and pointed responses to the former interrogatories, which in his opinion contain whatever is material to the decision of the cause.

7th August, 1809.

ANDREW RAMSAY.

[102] ON THE ALLEGATION AND EXHIBITS GIVEN ON BEHALF OF
MR. DALRYMPLE.

31st October, 1810.—JOHN CLERK, Esq. of the city of Edinburgh, advocate, and for some time His Majesty's Solicitor General for Scotland, aged about fifty-three years, a witness produced and sworn—

Deposes and says that he has practised as an advocate before the Supreme Court of Session in Scotland since the year 1785, and to the seventh article of the said allegation, the deponent having attentively and deliberately perused and considered the several articles of the said allegation with the exhibits annexed thereto, and also the libel given in the said cause on the part of Johanna Dalrymple the promoter, and the original exhibits, Nos. 1, 2, 10, and 11, and the several original letters annexed to the said libel, he deposes and says that, in his opinion, a person not having resided in Scotland otherwise than as being quartered there as a military officer, is not through such residence a domiciled resident. That the laws and usages of Scotland apply generally to persons actually resident within the country who contract marriages according to the methods and forms that would be binding upon the domiciled inhabitants, but that in cases where a marriage is alleged to have been contracted without having been solemnized in the face of the Church, and the question depends upon evidence of consent to the matrimonial contract, persons who are not domiciled residents may be in a different situation from the domiciled inhabitants. There may be acknowledgments or declarations of marriage intended merely as engagements to marry at some future period, or where the parties live together publicly, to give their connection a more decent and respectable appearance in the eyes of the world. Such cases occur in Scotland, notwithstanding the danger to parties of being entangled in marriages without their consent by the law, which admits of private marriages without the marriage ceremony, the acknowledgments or appearances of marriage being taken as evidence of it; but the deponent has been informed that in England, where private acknowledgments of marriage without the ceremony do not bind parties to the matrimonial contract, and consequently it is safer to pretend the connection of marriage where it does not [103] exist, such pretended marriages are not unfrequently formed without an intention to marry, and particularly that this is a practice in the

army. Thus when a regiment comes from England to be quartered in Scotland, the same habits continue among the officers and soldiers, who have women along with them who pass as their wives, though the connection is in reality of a more temporary nature. From this it should follow that the same circumstances that would infer consent to marriage in a domiciled inhabitant in Scotland, would in fact carry no such inference along with it against an English officer or soldier following the habits of his country. Thus, though it cannot be said that these persons while they remain in Scotland are not subject to the same law that applies to others, they have some advantage in weighing the evidence of consent to marry, where it is alleged that they have contracted private or irregular marriages. That the deponent is of opinion that the paper-writing, No. 1, does not amount to or constitute a marriage, as it is in its form a mere promise. The letters annexed to the libel do not amount to or constitute a marriage, but they may be considered as important evidence in support of an allegation that a marriage had been contracted by the parties: the deponent does not, however, consider them to be decisive evidence. Some of them are written in Scotland and others in England; the deponent cannot distinguish between these letters as to their effect in evidence from the place where they were written; a letter written in England may afford material evidence, but it would not constitute a marriage; and the letters written in Scotland have, in the deponent's opinion, no stronger effect than if they had been written in England. The paper-writing, No. 11, seems to have been an envelope, and the words of it "sacred promises and engagements," to which the parties appear to have put their initials, import that when it was written there was no marriage between them, but only promises and engagements to marry. The paper-writing, No. 2, imports a mutual declaration of marriage by John Dalrymple and Johanna Gordon. If these declarations are in the handwriting of the parties, they afford very important evidence in support of the allegation that a marriage had been contracted between them; and laying out of consideration the acknowledgment to which there is the signature of "J. Gordon," if the previous declaration and signature is of the handwriting of Mr. Dalrymple, it is evidence against him of a very high nature that he had contracted a marriage with Miss Gordon. But the deponent does not consider that the paper-writing, No. 2, though of the handwriting [104] of the parties, amounts to or constitutes a marriage. It is only evidence to prove the fact that a marriage had been contracted between the parties: it is not conclusive evidence, but only such as must be weighed along with the other circumstances of the case, and it will have more or less effect according to these circumstances. The paper-writing, No. 10, contains a declaration subscribed "J. W. H. Dalrymple," that Johanna Gordon is his lawful wife, and that he shall acknowledge her as such the moment he has it in his power; and, on the other hand, a promise by "J. Gordon now J. Dalrymple" that nothing but the greatest necessity shall force her to declare this marriage. This paper is also subscribed "Charlotte Gordon, witness." It imports little more than the paper-writing, No. 2; if the first part of it is written and subscribed by Mr. Dalrymple, it is important evidence against him to prove the fact that a marriage had been contracted between the parties; but the paper-writing does not amount to or constitute a marriage, it is only evidence which will have more or less effect according to the circumstances of the case; and upon the whole the deponent is of opinion that the paper-writings, No. 1, No. 2, No. 10, and No. 11, and the letters annexed to the libel do not amount to or constitute a marriage by the law of Scotland, though if those parts of the writings bearing to be promises and declarations by Mr. Dalrymple are with the signatures of his handwriting, they are very important evidence against him to prove that a marriage had been contracted. The deponent considers that in general such evidence is so strong, that it lays the onus probandi upon the party against whom it is brought, who may still, notwithstanding such writings, be able to shew from other facts and circumstances that no marriage was contracted. But in order to be aware of the full effect of these writings by the law of Scotland, it is necessary to take notice that if such a case were to be tried in Scotland, the deponent is of opinion that the interest of the wife whom Mr. Dalrymple afterwards married in England according to the rules of the Church, would be considered, and she would be made a party to the proceeding upon which the evidence adduced by Miss Gordon would be weighed, not only as to its effect against Mr. Dalrymple, but as to its effect against his wife, who would not be deprived of her status but upon evidence competent and sufficient against her. And the deponent is of opinion that the paper-

writings referred to would have had in the courts of Scotland a much greater effect against Mr. Dalrymple, if he had remained unmarried, than they would have had in the question with him after his marriage in England. The deponent [105] holds this opinion upon the general principles of the law of Scotland, but he shall refer to two decided cases which tend to confirm it. In the case of *Campbell* against *Cochrane*, which is reported in Falconer's Collection, 28th July, 1747, it was alleged that John Campbell of Carriek had made a private marriage with Magdalen Cochrane, and had afterwards married another lady ; after his death Magdalen Cochrane claimed the character of his widow ; but as she had connived at the second marriage, the Court of Session would not allow her to prove her allegations. Falconer's report goes no further ; but it appears from appeal cases upon which the House of Lords gave judgment, 31st January, 1753, that the decision of the Court of Session had been reversed of consent in the House of Lords, and Magdalen Cochrane was accordingly allowed to prove her case. The cause was decided against her upon the proof, and the judgment was affirmed in the House of Lords, as appears from a copy of the judgment which the deponent has seen upon one of these appeal cases. In the deponent's opinion the evidence for Magdalen Cochrane would have been sufficient against Campbell the husband, but it was not sustained against the lady whom he married publicly after having made what was said to have been his first marriage. And in another case, *Napier* against *Napier*, not reported, which was decided by the Court of Session about the year 1802, in which case the deponent was employed as counsel, there was evidence, which in the deponent's opinion would have been sufficient to prove a first marriage against the man, but which however was not sustained against his family by a second wife. The man was a native of Scotland, and as the deponent believes, of Glasgow ; he enlisted as a soldier at an early period of life, the first woman followed him, and it appeared from the evidence that she had lived with him as his wife along with the regiment. In the present case the deponent is of opinion that the writings referred to, supposing that they would have been sufficient evidence against Mr. Dalrymple, if he had remained unmarried, to prove that he had contracted a marriage with Miss Gordon, would not have been sufficient evidence in a question with Mr. Dalrymple's wife, as a party in the proceeding, which would have taken place if the question had been tried in Scotland, to prove that a marriage had been previously contracted with Miss Gordon ; so that according to the deponent's opinion of the law of Scotland, the second marriage is a most important circumstance in considering the evidence of the first marriage. But the deponent is further of opinion that the letters and writings lose a great deal of their weight [106] from another circumstance that though the import of the writings is that the parties were married, yet the fact appears to have been that no marriage ceremony was performed either in the face of the Church, or privately between the parties. But the deponent is of opinion that according to the law of Scotland something more is necessary to the constitution of a marriage than mere declarations in writing that the parties are married ; and though such writings may afford strong evidence that a marriage was contracted, they are not sufficient per se to constitute a marriage. If the parties trusted entirely to these writings not merely for the evidence but for the formation or constitution of their marriage, the deponent is of opinion that they did not do that which was necessary by the law of Scotland to constitute a marriage ; and though they had consented to marry, they did not thereby become married persons, but only formed a contract from which either party was at liberty to resile or draw back as in the case of imperfect obligations. The deponent holds this opinion upon the general principles of the law of Scotland which have been applied in various decided cases, and more particularly in the case of *M'Lauchlane* against *Dobson*, 6th December, 1796, reported in the Faculty Collection ; a decision which the deponent has always regarded as of the highest authority. The deponent strongly rests upon the opinion delivered by the Lord Justice Clerk M'Queen upon that case. He believes it to be universally acknowledged by the profession that the opinions of that Judge are of as much weight in questions of law as the opinions of any other Judge or lawyer that has appeared in Scotland. The deponent has seen the notes of his opinion in the handwriting of the Honourable Henry Erskine, formerly Lord Advocate of Scotland, who was a counsel in the cause, and which are in these words : " The case of *M'Lauchlane* against *Dobson* new, but the law is old and settled ; two facts admitted hinc inde, no celebration, no concubitus, nor promise of marriage, followed by copula. Contract as to land not

binding till regularly executed, unless where *res non sunt integræ*; a promise without copula, locus penitentiae, even verbal consent *de præsenti* admits penitentiae. Form of contracts contains express obligation to celebrate, till that done either party may resile. Private consent is not the consensus the law looks to. It must be before a priest, or something equivalent; they must take the oath of God to take each other; a present consent not followed with any thing may be mutually given up, but if so, it cannot be a marriage." Further, the deponent is of opinion that between a man and woman domiciled in [107] Scotland such promises, acknowledgments or declarations as are contained in the paper-writings and letters in this question, would not amount to or constitute a marriage, though the paper-writing marked No. 10 had been signed in the presence of a witness competent by the law of Scotland to attest and prove the same, but that such writing would only be evidence of more or less weight according to circumstances that a marriage had been contracted. And, further, the deponent is of opinion that if the promises, acknowledgments, and declarations contained in the paper-writings and letters already referred to do not amount to or constitute a marriage, or do not, as evidence, along with the other evidence to be had in the case, prove that a marriage had been contracted between the parties, they cannot amount to more on the part of the man than an obligation to solemnize a marriage in the face of the Church at some future time, provided he should be duly called upon by the woman so to do, and there should be no legal impediment to the marriage. Deposits that the most obvious view of these writings is that they contain admissions express or implied in point of fact that the parties were actually married, and such admissions in the handwriting of Mr. Dalrymple are evidence against him stronger or weaker according to the circumstances of the case that the fact so admitted was consistent with the truth: but that the paper-writings, No. 2 and No. 10, may be considered as having been intended to make and constitute a marriage *de præsenti*; and if these writings are sufficient evidence that such was the concurring intention of the parties when they were delivered, a question in law arises in which the deponent has reason to believe that different and opposite opinions are entertained by Scottish lawyers. It is commonly stated as a general rule of law that marriage may be constituted by consent alone, and in arguments upon this subject it is commonly said that *consensus non concubitus facit matrimonium*. The deponent is of opinion that in the application of these rules it must be understood that the consent intended by them means a consent to some *habilis modus* of constituting a marriage, which leaves the question behind, whether that which parties have consented to was a *habilis modus* or not. The deponent is of opinion that the writing and delivering of the paper-writings in this case was not *per se* *habilis modus* of constituting marriage, and would not have had the effect of making a marriage between the parties, even though the writings were to be considered as evidence that the parties had intended them for the purpose of constituting a marriage. But the deponent believes that an opposite opinion is [108] entertained by some lawyers who hold that, as a marriage may be constituted by consent alone, any intelligible form of expressing consent will make a marriage. This opinion seems to have had much influence with the Court in the case of *Walker against M'Adam*, 4th March, 1807, reported in the Faculty Collection. In that case the man declared the woman to be his wife before several witnesses, for the purpose, as it appears, of constituting a marriage *de præsenti*; in the course of the same day he shot himself with a pistol, so that the marriage was left in *nudis finibus contractus*, no copula or cohabitation having followed it; this however was sustained as a marriage by the Court; the decision has since been appealed from to the House of Lords, and in the deponent's opinion it was erroneous in law, in so far as the declaration before witnesses was sustained *rebus integris* as the constitution of a marriage. The Lord President Sir Ilay Campbell, whose opinion as a lawyer is of the greatest authority, was against the decision, and the appeal remains yet undetermined. The deponent is further of opinion that if the paper-writings now in question are not considered as evidence that it was the concurring intention of the parties at the time to make and constitute a marriage *de præsenti*, by means of these writings there can be no doubt that they do not constitute a marriage, for the consent necessary to the constitution of a marriage must be consent to a marriage *de præsenti* by both parties at the same time: if marriage is not completed at the moment, there is no marriage constituted by the supposed act of consent: thus if a man were to write such declarations as those referred to, and were to send them to a woman in a post letter, this would not constitute a marriage,

though it would afford evidence that a marriage had antecedently been constituted. The deponent thinks it is very clear that the writings created an obligation upon Mr. Dalrymple to marry Miss Gordon, but the question is whether they did nothing more. The deponent is of opinion that the words before the signature of J. Dalrymple in the paper-writing, No. 2, are in sufficient form to express consent *de præsenti* to marriage, and so are the words before the signature of J. W. H. Dalrymple in the paper-writing, No. 10, and that in so far there was a *habilis modus* of contracting a marriage. But though the words may be sufficient, the act of marriage may not be completed. If the act of consent necessary to marriage is only inchoated or begun, without being completed, there is no marriage; and the deponent is of opinion that the most direct expression of consent is not sufficient to make a marriage, unless the parties [109] either go through the marriage ceremony, or, after expressing their consent, complete the marriage by consummation. And, further, that supposing a marriage could be constituted without either ceremony or consummation, and by mere verbal expressions of consent, yet if the words are not used *eo intuitu* of making and constituting a marriage *de præsenti*, they are ineffectual, and the same is the case if the other party does not join in expressing the consent to marriage *de præsenti*. The consent on both sides ought to be unequivocally expressed, and at the same time; and it seems to be necessary that it shall create a belief in both parties that they are actually married, and that no further ceremony is necessary to unite them; for though their mutual professions should be very strong, they may still think that something more is necessary to constitute a marriage, as in the case of a man and woman who propose to marry, and previous to the ceremony sign their marriage settlements, which, in Scotland, usually contain words whereby the parties *per verba de præsenti* accept of one another as man and wife: the words are as strong as those employed by the parties in this case, and yet they do not consider themselves to be married. They have only signed their contract of marriage, which is no more than an obligation, and both parties have it in their power to retract. The common clause in contracts of marriage to which the deponent has alluded is in such words as the following:—"The said parties have accepted and do hereby accept of each other for lawful spouses, and they promise to solemnize the bond of marriage with all convenient speed, according to the rules of the Church." The writing with this clause in it, though executed with great formality in the presence of witnesses, and very frequently in the presence of a number of their nearest relations, never was held to constitute a marriage; the intent is only to create an obligation, and the writing has no further effect. For the same reason the writings in this case may have no other effect than that of creating an obligation to marry, though they are obviously very different from common contracts of marriage, in executing which the parties never suppose that they are constituting a marriage.

8. To the eighth article of the said allegation he deposes and says that, in his opinion, supposing a marriage had not been contracted by the parties, and that Mr. Dalrymple had only come under an obligation to marry Miss Gordon, such obligation must necessarily have been defeated by his subsequent marriage, and could not operate so as to void the subsequent marriage. But, on the other hand, supposing a marriage had been contracted [110] between Mr. Dalrymple and Miss Gordon, no omission or neglect on her part would void such previous marriage, and the subsequent marriage would be void and null.

9. And to the ninth article of the said allegation he deposes and says that, in his opinion, if the writings are of the handwriting of Mr. Dalrymple, they are probative without the attestation of witnesses: if they are not of his handwriting, but are subscribed by him, and this is admitted or proved, their effect may be doubtful; but the deponent is of opinion that even in that case they would be probative as declarations or acknowledgments of a fact; for example, that the parties had been married: but they would not be probative as contracts or obligations, and the deponent is of opinion that they would not be probative as agreements to marry *de præsenti*. Further, the deponent is of opinion that the natural and lawful sister of the woman party may not be received as a witness in her behalf to prove contracts, acknowledgments, or agreements of the nature of the aforesaid paper-writings, as it was decided in the case of *Dalziel* against *Richmond*, 10th July, 1790, reported in the Faculty Collection, that the sister of a person in a declarator of marriage was inadmissible as a witness for her; and though some older authorities are against that decision, the point thereby decided is now considered as established law. Further, the

deponent is of opinion that by the laws of Scotland women are not habile witnesses to written instruments, and he is of opinion that the attestation of Charlotte Gordon adds nothing to the authenticity of the paper-writing, No. 10.

JOHN CLERK.

Examined on interrogatories.

1. To the first of these interrogatories, this respondent deposes and answereth that in the case put the marriage would be effectual by the law of Scotland.

2. To the second interrogatory, the respondent deposes and answereth that the question whether marriage may be constituted between parties in Scotland by promise and subsequent copula was decided in the affirmative in the case of *Pennycook* against *Grinton and Graite*, 15 Dec., 1752, reported in the Faculty Collection; in reference to which case it is said by Lord Kaimes, in his *Elucidations* respecting the Law of Scotland, article 5, p. 39, that the Judges were almost unanimous that a promise cum copula makes a complete marriage; and Mr. Erskine in his *Institutes*, [111] b. 1, tit. vi. § 4, lays down the doctrine in the strongest terms that a copula subsequent to a promise of marriage constitutes marriage by the law of Scotland. But the respondent is of opinion that there are very weighty objections against the doctrine, some of which are stated by Lord Kaimes in the article of the *Elucidations* before mentioned; and the respondent is of opinion that the doctrine was not allowed in the practice of the Scotch courts till the before-mentioned case of *Pennycook*. Further, if a case of the same nature were to occur now in Scotland, in which there had been a promise of marriage followed by a copula, and the woman had taken no legal measures to have the marriage declared, till after a second marriage in facie ecclesiæ between the man and another woman, the respondent thinks it not altogether clear that the Scotch courts would annul such second marriage, though he is of opinion that they would annul it, but he should in such a case advise an appeal to the House of Lords against the judgment, with considerable expectations of success, upon what he considers to be the true principles of the law of Scotland. And the respondent further deposes and answereth that the question whether marriage may be constituted between parties in Scotland by solemn, verbal, or written declaration of consent de præsentī, with equal effect in point of validity as it may by a celebration in facie ecclesiæ, is not precisely settled by authorities and decisions; and the respondent has already given his opinion upon this subject in his deposition in chief, and the respondent has also given his opinion as to the effect of the legal domicile or place of residence of the parties in question as to the constitution of marriage within Scotland.

3. To the third interrogatory, the respondent deposes and answereth that the marriages celebrated at Gretna Green, and other places in Scotland, between persons domiciled in England and recently arrived from that country, have generally been considered as effectual marriages by the law of Scotland; though the respondent has frequently heard doubts expressed with regard to their validity. But this he considers to be a question rather in the law of England than in the law of Scotland, where the parties continue their domicile in England immediately after their marriage. If the parties were to reside in Scotland after their Gretna Green marriage, the case would resolve into that of a common irregular marriage. In the case of *Wyche* against *Blount*, 27th June, 1801, it was substantially found that a Gretna Green marriage between English parties, who had returned to England immediately after the celebration, was effectual.

[112] 4. To the fourth interrogatory, the respondent deposes and answereth in the negative.

5. To the fifth interrogatory, the respondent deposes and answereth in the affirmative as to the effect of a regular marriage celebrated in the face of the Scottish Church; and as to the remainder of the interrogatory the respondent deposes and answereth that he refers to his opinion already given. And further deposes and answereth that, in his opinion, a Scottish woman and an English officer quartered with his regiment in Scotland, contracting an irregular marriage, are subject to the same laws that apply to the domiciled inhabitants.

6. To the sixth interrogatory, the respondent deposes and answereth that, supposing a promise or obligation to marry followed by a copula, does, according to the law of Scotland, constitute a marriage, he knows of no case in which the parties are absolutely bound to fulfil an obligation to marry. But on that supposition they may in all cases resile from such obligation, being liable only to a claim of damages for breach of

engagement. But if, on the other hand, a promise or obligation to marry, followed by a copula, does not constitute a complete marriage, the respondent is of opinion that in such a case the parties, at least the man, could not resile from the obligation, although the effect of such obligation might be defeated by another marriage as a mid-impediment.

7. To the seventh interrogatory, the respondent deposes and answereth that Lord Stair's Institutes is a work of very high authority in the law of Scotland, though some of the opinions contained in it are erroneous: and as to the doctrine laid down, b. 1, tit. iv. § 6, referred to in the interrogatory, the respondent deposes and answers that he holds it to be correct under the limitations which will appear from former parts of his deposition, and that it has been recognized as the existing law of Scotland in some cases, apparently without limitation, but in other cases under limitations which appear to confirm the opinions which the respondent has already given upon this subject.

8. To the eighth interrogatory, the respondent deposes and answereth that Erskine's Institutes is one of the latest institutional works of authority on the law of Scotland, though some of the opinions contained in it are erroneous: and as to the doctrine therein laid down, b. 1, tit. vi. § 5, the respondent is of opinion that it is not recognized as the undoubted existing law of Scotland; that in the last edition which the respondent has seen of Erskine's Institutes, published in 1805, there is a note which [113] seems to the respondent to refer to the doctrine in these words: "From the later decisions of the court there is reason to doubt if it can now be held as law that the private declarations of parties, even in writing, are per se equivalent to actual celebration of marriage." And the respondent does for himself consider the doctrine to be incorrect, and he refers to former parts of his deposition for his opinions with respect to it.

9. To the ninth interrogatory, the respondent deposes and answereth that in his opinion the doctrine was recognized and allowed by the decision of the Court of Session, in the case of *Taylor against Kello*, 16th February, 1786, but that decision was reversed in the House of Lords, and though the reversal was upon special grounds, for which the respondent refers to the terms of the judgment, he does not consider that the doctrine was thereby recognized: further deposes and answereth that in his opinion the doctrine was not recognized by the decision of the Court of Session in the case of *Inglis against Robertson*, 3 March, 1786, as it appears to the respondent, though the report in the Faculty Collection wants precision, that it was a case of long intercourse during which the parties had carnal communication, and it is said that the defender in his defence did not deny concubitus; and upon the whole the respondent thinks that the decision does not apply to the doctrine of Mr. Erskine, cited in the eighth interrogatory: further deposes and answereth that his information with respect to the case *Callender against Boyd*, decided in 1801, but which does not appear to have been reported, is so slight that he does not think himself entitled to give any opinion upon that decision as an authority: further deposes and answereth that the decision in the case of *Edmondstone against Cochrane*, 15th May, 1804, does not recognize the doctrine, as that was a case in which a copula followed the obligation to marry or declaration of marriage; and though it is stated in the report that the Court in general held that a written acknowledgment de præsenti was sufficient to constitute marriage, and the interlocutor of the Lord Ordinary which the Court adhered to apparently rests upon the consent of parties to constitute a marriage de præsenti without referring to the copula; yet the respondent without other information respecting the case than what is contained in the report cannot suppose that the Court overlooked the very material circumstance of the copula, which would have been sufficient with a bare promise to bind the man to marriage, even although it were to be supposed that a declaration of marriage de præsenti did not constitute a complete [114] marriage, or that a promise of marriage with a subsequent copula did not constitute a complete marriage; but in either case that the obligation was by the subsequent copula rendered so binding as that the man could not resile from it, though if there had been a medium impedimentum it might have been defeated: but upon the evidence of the report the respondent is of opinion that it is at least highly probable that some such general doctrine as that laid down by Mr. Erskine in the eighth interrogatory was on that occasion laid down by the Judges.

10. To the tenth interrogatory, the respondent deposes and answereth that, as to

the effect of solemn written declarations of consent *de præsenti* to marriage, he refers to what he has already deposed to; and as to the reversal of the judgment in *Taylor* against *Kello*, by the House of Lords, he is at a loss to find any general declaration of law expressed or implied in the judgment, further than what may be implied in its being found that mutual express declarations and acknowledgments of marriage in writing were ineffectual to constitute a marriage, in the circumstances of that case, wherein it appeared to the House of Lords that the parties did not intend or understand the writings as a final agreement, nor was it so intended or understood that they had thereby contracted the state of matrimony or the relation of husband and wife from the date thereof. The facts stated in the report of the case in the Faculty Collection, and in the Appeal Cases which were before the House of Lords, leave it uncertain what will be sufficient in the circumstances of a case as a ground for finding that the most direct and unequivocal declaration of marriage in writing was not a final agreement, nor so intended or understood that the parties had thereby contracted the state of matrimony or the relation of husband and wife from the date thereof: but the respondent is of opinion that unless it had been held in that case by the House of Lords that the mutual declarations of marriage were not sufficient to prove the constitution of a marriage without consummation, or without something further done by the parties in pursuance of the agreement thereby declared, the judgment would not be consistent with any hypothesis he is acquainted with as to the law of Scotland with respect to marriage, and this opinion he has formed upon considering the facts of that case as they are stated in the report of the Faculty Collection and in the Appeal Cases.

11. To the eleventh interrogatory, the respondent deposes and answereth that he refers to the former parts of his deposition upon the subject of the interrogatory.

[115] 12. To the twelfth interrogatory, the respondent deposes and answereth that he is of opinion that it was decided in the case of *M'Adam* against *M'Adam*, 4th March, 1807, that a verbal declaration of marriage made before witnesses was sufficient to constitute a marriage, but the deponent never heard of any other case in which, according to his opinion, it was decided that a bare declaration of marriage without the ceremony of marriage performed by a clergyman, or by some person taking upon him the functions of a clergyman, was, while matters remained entire and in *nudis finibus contractus*, sufficient to constitute a marriage; and the respondent refers to what he has already deposed with respect to the case of *M'Adam* against *M'Adam*; and further deposes and answereth that, in his opinion, the various writings annexed to the libel in the present case, though they contain in words sufficiently full and explicit declarations of consent *de præsenti* to marriage, and declarations as full and explicit as in the case of *M'Adam*; yet he is of opinion that in the case of *M'Adam* the declaration of marriage was attended with an apparent intention of immediate publication of the contract and acknowledgments to the world by the man or the woman as his wife, which, on the supposition that marriage may be perfected by mere consent expressed by the parties, makes that a stronger case than the present, in which the expression of mere consent given by the parties was not attended with such acts, shewing that it was their immediate intention to contract the state of matrimony.

13. To the thirteenth interrogatory, the respondent deposes and answereth that written declarations of marriage have not, so far as he knows, been enumerated by lawyers among the writings to which the solemnities of formal deeds are necessarily required by the law of Scotland, and the respondent refers to a former part of his deposition upon this subject; and the respondent further deposes and answereth that he does not recollect of any case in which a writing was sustained as proof that a marriage had been contracted between the parties, where such writing would not have been probative according to the law of Scotland in the case of any other contract or obligation.

14. To the fourteenth interrogatory, this respondent deposes and answereth that in a question of personal obligation the want of the solemnities required by law is of no consequence where the party judicially admitted that he wrote, signed, and delivered the writing, but where the party only signed the writing and did not write it with his own hand, it is void and null without the solemnities where matters are entire and in [116] *nudis finibus contractus*. The respondent does not know that the point has occurred in a question of marriage where matters are not entire, but where some consideration has been given or something has been done by the obligee upon the faith of the deed, whereby his condition is rendered worse: the party who has

signed the deed is bound by it, though it want the solemnities, and though he did not write the deed.

15, 16. To the fifteenth and sixteenth interrogatories, this respondent deposes and answereth that he refers to former parts of his deposition upon these subjects.

17. To the seventeenth interrogatory, the respondent deposes and answereth that the decision in the case of *Pennycook* against *Grinton*, 15th December, 1752, determined that under the circumstances of that case the second marriage was null and void, and the respondent is of opinion that this ought to be considered as a decision, that a promise of marriage with a subsequent copula does constitute a marriage to the effect of voiding any after marriage. And although Lord Kaimes seems to think that the irregularity of the second marriage in that case, so far as it proceeded without proclamation of banns, had weight with the Judges; and seems to think that in a case where the banns of the second marriage have been regularly proclaimed, the second marriage would not be voided on the ground of a former connection in which there had been a promise of marriage cum copulâ. The respondent is of opinion that there is no material distinction between the two cases, for the second was a valid marriage without proclamation of banns, and if so it could not be voided but by a previous marriage; and if there was a previous marriage the second must have been voided whether it was regular or not. And the respondent refers to a former part of his deposition in regard to the case of *Pennycook* against *Grinton*, and with regard to the effect of a promise of marriage when followed by a copula. And the respondent further deposes and answereth that, excepting in the case of *Pennycook* against *Grinton*, he does not know that the question ever was decided whether a promise of marriage given by a man to one woman and a subsequent copula with her was sufficient to void an after marriage betwixt him and another woman. But the respondent finds in *Kilkerran's Decisions or Reports*, which is a book of authority, p. 488, a reference to two cases from which it appears to the respondent that, according to the opinion of the author, and according to the opinions which prevailed when those cases occurred, a promise of marriage with a subsequent copula did not constitute a marriage: *Kilkerran's* report, in which the reference is made, is of the case [117] of *Limning* against *Hamilton*, decided 1st December, 1749: this was an action of damages at the instance of a woman against a man for seduction or stuprum fraudulentum: the author says, "It was admitted that action might nevertheless lie ex dolo, had any fraud or deceit been used, and which was said to be the case in the only two decisions that are to be found upon record on this point, viz. *Ker* contrâ *Hyslop*, in 1696, and *Castlelaw* contrâ *Agnew* of *Shenchan*, as in both there was a promise of marriage; though in *Ker's* case, *Hyslop* the man had in the interim married another, and so could not be decerned to adhere; and in *Castlelaw's* case the adherence was not insisted on by her, and *Shenchan* was rather willing to pay the 200l. sterling which the commissaries had decreed, and so the adherence, which is the proper decerniture on promises of marriage and subsequent copula, was in effect passed from by consent of parties." The case of *Ker* against *Hyslop* is reported by *Fountainhall*, vol. i. p. 728, and appears to have been decided on 15th July, 1696; but the respondent has obtained no further information respecting the case of *Agnew*.

JOHN CLERK.

Additional interrogatories.

1. To the first of these additional interrogatories, the respondent deposes and answereth that he is of counsel for the defendant Mr. Dalrymple in this cause, and has been professionally employed by him in conducting his defence, and that according to the best of his recollection since its first commencement.

2. To the second additional interrogatory, the respondent deposes and answereth that he gave his advice and assistance in preparing and framing the cross interrogatories, on which the witnesses, produced for the plaintiff, were examined in summer and autumn 1809, and according to the best of his recollection he prepared some part of these interrogatories, though he did not finally adjust or prepare them in whole.

3. To the third additional interrogatory, the respondent deposes and answers in the affirmative.

4. To the fourth additional interrogatory, the respondent deposes and answers that he did advise the plea, that the plaintiff's suit is barred by the defendant's subsequent marriage with Miss Manners, and that he suggested that plea, though he does not [118] recollect whether he was the first or only person that suggested it or not; and that he does not recollect whether he took it for granted that the plaintiff was in the

perfect knowledge that the defendant had returned to Britain, and of his courtship of and intended marriage with Miss Manners, and rather thinks he did not take these circumstances for granted, or that they were much in his contemplation.

5. To the fifth additional interrogatory, this respondent deposes and answers that supposing the plaintiff neither knew of the defendant's return to Britain, but was induced to believe he was abroad, nor of his intended marriage with Miss Manners until it had actually taken place, his opinion as to the present suit being barred by the subsequent marriage would be the same, that it is on the supposition that the plaintiff was acquainted with these circumstances.

JOHN CLERK.

13th November, 1810.—DAVID CATHCART, ESQ., of the city of Edinburgh, advocate, aged forty-six years, a witness produced and sworn.

Deposes that he has practised as an advocate before the Court of Session in Scotland since the year 1785, and to the seventh article of the said allegation, the deponent having attentively and deliberately perused and considered the several articles of the said allegation with the exhibits annexed thereto, and also the libel given in the said cause on the part of Johanna Dalrymple the promoter, and the original exhibits marked No. 1, 2, 10, and 11, and the several original letters annexed to the said libel, he deposes and says that he conceives a person domiciled in England does not become domiciled in Scotland who comes there without any will of his own, in consequence of orders with a marching regiment, and merely remains there with his regiment. As to succession the deponent holds it clear that his domicile was not changed, although from his accidental residence his conduct must be subject to and regulated by the law of Scotland while he resides there. The deponent can entertain no doubt that such a person could lawfully contract a marriage according to the law of Scotland, but he thinks that in establishing a private marriage, the courts here in such a case would require much [119] stronger evidence than might be sufficient to establish a marriage betwixt natives of this country, and he conceives that it would enter deeply into the consideration of the courts of this country in determining a question of this kind, that the young man who granted the writings founded on, was not domiciled in this country, was a minor incapable of entering into such a contract in England where he was domiciled; and they would attentively consider whether the words or expressions from which his consent to marriage was inferred, were of that nature and form so as to leave no possibility of doubt as to his solemn intention to contract marriage especially if matters remained entire: the deponent is of opinion that between a man and a woman domiciled in Scotland, according to the law of Scotland such persons never having had carnal copulation together, upon the faith of or subsequent to any promise, acknowledgment, or declaration of marriage, and they never having lived or cohabited together as husband and wife, or been reputed as such by their relations, neighbours or acquaintances and others, such pretended promise, acknowledgment, or declaration as are contained in the writings marked No. 1, 2, 10, and 11, and the letters annexed to the libel, although the same had been preceded by a carnal copulation, do not amount to or constitute a valid or effectual marriage legally binding on either of the said parties; and matters being entire, he apprehends it was in the power of either of them to resile. The deponent will explain what he understands to be the law of Scotland with regard to marriage. By our ancient law, and by the canons of the Church of Scotland, vide canons of the Church of Scotland in 1242, published by Lord Hailes, celebration of marriage in facie ecclesiæ was indispensable. This unquestionably continued to be the law of Scotland till the Reformation, when marriage continued to be celebrated by clergymen who had been deprived of their functions. The difficulty of proving solemnization at a great distance of time gave rise to the Statute 1503, ch. 77, which introduced a presumption that if the marriage had not been objected to in the life-time of the man, it should be sufficient to obtain possession of the terce, that the woman was by habit and repute the man's lawful wife during his life-time. "By and while it be clearly decerned and sentence given that she was not his lawful wife." It is clear, therefore, that cohabitation as man and wife was not held as sufficient to constitute marriage, it was only held to afford a presumption that a marriage had been solemnized between the parties, unless the contrary had been proved, vide Sir George Mackenzie's observations, p. 114.

[120] In the same way the Act 1551, ch. 19, Anent Bigamy, demonstrates that a marriage could only be constituted by celebration in facie ecclesiæ. The law, there-

fore, had no idea of any other marriage, and Sir George Mackenzie remarks, marriage is contracted with us per hieralogiam, or benedictionem ecclesiæ et ante coitum. In the same way after the Reformation, although marriage was no longer a sacrament, yet celebration by a minister after the proclamation of banns was held to be essentially requisite: this is established by the first book of discipline in 1560 (vide Archbishop Spottiswood's Church History, b. i. p. 172), by the directory of worship in 1643, by the Acts 6 and 7 of Assembly 1690, and Act 15 of Assembly 1715; in short, the whole of our statutes not only hold the solemnization of a marriage by a clergyman as necessary, but punish with severity clergymen not authorised by the Church as then established who should attempt to celebrate marriage. By the Statute 1641, ch. 8, revised by Statute 1661, ch. 34, it was enacted that whoever shall marry in a clandestine way, or procure themselves to be married by jesuits, priests, or any others not authorised by the kirk, shall be imprisoned for three months and shall pay very high fines, and that the celebrator of such marriage shall be banished the kingdom, never to return therein, under the pain of death.

At the time these statutes passed no idea had ever been entertained that persons declaring their consent to marry *de præsenti*, was as effectual a marriage as could be celebrated by a clergyman without any thing whatever having followed upon it; such a declaration might afterwards produce that effect by consummation and cohabitation as man and wife, either in virtue of the Statute 1503, which secured her terce to the widow, who had cohabited with and lived with her husband as his wife, without their marriage being challenged during his life; or from matters not being entire, the one party might have a claim upon the other to solemnize marriage, and which might be enforced by the Commissary Court according to a case stated by Craig, lib. ii., diag. 18 and 29. By the Statute 1698, ch. 6, it was enacted that persons clandestinely or irregularly married, contrary to the Act 1661, shall be obliged to declare the name of the person who celebrated the same, and of the witnesses, under a very heavy penalty and imprisonment, and the celebrator is declared to be liable to be summarily seized, and to be punished by perpetual banishment, and such pecunial or corporal pains as the Privy Council should think fit. These statutes, therefore, appear al-[121]-together absurd, if celebration by a clergyman, or by some one assuming the functions of that office, had not been conceived necessary to constitute marriage by the law of Scotland; and the deponent is not acquainted with a single instance in which it has been ultimately decided, in Scotland, that the bare declaration of parties without celebration, *rebus integris*, ever had the effect of constituting marriage, unless the case of *M'Adam* against *M'Adam* (14th March, 1807), in which a great difference of opinion prevailed in the Court of Session, shall be held as of this description, but that case is not yet finally decided, being under appeal, and is totally different from this, as there Mr. M'Adam having lived with a woman by whom he had two children, summoned all his servants, and taking her by the hand in their presence, declared her his lawful wife, and the children his lawful children, and to which the lady seemed to assent, and was congratulated upon the marriage by many persons, and in the course of the same day Mr. M'Adam shot himself. Here there was a public declaration of marriage *de præsenti* before a number of witnesses, which rendered it public and notorious, and he had never resiled from that declaration of marriage; whereas, in the present case, according to the statement given, the writings founded on were altogether latent and known to no person but themselves, and were solely in the custody of the lady. The deponent apprehends that many cases have occurred in Scotland where the acknowledgments or declarations of marriage by the parties were stronger than those made use of in this case, and where, from there having been no cohabitation afterwards as man and wife, these declarations in words *de præsenti* were not held sufficient to constitute a marriage, that is to say, that until cohabitation had barred the power of resiling, each of the parties might resile. In the case of *M'Lauchlane* against *Dobson* (6th Dec., 1796, Supplement to Dictionary) a long correspondence by letters, in which the parties styled each other husband and wife, followed by a verbal declaration of marriage before witnesses, was held insufficient to constitute a marriage where there was no consummation; for although in this country there are no precise forms which are indispensable in the solemnization of marriage, yet *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration. In that case at least thirty letters had been written by Dobson to the lady,

addressed to her as his wife, and subscribed her affectionate husband, and he had even written letters to her mother and sister, addressed to the first in the cha-[122]-racter of his mother-in-law, and the latter his sister; the lady had in the same manner subscribed herself his affectionate wife, and even by the name of Helena Dobson; and at a meeting of her relations Dobson did there publicly acknowledge and declare Helena M'Lauchlane to be his married wife, and she on her part declared him her lawful husband: although the commissaries in an action at the instance of the lady against Dobson declared the marriage, yet the Court of Session altered that judgment. In that case it was expressly laid down by Lord Justice Clerk M'Queen (certainly one of the highest authorities upon the law of Scotland) "that consent de præsenti admits penitentiæ; private consent is not the consent the law alludes to, it must be before a priest or something equivalent, they must take the oath of God to each other, a present consent not followed with any thing may be given up, but if so, it cannot be a marriage." And this reasoning had great weight with the bench. In the case of *M'Innes* against *More* the declaration of marriage, which was by a holograph writing in words de præsenti (20th Dec., 1781), was found not to be sufficient to constitute marriage. The decree of the House of Lords declared "that the written acknowledgment is not sufficient proof of any marriage having passed betwixt the pursuer and defender." In that case a consent or declaration of marriage de præsenti was established, but this was not found sufficient to prevent *More* from resiling, as matters were entire from that period, no cohabitation having taken place. In the case of *Taylor* against *Kello* (16th February, 1786), the parties had interchanged and delivered to each other mutual missives in the following terms:—"I hereby solemnly declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." There was thus the most complete legal evidence of mutual declarations of marriage de præsenti. The commissaries found this to be a marriage; the Court of Session confirmed the judgment, but it was afterwards reversed upon appeal: no doubt different cases might be mentioned, where similar writings have been held sufficient to constitute a marriage, but then in all these cases consummation or cohabitation as man and wife had followed. Thus in the case of *M'Kie* against *Ferguson*, 1782, both parties in the presence of witnesses declared before God and man that they took each other for man and wife, and they accordingly undressed and went to bed, where they remained nudus cum nudâ, with the door locked for a considerable time; the commissaries, 4th Jan., 1780, "found facts, circumstances, and qualifications proven, [123] sufficient to infer a marriage betwixt the parties," and this judgment was confirmed. In the same way in the case of *Cochrane* against *Edmonstone* (1802), although there was a private declaration of marriage in words de præsenti, yet this was also followed by consummation, as *Edmonstone* admitted that he slept with the lady the night after he had given her the letter, and their cohabitation as man and wife continued for some time afterwards. Further, all contracts of marriage which are subscribed in the most solemn and formal manner, contain a consent de præsenti, the parties thereby "accept and take each other for lawful spouses," with an after declaration to solemnize the marriage in face of the Church. Yet it has always been held that these declarations of marriage made de præsenti do not constitute marriage, but that it is in the power of either of the parties to resile; and even when this solemn contract was fortified by penalties, it has been found that there was still a power of resiling, *rebus integris*, 25th Jan., 1715, *Young* against *Irvine* and *Anderson*. Although Lord Stair has not treated of this subject with his usual accuracy, yet the deponent does not consider his Lordship's opinion as decidedly contrary to what he the deponent has above ventured to state, for although Lord Stair, b. i. t. 4, seems to think that the public solemnization of marriage though enjoined by the law is not essential, and takes notice of the distinction betwixt public and private, or clandestine marriages; yet when he comes to specify how a private or clandestine marriage is constituted, he refers to cohabitation, and being commonly reputed man and wife, which he observes validates the marriage, and gives the wife right to her terce, by the Statute 1503, ch. 77, and he also refers to a contract of marriage found valid, though the marriage was never solemnized, and to a similar case in which the contract of marriage was found valid, and the man obliged to solemnize the marriage, seeing he had procreated children with the woman, and by his writings had acknowledged he had married her; all this seems to the deponent to confirm the opinion that *rebus integris*, a contract or declara-

tion of marriage may be resiled from; his Lordship has indeed said, upon the authority of the canon law, that *consensus non coitus facit matrimonium*; this is certainly true, it is not the coitus that makes the marriage, but the consent must be expressed in the regular way the law requires, by solemnization, and if it is not so expressed, the court must judge whether, by facts and circumstances, the alleged consent has been carried into effect, and will not give it greater weight than the declaration of parties *de præsenti* in a regular contract of marriage, that they accept of each other as husband and wife, and that they will afterwards cohabit as married persons, or celebrate the marriage with their first conveniency. As to the writings, No. 2 and 10, they are stated in the envelope to be sacred promises and engagements, which demonstrates the opinion of the parties that further celebration was to take place; and in the writing, No. 10, Mr. Dalrymple says, "and as such I shall acknowledge her the moment it is in my power," and Miss Gordon declares "that nothing but necessity shall ever force me to declare this marriage," which seems also to imply that something farther was to be done. And therefore, even according to this view, the deponent conceives either party may have the power of resiling while matters are entire. But if parties have acted upon the faith of it by consummation or cohabitation, this, as in every other agreement, must bar penitencia, and must of course render the consent of equal effect as if given in *facie ecclesiæ*, Mr. Erskine's doctrine is more unfavourable to the opinion the deponent has formed. He has referred to no authority where the private consent of parties by words *de præsenti* has been found sufficient to constitute marriage by the mere omission of words or by a writing, either consummation or cohabitation having followed upon it. The deponent has already said that he can find no such case; and the three cases which have been decided since Mr. Erskine's Institute was written, viz. *M'Lauchlane*, *M'Innes*, and *Taylor* in all of which the most express words *de præsenti* are made use of, seem to the deponent to be sufficiently strong to shake the opinion of Mr. Erskine unsupported by any authority whatever. Besides, about the very time that Mr. Erskine wrote his book, a most learned and able judge had formed a decidedly contrary opinion, which has been published in his *Elucidations* respecting the law of Scotland, and which appears to the deponent entitled to very great weight, vide *Kaimes's Elucidations*, article 5. The deponent apprehends that the consent or acknowledgement *de præsenti* may be proved by witnesses, or it may be proved by writing, and it would be equally effectual whether it be proved in the one way or the other. If proved by writing, it should be by a holograph writing, or by a writing attested before two unexceptionable witnesses. The writing, No. 10, is neither the better nor worse of "Charlotte Gordon, witness;" a woman cannot be an instrumentary witness; and on account of her being the sister of one of the parties, she could not be examined on her part; vide 10th July, 1790, *Dalziel* against *Richardson*.

[125] 8. To the eighth article of the said allegation, the deponent is humbly of opinion and says that by the general law, usages, and customs of Scotland, the writings there mentioned and alluded to do not amount to more than an obligation to solemnize a marriage in the face of the Church at some future period, provided either party should be duly called upon so to do, and there should be no legal impediment to the said marriage; and if the woman shall afterwards be aware, or have just grounds to presume, that it is not the intention of the man to proceed to the solemnization of the marriage in pursuance thereof, and in particular shall have knowledge or credible information that he is about to solemnize marriage with another person, and thereupon shall omit or neglect to call upon him to proceed to the solemnization and completion of that marriage in pursuance of such obligation, and to institute legal proceedings for giving effect thereto, and the man shall accordingly without objection or interruption in due and legal form solemnize marriage with another person, then such obligation to marry as is contained in the said papers or any of them, cannot operate to render void the subsequent marriage so duly and lawfully solemnized. If a legal marriage has taken place, then any posterior marriage of one of the parties must be null. No doubt in the case of *Pennycook* against *Grinton*, 15th December, 1752, it was found that a promise of marriage followed with a copula makes a lawful marriage, and that an after-marriage of one of the parties was void. Lord Kaimes has most justly questioned the authority of this judgment, and seems to think it must have had great weight with the court that proclamation of banns had not taken place in the posterior marriage. His Lordship certainly assigns the

strongest reasons for questioning it, and the deponent doubts much how far the court would now pronounce a similar judgment, especially when he considers two other cases which he thinks materially affect this question; the one is the case of *Magdalen Cochrane* against *Campbell*, 19th June, 1751, and affirmed in the House of Lords, 31st January, 1753; and the other that of *William Napier* against *Napiers*, 12th June, 1801. In both of these cases there was the strongest evidence of anterior marriages produced, such as the deponent is quite satisfied must have established these marriages, had not other marriages taken place in which the rights of third parties were involved. The Court of Session, in the first case, found that the pursuer by her acquiescence for many years was barred personali exceptione from being admitted to prove that she was married to Mr. Campbell of Carrick, before he was married to Jean [126] Campbell. This interlocutor was appealed, and the judgment was of consent reversed 6th February, 1748, and both parties led their proof; Magdalen Cochrane accordingly alleged that Mr. Cockburn, the episcopal clergyman who married them, together with the witnesses who were present, were dead; that Mr. Cockburn being afraid of the penalties of celebrating a clandestine marriage, had refused to grant a certificate, but declared that the certificate granted by Mr. Campbell was equally effectual as if granted by him; and Mr. Campbell accordingly granted the strongest certificate, declaring that he was that day married, and that she was his wife: she produced that certificate, and she proved their previous courtship and a general report in the town of Paisly and neighbourhood of the marriage at the time it was celebrated, and recent declarations to third parties by Mr. Campbell; that they had been married by Mr. Cockburn, and before his two servants, the persons mentioned by the pursuer; and there was evidence of the consummation, and of their having cohabited as man and wife, and there were no less than 128 letters all written by Mr. Campbell to her as his wife; in short, there was a proof of marriage by declaration de præsenti, and facts and circumstances which in an ordinary case would have been irresistible; but as she had been prevailed upon to keep the marriage secret on account of Mr. Campbell's situation, and after his second marriage, at his earnest solicitation to save him from absolute ruin, the deponent conceives that when the commissioners found Magdalen Cochrane's marriage not proved, and Jean Campbell's marriage established, they must have decided the case upon the second marriage, as a mid-impediment which prevented the evidence as to the first marriage, which did not amount to a celebration in facie ecclesiæ, receiving full effect. The case of *Napier* versus *Napiers* was of a similar description, the evidence of the first marriage by cohabitation, habit, and repute, the deponent thinks, must have prevailed, had not a second marriage taken place in facie ecclesiæ. Lord Kilkerran, p. 488, in reporting the opinion of the court in the case of *Linen* versus *Hamilton*, shews also that the court at that time first assembled, 1749, understood that in the case of a promise of marriage cum copulâ subsequente, a man by entering into another marriage in the meantime, might prevent the woman from pursuing for a declaration of marriage, as he states the opinion of the court to have been that, if the man in the meantime married another woman, there could be no process for adherence, and he refers to the case of *Kerr* versus *Hislop* in 1796 as ascertaining this.

[127] 9. To the ninth article of the said allegation the deponent deposes and says that if a writing be holograph by the law of Scotland, it does not require the attestation of two competent witnesses; the deponent has already stated that Charlotte Gordon cannot be an instrumentary witness.

DAVID CATHCART.

Examined upon interrogatories.

1. To the first of these interrogatories, this respondent deposes and answers affirmative.

2. To the second interrogatory, the respondent deposes and answers that he thinks a marriage may be constituted in Scotland by promise and subsequent copula, or by a solemn verbal or written declaration of parties, if followed by consummation or cohabitation as man and wife, without reference to the legal domicile or place of the parties' residence.

3. To the third interrogatory, the respondent deposes and answers that he thinks marriages celebrated at Gretna Green or other places in Scotland, will be effectual marriages, although both parties were domiciled in England, provided the celebration, or what has followed upon it, be sufficient to constitute a marriage by the law of

Scotland; and the respondent considers that this doctrine is confirmed by the decision of the court, *Wyche versus Blount*, 27th June, 1801.

4. To the fourth interrogatory, the respondent deposes and answers that he is not acquainted with any decision, maxim, or authority declaring that persons not domiciled in Scotland are not subject to the law of marriage there.

5. To the fifth interrogatory, the respondent deposes and answers affirmative, except as to the last part, as he does not think any consent *de præsenti* except in *facie ecclesiæ*, *rebus integris*, can constitute a marriage in these circumstances, upon the grounds he has endeavoured to explain in his deposition in chief.

6. To the sixth interrogatory, the respondent deposes and answers that he apprehends that parties are entitled to resile from every obligation to marriage, provided that matters are entire; but if they have cohabited together subsequent to that obligation, he thinks they cannot resile.

7. To the seventh interrogatory, the respondent deposes and answers that Lord Stair's *Institutes* is a book of great authority in the law of Scotland. The passage alluded to in this interrogatory must be considered with the context, and the deponent [128] doubts very much how far the doctrine which seems to arise from these words, taken by themselves, can be recognized as the existing law of Scotland.

8. To the eighth interrogatory, the respondent deposes and answers that Erskine's *Institutes* is one of the latest institutional works of authority in the law of Scotland, but the respondent does not think that the doctrine laid down in the passage quoted has been recognized as the existing law of Scotland: in the last edition this doctrine is attempted to be corrected by a note of the editor referring to different causes decided since Mr. Erskine's book was written.

9. To the ninth interrogatory, the respondent deposes and answers that he thinks the case of *Kello and Taylor* would have been a decision in favour of this doctrine, had it not been reversed. In the case of *Inglis and Robertson*, concubitus is not denied in the defences. The case of *Callender versus Boyd* the respondent is not acquainted with. And in the case of *Cochrane against Edmonstone* it was admitted that he had slept with her the very night after the writing had been granted.

10. To the tenth interrogatory, the respondent deposes and answers that he thinks that the case of *M^cLauchlane versus Dobson* and the case of *More versus M^cInnes* had an opposite import to the doctrine here stated; and in the case of *Taylor versus Kello*, although a specialty has been introduced into the judgment of the House of Lords reversing the decision of the courts below, yet the respondent thinks this judgment completely shakes this case as an authority in support of the doctrine stated in this interrogatory, and leaves room for founding on it as importing a contrary doctrine.

11. To the eleventh interrogatory, the respondent deposes and answers that he does not think that a solemn written or verbal declaration of such consent, and not made in *facie ecclesiæ*, constitutes marriage by the law of Scotland, without either cohabitation or a subsequent copula.

12. To the twelfth interrogatory, the respondent deposes and answers that he has already taken notice of some distinctions betwixt *M^cAdam's case* and the present: that case however certainly supports the doctrine in the interrogatory, but he does not think that case well decided; and until it be decided in the House of Lords, where an appeal has been entered, he cannot consider it as laying down the law of Scotland.

13. To the thirteenth interrogatory, the respondent deposes and answers that it has been decided (in the case of *Johnston [129] versus Smith*, 18th November, 1766), that in a declarator of marriage, where the writings were neither holograph nor subscribed before witnesses, they were not sufficient evidence, but in that case the party was dead.

14. To the fourteenth interrogatory, the respondent deposes and answers that he thinks, where the party has judicially admitted that he did knowingly and deliberately write and sign and deliver the writings in question, the want of the solemnities to the writings is not of much consequence.

15. To the fifteenth interrogatory, the respondent deposes and answers that in the last case which he is acquainted with, the Court of Session found that the mother and sister of the pursuer in a declarator of marriage were not admissible witnesses.

16, 17. To the sixteenth and seventeenth interrogatories, the respondent answers that he is unacquainted with any cases in which this point has been argued, except in the cases of *Pennycook against Grinton*, *Cochrane versus Campbell*, and *Napier versus*

Napiers, already taken notice of in his deposition in chief. In the first of these cases, the court found the second marriage null in respect that the first was proved. In the two last cases, although the evidence of the first marriage was fully as strong, the court gave effect to the second marriage, but without determining this point of law. Lord Kaimes (in his *Elucidations*, article 5th) has given a decided opinion that a second marriage in facie ecclesiæ would in such a case be effectual. And to the additional interrogatories, the respondent deposes and answereth that soon after these proceedings commenced, as he believes, he received a retaining fee, and also a case with correspondence upon the part of Mrs. Laura Manners, and he understood himself to be retained as her counsel, in the event of any proceedings on her part in Scotland, but he has given no advice upon the subject matter of the said action, or any way relative to the defence to be maintained against the claim and suit of the plaintiff, nor has he ever attended any consultation in the cause.

DAVID CATHCART.

20th November, 1809.—ADAM GILLIES, ESQ., of the city of Edinburgh, advocate, aged forty-three years, a witness produced and sworn, deposes—

That he has practised as an advocate before the Court of Session in Scotland since the year 1787.

[130] 7, 8, 9. And to the seventh, eighth, and ninth articles of the said allegation, the deponent having attentively and deliberately perused and considered the several articles of the said allegation, with the exhibits annexed thereto, and also the libel given in the said cause on the part of Johanna Dalrymple the promoter, and the original exhibits, marked Nos. 1, 2, 10, and 11, and the several original letters annexed to the said libel, he deposes and says that he is of opinion that the laws and usages of Scotland, affirming the validity of marriage not proved to have been solemnized in the face of the Church, do apply to a person resident in that country at the time when he is said to have contracted such marriage, although such person should only be quartered there as a soldier in the manner set forth in the allegation, and although he should have his proper domicile not in Scotland but in England, or in any other foreign country. In some cases, however, it may be a circumstance of considerable importance that the party against whom a declarator of marriage is brought in Scotland, has merely been casually resident instead of being regularly domiciled in that country. Thus where the pursuer of a declarator of marriage alleges cohabitation and habit and repute as man and wife, and founds on these circumstances as establishing a marriage with the defender, the deponent thinks that it would be requisite that these allegations should be proved by stronger and more pregnant evidence, in the case of a person whose residence in Scotland was casual and temporary, than in the case of one who is properly domiciled in that country. In both cases the circumstances, by which cohabitation and habit and repute as man and wife are attempted to be established, must be of an uniform tenor, so as to indicate the understanding of the parties that they are married to each other, which in every such case is necessary to constitute a marriage; but such understanding may fairly be inferred from fewer and slighter circumstances in the case of persons domiciled in Scotland than in the case of persons only casually resident in that country. The deponent is further of opinion that the alleged promise, acknowledgment, or declaration of marriage as contained in the paper-writings, marked No. 1, No. 2, No. 10, and No. 11, derives no additional force from the circumstances of the parties having had carnal copulation together at any time previous to the dates of such writings, and if they had no carnal copulation together, and did not cohabit together as man and wife, and were not commonly reputed as such subsequent to the date of the said writings or any of them, the deponent then thinks that the said promise, acknowledgment, or de-[131]-claration, upon the supposition that the writings in which it is contained afford legal evidence of the same, is not sufficient to constitute a valid and effectual marriage. The deponent is further of opinion that the promise, acknowledgment, or declaration contained in the writings already referred to, did not amount to more, upon the part of Mr. Dalrymple, than an obligation to solemnize a marriage in the face of the Church at some future period, and this obligation is rendered ineffectual by his subsequent marriage duly and legally solemnized in England. The writings, No. 2 and No. 10, above referred to, if they are, as they are alleged to be, of the handwriting of Mr. Dalrymple, the defendant, do not require to be tested or subscribed by witnesses in order to be probative, or to entitle them to bear faith in judgment: did such writings require to be tested, the attestation or signature of

Charlotte Gordon could be of no avail; 1st, because a female is incapable of being an instrumentary witness; and, 2dly, because it is requisite that there should be two witnesses to all deeds which are not sufficiently authenticated by the subscription of the party. ADAM GILLIES.

Examined on interrogatories.

1. To the first of these interrogatories, the respondent deposes and answers that he is of opinion that a marriage celebrated in Scotland in facie ecclesiæ between parties under twenty-one years of age, and without the consent of parents or of guardians, would be valid and effectual by the law of Scotland, although neither of the parties had any fixed domicile in that country.

2. To the second interrogatory, this respondent deposes and answers that, as it consists of different parts, or rather as it involves several interrogatories, he considers it necessary for the sake of distinctness to make a separate answer to each. 1st. It is asked whether marriage may not be constituted between parties in Scotland by promise and subsequent copula, with equal effect in point of validity as it may be by a celebration facie ecclesiæ. Answer. In the respondent's opinion, a marriage between parties in Scotland cannot be constituted with equal effect in point of validity by promise and subsequent copula, as by celebration in facie ecclesiæ: he considers this, however, as a point of much difficulty, and states his opinion upon it with much diffidence. He certainly thinks that, by a promise and a subsequent co-[132]-pula, a party incurs an obligation to solemnize a marriage in face of the Church, from which he is not at liberty to resile, and which, if no impediment intervened, would be enforced against him, and his marriage declared by the courts of law in Scotland; but if prior to the institution of any such action of declarator of marriage, the party against whom it is brought had publicly married another woman, by a marriage duly proclaimed and regularly celebrated without objection in facie ecclesiæ, the respondent should consider this as a legal impediment sufficient to prevent a decree of declarator of marriage from being pronounced in the action founded on the prior promise and copula, and he should think that the courts of law in Scotland would hold that the second marriage celebrated in facie ecclesiæ was valid, and consequently that the party defendant was not bound to fulfil, or rather could not fulfil, the obligation previously incurred by him by the promise and copula. The decision in the case of *Pennycook against Grinton*, 15th December, 1752, appears to be hostile to the opinion which the respondent has now expressed; but in that case the marriage of Grinton with Ann Graite was not duly and regularly proclaimed and celebrated; and it appears to the respondent that Lord Kaimes's remarks upon the decision in the case of *Grinton*, in his *Elucidations* respecting the law of Scotland, article the fifth, are sound and just. Secondly, it is asked whether marriage may not be constituted between parties in Scotland by solemn verbal or written declarations of consent de præsentī, or of mutual acceptance of each other as husband and wife, with equal effect in point of validity, as it may be by celebration in facie ecclesiæ. Answer. The respondent conceives from the way in which this interrogatory is put, it is not easy to return a definitive answer to it. To make a marriage valid by the law of Scotland it is not necessary that it should be regularly celebrated in facie ecclesiæ, neither is it requisite that it should be celebrated by a clergyman or by a person actually in holy orders; but, on the other hand, the respondent is of opinion that a simple consent to marry expressed de præsentī, whether in writing or verbally before witnesses, is not, rebus integris, sufficient to constitute a valid marriage; and he conceives the law upon this point to be correctly stated in the following observation, which is said to have been made from the bench in the report of the case of *M'Lauchlane against Dobson*, 6th December, 1796:—"Although by the law of Scotland there are no precise forms which are indispensable in the solemnization of marriage, yet rebus integris it can only be constituted by a consent adhibited in the presence of a [133] clergyman, or in some other solemn mode equivalent to actual celebration." Lastly, it is asked whether in all cases marriage be not held to be constituted by the consent of the parties as expressed at the time, and without reference to their legal domicile or place of residence? Answer. The respondent conceives that all parties resident in Scotland are, in regard to marriage, subject to the laws of Scotland, and he therefore thinks that if the consent of the parties as expressed at the time, is such as would be sufficient to constitute a valid marriage betwixt them, supposing them to be domiciled in Scotland, the same would be sufficient to make a valid marriage, although they were both

or either of them not domiciled in that country ; at the same time it appears to the respondent to be a circumstance of importance that both of the parties, or even that one of them is a foreigner, having no domicile in this country, as such circumstance may have material influence upon the opinion that may be formed as to the intention or understanding of such party in declaring his or her consent to the marriage. In every case where marriage is not duly celebrated in facie ecclesiæ, it is an essential requisite that the intention of the parties to contract a valid marriage should be fully proved, and in judging of such a proof it may be a circumstance of considerable weight that one of the parties was a stranger and had no domicile in Scotland.

3. To the third interrogatory, the respondent deposes and answers that he is of opinion that marriages celebrated at Gretna Green, or other places in Scotland near the borders, between persons domiciled in England and recently arrived from that country, are effectual marriages by the law of Scotland, provided the celebration be such as would have made a valid marriage between parties domiciled in that country ; and the respondent thinks this was substantially found by the decree of the Court of Session in the case of *Wyche against Blount*, 27th of June, 1801, of which he understands that the circumstances were such as they are stated to have been in this interrogatory.

4. To the fourth interrogatory, the respondent deposes and answers that he has already stated it as his opinion that parties in Scotland, whether domiciled in that country or not, are subject to the Scotch law of marriage, and he is not acquainted with any decision, maxim, or dictum of authority in the law of Scotland of a contrary tendency, neither does he know of any decision, maxim, or dictum of the law of Scotland declaring that parties in that country, but not legally domiciled there, will not be effectually married by deliberately performing those acts which constitute marriage between domiciled residents in Scotland ; but he is of opinion, as he formerly stated, that the circumstances of both or either of the parties having no domicile in Scotland may be of importance in judging of their actual intention and meaning at the time when they performed those acts from which their marriage is inferred, or by which it is attempted to be proved.

5. To the fifth interrogatory, the respondent deposes and answers that he is of opinion that a marriage celebrated in the face of the Scottish Church, between a Scottish woman and an English officer quartered with his regiment in Scotland, will be valid and effectual by the law of Scotland, although such celebration may have been unattended with those observances necessary to make a marriage effectual in England. He further thinks, under the qualification which he has already endeavoured to explain as to the effect which the circumstance of his being a foreigner might have, in the scale of evidence with regard to his intention, that in the case of an English officer quartered with his regiment in Scotland, the same effect would be given to a promise subsequente copulâ, as to a solemn written declaration de præsentî, as in the case of a domiciled Scotchman.

6. To the sixth interrogatory, the respondent deposes and answers that he thinks there is such a thing recognized in the law of Scotland as an obligation to marry, which the parties can be absolutely bound to fulfil, and that they may not in all cases resile from a mere obligation, being liable only to a claim of damages for breach of engagement.

7. To the seventh interrogatory, this respondent deposes and answers that Lord Stair's Institute is a work of great authority in the law of Scotland, but he does not think that his doctrine, as expressed in the short passage of that work which is quoted in this interrogatory, is recognized as the existing law of Scotland. Neither does he think that Lord Stair's own opinion on the subject can be fully or accurately collected from the words of this passage when taken by itself. It is explained, and in a great measure qualified, by the context, though in the whole of this section of his work it appears to the respondent that Lord Stair has not expressed himself with his usual perspicuity. With a reference to the manner in which he and other writers on the law of Scotland have treated the subject of marriage, Lord Kaimes, in his *Elucidations* (page 29), expresses himself as follows :—" Few branches of our law are handled with less precision than what particulars are necessary to complete a marriage. There is a [135] darkness and confusion in our writers from jumbling together three points that are clearly distinct. The first is, what solemnities are necessary to complete a marriage? The second, what circumstances are sufficient to presume that marriage has been regularly solemnized? And the third, what circumstances are sufficient to

oblige a party by a process to solemnize a marriage?" The respondent entirely concurs in the justness of these observations.

8. To the eighth interrogatory, the respondent deposes and answers that Mr. Erskine's Institutes is one of the latest institutional works of authority on the law of Scotland, but he does not think that his doctrine, as expressed in that passage of his Institute which is here quoted, is recognized as the existing law of Scotland; and accordingly, by the last editor of Mr. Erskine's work, there is a note upon this passage, in which he states that from the later decisions of the court (page 95), "there is reason to doubt if it can now be held as law that the private declarations of parties, even in writing, are per se equivalent to actual celebration of marriage."

9. To the ninth interrogatory, the respondent deposes and answers that the doctrine said to be laid down by Lord Stair and Mr. Erskine, in these passages of their works which are recited in the two last interrogatories, does not appear to him to be recognized and confirmed by any of the decisions here alluded to. Had the judgment of the Court of Session in the case of *Taylor* against *Kello* remained unaltered, it would certainly have been a decision tending to confirm the doctrine said to be laid down by Mr. Erskine; but the decision of the Court of Session in that case was reversed by the House of Lords; and although the judgment of their Lordships bears to have proceeded upon special grounds, yet, on attending to the circumstances of the case, the respondent considers the reversal of the Court of Session's decree as a decision hostile to the doctrine mentioned in this interrogatory. From the report of the case of *Inglis* against *Robertson* it appears that the defendant did not deny concubitus, which must have been subsequent as well as prior to the written declarations founded on. The case of *Callender* versus *Boyd* is one with which the respondent is not acquainted, and which is not reported so far as he can find; the case of *Edmonstone* versus *Cochrane* is in like manner not reported, but in that case also he understands that the declaration was followed by a copula.

10. To the tenth interrogatory, the respondent deposes and answers that judgments of an opposite import appear to him to [136] have been pronounced in the Court of Session and by the House of Lords in the following cases, viz. *M'Innes* versus *More*, December 20th, 1781; *Anderson* versus *Fullerton*, Nov. 13th, 1795; and *M'Lauchlane* versus *Dobson*, 16th Dec., 1796. In the first of the cases above mentioned there was a written acknowledgment or declaration of marriage de præsenti; and in the last case, that of *Dobson*, there was a verbal declaration de præsenti, in presence of witnesses, and that preceded by a long correspondence wherein the parties styled each other husband and wife, which the respondent conceives to be fully equivalent to a written declaration of consent de præsenti. In answer to the remaining part of this interrogatory, which regards the reversal of the judgment in *Taylor* versus *Kello*, the respondent has stated already all that occurs to him.

11. To the eleventh interrogatory, this respondent deposes and answers that he does not distinctly comprehend what is meant by the term solemn, as it seems applied in this interrogatory, and in some preceding ones, to a consent de præsenti, or declaration of marriage, when such consent or declaration has not been exhibited or made in presence of a clergyman, or accompanied with any ceremony such as can be deemed equivalent to actual celebration. The respondent is, however, of opinion that a consent de præsenti expressed verbally before witnesses, and without particular ceremony or solemnity, is not sufficient per se to constitute a valid marriage. And he also thinks that declarations or acknowledgments of marriage in writing interchanged betwixt the parties privately, and without the intervention of witnesses, are not sufficient, rebus integris, to constitute a valid marriage.

12. To the twelfth interrogatory, this respondent deposes and answers that in the case of *M'Adam* versus *M'Adam*, a verbal declaration of consent de præsenti, made in the presence of witnesses called or assembled together for the purpose, was sustained as a sufficient ground for a declarator of marriage. But in that case no attempt was made by either of the parties to resile, as indeed the declaration was followed a few hours after by the death of one of them; with respect to this case, however, it is to be observed that the judgment pronounced in it by the Court of Session is not final, but is now under appeal to the House of Lords, in which it may possibly be reversed; and the respondent does not therefore consider that judgment as fixing any point of law. With the exception of the case of *M'Adam*, the respondent does not know of any in which a simple consent de præsenti expressed verbally before witnesses was

held sufficient, *rebus integris*, to con-[137]-stitute a valid marriage; and he is of opinion that in the various writings annexed to the libel in the present case there are not contained such full and explicit declarations *de præsenti* as have been found sufficient to make a valid marriage in any case with which he is acquainted.

13. To the thirteenth interrogatory, the respondent deposes and answers that if it were law that a written declaration of marriage was sufficient *per se* to constitute a marriage, he thinks it would follow that such declarations would be held to be among the writings to which the solemnities of former deeds are required by the law of Scotland. Upon the supposition which has been made, such writings would be truly deeds of importance, to the validity of which, unless holograph of the party, such solemnities are essential. In answer to the remaining part of this interrogatory the respondent can only say that in none of the cases already referred to does it appear to him that a written declaration of marriage *per se* was found to constitute a valid marriage.

14. To the fourteenth interrogatory, the respondent deposes and answers that in a question of marriage, or in any question of personal obligation, he thinks the want of the solemnities above mentioned will be sufficiently supplied by the judicial admission of the party that he did knowingly and deliberately write or sign and deliver the writings in question.

15. To the fifteenth interrogatory, the respondent deposes and answers, he thinks that a sister or other near relation, such as an uncle or an aunt, cannot be examined as a witness even in an occult family transaction, such as a clandestine marriage, where there is a *penuria testium*. Nor is the objection to the admissibility of a sister removed by the circumstance of her being a subscribing witness to the writing which she is to authenticate.

16. To the sixteenth interrogatory, the respondent deposes and answers that there is no decision nor any other authority in the law of Scotland for holding that a party already actually married can validly enter into a second marriage, but he conceives that a party may make promises and declarations, and perform acts by which he incurs a valid obligation to solemnize a marriage; and that such obligation will be enforced against him if an action for that purpose is brought before he enters into a second marriage, and will not be enforced against him if the action is delayed until a second marriage is contracted: and this opinion seems to be confirmed by the judgment of the Court of Session in [138] the case of *Cochrane* against *Campbell*, which judgment was affirmed by the House of Lords on the 31st of January, 1753.

17. To the seventeenth interrogatory, the respondent deposes and answers that with regard to the decision in the case of *Pennycook* versus *Grinton*, he has already stated all that has occurred to him. He considers the judgments in the Court of Session and of the House of Lords in the case of *Campbell*, to which he has just alluded, to be of an opposite tendency to the decision of the Court of Session in the case of *Grinton*, as the proof of the prior marriage in that case appears to the respondent to have been stronger than in the case of *Grinton*.

ADAM GILLIES.

Additional interrogatories.

1. To the first of these additional interrogatories, the respondent deposes and answers that he is of counsel for Mr. Dalrymple, the defendant in this cause, and has since its first commencement been occasionally employed by him in conducting his defence.

2. To the second additional interrogatory, the respondent deposes and answers that he did give his advice and assistance in preparing and framing the cross interrogatories here mentioned, but this part of the business was conducted chiefly according to the directions of Mr. Clerk, a preceding witness examined in this cause, and the respondent does not think that he himself prepared any of the cross interrogatories, though some additions or alterations may have been suggested by him and adopted.

3. To the third additional interrogatory, the respondent deposes and answers that, according to the best of his recollection, he did not give any advice and assistance in preparing, altering, or revising the allegation or pretended allegation mentioned in this interrogatory.

4. To the fourth additional interrogatory the respondent deposes and answers that as counsel for the defendant he did suggest or advise the plea here mentioned as now maintained by him, and at the time of giving that advice he believes he was informed

by his employer, and consequently he would take it for granted that the plaintiff was in the thorough knowledge not only [139] that the defendant had returned to Britain, but also of his courtship of and intended marriage with Miss Manners.

5. To the fifth additional interrogatory, the respondent deposes and answers that the supposition which is here put would have had little or no influence with him in forming his opinion upon the point mentioned in this interrogatory.

ADAM GILLIES.

22d October, 1810.—Sir Ilay Campbell, Baronet, late Lord President of the Court of Session in Scotland, aged seventy-six years, a witness, produced and sworn, deposes that prior to the month of November, 1888, he was for nineteen years president of the said Court; and to the seventh, eighth and ninth articles of the said allegation, this deponent having attentively and deliberately considered the several articles of the said allegation with the exhibits annexed, and also the libel given in this cause on the part of Johanna Dalrymple, the promoter, and the original exhibits, marked No. 1, 2, 10, 11, and the several original letters annexed to the said libel, he deposes and says that the general principle of the law of Scotland, with respect to marriage, is that it is perfected by the mutual consent of parties accepting each other as husband and wife. The solemnities of a regular marriage, although required as matter of order and as the most unexceptionable form of entering into that state, are not held to be indispensable, and accordingly irregular marriages, i.e. without the usual forms, are very common in Scotland: as the consent, however, which is necessary to constitute the matrimonial contract, must be deliberate and serious, clearly denoting the intention of the parties to become husband and wife, and attended with no ambiguity, questions often arise concerning the validity of irregular marriages, and the decision of these must of course depend in a great measure on the circumstances of each particular case. An irregular marriage may be constituted, or rather, it may be said, proved in various ways.

1st. By cohabitation as husband and wife at bed and board, and general habit and repute. This has even been sanctioned by statute (1503, c. 77), and forms a presumption so strong scarcely to be called in question.

2d. By promise de futuro and copula following upon it, because the engagements, though having a reference to future time, [140] is supposed to be purified by the act of consummation, and rendered a present contract, if there be no middle impediment to bar the claim.

3d. By formal acknowledgments per verba de præsenti, either in writing, or declared before witnesses, though not in presence of a clergyman; but these must appear to have been made with the deliberate intention of living together as husband and wife, and must be attended with personal intercourse, if not subsequent, at least prior, otherwise they will resolve into a mere stipulatio sponsalitia, similar to what is in every contract of marriage in the Scots form, which proceeds on a recital that the parties have accepted of each other as husband and wife, but which may be resiled from, rebus integris. The Court of Session was of this opinion in the case of *M'Lauchlane against Dobson*, 6th Dec., 1796, which the deponent apprehends was rightly decided. Had there been either an antecedent or a subsequent copula by which matters were not entire, it is probable that the court would have decided otherwise; though this is not clear, as there were circumstances tending to shew that the parties did not truly mean to live together, and both of them admitted that there never was cohabitation of any kind between them. In the case of a regular marriage in facie ecclesiæ, celebrated by a clergyman, it may happen that the parties may accidentally be prevented from going together, e.g. the man or the woman may die suddenly before any bedding. Yet the deponent conceives that the status of marriage would be complete, agreeably to the maxim consensus non concubitus facit matrimonium, but everything short of the actual and regular ceremony ought to be considered in a different light. These doctrines of the law of Scotland are treated more fully in our law books. The latest author, who of course takes notice of all the modern decisions upon the subject, is Mr. Hutchinson. See his book on Justice of Peace Jurisdiction, second edition, book iii. chap. 8. The cases of *M'Innes against More* and *Taylor against Kello*, with the judgments upon them in the House of Lords; likewise the case of *M'Culloch*, 10th Feb., 1759, with the reversal in the House of Lords, may be particularly attended to, as it seems to have been thought in these

cases that the Court below had gone rather too far in sustaining equivocal evidence of marriage. In the present case (*Dalrymple* against *Dalrymple*) habit and repute, or any known cohabitation as husband and wife, are out of the question, so far as appears to the deponent from any of the materials laid before him, and therefore the first of the above grounds for declaring marriage does [141] not apply. The second is in part made out by written evidence, for the writing, No. 1, which, if acknowledged or proved to be holograph, contains a clear promise of marriage, or rather mutual promises; but the subsequent consummation is disputed, which therefore must depend upon proof, and if proved it will then be for the judge to consider whether this ground for declaring a marriage is or is not effectually opposed by other circumstances requiring to be attended to, such as those to be afterwards mentioned. The third is also so far proved scripto, by the writing, No. 2, which contains a very explicit mutual declaration of marriage de præsentī, and by various letters under the hand of the party, John William Henry Dalrymple (No. 3, &c.), all of which it is alleged are holograph, and if they are either proved or admitted to be so, they of course by our law are to be held as authentic; and it is immaterial that they are not signed by witnesses, for holograph writings do not require witnesses, except to prove their dates, and nothing here seems to turn upon the precise dates, as the first ten or twelve of them appear from their contents to have been written before the party, John William Henry Dalrymple, left Scotland, and the others soon after, and evidently before any middle impediment existed by marrying another. But before any conclusive inference can be drawn from these written acknowledgments of marriage, however direct, it is necessary that all the circumstances attending them should be carefully examined. The deponent does not consider it a good objection on the part of Mr. Dalrymple that he was an English officer, having no permanent domicile in Scotland, but only there transiently with his regiment. Were this a question concerning his intestate personal succession, the deponent would consider England and not Scotland to be at present, and to have been at that time, the country of his domicile, the laws of which would of course be alone considered as regulating the question of succession, but the present seems to the deponent to be a case of a different nature.

Mr. Dalrymple, while in Scotland, was capable of contracting debt there, and of being sued for it if found within the jurisdiction: he was also capable of contracting marriage there, especially with a Scots lady, the marriage being entered into according to any form recognized by the law of that country to be good, for which reason all the Gretna Green marriages are held to be good, though uniformly irregular, and although by the marriage act they could not have been so made in England. But in ex-[142]-amining the circumstances of the present case, the youth and inexperience of the party, John William Henry Dalrymple, and his being a stranger to the customs of the country, may perhaps enter into the consideration of the judge along with other circumstances, though it must also be kept in view that he was of sufficient age to marry. Another circumstance, which may be thought somewhat unfavourable to the lady, is that she seems to have agreed by the writing, No. 10, to an indefinite obligation of secrecy, and to have accepted of a similar engagement on the part of the gentleman, implying a new reference to future time, not altogether consistent with the idea of present marriage. The mutual consent in the writing, No. 2, being of an unqualified nature, ought not to have been thrown loose by the suspensive and qualified obligation in No. 10. This at least is a circumstance deserving to be considered. It is said that one of the writings of No. 10 was not properly tested, and they both appear to be of the same hand-writing; but these alleged informalities seem to be of little consequence, as the writing, whether holograph of the promoter, Johanna Dalrymple, or only signed by her, was taken into her possession, and produced by her as evidence; and it is neither the better nor the worse for being also signed by her sister. Further, the long silence of the lady as well as the gentleman after the correspondence ceased, by which both the one and the other might be put off their guard and third parties might be deceived, are circumstances which in such a case cannot be laid out of view. It is not said there was any child in the case, or any personal intercourse subsequent to the gentleman's leaving Scotland in summer 1804: the whole written evidence of their prior connection seems to have been in the hands of one of the parties, and consequently in her power, and no step was taken to interpel marriage with another. These are circumstances which call for explanation. The case of *Magdalen Cochrane* against *Campbell* in 1747, which is to

be found in Falconer's Collection, and is likewise detailed in Mr. Hutchinson's book, vol. 4, app. iii p. 26, seems proper to be attended to. It is also noticed in the Dictionary of Decisions, vol. 4, voce Personal Objections, p. 79. These hints the deponent merely throws out as connected with the question of law, upon which alone he presumes his evidence is required. They are submitted with the greatest deference to the very able and respectable judge who is to try the cause. He abstains from drawing any ultimate conclusion for two reasons; first, because the whole merits of the [143] case are not before him; secondly, because it would be presumptuous in him to do so when he is called merely as a witness.

ILAY CAMPBELL.

Examined on interrogatories.

1, 2, 3, 4, 5. To the first, second, third, fourth, and fifth interrogatories, this respondent answereth and saith that, in his deposition already given as aforesaid, he has sufficiently answered them.

6. To the sixth of these interrogatories, he deposes and says that an obligation to marry having relation to future time may be resiled from, *rebus integris*; but the question of damages for breach of engagement remains entire.

7, 8. To the seventh and eighth interrogatories, he deposes and says that both Lord Stair's and Mr. Erskine's Institutes are books of authority on the law of Scotland.

9, 10. To the ninth and tenth interrogatories, he deposes and says that the decisions will speak for themselves.

11. To the eleventh interrogatory, he deposes and says that it is already answered in his deposition in chief, as aforesaid.

12. To the twelfth interrogatory, he deposes and says that he understands the case of *M'Adam* to be still in dependence before the House of Lords. He avoided saying anything about it in his deposition as aforesaid; but since the question is asked he is bound to answer that the judgment of the Court of Session was such as the interrogatory describes it to have been, but that he, the respondent, and some others of the judges, disapproved of the judgment or decision, and he and they thought the case very similar to that of *Fullarton*, where a posthumous marriage was found to be bad.

13, 14. To the thirteenth and fourteenth interrogatories, he deposes and says they are already answered in his deposition in chief as aforesaid.

15. To the fifteenth interrogatory, he deposes and says that he is humbly of opinion that as marriage ought to be public, a sister ought not to be admitted as a good witness, on the pretence of *penuria testium*.

16, 17. To the sixteenth and seventeenth interrogatories, he deposes and says that he has already suggested that the case of *Magdalene Cochrane* against *Campbell* ought to be looked into, where there appears to have been a written acknowledgment of [144] marriage, but where the pursuer, who had allowed a marriage to take place with another lady, was ultimately unsuccessful. If the decision in the case of *Grinton and Graite* can be at all justified, it is upon the ground that the second marriage was also irregular. The respondent has already said that in judging of irregular marriages, every circumstance attending the case must be taken into view.

ILAY CAMPBELL.

EXHIBITS AND LETTERS.

No 1.

(Endorsed) "A sacred promise."

I do hereby promise to marry you as soon as it is in my power, and never marry another.

J. DALRYMPLE.

& I promise the same.

J. GORDON.

No. 2.

I hereby declare that Johanna Gordon is my lawful wife.

May 28th, 1804.

J. DALRYMPLE.

And I hereby acknowledge John Dalrymple as my lawful husband.

J. GORDON.

No. 10.

I hereby declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power.

July 11th, 1804, Edinboro.

J. W. DALRYMPLE.

I hereby promise that nothing but the greatest necessity (necessity which situation alone can justify) shall ever force me to declare this marriage.

J. GORDON.

July 11th, 1804. (now) J. DALRYMPLE.

Witness, Charlotte Gordon.

No. 11.

“Sacred promises and engagements.”

“J. D.” and “J. G.”

[145] Letters annexed to and pleaded in the libel given on behalf of Mrs. Dalrymple.

No. 3.

Dunbar, Friday Evening.

My Dearest Love,—I am waiting with impatience for the letters from Edinbro', as I expect a few lines from you; but to prevent all unnecessary disappointment I will commence mine, lest it should not arrive in time to-morrow. I am quite alone in this horrible place, and till this moment I have been most melancholy at reflecting how few hours have elapsed since my happiness was perfect, blest with the society of one whom I adore, and for whose happiness I would sacrifice my life; but still Hope, which seldom deserts me, remains my friend, and whispers for my consolation “You are not forgotten.” Sorry am I to find that my hopes of a letter are vain; but I trust that the omission proceeds more from fatigue than illness, as I am certain one or the other must be the cause, as I know how scrupulously you observe all promises; and when you reflect on my miserable situation, cut off from all the society I liked, and banished to a wretched town without one friend to speak to, you will I am sure increase rather than diminish those dear attentions you have so repeatedly shewn me: therefore I am selfish enough to desire you to write two letters daily, which must be put into the post by two o'clock, and they will arrive here at eight. If you write me one every night, and another in the morning, it would be easier for yourself. Pray forgive my impatience in asking such a request, as you know my motive. I will be in Edinbro' by 11 at night on Monday, so we may arrange every thing for the Tuesday's expedition. I think it would be better not to send the currie into town, as it is too well known,† . . . but as you please, you have but to order, I to obey. This most horrid place has made me so very melancholy that I fear my letter will bear some marks of it, but as I well know how anxious you are sometimes for letters, I was determined to attempt it. I shall only add that I trust all that has ever happened within our know-[146]-ledge may be faithfully remembered by us, and that you will never change the opinion (you have so repeatedly assured me you have of me), indeed to doubt it would be the act of the greatest ingratitude on my part. I insist on your ordering every thing you want, and drawing on me for whatever money you stand in need of, as it is but your right, and in accepting of it you will prove your acknowledgment of it. Let your dear picture be finished as soon as possible, as I shall be impatient for so beautiful a companion, though God knows but a poor apology for the reality. . . . Give my love to my dear little sister, and the post only allows me time to say how truly, how devotedly,—I am, dear wife, your sincere and faithful

J. D.

This letter has the Edinburgh post-mark of May 27, 1804.

I passed Tranent but did not see Johnson. Send me a small seal with a proper inscription, as I have only a wafer seal, which does not do: you may put it in a letter.

No. 4.

(Addressed) “Miss Gordon, Saint Andrew's Square, Edinburgh.”

Tuesday.

My Dearest Sweet Wife,—You are I dare say happy at Queen's Ferry, while your poor husband is in this most horrible place tired to death, thinking only on what he felt

† The passages, which are omitted, relate entirely to other persons, and have no bearing on the present question.

last night, for the height of human happiness was his. To be near the woman we love is a sensation only to be conceived by those who have experienced what it is to be separated. God knows no one has ever felt it more severely than I have, as what hours has this cursed place lost me, hours which may never afford me the pleasure I have experienced, as fate appears determined to place us at a more remote distance. What am I to do when you are at Cluny? Heaven alone knows! It will be impossible for me to be with you; as to leaving you, the thought is distraction; think on some plan for me, as I shall be truly miserable if you do not. Have you forgiven me for what I attempted last night? Believe me the thought of your cutting me [147] has made me very unhappy. Pray do not, you cannot, you shall not; by the power of heaven I would rather see you dead than in another's arms. The idea is misery; my sweetest love, do, do forgive me; consider you are my wife, you are the only woman I ever cared for, and believe me my sentiments are not of that changeable disposition they would wish you to believe. I am engaged, to retract is, and ever shall be, impossible. It was very lucky I left Edinbro' at the time I did, as I found my name down for a court-martial; but thank heaven I was in most excellent time. I think I shall soon take another voyage—I think of asking Don for leave on Saturday, and of being with you at the usual hour; but I shall be able more fully to arrange it on Friday. Your dear sermon is arrived; it found me at dinner with . . . which will, I fear, delay this letter, but I hope most sincerely it will arrive in time for my pretty dear. Send me a long account of the expedition; was . . . there? Not that I doubt my love's fidelity, but still I wish to know even her most inmost thoughts; such is the doating fondness I have and ever shall have for her, she is my only life, and as long as breath remains will I protect and preserve her. Your letter was not quite so angry as I feared it would have been, but you will pardon it although it was my right yet I make a determination not too often to exert it. What a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday. Thank God, a time will soon come when all those vexations will be of no consequence. Having proved my legal right to protect you, which I have most fully established, and nothing in this earthly world ever can or shall break those ties which it will be ever my greatest happiness to reflect on. The post allows me only to say that the dearest love is always in the thoughts of her doating husband. J. D.

Mrs. Dalrymple.

Brotherly love to my sister and R.

This letter has the Edinburgh post-mark of May 30, 1804.

No. 5.

(Addressed) "Miss Gordon, 4 Saint Andrew's Square, Edinburgh."

Wednesday.

My Dearest Love,—As I dine out with the 18th, it will probably be late before I return, in which case I shall write to you this mo-[148]-ment. I expect by this night's post a very long letter from pretty dear, giving me a long history of all that has happened since my departure. I am just returned from taking a drive, solitary enough, at least; how much I thought of the difference between the one I took this day last week! then I was as happy as possible: when I shall take another as pleasant I know not, but most sincerely wish for it. I intend leaving this on Saturday evening, and leaving the curriole at Haddington, with directions for its following me the next day, as I intend being present at the review on the 4th, where, of course, I shall have the pleasure of meeting with you. On Saturday, therefore, we meet. The hurry I was in last night for your letter being in time, prevented my taking notice of one part of your dear little sermon, in which you seem to think my intentions are to retract from what I have said so repeatedly to you. Indeed, my love, this is not behaving right, and I insist on never finding it in your letter again, as I shall be seriously angry with you, and in turn shall lecture your want of confidence as you do my constancy; believe me, I have not spoken to a woman since I saw you, indeed, excepting . . . I am happy to hear that Lotta does not go till Saturday, as it will give us a better opportunity if you are at Braid. Give her brother's love in the kindest manner to his pretty little sister; tell her I hope to see my friend become a happy man ere long, although I see many obstacles to that ever taking place. This will be a most horrible dull letter, but as your pretty epistle has not arrived, I am quite at a loss for any thing to say, as repeating what sentiments I feel and ever shall

entertain for you would not, I fear, amuse you, as you entertain so many doubts of their ever being fulfilled; forgive me saying this so often, but I am very ill-humoured at being alone so long, so the dearest of creatures will pardon me I am sure. I got your's directed to Haddington. I found B. in his bed about eight in the morning, and took the letter from him; he was asleep, and I dare say, was not sensible to its loss. . . . will be here by the mail of this night, this will quiet your apprehensions of me, as I am certain he would not allow me were I inclined to be foolish. I hope the seal will soon come; the ring has never quitted my finger, nor ever shall. I keep this letter open till ten in order to answer your's. Half past nine—no letter is arrived: Great God! what is the cause? Oh! Jacky, believe me, all the torments of hell are nothing compared with what I now experience, but remember you are mine, and may this be the last word I ever write if I ever resign you to [149] another. I suppose . . . has made you forget the bundle, forget your sacred promises, but all heaven shall not tempt me to suffer you one moment in his company. I am distracted; I am truly wretched; I know not what I write. How can you use me so? but on [torn †] you shall, you must become my wife, as I will not trust you a moment out of my sight. Oh, my love! take pity on me, think on me; how doatingly fond I am of you; how I adore you! Why do you not write to me? Have I not punctually fulfilled every promise I ever made? Did I ever keep you without a letter? Did you not sacredly promise to write two letters daily for me, and have you fulfilled it? No, you have forgot me; and I am only sorry I have lived to see this day: better had it been for me if I had died, or any thing but this. I could sooner have suffered any pain, any torment; but write to me by return of post, tell me only that you love me, then I shall be happy. Oh, my love! what can be greater torment than disappointment in such a case as this? I have been mad, miserably so. I know not what I have written, as I am crying so that I can hardly see the paper. I hope you will forgive me, and pardon all I have ever offended you in, as I cannot recollect any part of my conduct which deserves so harsh a treatment; think on me, pray do, and write me your forgiveness, as I am truly unhappy if you do not. I must at all hazards come to you; better would it be for me to become an outcast of society than experience what I now do. Pray write by return of post, and say you forgive me, is all I ask, although I am ignorant how I offended you. That God Almighty may bless and preserve my wife is the prayer of her husband.

J. D.

No. 6.

(Addressed) "Miss Gordon, 4 Saint Andrew's Square, Edinburgh."

Thursday.

My Dearest Sweet Love,—A thousand times do I thank you for your pardoning me, as till the post arrived I was most unhappy at thinking my only love and delight was seriously angry with me; [150] this would certainly render me eternally miserable, as I could bear anything but her anger and disdain. Your disappointment was certainly a most severe trial, one which I little deserved, as I wrote to you on Tuesday night, and even shortened what I had to say on purpose that it should be in time; how you did not receive it I am at a loss to imagine, but suppose it was owing to some mistake in the post, which you know I cannot possibly prevent, as I write every night of my life to you, and if you do not receive a letter, be certain it is not my fault. . . . I shall pay them a visit to-morrow, as nothing but the business of this horrid day would have prevented my going, thinking that she would be there, as I wished to enquire what was the matter with you, fearing a thousand things might have happened, but as it is lucky, I did not go, your letter has afforded me real comfort as it proves how noble a soul you possess; believe me, I should conceive myself most criminal did I, after what has passed, think of being off; believe me, you need not entertain any apprehensions in that point, as I am too deeply attached to you for any thing to change; although I do lecture you on your doubting my constancy, yet I still am pleased at it, as I consider it as a proof of your affection. . . . I called on . . . he rallied me about you, and said that if you were at North Berwick it would not be in the power of the worst of days to detain me here; he inquired after my little sister, and said she was a dear little creature; little did he think what a relationship subsisted between us. He invited me to dine there to-morrow, but if possible I will be off, as I think it will be impossible for me to be from North Berwick

† On Sunday, on my soul.

in time. On Saturday night, dearest of dears, we meet: happy will it be for me, as I am quite dead without you; the time will come, I hope, when that separation shall be no more, as it grieves me even to suffer you five minutes from your husband, although most fully, most completely convinced of your unalterable attachment. On my part I can only say that nothing can change my sentiments of you, they are too firmly rooted to be destroyed, independent even of those sacred ties which unite us, my love, for you would still be the same; as it is now sealed, it would be most villainous in me to alter one sentiment I ever professed. This will, I sincerely hope, convince you how sorry I am that the neglect of a letter should have made you so angry, but I desire you to inform me if you received mine of Tuesday night, that I may inquire into its loss if it did not ar-[151]-rive. Once more then I most solemnly request you will not allow one thought injurious to the fulfilment of all the promises and engagements I am under to you, as nothing can or ever should, if possible, annul them; read this over and over, and put that confidence in me which your peace of mind, your duty, in short, every thing ought to be dear to you requires, as it will be the most certain way to make yourself miserable for ever, as this kind of suspicion will finally end in your being jealous if I speak to another woman. Forgive this lecture, my love, as it is the only thing I can find in you to lecture. I will let you know whatever passes to-morrow at B.; I should not go there did I not think it would appear remarkable after the acquaintance I have with both parties. Lotta will be too much engaged to flirt with me if I was in spirits, which is far from being the case. When is the seal to be finished? and I am all impatience in that as well as every other thing. Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how apropos plans come into her pretty head; there appears to be only one difficulty, which is where to meet, as there is but one room, but we must obviate that if possible. I intend asking leave in August for a month, and shall bend my course North, as I wish to fix my quarters in Aberdeen for a month at least, as we could often meet there and at . . . castle. Write to me immediately on the receipt of this letter, and say you forgive me, and that you never will again disappoint me, and I shall then be really happy. Pray where is the virgin, you never mention her: what brought her to my mind heaven alone knows. That God Almighty may ever preserve my wife, and inspire her with the purest love for her husband, is the first and sole wish of her adoring . . . J. D.

(The full signature obliterated.)

No. 7.

(Addressed) "Miss Gordon, Braid, Edinburgh."

Tuesday, half past nine.

My Dearest Love,—Curse on my fate that although not wanted it should ever enter my head to come here, it is too late to attempt returning, but I will be with you at eleven to-morrow night. Meet [152] me as usual: your letter has grievously vexed me; how could you write me such a one. Believe me, in the greatest haste,—Believe me, your affectionate husband.

J. D.

P.S.—Arrange every thing with L. about the other room.

No. 8.

(Addressed) "Miss Gordon, Braid, Edinburgh."

Thursday.

My Dearest Love,—I have only time to say that I have yours, but there is only half an hour to answer it. I have received several letters from town, all of which say that Lord Stair has heard the report of our marriage. Good God! how hard is my fate, that for the malice of a set of people I should run the hazard of being disinherited, therefore contradict it in every company, as my sole hope depends on him, and such a report would infallibly ruin me, which I know would hurt you, as I know you love me. I should not have mentioned this had it not been absolutely necessary for me to inform you of it; tell me if it is possible to see you now your brother has arrived, as it may be running too great risks: I shall be happy to be introduced to him. You, I hope, received my letters safe. . . . My father wishes me to exchange into the Foot Guards, but I shall give no decisive answer; his aversion consists in my being sent to Ireland next year; when that time arrives I will first apply for a recruiting party, then, if refused, exchange into the Guards, certain of one

from them, which will detain me in Edinbro' as long as the war lasts. I hope soon to be able to see you at Braid, when I shall receive dear Lotta's pardon from her own mouth, as she knows I am very fond of her. I have spread the report of our not being married far and near. Would to God there was a punishment for people maliciously trying to annoy others, as we have not been exempt from our torments. . . .—Believe me, unalterably your's, J. D.

A most extraordinary circumstance alarmed us this morning, but the post only waits, so adieu.

[153] No. 9.

(Addressed) "Miss Gordon, St. Andrew's Square."

My Dearest and Only Love,—Your letter has made me truly miserable; I have only read half of it, as I am all impatience to assure you how unhappy the thought of neglecting you has made me. Nothing but the most absolute necessity of drills and every other species of annoyance could have made me neglect it this day, but till five o'clock I was not at leisure a moment. Would to God I could come to town, but it is absolutely impossible this night. I will write three sheets of paper to you this night. At present this must be the only letter I have time to write. Well knowing the anxiety you must feel, and the danger of the servant's being seen. That God Almighty may eternally protect you is the only wish of—Your devoted hus—J. D.

No. 12.

(Addressed) "Miss Gordon, Braid, Edinburgh."

Halifax, July 25th.

My Dearest Wife,—For the last time I write, unless you immediately write me an explanation of the cause of your being so long silent. I cannot suppose my letters have not reached you, as I never yet found the post deceiving me; but to think that any one should have already supplanted me in your affection is too melancholy for me to support. I have been now absent ten days, during which time you have not written one word in reply to the letters I constantly sent you. If my letters are disagreeable to you why not tell me so? for it must be inferred from no notice ever being taken of them that is the case; but although you are so negligent of your promises, it shall never be said that in any one instance I departed from mine, considering them to be more strictly observed on account of the distance which separates us; but to save trouble, if I do not hear from you to-morrow, I will write to my sister, and desire to know what is the reason of this silence, and I am certain she will not suffer me to be kept in the perfect state [154] of ignorance of what is passing with you. Believe me, that the pain that writing to you in this manner gives me is greater than I ever yet experienced, but I freely forgive you, as indeed, I could any thing you ever did to me, only trusting that, at some future period you may think me worthy of being restored to that place I once possessed in your esteem, and to lose which would be worse than death. I shall leave this for York to-morrow, where I remain till Sunday, possibly later; direct to me there, but you shall hear from me ere that takes place, as I shall not leave off writing till we meet. I think of visiting Aberdeen after the 24th of August, where we can meet, for I am determined to see you, cost what it will. . . . Whatever money you want, draw on me without scruple, as I am certain you must be in want of it. Pray write me if it is but your name: and, dearest life, believe me,—Most devotedly, your D.

P.S.—Send me your picture as soon as possible.

No. 13.

(Addressed) "Miss Gordon, 4 Saint Andrew Square, Edinburgh."

Chelsea, May 29th, 1805.

My Dearest Love,—Your anger, on account of my negligence, is perfectly correct. I have behaved rather ill; therefore as I am fully sensible of my misdeeds, the least you can do is to extend your forgiveness. I do not wonder at your feeling hurt at it, but I hope no slight occasion will induce you to do any thing desperate, as it will prove a source of bitter regret to you afterwards. Living here I think naturally makes a man idle; but I assure you, you may depend upon my never changing any part of my conduct by separation. I have spoke on the whole affair to a very particular friend of my father's, at this time residing with him, who has assured me that he will do every thing in his power to [155] assist both of us, but that he would

advise me to wait the course of time with him, as he says he is certain he would immediately convey his fortune over in trust to somebody, were I, as things are at present, to hint at such a transaction as marriage; therefore I am inclined to follow his advice, particularly as, situated as you are, nothing could strengthen the ties which unite us, and as the fortune I possess in my own right is so small and so much impaired that it would be nearly impossible for me to support you in the style of life you ought, as my wife, to be supported in; therefore it is my wish it should not be mentioned till such time as it can without injury to ourselves be done. At the same time, I must insist on a paper properly signed by you, acknowledging yourself my wife, being sent me as soon as possible, as in case of my death, it would be necessary for you to produce it to enable you to take possession of what I may leave behind. I did not intend this as a melancholy epistle, but as essentially necessary to both our interests, therefore look upon it as such, and as you obey me, or I you, we shall be as happy as otherwise we should be miserable. . . . Write to me as soon as you can, and never, my love, be annoyed at not hearing from me, as you may depend upon my ever holding your interest in my mind, and as there is nothing I would not sacrifice for your good, so am I certain there is nothing you would consider too much to be done for me, well knowing your genuine goodness of heart and disposition. I met Captain J. again, which is very disagreeable, as considering his relationship it makes it very unpleasant, and I wish particularly to be reconciled with both of them were it possible, but as you know the temper of the one, I am very apprehensive it is not likely to take place, only you have my free permission to act as you please, and to tell Charlotte that I wish her every comfort, and only regret my cursed folly in ever mentioning a subject likely to disturb the harmony of her house. . . . I am so much hurried by the General, who is awaiting for me, that I have only time to say—I ever am, dearest love, most affect. your's,
J. D.

Many thanks for the picture, which arrived safe.

[156] No. 14.

(Addressed) "Miss Gordon, 4 St. Andrew's Square, Edinburgh."

Chelsea College, June 10, 1805.

My Dearest Wife,—I am greatly surprised at your having so long declined writing; and not knowing to what cause it is owing, am inclined to attribute it to nothing very favourable to myself. If you have cause of complaint against me, why not at once, my love, tell me so, and not drive me to distraction by abstaining a fortnight without ever writing one line. I am unwilling to attribute it to a change in your affection, well knowing how much you may be trusted; but if I do not very soon hear from you, I shall not be perfectly easy on that head. If you are angry with me for going abroad I will allow you to have just cause; but when you consider the utter impossibility of my existing in this country as a gentleman, on account of the mean conduct of those who ought to be the first to support me; you will I hope allow there is more ground than caprice for this sudden movement. In the next place, I solemnly assure you that I will not be absent from you very long, and that as soon as my affairs are put into any order and arrangement, my return will be certain. Situated as I am, is to me misery to exist; tired out of my life at home, and eternally quarrelling with those I am living with, renders it to my mind nothing less than a very accurate specimen of what may be expected hereafter; but having these things constantly tormenting me, will you allow me to endeavour, by a short absence, to rectify them? You know how little in point of use my stay would signify for these next four months, and with my turn for expence how very liable I am to involve myself ten times deeper than ever. If in thus asking your consent to what, although you may allow, you do not approve, I most humbly, dearest love, most solemnly conjure you to pardon me, and to repeat the assurance how deeply those attractions which were the first cause of our acquaintance remain fixed in my breast; and in whatever part of the world chance may throw me, they will afford me the consolation and hope of in a little time of proving my regard to the whole world; an event evidently, I think, at no great distance, will at once render me independent and you equally so; for while the obstacles and plagues which now torment me exist, [157] neither you or myself can ever know either ease or happiness. You will, I hope, grant me your pardon for thus tormenting you with what I fear must evidently appear to you as a dull repetition of the same sentiments constantly made use of, but I solemnly assure you that they are

the natural feelings of one who, though in every action of his life has hitherto been most unfortunate, yet has no wish to conceal them from you. To return to a more gay and proper subject for a letter. I am most happy that Charlotte has now arrived at the zenith of power, and is surrounded by every wish she can form; most sincerely do I congratulate her—and although an idle moment put a slight check to our former acquaintance, yet I hope that on my return to this town next year, it may appear to her as the failing of human nature, and in a general confession to atone for the crime, may be productive of a renewal of our former friendship, as nothing could give me greater satisfaction than once more to be considered, as I believe I may be allowed her brother. The people here say that old Pulteney never made a will. If she is the gainer by it, I hope so most sincerely. I supped the other night with a M. ———, who was a good deal in Edinburgh last winter. He said he knew you perfectly, and told me a great many anecdotes about you, which could not but be gratifying to me, as I find that the idle bundle is not so much forgotten as some people would have me believe. . . . When I leave this capital is I believe most uncertain. The ship I am going in is nearly ready; but no person can possibly say when she will be: and as to her sailing, I think it will not be for some time yet. Situated therefore as I am, pray my only love do write to me by return of post, and if you have any regard, or the least remains of the attachment you once had and professed, do write constantly to me, and at the same time forward the paper I requested of you in my last letter, and acknowledge yourself my wife, that as we are not immortal, I may leave you, in trust of a friend of the greatest honour, the small remains of what once was a tolerable fortune. Did I not consider this as most essentially necessary for both our interests, on my honour I would not request it; but as you cannot refuse on any legal grounds, do my dearest wife forward it directly, and let your pardon for all the uneasiness I have given you accompany it, or otherwise I shall be perfectly miserable; and I most solemnly promise that there is nothing on earth that you may request that I will not do, except remaining here, which situated as I am would render it perfectly [158] unsafe in me to comply with, as nothing but my departure can restore my fortune to what it once was, or cause the liquidation of those debts which have hitherto so long plagued and perplexed me. Having thus explained to you the whole cause of my departure, I am inclined from your goodness of heart, setting aside all other considerations or claims, to hope that the return of the post will bring back a perfect, free, and uncontracted pardon for past, for all sins committed, but particularly as they were not caused by myself, but the villainy and malice of others. I shall now conclude with every wish this world can bestow, may be your's, and that I ever am,—Dear Jacky, most devotedly, your husband, D

No. 15.

(Addressed) “Miss Gordon, Braid, near Edinburgh.”

Chelsea, June 28th, 1805.

My Dearest Love,—I return you a thousand thanks for your kind remembrance of so idle a being as myself. I allow it is more than I merit, but I have endeavoured to do something in return for it. I have called on Lotta and Johnstone this day; they were out of town, but as soon as they return I will certainly call again and write her a letter expressing my sorrow for the disagreement, and hoping to be again considered as her brother, a title I would not give up for any consideration, and when I return, our families I trust will be on the footing they ought to be. But you must allow that he ought to have first spoke to me, as I could not consistently with etiquette make the first advances: although stifling all other feelings to the desire of reconciliation, I have in this instance been the first. I with this send you the hair so long wanted, and which you ought ere this to have received. It was by mistake sent to Colonel Dalrymple, where it was likely to remain, had I not luckily arrived in town. If it does not please you, write to Wirgman, St. James Street, he will alter it, and has my directions to forward to you any thing you may write to him for, so do not out of false notions of economy deny yourself what you require, as I should not wish my wife on any ac-[159]-count to appear in any thing not perfectly consistent with her rank. The duchess is still in London. If I remain here till Sunday Sir Willoughby Aston has promised to introduce me to her notice. . . . I am going this evening to a masquerade, and afterwards to Mrs. Hamilton's, our relation: Lady H. Dalrymple is to be there, and I expect of course a great deal of railery, not having seen her since the confession she made me make at Dunbar relative to certain affairs in which you

were greatly concerned, but by which I fear her ladyship did not greatly improve her stock of knowledge on the subject. . . . I arrived here very late on Tuesday from Suffolk, and now find I might as well have remained where I was, but I confess the country is to me so horribly dull, that I find time too heavy on my hands to admit of a long stay there. I want to go north, but in the state of uncertainty relative to my going abroad, I do not think it advisable to leave this place. To say the truth, I begin to wish I had not [torn] to the proposal, but as my relinquishing it now would only gratify certain people whom I equally detest and despise, I am rather inclined to proceed. But of my departure you shall have ample notice. Will you send me a lock of your beautiful hair, as I intend having it set in a new form, particularly as the only lock I have at present is too small to convey to me the remembrance I wish. There is one thing, my love, which annoys me, I mean the reflection of not having behaved to you so liberally as I ought to have done; but I hope you will pardon me, and in return you have my free permission from the 16th of November to make whatsoever expence you please, as I will before my departure arrange all money matters in such a manner as to give you every opportunity of gratifying your taste or any other fancy you may take into your head. I hope that virgin sister of mine is likely to change that odious appellation. You should introduce some captain to her that she might at least be on equal footing with yourselves. . . .—God bless you, my dearest love, ever affectionate Husband.

[160] A.

Ballenerief House by Had.,
19th Nov., 1807.

Sir,—As I find by means of the correspondence I have had the honor of having with you that the footing on which I stand with Mr. Dalrymple has transpired, and through the Duchess of Gordon, it has come to both my brother's ears. In this case I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day. The last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter, and that his and her arms were actually quartered on the carriage. All these various reports came from the Duchess of Gordon, and she says, from what she learnt through you, from a friend of your's, that I have Mr. D. completely in my power; that I can either make him acknowledge me publicly as his wife, or make him pay a very large sum of money. The latter of which I shall certainly not do. I do not want money, I want justice; and as I am used extremely ill by him, I shall shew the world who has been to blame. If you, Sir, with your usual goodness of heart, did let him know my determination in this business, and that I am to have the support of my brothers in the case, and unless he comes forward and says he means to behave like a gentleman, and as he ought to do, I will make him. A maintenance he is obliged to allow me, whether he lives with me or not; few would have borne this treatment so long, and if the secret had not been divulged through you, I do not believe I would have divulged it, for fear of involving others; but, on the whole, I believe I am obliged to you. I have the honour to remain,—Your very obedient humble servant,
J. GORDON.

(Addressed) to "Samuel Hawkins, Esq."

(Private.)

B.

Edinburgh, May 9th, 1808.

Sir,—Your former goodness to me induces me to again trouble you with a few lines, to see if you would have the goodness to let me know if there has been any accounts lately from [161] Mr. Dalrymple. My unhappy situation is the only apology I can offer for the uncommon trouble I have offered you, and which your humanity has paid attention to; any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement, as though I have not brought forward my claims at this time for particular reasons, that is not to say I have relinquished them. That I am determined I never will do, and were he to think of forming any of the connexions that have been talked of, or any connexion whatever, I will immediately come forward with my claims, which must put himself and the unfortunate woman in a most disagreeable situation. My idea is, that he is not aware how binding his engagements are with me, and though this says little for his honor, some friend ought to warn him

of his situation. () I am convinced he will force me to strong measures ere long. Pray excuse my troubling you, but my sufferings must plead my apology. I know not what comfort is since this cruel business.—I have the honour to remain, &c. &c.

Samuel Hawkins, Esq.

No. 16.

(Addressed) 'Miss Gordon, Braid, near Edinburgh.'

Portsmouth, July 19, 1805.

My Dearest Love,—I have been so hurried on my departure for this place that I have been literally travelling for this fortnight, but at last am stationary at this most delectable place. As yet no convoy is or for some days likely to be appointed; and as I dread the thoughts of remaining at so horrible and dirty a place, I think it very likely that I shall return to the centre of all gaiety, London, till necessity obliges my departure. I at present feel by no means inclined for a Mediterranean trip, and could I by any means in the world contrive to be off, I should certainly make use of them. As things are at present, I purpose returning here in January or sooner if possible; but as all arrangements of this nature must be liable to so many changes, I do not fix any precise time for my return, as you may depend on my taking the very first opportunity of leaving a country which I by no means approve of, and which nothing but a foolish pique induced me to volunteer for; to add to all my misfortunes, just three days before I left London, I was introduced to the Duchess of St. [162] Albans. . . . My father was suddenly taken ill after dinner on Monday, and they were at first very apprehensive something serious might have happened; but however he has rallied again, and they say better than before. He left this place the next morning for Chelsea. I would recommend you to enclose all my letters in a packet, to be forwarded to me through the care of Sir Rupert George, the Transport Office, London, who has more frequent opportunities of forwarding them than any other person. By the bye, it is very extraordinary that I have not received one line from you for this fortnight past, which I attribute to the letters being missent, as there have been several letters written from London to me which I have never received. I wish you would before I go acquaint me where your brother is likely to be found, as I particularly wish to meet him. What sort of a disposition is he of, that I may be able to understand how to manage him in regard to yourself? . . . London is now nearly over, the place is becoming quite deserted: indeed I am not sorry for it, as no one ever left a place with more reluctance than I did town; and in exchange have got into a vile beastly place, and on the high road to a worse. I fear long enough before this reaches you I shall have taken my departure; but before that event takes place I must assure you that it is my fixed determination that nothing in the common course of things shall detain me there beyond the time first specified; and as that is so short, I think we can only look forward to it; there is one thing which I particularly wish to caution you about, which is never to give any belief to a variety of reports which may be circulated relative to me during my absence. If you do you will render yourself eternally miserable, and produce a breach between us which nothing in this world ever can rectify. I shall not explain to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are meant only for the ruin of both. Once more therefore I entreat you, if you value your peace or happiness, believe no report about me whatever, unless you know it to be true. This advice you will thank me one day or other for—at present it may appear harsh and ill-judged, but time will prove to you how justly I have foretold what will happen. I am sorry I did not see Charlotte before I left London, but in fact I was so very much hurried with the preparations and other troubles, that when they returned I had no time to see them. A thousand thanks for the [163] hair. I have it most beautifully set, and shall keep it as a memorial of pleasures past, but which will I hope soon return. Why do you not write to Allen and order another riding habit? He has my directions to make whatever you think proper to order; so it is your own fault if you ever want any thing—and when I am in Italy, if there is any thing you may particularly fancy, it shall be sent you. How is your father in health? in temper I should think nothing extraordinary.—God bless you, ever dearest love, your's,

J. D.

No. 18.

(Addressed) "Miss J. Gordon, Sir J. Johnstone's, Bart., Ballencrief, Hadding."
Grand Parade, Brighthelmstone,
26th Oct. 1807.

Madam,—Very unexpectedly until within these few days only, since I did myself the honour of addressing you from Mr. Coutts's Banking House, have I continued away from this place, so that the contents of your several letters were entirely unknown to me until my return, and under circumstances apparently so disadvantageous as I appear to have been placed in one of them, as also indeed to have relieved you from a considerable degree of anxiety on your own account, I should not have deferred so long satisfying you in your different enquiries; and reserving all explanations as to myself, I shall begin first with assurances to you that nothing really can have been more groundless than the extraordinary report circulated in your part of Mr. Dalrymple being either previously to or since the time of your enquiring of me, being in London, or even one thousand miles of it, having continued at Vienna, from which place I have received frequent accounts from him, and the last (making allowances for the great difficulty of communication) of recent date: so far too from its being at all in his contemplation even to return to this country, that he speaks decidedly of its being his intention to remain abroad for two years, and appears to have a strong inclination to extend his present quarters to a very considerable distance; having disposed, I should hope entirely to your satisfaction, of the groundlessness of that part of the report, it must be wholly needless to enter at all into the remainder of it, unless it may be to observe, that from the same quarter, in which a freedom of speech appears to [164] have been made use of to my own prejudice, may have originated that, which certainly with no foundation at all, in the instance you allude to at least, can be ascribed to Mr. Dalrymple. Now with regard to any disclosure on my part of the correspondence which I have had the honour of holding with yourself, I beg you to rest assured that I have been particularly guarded; but when a young and impetuously minded character should on the first and only interview I ever had with him, have declared it to be his fixed determination hand over head, and with the utmost violence, to proceed against one for whom you had expressed that affection so natural in a near connection, it was at least I thought necessary to let him be informed that I have been in correspondence with yourself on the subject, and that such circumstances had come to my knowledge as would, I was sure, preclude him from taking any such course as he proposed. I however never produced one single letter of your's.—I have the honour to remain, &c.

SAMUEL HAWKINS.

• No. 19.

(Addressed) "Miss J. Gordon, Ballencrief House, Haddington, N. B."
Grand Parade, Brighthelmstone,
11th Dec., 1807.

Madam,—When I did myself the honour of last addressing you, although dated I believe as above, it was in a great hurry at an inn on the road just as I was changing horses, and in my way on a very long journey into Wales, from which part I only returned this day, or I should certainly sooner have acknowledged your letters from Ballencrief House, and which I very much wish I was able to do more to your satisfaction; but the present most extraordinary situation of this country, with all parts of the Continent, has effectually indeed cut off every sort of intercourse. I am wholly at a loss in what way to forward a letter to Mr. Dalrymple, and he must be so much so himself, I apprehend, that I have no expectation now of hearing until matters take a more favourable turn. The last letter I received from him was dated from Vienna, and it is now upwards of three months since; at that time any breach between the Austrians and this country was not in the least foreseen by any of the English residing at Vienna; but the Austrian Minister having yesterday, I was informed, required his passports, the English will be without any place of [165] refuge whatever, unless they should be able by any means to get into Switzerland. There is too much reason, therefore, to conclude that even those English at Vienna will share the same fate with their other countrymen on the Continent.

In Mr. Dalrymple's different letters, and particularly the last of them. I am given to understand by him, that in place of two years, the first time limited for his stay, he should not think of quitting the Continent at all, being heartily disgusted, as he

observed to me, with England and its society. If any thing should by chance take me into the north, I should in that event do myself the honour of seeing you, when I might probably be more unreserved than I am in writing. At any rate I feel that I should have very little difficulty in satisfying you of my having acted throughout in such a manner as could not fail meeting as much with your own approbation as it would, I am convinced, that of Mr. Dalrymple. It is best for me not to mention the name of the person I alluded to in my last, but I have the satisfaction to think that by my timely explanation, and that only too in a general manner, much mischief was in all probability prevented; I could most easily defend the part I took to the Duchess of Gordon, or to any of your own family, and most seriously wishing that I could prove much more useful to yourself or Mr. Dalrymple,—Have the honour to be, &c.

SAMUEL HAWKINS.

No. 20.

(Addressed) “Miss Gordon, Braid House, near Edinburgh.”

Findon, near Shoreham, 7th June, 1808.

Madam,—Just at the moment that I ascertained, as I thought, Mr. Dalrymple's being at Palermo, and was actually writing to him at that place, having had a promise of my letters being forwarded from the Commander in Chief's Office, who, to my no small surprise, should make his appearance here but Mr. D. himself? He left Palermo, he informed me, only six and twenty days previously to his going down to me at Brighthelmstone, and finding that I had left that place, came over immediately to me at my new residence at Findon. Great, however, as my surprize was at seeing him, it hath been very much exceeded indeed by my having received letters from two very particular friends of his late father, informing me that on the very day after his return from hence to town he was married to Miss Manners. It being, as I have already intimated to you, known to some of [166] his friends, that Mr. Dalrymple had so recently to his marriage with Miss Manners, been with myself, it was not altogether unnatural I felt (ill-founded as such a conjecture certainly was) that it should strike them I might not only be privy to, but even the adviser of such a measure as was immediately afterwards taken; and therefore to do away the slightest surmise of the kind, I felt it incumbent on me to make assurances to them, as I also do to yourself, that neither in thought, word, or deed, have I at all participated in it, but on the contrary I believe my advice and opinion were considered (to use his own term) much too gloomy, and were the means, I dare say, of completely deterring him from confiding one syllable of his intentions in my breast.—I have the honour to be, &c.

SAMUEL HAWKINS.

Extract from the personal answers on oath of John William Henry Dalrymple, Esq.

The respondent positively saith that the only time when any connection by carnal copulation took place between them was on a night in the aforesaid month of May, at the house of the said Charles Gordon, Esq., at Edinburgh, prior to the signature by the respondent of the paper, marked No. 1.

Extract from the personal answers on oath of Miss Johanna Gordon.

The respondent further answering, says that she denies that no carnal copulation did ever take place between the said John William Henry Dalrymple and the respondent at any time subsequent to the signing of the said marriage contracts articulate, or either of them, or that the said John William Henry Dalrymple and the respondent did not in pursuance and upon the faith of the said marriage contracts articulate, or either of them, cohabit together as lawful husband and wife, or ever own or acknowledge each other as and for lawful husband and wife; for the respondent saith that, subsequently to the written acknowledgement of marriage bearing date the 28th of May, 1804, they, the said John William Henry Dalrymple and the respondent, upon the faith of their said marriage, consummated the same, and several times afterwards had the carnal use and knowledge of each other's bodies, as well at the house of the respondent's father in Edinburgh, as at his country-seat at Braid.

APPENDIX, No. II.

[167] PAPERS IN THE CASE OF GILBERT *v.* BUZZARD AND BOYER.

No. 1.

A letter addressed to the Rt. Hon. Sir W. Scott, on the subject of the durability of wood and iron.

Belle Vue House, Chelsea,
February 10, 1821.

My Dear Sir,—Since I have read the papers which I lately returned to you, I am more convinced than ever that the question as to the comparative duration of wood and iron cannot be satisfactorily decided by arguments founded upon chemical theory, for the diversity in the opinions of men undoubtedly well versed in the science of chemistry (as exhibited in the above mentioned papers) evidently proves that these opinions have been rather formed upon conjectures than upon facts. Notwithstanding, therefore, all the love and respect with which I regard my favourite science, I am induced to make it give place to another mode of investigation which to me appears preferable, because it seems to be more certain. I shall now therefore beg leave to submit to you such facts as I have been able to collect, tending to shew the comparative duration of wood and iron when placed under equal circumstances; and for this purpose I will endeavour to state the effects which take place on wood and iron.

1st. In very dry situations;

2dly. In the opposite extreme, or that of permanent submersion in water;

And 3dly. In situations which are damp, or where there may be alternations of dryness and moisture.

Wood, when well seasoned as it is called, and placed in a dry situation, will frequently remain unimpaired for many centuries. We have instances proving this in the timber of ancient buildings and articles of furniture; but amongst the most remarkable are the cases made of Egyptian sycamore containing certain mummies.

These are very perfect, and have unquestionably lasted more than two thousand years.

It must however be recollected that these have not only been placed in dry situations, but have been also protected by a coat-[168]-ing of plaster, which has contributed to their preservation, like the calcareous incrustations on vegetable substances found at Carlsbad and other places, or the siliceous depositions upon similar substances produced by the waters of the Geyzer fountain in Iceland.

Dryness is essentially requisite for the preservation of these, but the plaster of the mummy cases and the incrustations which I have mentioned also protect the wood from the attacks of insects, which so frequently in Europe cause its destruction; whilst the same species of destruction takes place in India to an almost inconceivable extent by the ravages of the termites or white ants, whose attacks can only be resisted by glass, stone, or metal.

Now supposing iron to be placed under circumstances similar to those which have been mentioned, we have every reason to believe that it would last ad infinitum; for in a dry situation we do not know of any agent by which it can be corroded, and we are perfectly certain that insects cannot make any impression upon it. It therefore appears that, even under circumstances most favourable to wood, this will be much surpassed in point of duration by iron.

I shall now proceed to consider the effects produced upon wood and iron when permanently submerged in water, and first as to wood; we have many examples of trunks of trees which have been long preserved in the state of submersion, and we may take as an instance the Submarine Forest at Sutton, on the coast of Lincolnshire, described in the Philosophical Transactions for 1799, p. 145.

In this and other similar instances the wood is solid and well preserved, but is more or less of a black hue, which I am inclined to attribute to incipient carbonisation produced by the action of water, and which carbonisation I believe has contributed very much to the preservation of the wood.

It is, however, remarkable that (excepting the piles of some ancient bridges*) not

* Also the Coway stakes.

any example occurs of wood in a manufactured state having been so preserved, at least I do not recollect to have seen, read, or heard of any such case; whilst as to iron, innumerable facts can be cited to prove how very little this metal becomes corroded in similar circumstances.

Even from depths of the sea, anchors, chains, bolts, rings, and cannon have been raised after the lapse of many years, and [169] have been found in a more or less perfect state; but as these are not so immediately applicable to the present question I shall pass them over, and more particularly notice the effects produced upon iron by long submersion in the water of lakes and rivers.

It is well known that in the year 1568, when the young George Douglas escaped with Mary Queen of Scots from the castle of Lochleven, he threw the keys of the castle into the lake. These keys were accidentally fished up from the bottom of the lake about five years ago, and I have been informed were found nearly or quite in as perfect a state as they probably had been when cast into the water.

I remember to have seen at Sir Joseph Banks's, about three years ago, several swords and daggers which had been brought up from the bottom of the Thames, and which from their make were at least of the 15th century.

These were in good preservation, very little corroded, and only covered with a thin coat of blackish brown rust, which could easily have been removed by a cutler, and then the weapons would have been as fit for service as ever.

Even the slender spindles or spikes by which the hilts were connected with the pommels remained perfect; but not the smallest trace of the wood which probably had formed the handles could be perceived.

Sir Joseph Banks also possessed various swords, daggers, and an axe of steel, which were found with weapons and utensils of bronze in the bed of the river Witham in Lincolnshire when that river was cleaned out in 1787 and 1788. Some of the steel weapons were deemed to be Saxon or Norman, but others as well as the axe appeared to be decidedly Roman. Dr. Pearson has given an account of them in the *Phil. Trans.* for 1796, pp. 395-450.

Here again, although we find that several of them, such as the Sword, Fig. 1, the Axe, Fig. 2, and the Dagger, Fig. 4, Tab. XV., were in good preservation, yet not the smallest particle of wood which had formed the handles could be found, and we may therefore conclude, from these and the other examples which have been mentioned, that iron does not suffer by permanent submersion in water any thing like what might be expected, but that the case is very different as to wood.

When, however, wood and iron are exposed to the effects of damp, or to the alternations of damp and occasional comparative dryness, then it is that both most speedily experience decay. This peculiarly merits to be considered as being more immediately applicable to the present question, namely, the comparative durability of wooden and iron coffins; and although we have not the means of making a direct comparison, iron never having been employed until this time for such a purpose, yet I think we may form a tolerably correct estimate from the ancient implements and weapons so frequently found buried in the earth and in the tumuli called barrows. Of course I only intend to notice those which are of iron or steel, but I may observe, en passant, that those made of bronze, such as heads of spears and the implements called celts, have never been found with any remaining portion of the wood with which they had been originally connected.

The iron or steel weapons, many of which are undoubtedly British and Roman, have been found under a great variety of circumstances, and often in good preservation.

A few examples selected from the *Archæologia* will be sufficient for my purpose.

Some short Roman swords made of steel were dug up between Spalding and Stamford in Lincolnshire. *Archæol.* vol. 5, p. 115.

Account of antiquities found in a barrow at Aspatria in Cumberland by Mr. Rooke. *Archæol.* vol. 10, p. 112. Amongst these are described an iron broad sword, a dagger, a bit, and a spur.

A hatchet of iron found at Kingsholm by Mr. S. Lysons. *Antiquities in Gloucestershire.* *Archæol.* vol. 10, p. 133.

An iron dagger, with heads of spears, &c. apparently Roman, and found by Mr. Gell, near Hopton in Derbyshire, covered with stones, in a situation where it is supposed a battle had taken place. *Archæol.* vol. 12, p. 2.

Various pieces of iron and a small iron chain found in the remains of a Roman

building at Caer Irun in Caernarvonshire by Mr. S. Lysons. *Archæol.* vol. 16, pp. 130, 132.

These examples are sufficient to shew that iron will last a very considerable time, although exposed in different situations to the alternations of moisture and dryness; but this is not so in respect to wood: for in the innumerable instances which might be brought forward in addition to the few which I have selected, not any example occurs of the handles of the axes and celts, of the shafts of the spears, or of those parts made of wood which had been connected with the blades of the swords and daggers having ever been found; and it is therefore evident that the wood in all these cases has long ago perished, whilst malleable iron, even in the disadvantageous form of laminæ, has outlasted the former for ages, although exposed under similar circumstances.

[171] One solitary instance, and but one, presents itself to me, in which even the vestige of wood has been observed, and as it seems not only to be curious, but also very applicable, I shall here particularly take notice of it.

Mr. Hayman Rooke, in a letter to Sir George Yonge, dated December 5, 1790, and printed in the 10th volume of the *Archæologia*, p. 378, has given an account of some Roman remains in Sherwood Forest, and afterwards mentions three large tumuli or barrows situate in the forest about a mile from Oxtun, one of which he opened, and states that it was formed of fine mould to the depth of seven feet and a half from the top to a little below the natural soil; after which he says, "We came to a kind of gray sand mixed with clay about five inches thick, some parts of which were moist; on this lay an urn half full of ashes, and covered with a piece of coarse baked earth, which (the piece of baked earth) broke when taken up. On examining this urn, to my great surprise it appeared to be iron corroded with rust. On one side and at the bottom is a piece of wood which sticks to the urn, and several small pieces were found near it, which from their shape, being hollowed out, evidently appeared to have stuck to the urn. I think there is great reason to suppose that this urn was deposited in the barrow in a wooden case, which when it began to decay and get moist would naturally adhere to the iron."

With this urn Mr. Rooke found a sword in a wooden scabbard, and also a dagger, which likewise had been in a scabbard of wood, but this was so much decayed that only some portions which stuck to the blade could be distinguished. The scabbard of the sword was the least decayed, but when the wood was pressed it mouldered into dust. Mr. Rooke afterwards states that with this urn and the weapons some glass beads were found, and then says, "I think there is no doubt of these barrows having been sepulchres of the antient Britons; and I should suppose, from its vicinity to this barrow, the little inclosure above mentioned was a work of the same people."

"The iron urn is certainly a very singular and curious discovery, and I should think not manufactured in this island."

The Reverend Mr. Whitaker tells us (*Hist. of Manchester*, vol. 2, p. 28) "that it was late before any mines of iron were opened in this island. They appear to have been begun only a few years before the descent of Cæsar, and even then were carried on not by the Britons, but the Belgæ. To that period both of them received from the Continent all the iron they had among them."

[172] "In this traffic (says Mr. Rooke) arms and domestic utensils were most probably imported, and as the Gauls are supposed to have used urn burial, it is not unlikely that they should export a few sepulchral urns of that durable metal to Britain; by which it will appear that the Britons used that mode of interment before the time of the Romans in this island."

Here we have the positive fact of wood and iron having been buried together in a situation not favourable to the duration of either; and when speaking of the wood, it is quite manifest that Mr. Rooke only means to say that it could be distinguished as having been wood, and not that it was wood in its perfect state; for from his expressions it clearly appears to have been in that state of decay commonly called touch wood, so far decayed indeed that when it was pressed it mouldered into dust.

The iron also was much corroded, for the sword, which was two feet six inches in length and four inches broad, when taken up broke into seven pieces; this likewise happened to the dagger; but the urn remained entire, and was proved by the magnet to have retained its metallic properties, notwithstanding the probability that more than eighteen centuries had elapsed since it had been buried in the earth.

From the various facts therefore which I have thus, my dear sir, submitted to you, I feel convinced that iron, when buried in the earth, is much more durable than wood ; and in saying this, I speak of wrought iron, but should cast iron ever be employed in the manufacture of coffins, it cannot be doubted that these (brittleness excepted) will in duration much exceed those which are now made of that metal in its malleable state.—With great regard, believe me, dear Sir William, your most faithful and obedient servant,

CHARLES HATCHETT.

The Right Honourable Sir William Scott, &c. &c. &c.

No. 2.

Belle Vue House, Chelsea,
April 23, 1821.

My Dear Sir,—The timbers of our men of war, which are of ancient date, I have no doubt are those which, from their situation in the ships, have in a great measure been kept dry, and they may, therefore, be regarded as placed under circumstances very similar to the timbers of antient buildings.

[173] The long duration of the Coway stakes, and of the piles of some antient bridges (such as those of Trajan's Bridge on the Danube), I am inclined to attribute partly to the quality of the wood, and partly to the nature of the soil into which they have been driven.

The comparative duration of wood (I mean oak compared with oak) is very different, not merely as to the well known inferiority of the sap wood to that which is called the heart ; but between the heart wood of the same species of oak trees planted in different soils ; and there is great reason to believe that the quality of the soil is commonly the cause of the difference in the quality of the wood.

In some places (and I have understood that Richmond Park is one of these) the oak trees, although of fine growth and healthy, are found to be red-hearted, which, by professional men, is considered as an indication of very inferior durability ; and on the other hand, the oak of the New Forest and other places is not so, and is, therefore, of greater value.

I need not remind you of the numerous instances which prove the effects of soils on the vegetable kingdom. The wine called Sercial is very unlike the other wines of Madeira, and not at all resembling hock wine ; yet the vines which produce it were carried from the hock countries, and planted in the island of Madeira. Coté rotí would have been a very different wine had it been made from the same species of grapes growing on the other bank of the Rhone. We must, however, admit, in addition to the difference of soil, the conjoined influence of aspect and of climate.

A great difference in duration, I conceive, may also arise from the nature of the soil in which piles have been fixed ; for, when implanted in a very firm and binding soil, the duration of the wood is likely to be great, whilst the contrary may be expected in a porous or bibulous soil. I have seen some instances of this.

In addition to these remarks I may add the well known fact that timbers which have been superficially charred last much longer in the ground than timbers which have not been charred.

I believe, therefore, that the quality of the wood and the nature of the soil have been the causes of the long duration of those pieces of timber or piles, which, in a few instances, have been found nearly or quite in a perfect state.—Believe me, dear Sir William, most truly and faithfully yours,

CHARLES HATCHETT.

The Rt. Hon. Sir Wm. Scott, &c. &c. &c.

[174] No. 3.

Sir,—Do forgive me ; nothing but the most urgent necessity should have induced me to approach you.

The public entertain an idea that 10l. may be demanded—I have three establishments to sustain, and since March 2nd I have sent out but one iron coffin ; I have two corpses in one parish which have been refused admission to the family's own grave ; the family have been induced to wait, hoping for your decision daily ; as you, sir, stated that you would appoint a day, we thought it would be early.—Humbly asking your forgiveness, I am, sir, your very humble servant,

Goswell Street Road, March 28, 1821.

EDWARD LILLIE BRIDGMAN.

To the Rt. Hon. Sir Wm. Scott.

No. 4.

Sir,—Fearing that the table of fees exhibited by St. Andrew's parish might be decided on before the enclosed proposal could reach you, through the Register's Office (to which I shall immediately forward it) I have presumed to transmit it for your consideration.

Earnestly hoping that it may lead to a termination of the disputes and litigations in which I have been unfortunately involved with the parish of St. Andrew.—I remain, with admiration and respect, your obedient servant,

Goswell Street Road, May 9, 1821.

EDWARD LILLIE BRIDGMAN.

To the Rt. Hon. Sir Wm. Scott.

No. 5.

The following document accompanied the preceding letter.

To exonerate the parishes within the bills of mortality from inconvenience, and furnish means of judging of the comparative durability of wooden and iron coffins, I, Edward Lillie Bridgman, the patentee of the iron coffins, will engage to purchase a grave in any parish in which I may wish to inter a corpse, paying the same price for it that the parishioners pay for family graves, and paying for each interment in it at the same rate which parishioners pay—and I will engage to inter none in it but parishioners.

It being acknowledged that plate iron 1-12th of an inch thick, painted neither externally nor internally, will soon oxydate and fall in, unless supported by perpendicular bars. But as a fear exists that the patentee will use more durable materials, he is ready to execute a bond to the company of parish clerks, or any person the court may appoint, engaging to forfeit one hundred pounds, if any other than unpainted and unvarnished plate iron coffins, not exceeding the 12th of an inch in thickness, and unsupported by perpendicular iron bars, are buried in the grave he may purchase in any parish. Should he wish to inter coffins made of a thicker or different metal, he will make a special contract for its interment, and the searchers can report the material and thickness of the coffins.

As the inhabitants of a parish contribute to the purchase of burying grounds, and parishioners who have family graves acquire them by purchase, it is supposed that they would be exempted from the payment of any additional fee for interring in their family grave or vault, which already belongs to them by purchase, and is not available for burials to the parish.

Goswell Street Road, May 9, 1821.

EDWARD LILLIE BRIDGMAN.

No. 6.

To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled,

The humble petition of Edward Lillie Bridgman, most respectfully sheweth,

That the idea of employing wrought iron in the construction of coffins, originated in the desire to secure the relatives of the dead from the shocking apprehension of their deceased friends being sacrilegiously torn from their graves or vaults, and exposed to the dissector's knife, or to articulation; to exempt the public from the disgusting exhibition of the mangled remains of half [176] decayed bodies; and preserve its health by preventing the noxious effluvia which arises from decomposing bodies polluting the atmosphere.

Your petitioner humbly represents to this Honourable House that the parish of St. Andrew, Holborn, having refused to bury the corpse of Mrs. Gilbert in a wrought iron coffin, application was made to the Judge of the Consistory Court, who ordered its burial; but has subsequently appointed a fee of 10l. extra on the interment of each metal coffin in that parish.

Your petitioner humbly presumes to think that this fee, which will operate so as nearly to destroy his invention, is not proved necessary by the evidence of the chemists, on whose opinion it is professedly grounded—the only affidavit at all referring to the comparative duration of wood and iron when interred, mentions the probability of iron coffins lasting three times as long as wood. And although this affidavit is expressed in doubtful language, and is in direct opposition to the opinions of eminent practical chemists, yet the Judge has imposed an additional fee of more than eight

times the amount of the common fee, or, as the supposed prolonged occupation of the ground is the avowed object of its imposition (the minister's duties not being at all increased) the Judge has, in fact, estimated the duration of iron coffins as being thirty times greater than those made of wood.

Your petitioner is aware that an idea exists of iron coffins soon filling all the churchyards in London: but he cannot help expressing surprise at such an erroneous opinion being ever entertained; as, in addition to the well known destructibility of thin plate iron when buried, should half the persons who die in London in thirty years, supposing its population a million, be buried in iron, which, attachment to old habits, and the limited means of the manufacturer must prevent, still the ground occupied with their coffins annually, would only amount to two square roods and six square poles, if the coffins are buried to the depth of fourteen feet; as 140 six-foot coffins only occupy a cube 14 feet square. For, as one six-foot coffin occupies only a square yard, 16,666 coffins buried 10 deep will only occupy 1666 square yards and 3-5ths, which is two square roods and $5\frac{1}{2}$ square poles.

Your petitioner presumes to think that iron coffins are not only deserving of patronage, as offering security for the dead, but as furnishing employment for the living, and as preserving our timber for naval and domestic purposes. One hundred coffins weighing five tons, require 115 ton of ironstone, limestone, and coal, which cost only 6l. 10s. in the mine, but would cost the [177] manufacturer about 200l., as they would furnish 1290 days' labour at 3s. per day; while the manufacture of 100 wood coffins would not occupy 100 days.

Your petitioner having observed how greatly the public are inconvenienced by walking funerals, and how much the feelings of the mourners were wounded by their being made a public spectacle on so distressing an occasion, and their health injured by the unfavourableness of the weather, invented a joint-hearse and coach to convey the corpse and eight mourners to the place of interment, at such a moderate expense as would enable the lower classes to use this conveyance, for which your petitioner obtained His Majesty's Royal Letters Patent, in April, 1818. Having built this vehicle, your petitioner applied to the Commissioners of Hackney Coaches for a licence, which was refused, on the plea that they were diminishing the number of hackney coaches and chariots. Hearing, some months after this application, that the number of hackney coaches and chariots was sufficiently reduced, and that new licences were granting, the application was renewed—but your petitioner was informed that although the Commissioners had intended to have licenced him, yet, in consequence of the proprietors of mourning coaches petitioning against him, they should not grant a licence. The Lords Commissioners of the Treasury were appealed to; but they declined interfering. The proprietors of mourning coaches, finding that they had succeeded in preventing my obtaining a licence, entered into a combination not to let me hire any of the mourning coaches customarily used, nor could your petitioner hire any in his own name until he had indicted them for a conspiracy. Your petitioner humbly submits to this Honourable House that this denial of a licence was a great personal injury, as he had incurred considerable expences in building the joint-hearse and coach, buying horses, taking out a post-horse licence, &c. &c., and by preventing his performing a contract made with the parish of St. Martin's in the Fields, to carry their dead for interment to Camden Town. That this suppression of his invention is an injury to the lower classes, who absolutely need an improved mode of conveying bodies for interment, especially where burial-places are distant from the habitations of the deceased, and in children's funerals; among all classes the danger of infection being so great as to occasion the prohibition of children's coffins being carried in hackney coaches. And that the revenue must be injured by preventing the adoption of these carriages, it being assumed that their utility would bring them into general use with [178] those whose limited means prevent the employment of hearse and mourning coaches.

Your petitioner humbly represents to this Honourable House that at the time he built the joint-hearse and coach, the possibility of the Commissioners of Hackney Coaches refusing to licence a vehicle which they acknowledge is legal, was not anticipated. The impossibility of obtaining redress from the Commissioners of Hackney Coaches or the Lords of the Treasury, compels your petitioner to look to this Honourable House as the only court that can afford him relief.

Your petitioner extremely regrets being necessitated to trouble this Honourable

House, but he finds that he cannot appeal to the Consistory Court against its decision, or bring his case in any other way before that court; and having embarked his property in his invention, at the time when the choice of materials for making coffins rested with the purchaser, and the Judge of the Consistory Court having confirmed that right.

Your petitioner earnestly entreats this Honourable House to grant him such relief as its wisdom may dictate, and, as in duty bound, he will ever pray.

EDWARD LILLIE BRIDGMAN,

June 19th, 1821.

Furnishing undertaker, Goswell Street Road, London.

REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOSEPH PHILLIMORE, LL.D., Advocate in Doctors' Commons, Chancellor of the Diocese of Oxford, and Regius Professor of Civil Law in the University of Oxford. Vol. I. Containing Cases from Hilary Term, 1809, to Hilary Term, 1812, inclusive. London, 1818.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

THOROLD *v.* THOROLD. Prerogative Court, Hilary Term, 1809.—A paper in the form of a deed of gift, admitted to probate.

[Referred to, *King's Proctor v. Davies*, 1830, 3 Hagg. Ecc. 218.]

An allegation (*a*) was offered to the Court on the behalf of Miss Thorold, propounding a paper, in the form of a deed of gift, as the last will and testament of her brother, William Thorold, Esq., of Syston Park, in the county of Lincoln.

[2] The adverse party in the cause was Sir Thomas Thorold, Bart., the father of the deceased.

The paper propounded was in form and substance as follows:—

“Be it known to all it may concern, that I, William Thorold, of Syston Park, in the county of Lincoln, do hereby give (after my death) to my beloved sister, Jane Thorold, of Syston Park, in the said county of Lincoln, the following estates; and also, should all or any parts of these estates be sold by me during my life, all such monies arising therefrom as shall be placed in the public funds, shall be at her disposal, viz.

“1st. My third in the remainder of the unsold Ayton estate, in the county of Durham.

“2dly. My moiety in the Husthwaite and Newbald estates, in the county of York.

“3dly. My moiety in an estate at Elmley, in the county of York.

“4thly. My estate at Barrowby in the county of Lincoln.

“5thly. My estate at Carlton, in the county of Lincoln.

“6thly. My estate at Holbeach, in the county of Lincoln.

“7thly. My house and lands, at Derby.

“This deed of gift, in my own proper handwriting, was made, sealed, signed and delivered to my aforesaid beloved sister, Jane Thorold, spinster, of [3] Syston Park,

(*a*) According to the practice of the Prerogative Court the facts intended to be relied upon in support of any contested suit are set forth in a plea, which is termed an allegation; this is submitted to the inspection of the counsel of the adverse party; and if it appears to them objectionable, either in form or substance, they oppose the admission of it. If the opposition goes to the substance of the allegation, and is held to be well founded, the Court rejects it; by which mode of proceeding the suit is terminated without going into any proof of the facts.

in the county of Lincoln, this 16th day of December, One thousand eight hundred and six,

"WILLIAM THOROLD.

"In the presence of James Speed, William Armes, Henry Parlett."

Arnold and Barnaby against the admission of the allegation. It is impossible that this paper can be considered as testamentary, inasmuch as there is neither executor nor residuary legatee named in it, and it purports to be only a deed of gift; it contains, indeed, the expression, "I hereby give, after my death," but it is not every paper that disposes of property after death which can be considered as of a testamentary nature. A variety of contracts are not so considered; settlements, for instance, made in contemplation of marriage, are usually to take place after the death of one of the parties, and have never been considered as testamentary; and yet they would become so by the same rule, which would impress a testamentary character on an instrument of this description. A paper, therefore, may dispose of property after death, and yet not be entitled to probate. The rule is not universal, but must vary according to the circumstances of each case: and the safest guide for the Court will be the intention of the writer, as evidenced by his own language; here he calls the instrument a deed of gift. The difference between [4] a testamentary paper and a deed of gift is essential and obvious; the former is ambulatory till the death of the testator, the latter is irrevocable. The one does not require delivery into the hand of the party for whose benefit it is intended, the other does.

In the present case Mr. Thorold gives property to his sister, by an instrument to which he himself, under his own hand, affixes the appellation of a deed of gift, virtually declaring that it was not to operate as a testamentary paper, and he delivered it to his sister in the presence of witnesses. It commences not in the solemn form usually adopted in the inception of testamentary papers, but in the form appropriated to deeds of gift.

Swinburne (b) distinguishes between deeds of gift which are to take place as donations *mortis causâ*, and such as are to operate as legacies; and this, according to his definition, would be *donatio mortis causâ*, over which this Court could entertain no jurisdiction.

It may be observed also as a proof that it was not intended to operate as a will that, as a disposition of the property of the deceased, it is incomplete, it only provides for that portion of it which was to arise from the sale of certain real estates, in his lifetime, and might afterwards be vested in the funds. Of the remainder there is no disposition; as to that he would die intestate.

[5] Swabey and Adams in support of the allegation. In substance the paper is testamentary, and may be so considered without interfering in the least with the general propositions laid down on the other side; indeed, if it is not considered as testamentary it can have no operation, for it is written on unstamped paper, and consequently, as a deed, would be a mere nullity; and it is a known maxim of law that, if a paper would be ineffectual in one way, endeavour should be used to give it effect in another, "*ut res magis valeat quam pereat*:" independently of these considerations, there are many adjudged cases as to the point at issue.

In *Green v. Proude* (c) a deed indented passed as a will.

In *Rigden v. Vallier* (d) a deed by which property was granted among children

(b) Part 1, sec. 7. Swinburne has not, perhaps, explained himself on this topic with his usual perspicuity; indeed it has been admitted by his editor that there is some perplexity in the passage to which allusion is made in the argument: he had obviously in his view when he was writing the several passages on this subject in the Roman law. See Digest, lib. 39, tit. 6. Just. l. 2, tit. 7.

(c) On ejectment on trial at bar the first question was, whether there was a will or no will? the plaintiff produced a deed, indented, made between two parties, a man and his son; and the father did agree to give the son so much, and the son did agree to pay such and such debts and sums of money; and there were some particular expressions resembling the form of a will, as that he was sick in body, and did give all his goods and chattels, &c. but the writing was both sealed and delivered as a deed; and they gave evidence that he intended it for his will, which the Court said was good proof of his will. See *Green v. Proude*, 1 Mod. 117.

(d) The expressions reported to have fallen from Lord Hardwicke, on this part of the case of *Rigden v. Vallier*, in 2 Vesey, p. 252, are as follows:—"Another thing is, that this appears to me to be as near a testamentary act as can possibly be; nor do

was considered [6] to be of a testamentary nature; and in this Court several papers, styled deeds of gift, have been established as wills; as in *Corp v. Corp*, and in *Johnson v. Johnson*. With respect to the passage from Swinburne, it may be answered that in Swinburne's time no testament could be made without an executor: (e) this, however, is rather to be considered as a testamentary schedule than a testament, the difference between the two being that one appoints an executor, whereas the other is carried into effect without any such appointment. There is also a marked distinction between an instrument of this sort and a *donatio mortis causâ*, because, in the latter case, if death does not ensue, (f) the gift must be returned.

[7] Arnold in reply to the cases. In *Green v. Proude* the deceased described himself as being very sick in body; the instrument, therefore, had all the appearance of being a testamentary act.

In *Rigden v. Vallier* the bequest being to take effect after payment of funeral expenses, the *animus testandi* was clearly shewn.

In *Corp v. Corp* the instrument as a contract was considered as of no effect in the lifetime of the testator, and a special direction concerning the paper was given to his executors and administrators; added to this being between husband and wife it could not be considered as a deed of gift.

Johnson v. Johnson was different in all its circumstances; the instructions were for a will, but the attorney by mistake drew the paper in the form of a deed.

Judgment—*Sir John Nicholl*. The sole question arising upon the admissibility of this allegation is whether the paper propounded is a testamentary instrument, and proper to be proved as such.

Two grounds of objection may be taken, first, [8] that it relates to real property only; secondly, that it declares itself to be a deed of gift, and, consequently, cannot be considered as a will.

With respect to the first point, though the property may consist wholly of estates, yet it does not appear to the Court that they may not be estates, disposable as personal property: neither is there any thing to shew that some of these estates may not have been sold during the life of the testator, and then he expressly directs "that all such monies arising therefrom as shall be vested in the funds shall be at Miss Thorold's disposal;" these monies, therefore, must fall under the description of personal property.

I know why this cannot be proved as a will in the Ecclesiastical Court, notwithstanding the solemnity of the execution, by sealing and delivery according to the case of *Kibbot v. Lee*; for there was a will sealed and delivered, and in a late case of *Trimmer v. Jackson* in B. R. sent out of this court: he makes use, indeed, of the words 'give, grant and confirm;' but that is not material; and then says, 'after his decease;' so of his personal estate, after his debts and funeral paid; which is plainly a testamentary disposition, his whole personal estate being in his power during his life, and they are in the case of residuary legatees, so that it appears to be in his view, as a testamentary act."

(e) Swinburne says, "The executor is the foundation, the substance, the head, and indeed the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament." Swinburne, part 1, sec. 3, p. 14. See also the same author, part 1, sec. 1, p. 4, and again, sec. 11, p. 83, and Godolphin, O. L. p. 13.

The fact is, the executor was considered as analogous to the heir (*hæres*) of the civil law, who was so essential to the will, that if no heir was constituted in the instrument there was an intestacy.

(f) This is clearly the idea the Roman law entertained of this species of donation, "*mortis causâ donatio est quæ propter mortis fit suspitionem: eum quis ita donat, ut, si quid humanitus ei contigisset haberet is qui accipit: sin autem super vixisset is, qui donavit, reciperet: vel si eum donationis penituisset, aut prior decesserit is cui donatum sit.*" Inst. lib. 2, tit. 7, s. 1.

In a subsequent passage the whole doctrine on this head it thus summed up and expounded. "In summâ *mortis causâ donatio est, cum magis se quis velit habere, quam eum, cui donet, magisque eum cui donat, quam hæredem suum,*" and then the framers of the Institutes, as if to adorn and illustrate the conclusions of law at which they had arrived, introduce into their work that remarkable passage from the *Odyssey*, in which Telemachus (in reply to a question put to him by Piræus, whether

This Court has always held that, even if it should be doubtful (g) whether some part of the [9] property be not freehold, it will grant probate, and for this obvious reason the probate may be necessary for the purposes of justice, and no evil can arise from the grant of it: thus, if Miss Thorold takes probate of this instrument and all the estates are real, the probate of this Court can in no way affect them; but if any part should be personal, or if the land should have been sold and the money vested in the funds, for that part the probate ought to pass, supposing the instrument to be in its nature testamentary; besides, it is difficult to imagine why one party should desire probate and the other party object to it, if all the estate is freehold; since in that case the probate could have no effect whatever. There appears, therefore, sufficient ground in the present stage of the proceedings to presume that there may be property to which the probate may be applicable; but, at the same time, if it were perfectly clear that there was no such property, the Court would not entertain any question respecting the validity of the instrument.

The main question, however, is whether the instrument can be considered as testamentary?

In deciding a point of this nature, the Court always looks to the substance, and not to the form of the instrument; to the intention of the writer, [10] and not to the denomination he affixes to it: it calls itself a deed of gift, but it cannot be valid as such—it is not upon a stamp—it contains no valuable consideration—it might have been revoked during his lifetime, for there is nothing to prevent him from selling the estates; indeed, he expressly looks forward to such an event, for he directs that the monies arising from the sale of them shall be vested in the public funds. This instrument, then, cannot, as far as this Court can form any opinion, take effect as a deed of gift: it is not irrevocable, it is only to be consummated by death—not to operate during life; the words are, “I give, after my death”—death is the event which is to give effect and operation to the instrument. Marriage settlements and contracts are of a totally different nature; they take effect during life.

Many instruments of this kind have been admitted to probate. The case of *Shergold v. Shergold*, (h) decided in the Prerogative, is a stronger case than this, because there something of a consideration (viz. sixpence) was given.

In *Markwick v. Taylor* administration with a deed annexed was given. (i)

he may wish the valuable presents he had brought with him from Lacedæmon to be removed to the palace from the place where they had been deposited) thus expresses himself:

Πείραι, οὐ γὰρ τ' ἴδμεν ὅπως ἐσαὶ τὰδε ἔργα
 Εἰ κεν ἐμέ μνηστῆρες ἀγήμερος ἐν μεγάροις
 Λάθρη κτείναντες πατρώϊα πάντα δάσονται,
 'Αὐτὸν ἔχοντα σε βούλομαι ἐπαυρέμεν, ἢ τίνα τῶνδε,
 Εἶδε κ' ἐγὼ τούτοις φόνον καὶ κῆρα φυνείσω,
 Δῆ τότε μοὶ χαίροντι φέρειν πρὸς δώματα χαίρων.

Hom. *Odyss.* lib. 17, l. 79, et seq.

(g) In the case of *Durken v. Johnstone by his Guardian*, Prerog. Trin. Term, 1796. Where the question arose on the testamentary schedule of John Durkin, and a considerable degree of uncertainty prevailed as to the nature of the deceased's property. The Court (Sir W. Wynne) said an objection has been taken that this is a real estate, and not within the jurisdiction of the Court, but it is not clear whether it is all real property, or property held only for a term of years: still if the paper may have any effect on the estate, I am bound to pronounce for it. This Court is not to judge of the effect; and if it does not appear evidently to be a paper only applying to a freehold estate, it is the duty of this Court to establish it.

(h) *Shergold v. Shergold*, Prerog. 1714. Dr. Walter Pope made a deed of gift to Ann Shergold to take effect after his death, and upon delivery of sixpence gave, granted, and put her into possession of all his estates—administration was granted with this deed annexed.

(i) *Markwick v. Taylor*, Prerog. 1722. Markwick made a deed of gift of all his estates after death—administration with the deed as a testamentary schedule annexed, was decreed by the Court.

[11] In *Hog v. Lashley* a Scotch settlement, in the form of a contract, was admitted to probate.^(k)

In *Corp v. Corp* ^(l) a paper, entitled a deed of gift, was held to operate as a will. That case was argued at great length, and many cases were cited from the common law to shew that a principle governs all courts to be astute in finding out a mode of giving effect, in one way or another, to an instrument of this sort. They all go on the principle that the intention of the party is the point to [12] be looked to, and not the form of the instrument.

In the present case there is not so much difficulty as there has been in others which have been decided. Nothing could give this instrument operation as a deed of gift; it is expressly a gift to take place upon the testator's death. I have no hesitation therefore in admitting the allegation to proof.

SCOTT v. RHODES. Prerogative Court, Hilary Term, 1809.—An unfinished and unexecuted paper established as a will.

Thomas Burchall, one of the clerks of the Bank of England, was found dead in his bedroom, on the morning of the 8th of September, 1807, having gone to bed on the preceding evening apparently in perfect health.

In a box in which the deceased was in the habit of keeping papers of moment and concern were found four testamentary writings, of the following import:—

(D) A will dated August 17, 1793, regularly executed and attested, by which he bequeathed to his wife 2000l. 4 per cents. for life; 1000l. of which are to remain at her disposal, and of the other 1000l. 500l. to go to Mrs. Whinnell, his wife's sister; 200l. to Mrs. Scott, his wife's other sister, or, if she died first, to John Scott, her husband, and to their three children 100l. each, and appointed Mrs. Whinnell and Mr. Scott executors.

(C) A will dated Oct. 5, 1805, regularly exe-^[13]cut and attested, by which he left all his property to his wife for her life; at her decease, one half of the property in the funds to be at her own disposal; the other half to go to her sister Mary Scott, wife of John Scott, her children, and their heirs for ever. John Scott and his son Benjamin to be the executors.

(A) A paper in the hand-writing of the deceased, of which the following is a copy:—

"This is the last will and testament of me, John Burchall, late of Old Gravel Lane, now of King David Lane, in Shadwell, in the county of Middlesex, gent.

"First, I recommend my soul into the hands of Almighty God, through the merits of my merciful Redeemer, the Lord Jesus Christ; and as to my worldly goods and estate, I dispose of them as follows:—

"I first desire my just debts and expenses attending my decease, shall be duly paid; I then leave to my dear sister Mary Scott, wife of John Scott,^(a) of Worship Street,

^(k) *Hog v. Lashley*, Prerog. 1789. A Scotch settlement in the form of a contract, but to take place on the death of one of the contracting parties, was pleaded in an allegation as the last will and testament of the party deceased—it was objected that the instrument was not in its nature testamentary—but the objection was over-ruled and the allegation admitted to proof.

^(l) *Corp v. Corp*, Prerog. 1793. In this case the deed was not to take effect on the death of the writer, but on another contingency, viz. the death of the wife's mother, or the sale of a certain estate—it was entitled "a deed of gift;" the obligatory part was in the following terms:—"By this deed I bind myself to give to my wife, either upon the demise of her mother, or the sale of the Yorkshire estate," &c. &c.; and it concluded, "I do therefore hereby ordain that my executors, administrators, and assigns, consider this deed as the most solemn obligation, in confirmation of which I set my hand and seal." This paper was directed to Mrs. Moore, the wife's mother. The cases cited in argument were *Rigden v. Vallier*, 2 Vesey, 253. *Kittell v. Lee*, Hobart, 312. *Rowe v. Treemain*, 2 W. Wilson, 75. *Goodtitle v. Bailey*, Cowper, 375. *Green v. Proude*, 1 Keble (Mod. 117). *Wittan v. Wittan*, Chan. Cases, 208. *Johnson v. Johnson*, Prerog. 1780.

The Court said, "That it had been laid down in *Goodtitle v. Bailey*, and also in the case in the 2d Wilson, that the instrument, if it cannot operate in one form may in another, and that it was the duty of the Court to give it effect.

(a) His wife had died subsequent to the date of C.

Finsbury, the one half of whatever I may die possessed of in the public funds, and to her heirs for ever. From the other half, it is my wish that one hundred pounds sterling shall be raised, which I leave to Mr. John Scott, as aforesaid; the residue of my property in the funds, I leave to be equally divided between the three children of the said John and Mary Scott, John William ——— Scott, Benjamin Whinnell Scott, and Elizabeth Scott, and to their heirs for [14] ever. All the rest, residue and remainder of my property, whether real or personal, in possession or reversion, I leave to John Scott, to his heirs for ever, and I hereby constitute the said John Scott and Benjamin Whinnell Scott, the executors of this my last will and testament.

"In witness whereof, I, the said testator, John Burchall, have hereunto set my hand and seal, the day of August, One thousand eight hundred and seven.

"Signed, sealed, published and declared by the said testator, John Burchall, as for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have, as hereunto, set our hands, as witnesses.

"L.S."

(B) A paper, in substance of nearly similar import to A and labouring under precisely the same imperfections in point of form, inasmuch as it was not signed, and had a clause of attestation, but was not witnessed. This paper was also, throughout, in the hand-writing of the deceased.

(A) Was propounded as containing the last will and testament of the deceased, by Mr. Scott, the executor named in that paper. It was opposed by Ann Rhodes, the cousin-german and one of the next of kin to the deceased, who prayed the Court to pronounce for an intestacy.

In support of paper (A) several witnesses were examined, who deposed in strong terms to the [15] unvarying affection the deceased entertained for Mr. Scott and his family (who were his wife's nearest relations), and to declarations repeatedly made by him of his intention of bequeathing his property to them.

To account for the unfinished state of the paper, Charlotte Milnes, who lived in the neighbourhood of the deceased, and who used to come every morning to do his household work and return to her own home at night, deposed in substance as follows:—

That the deceased had no (b) business whatever of his own, but was in the habit of doing any little writing, such as making out bills and writing letters for persons who could not write. That about ten days or a fortnight before his death, she observed him employed in writing that which she supposed to be his will: that he had the whole leaf of the table up, and had several writings on large sheets of paper before him, quite unlike bills or letters: that he desired the defendant to tell Mr. Raffle (for whom he was in the habit of writing letters), if he should call, that he, the testator, was out, and at the same time said that he was so much taken up with other people's concerns that he could not do what he had to do for himself; and seemed rather soured in his temper, and the daughter of Mr. Raffle having accordingly called that afternoon, the deponent told her the testator was not at home.

[16] That the deceased continued writing for some considerable time, for he was extremely slow, and always made a draft of what he wrote, but as she cannot write she is unable to depose with certainty, though she does verily believe, that it was in writing his will that he was at such time employed.

That on the Monday next before the Wednesday on which the deceased died, she again saw him writing with the same kind of papers before him, and she verily believes that he was then completing his will, but cannot depose with certainty thereto.

That on the night before the deceased died, he being then very well and quite cheerful, told the deponent that he meant to go the next day to Apothecary's Hall, and would make it in his way to call on Mr. Scott, whom he wished very much to see.

That the testator died quite suddenly, for he had not been confined by any illness, and on the very day preceding his death he was in good health and spirits, and walked out as usual in the fields towards Whitechapel, and in the evening she left him about half past nine as usual.

She then proceeded to detail the circumstances of her finding him the next morning dead in his bed-room, but dressed, and concluded by saying that she verily believed that the deceased was by his sudden death deprived of carrying his intentions into

(b) This must be understood with reference to private business, as he was in daily attendance at the bank, where he transacted business as one of the clerks.

effect by a formal execution of his will, for she has not the least doubt but that if he had called upon Mrs. Scott on that day, he would have put a finish to his will by executing the same.

Swabey and Adams in support of the paper.

[17] Arnold and for the next of kin.

Judgment—*Sir John Nicholl.* In support of this paper the executor has pleaded, and fully proved that, the deceased entertained the greatest regard for Mary Scott, who was his wife's sister, and her husband John Scott; that he had declared that it was owing to the advice of John Scott that he had acquired his property, and that after the death of his wife he had repeatedly said that Mary Scott and her children and John should have all that he had; other declarations even stronger than these are spoken to. It also appears that he kept up no intercourse with his own relations, that he never mentioned any relations, and possibly did not know that he had any living.

It is the less necessary to dwell upon this part of the evidence, because there are acts of the deceased, before the Court, which always afford more satisfactory proof of testamentary intention than declarations. Declarations may be loosely made, and are always liable to be misapprehended or incorrectly represented.

On the 17th of April, 1793, the deceased executed a will, in which his wife and her relations were the sole objects of his bounty, and there is no mention of any relations of his own.

On the 7th of October, 1805, he made another will; by this the whole of his property was given to his wife for life; half to be at her disposal, the other half to Mary Scott, John Scott, and their children.

In November, 1805, the wife is stated to have died; this naturally led to a new will; and from the [18] contents of the former wills it would be probable that John and Mary Scott and their family would be the parties solely benefited.

It is pleaded that in 1807, the deceased prepared the paper B as a draft for the present will; it is indeed, for the most part, word for word the same as the instrument propounded; the only evidence applying to it is that it is in the handwriting of the deceased: it is dated in 1807; but in what month of that year it was written the paper does not import; not even whether it was prior or subsequent to the instrument now propounded. That it was the draft of his will is by no means made out; nor is it, I think, at all probable that it should have been; it is, if any thing, more formally prepared than B, and there is a bequest over of the residue to the children in these words: "All the rest, residue, and remainder of my property, whether real or personal, in possession or reversion, I leave to the said John and his heirs for ever, and in the event of his previous decease, to his said children as above, or the survivors of them, or their heirs for ever." These latter words are omitted in the paper propounded, and it is not probable they would have been omitted if B had been the draft of it.

B then is not only the more full of the two, but if any thing, the more formal; it is written as fairly, it has paper on a wafer both for the deceased and the witnesses to seal; it is in every respect an instrument prepared and ready for execution, and varying in some degree, it should seem, as if it was not intended as a duplicate. It would therefore be extremely difficult to ascertain, if it were necessary, which of these two papers was last written.

[19] All these testamentary acts, however, serve strongly to point out what were the testamentary intentions of the deceased, up to August, 1807; and as far as evidence of this sort can go, they do most forcibly support the instrument propounded.

But evidence of this sort, however strong, is not sufficient. The paper propounded was manifestly intended to be executed by being subscribed, and to be attested by witnesses. And however clear the proof may be that at the time the deceased wrote this paper he intended so to dispose of his property by will, yet it being equally clear that in order to give effect to the instrument he intended to do the further act of signing in the presence of witnesses, the law requires it to be shewn why the further act was not done.

Only one witness has been examined to these important facts; but if that witness is to be believed, and there is nothing to discredit her, she proves a case much more favourable to the support of the paper than the plea itself. And from the testator's habit it is not probable that more witnesses could have been produced to this part of the case. She says that the deceased had no business of his own; and yet from his

conversation it was only on his own affairs that he was employed, and therefore it is probable that it was about his will. The description of the size of the paper agrees with these instruments, and confirms their identity. The time of writing, which was ten days or a fortnight before his death, corresponded with the date of the paper A, which was in August.

The last time when she saw him writing was on [20] the Monday next before the Wednesday on which he died; and whether he was then quite completing A, or whether (which is more probable) he was then writing B, it brings the act down much nearer to the deceased's death than is stated in the plea.^(a)

My predecessors in this place have held the rule strict that proof must shew a continuance of intention, and that the deceased was prevented from completing the instrument by the act of God: it is my duty to tread in their steps, and to adhere to those principles which they have laid down. I am not at liberty to depart from them in any instance if I were so inclined: but there is no point upon which I should be less inclined to do it than upon that now under consideration. I am strongly impressed with the necessity of applying the rule strictly, and with firmness.

In this case it may be said that on the Tuesday the deceased was well, walked out, and would have executed his will; but the continuance and progress of his intention is proved, and the presumption of abandonment is repelled by what the witness states, "That on Tuesday night the deceased [21] said he should call on Mr. Scott the next day, and wished much to see him. Now, connecting this with the fact that the two former wills were executed at Mr. Scott's house, that this instrument was only completed on the day before, and that he was anxious to see Mr. Scott, is it not highly probable that his purpose was, on the very next day, to go to Scott to execute this will? and, dying suddenly before the next day, this comes up strictly to the case of the execution being prevented by the act of God.

It might be conjectured that the deceased got up early the next morning (which from the circumstances he appears to have done) in order to go to Mr. Scott's before he proceeded to his accustomed occupation at the bank; this, however, would be mere conjecture.

Upon the whole, there being such clear proof of long intention to give the whole of his property to this family—not the slightest appearance of any intention to benefit his relations—no ground to suspect any hesitation or doubt in the deceased's mind, the will having been prepared for execution so short a time before his death, and the continuance of intention being brought down to the very day when the act of God intervened and prevented the execution of the instrument, I think that I am departing from no principles which have governed this Court, in pronouncing this paper to be the will of the deceased; and I do accordingly pronounce for it.

[22] RYMES v. CLARKSON. Prerogative Court, Hilary Term, Feb. 9th, 1809.—

Probate of a codicil written in pencil, and which had been in possession of the executor upwards of three years, called in and revoked.

Luke Hall put a period to his existence on the 21st of May, 1804, having been deranged in his intellects for the last twelve months immediately preceding his death; probate was taken of his will, and four codicils, by Clarkson, one of the executors, on the 11th of September, 1804.

On the 25th of June, 1808, Rymes, another of the executors called in this probate, and cited Clarkson to shew cause why the second codicil written in pencil should not be revoked; Clarkson declined contesting the suit, but the codicil was propounded in an allegation by Joseph Hall, a legatee, under the instrument.

This allegation pleaded in substance,

1st. The death of Luke Hall, and then enumerated the several relations entitled in the distribution of his property, if he had died intestate, but stated that he had left a will and four codicils.

(a) This cause first came before the Court in Trinity Term, 1808, when the admission of the allegation propounding paper A was opposed, and the then Judge of the Prerogative Court (Sir William Wynne), after stating how strictly he held to the rule he had always endeavoured to enforce as to the execution of testamentary papers, where formal execution appeared to have been intended, expressed, nevertheless, his opinion that, if the facts laid in the allegation should be proved, the instrument would be entitled to be established as the last will and testament of the deceased.

2ndly. That the deceased, several years previous to his death, took his niece, Sarah Vowell, to live with him. That Sarah Vowell intermarried with Richard Clarkson in 1800. That from that period the deceased principally resided at or near the house of Richard Clarkson at Kingston; and that about twelve months before his death he was attacked with a depression of spirits, and then, for the first time, shewed symptoms of derangement.

3dly. That sometime between the 27th of March, 1800 (being the date of the first codicil), and the commencement of the deceased's derangement, he did, with his own hand, write in pencil the very [23] codicil propounded, and at the time of his writing it was of sound and disposing mind.

4thly. That before the executor took probate of the will and four codicils, a true copy of the second codicil, duly collated, was made and deposited in the registry.

5thly. That when Clarkson applied for probate as executor, he was advised that in consequence of the informal manner in which the said codicils were written, the consent of Joseph Hall, Nathaniel Hall, and Sarah Clarkson, respectively mentioned in the codicil in pencil, was requisite previous to obtaining probate, and he accordingly applied to Joseph Hall and Sarah Clarkson for their consent, and that Sarah Clarkson, then, in the presence of Richard Clarkson her husband, assured Joseph Hall that the codicil and memorandum in pencil had been written by the deceased long prior to his having shewn any symptoms of mental derangement, and declared that she had frequently seen the will and codicils prior to that time; and, as she observed the codicil to be written in pencil, had advised the deceased to send the same to his attorney, to have them more formally written; and she further declared, and has frequently declared to others, that the deceased was perfectly sensible at the time he wrote the codicil and memorandum in pencil.

That Joseph Hall and Sarah Clarkson executed proxies, whereby they consented that the probate of the codicil and memorandum in pencil should be granted to Clarkson, with the will and the other codicils, and that Nathaniel Hall being abroad, a [24] decree issued against him, to shew cause why the probate should not be granted to Clarkson.

That Rymes and Clarkson had respectively, since the grant of the probate, and before February, 1806, when the Master of the Rolls delivered his opinion on the construction of the second codicil, in a suit instituted on behalf of the children of Joseph Hall against Richard Clarkson, for the recovery of their legacies, on various occasions spoken of the second codicil in pencil, as the act of the deceased while he was of sound mind.

The will bore date the 10th of March, 1798, and was regularly made and attested by two witnesses. By it the testator bequeathed a variety of legacies to his numerous relations and friends, of which it will not be necessary for the purposes of the subsequent argument to enumerate more than the following:—"Item, I give and bequeath to my brother Joseph Hall, of the city of Bristol, in consideration of his having a large family, 1000l. Item, I give and bequeath unto each of the children of my brother Joseph Hall, who shall be living at the time of my decease, 50l."

He left his niece "Sarah Vowell (who had since become Mrs. Clarkson), 1000l., and also appointed her residuary legatee. His brother William Hall, John Olding (John Olding died before this suit was instituted), banker, and Samuel Rymes, were the executors."

The will also contained a provision, "That if by any unforeseen event his estate and effects should not be competent to answer and pay all the lega-[25]-cies therein before given, that then and in such case each and every of the legacies should sustain a proportionate loss or diminution, upon their several and respective legacies."

The first codicil was of the 27th of May, 1810. By this, amongst other small bequests, an additional legacy of 500l. was given to his brother Joseph Hall; and Richard Clarkson was appointed one of his executors, in the stead of William Hall. This instrument was signed and sealed, but not attested.

The second codicil, the subject of the present litigation, was written in pencil, at the foot of the first, and was as follows:—

"Instead of leaving 2000l. to my brother J. personally, I wish to leave the same sum to him and his children. N. Hall's legacy of 500l. I wish to leave to my brother D. Hall's children, after the decease of N. H. and his wife. Instead of 1000l. to Mrs. C. as in my will, I wish to leave 3000l. in trust for the use of Mr. and Mrs. C.

during life, and at their decease to be equally divided among their surviving children, at the same time leaving Mrs. C. residuary legatee."

This was neither signed nor dated.

The third codicil was in the hand-writing of the deceased, and thus expressed: "I know my dear niece Mrs. Clarkson will scrupulously attend to every request of mine respecting the disposal of my property, as though mentioned in the body of my will: it is my wish that mourning rings may be sent to those friends that she knows I valued and [26] lived in habits of intimacy with, such as my friends Mr. and Mrs. Olding, Mr. and Mrs. Martin, my partners, with their wives, Mr. Samuel Shaw, &c. And it is further my request, that if Miss Sarah Reeve should be living at the time of my decease, Mrs. C. would give her a sum not exceeding 50l. and that to depend on her situation and character at the time. And I further hope and depend on it that Mrs. C. will be kind enough to occasionally see that my unfortunate little child Marianne Wall, is taken proper care of, and educated in such a manner as to become an useful member of society, and that she is placed in proper hands: if the mother conducts herself virtuously and well, she is the fittest person to have the care of her, but by no means otherwise. Should the interest of the property I have left the child not be adequate to her support, I doubt not Mrs. C. will with pleasure contribute something more towards her support, rather than have the principal broke in upon. I expect and hope my dear Mrs. C. will have at least three thousand pounds, after all my debts and legacies are paid; with my best wishes for her happiness, and that of her dear partner and children, I sign this.

"18th March, 1802. L. HALL."

The fourth codicil left 1000l. consols, in trust, to the executors, for Marianne Wall, which, if she died before she attained the age of 21, was to fall into the residue; it concluded thus: "I declare this to be a codicil to my will; witness my hand this 12th day of May, 1802. L. HALL."

[27] At the bottom of it was written in ink, "I had left Marianne Wall, mother of the above named child, a legacy, but have since cancelled it, finding her conduct to be such (from a dreadful habit of lying which she has contracted, &c.) as to render her unworthy of my esteem, and it is my wish, if possible, to keep her ignorant as to the residence of her child that she may never have the least influence over her." And then followed in pencil—

"Instead of the above one thousand consols, to be one thousand pounds."

Adams and Burnaby in opposition to the allegation. The question at issue is whether this paper is deliberative or dispositive? on the face of it it appears to have been intended as a mere memorandum; and this idea of its character is confirmed by the deceased's habits of business and regularity, which are clearly evidenced by the several testamentary instruments before the Court. Besides, the paper itself contains no dispositive words; it merely expresses a wish; whereas in all his other testamentary writings there are the words "I give and bequeath." A simple wish can never have the effect and validity of a bequest. The codicil too is imperfect: it has neither date nor signature; it contains only the initials of the names of those persons whom it is supposed the testator intended to benefit; in this also the contrast is striking, for all the other codicils are dated and signed. Add to this too, it is written only in pencil.

Court. "What would be the effect of it should [28] it be proved that this paper was written at the same time with the pencil memorandum in the third codicil?"

ARGUMENT RESUMED.

Even then it would be liable to all the objections arising from its obvious imperfection. Besides, we are given to understand that a question is now pending before the Court of Chancery for the purpose of ascertaining whether these legacies are accumulative; and if the Court of Chancery should, as it is to be apprehended it will, pronounce that they are to be so considered, they will be at complete variance with the intentions of the deceased and the whole disposition of his property, inasmuch as there will not be assets sufficient to discharge the legacies, and nothing can be better established than his intention to benefit the residuary legatee.

Arnold and Swabey contra. The admission of this allegation has been opposed on various grounds, viz. as to the material with which the codicil is written, as to the

form of words in which it is drawn up, and as to its repugnance both to the circumstances and habits of the testator, and to his acts as they stand before the Court.

With respect to the material; it cannot be denied but that a man may write his will with any material he pleases: it may be imprudent to write it with a material liable to easy obliteration; but a will written in pencil is as valid as a will written in ink, [29] and so is a codicil. The material may be a circumstance to guide the Court in deciding whether the deceased intended it as a final disposition or not? but standing by itself it cannot be questioned: if, for the sake of argument, the presumption is admitted that if a man has written all his other testamentary acts with a more durable material, that which is written in pencil is not of equal weight; still if the party has done other testamentary acts in pencil, which stand undisputed, then that presumption falls to the ground. Though done with an unusual material, it is not done with an unlawful one, since by the law of England the greatest possible latitude is allowed in this respect; a will in chalk or slate is a good will; it may be written quocunque modo velit, quocunque modo possit; the testator may, like the Roman soldier, write it on the ground with his sword.(b)

Again, it is said that this paper has not the formalities which make it a solemn and perfect instrument; that it has neither date, attestation, nor seal. [30] To this we reply that it is in the hand-writing of the testator, and that therefore the Court is bound to receive it without those formalities.

As to the time at which it was written, if we were left to conjecture we should submit that there were good grounds for supposing that it was subsequent to the other testamentary acts; and at that time when the pencil writing was added to the other codicil, consequently that it was written upon a revision of all that he had done before; with respect, however, to this, it is no otherwise really material than that, in order to give it validity, it must be proved to have been written during the time that the testator remained of sound and disposing mind.

The words of the paper have been objected to; but we conceive it cannot be denied that any words of bequest which state the inclination of the deceased's mind have been determined to have the effect of direct dispositive words. A will may be good without dispositive words where the testator has not made the whole of his will in these words; the Court will look to his intention and to his acts.

It is said that the words are equivocal, and we admit that they are not so dispositive as "I give and bequeath." "I wish," generally speaking, is indicative of the will without the power of giving; but when the person wishing has the power as well as the inclination, when he has stated the inclination he is to be considered as having done the act.

Again, it is objected that the party might have put this into the same form that he has put the other codicils. To this we reply that we are to presume [31] that he knew what the law was with respect to the disposal of his personal property, and that his will thus expressed would be operative. Further, it is contended that the deceased does not give a correct description of the acts he wished to do; this would found something of an argument against his capacity; but we contend the description is not so varying and incorrect as would lead to the conclusions assumed by the other side; though inaccurate, it is not such an inaccuracy as the Court would consider of importance. He recites the legacy to Hall correctly, and afterwards gives the benefit to his other brother's children in remainder. But then the counsel on the other side, assuming the hypothesis that the legacies are accumulative, say that there would be no residue; we maintain that the argument may be taken the other way, that the deceased doubted whether he had sufficient property to carry into effect what he

(b) "*Quoniam militum testamenta juris vinculis non subjiciantur cum propter simplicitatem militarem quomodo velint, et quomodo possint ea facere his concedatur.*" Cod. lib. 6, tit. 21, sec. 3.

The Roman soldier was indulged with very peculiar privileges and immunities in making his will: it is presumed that this part of the argument has reference to the following passage in the Code:—"Proinde sicut juris rationibus licuit, et semper licebit, si quid in vaginâ aut clypeo literis sanguine suo rutilantibus adnotaverint (milites) aut in pulvere inscripserint gladio suo ipso tempore quo in prælio vitæ sortem derelinquant, hujusmodi voluntatem stabilem esse oportet." Cod. lib. 6, tit. 21, sec. 15.

intended; he was in trade, and his property subject to contingencies, and even if his legacies were to suffer a pro rata diminution, still the principal object of his bounty would have the largest proportion. It is then argued that as the legacies must be taken cumulatively there would be no assets. This might be an argument against their being considered as accumulative; but the door cannot be opened to that argument till the Court has declared whether the paper is testamentary or not. This Court has only to consider whether the paper is in such a form as will entitle it to probate: it is for another court to decide what will be the effect of it.

[32] The fourth article of the allegation has been opposed as pleading facts which will not aid the case, inasmuch as they are not the acts of the testator; they are acts, however, not without their weight, and, from their bearing on the present suit, extremely material to be brought to the notice of the Court.

The Court took time to deliberate.

Feb. 18.—*Judgment*—*Sir John Nicholl*. As the decision of the Court respecting the admission of the allegation may probably dispose of the whole case, I have been induced to consider it maturely: and it may be necessary also that I should state fully the conclusions at which I have arrived.

It has been truly said that the allegation goes little, if at all, further than to plead that the deceased was of sound mind when the paper in question was written. The date is not attempted to be fixed nearer than three years; it contents itself with pleading that it must have been written after the 27th of March, 1800, and before his derangement which took place in May, 1803.

The Court has endeavoured to ascertain, and has put it to the counsel to say whether, from the internal evidence arising from the papers, it could at least be fixed whether it was written before or after the two codicils of 1802. But there is nothing on this point beyond mere conjecture; the time is left at large for upwards of three years, nothing to shew whether it was written after the codicil of 1800; whether at the same time as the me-[33]-morandum at the foot of the codicil of May, 1802; or whether it was at some later and different time: the allegation pleads neither any declarations applying to it nor any recognition of it. The fifth article indeed sets forth some declarations of Mrs. Clarkson the residuary legatee, and of the executor, but not of the strongest sort; they merely go the length of stating that the paper was written prior to his derangement, and that she had advised the deceased to send to an attorney to have it more formally executed. But there is no averment that the deceased declared that this pencil writing was sufficient in its present form, and that he intended it should operate in its present state, nor any thing to that effect; still less is there any attempt to shew that the deceased had not full opportunity to write it in a more formal and complete manner, as he had done the other codicils.

Some question has been made whether the declarations of Mrs. Clarkson are admissible evidence? It has been said that she may be examined against the executor opposing the codicil, as a witness; if so, her declarations cannot be pleaded. But there are some doubts (which it is not necessary to decide) whether either her declarations or her depositions can be taken as evidence; she is a legatee under the codicil; and if the assets should fail, she may be more benefited as legatee under the codicil than as residuary legatee under the will. She is also the wife of the executor who has taken probate; and can the wife of the executor be examined as a witness?

The main, however, and indeed the sole ques-[34]-tion is, what is the description of the paper? And what was the intention of the deceased respecting it? Did he write it and intend it as a memorandum, concerning which he was to deliberate, and in case he should come to a final determination to make these alterations and additions, and thence to draw up a fuller and more formal paper? Or had he already come to that final resolution; and did he write this paper, meaning that it should operate in its present form? And having no intention to do any further act to give it effect? For I take it to be the duty and very function of the Court of Probate to decide *quo animo* the paper was written, was it *animo testandi*, or only something preparatory to his final disposition? This was the doctrine the (c) Court of Review held in

(c) When then, at what period, did the *voluntas testandi* exist in his mind *quoad* this instrument? It is admitted, as it must be, that when he subscribed his name, he was looking to some future act; the decision that this is his will would destroy

Matthews v. Warner, though the paper in that case was signed and dated, and expressly termed "this (d) my will." Now the intention of the testator in this respect can only be judged of and decided upon from due consideration of all the [35] circumstances before the Court. It has been objected that it is written in pencil; to this it has been replied that the deceased had a right to write his will with a pencil, or to write his will and three codicils in ink, and a fourth in pencil; and so he has undoubtedly, and it would be valid in law, provided the Court could be satisfied that he intended so to do. For instance, if he had added, I have written this codicil in pencil, but intend it shall operate as my will; or if it could be accounted for by shewing that he had no other materials, as it was permitted to the dying soldier to write his will with his sword in the dust. But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind, and as a codicil, or whether it was merely preparatory to a more formal disposition? The material with which it is written becomes a most important circumstance, and the importance of it is still further increased when the Court sees that the deceased made other codicils, all formerly written in ink, one before this paper, others possibly after it. Then the natural and rational conclusion is that this was a mere memorandum for future deliberation, and not a finished instrument intended at all events to become a part of his will, or, as far as it goes, to alter and controul both that previous will, and a codicil regularly executed.

Secondly, the same course of reasoning applies to its being neither signed nor dated. It is said that the law neither requires subscription nor date: this would be perfectly true if there had been other proof that the deceased intended it as a final [36] testamentary act. But when we are engaged in an enquiry whether it is finished or incomplete, the want of date and signature is also exceedingly important.

The third objection taken is that the paper is not in dispositive terms. To this it has been answered that terms of wish and request are frequently construed imperatively, and that in the paper of the 18th of March, about which there is no question, the same expressions are used. The answer may be true, but it does not remove the pressure of the objection upon the real point in the case: the natural and usual terms which a person adopts when he writes a paper intended as his final testamentary disposition are, "I give," or "I bequeath," not I wish to give: and although in the paper of the 18th of March the same expressions are to be found; yet that very paper is rather a confidential expression of his wishes, addressed to his niece Mrs. Clarkson, than a formal codicil; but in the two formal codicils of the 27th of March, 1808, and that of the 12th of May, 1802, the terms are dispositive, "I give," "I bequeath." The objection, therefore, though not of the most powerful cast, has nevertheless a bearing upon the consideration of the question whether this was intended as a final operative paper, or whether it was a loose memorandum for future consideration.

Fourthly, the same inference is to be drawn from the inaccurate manner in which the paper refers to the bequests in the will: the words are, "Instead of leaving 2000l. to my brother J. personally, I wish to leave the same to him and his [37] children:" whereas the fact is that he has left his brother J. 1000l. by his will, and 500l. by a codicil. This inaccuracy is rather characteristic of a loose memorandum than of an instrument finally and deliberately intended to operate. In this, as in some other passages, persons are only described by their initials: this again tends to the same conclusion.

Fifthly, it has been stated that if this paper should be established, the legacies will become accumulative; and if they are accumulative, that then the residue will fall considerably short of 3000l., to which extent it is obvious the testator intended to benefit Mrs. Clarkson. To this it has been truly answered that, if the deceased has made a will producing an effect different from his intention, the Court of Probate must nevertheless establish that will. But the question is upon an imperfect informal

the most general maxim I know of *voluntas testatoris ambulatoria est usque ad mortem*. See *Ld. Chancellor Rosslyn's judgment*, *Vesey*, jun. vol. iv. p. 210.

(d) 4 *Vesey*, jun. 186. "I appoint my good friend Mr. Edward Epine, and my good friend Mr. Edward Johnson, my executors, to see this my last will and testament complied with. Dated at Deptford, 2d Oct. 1785.

"WM. MATTHEWS."

paper; the evidence of intention from extrinsic circumstances is let in, and the Court only establishes a paper, labouring under such imperfection and informality, for the purpose of carrying into effect intentions clearly established. In this instance, however, it is not clear that the effect suggested would be produced; either that the legacies would be accumulative; or that if they should be so considered, that the residue would be insufficient: and therefore the Court does not rely upon this argument. But the consideration at least may, indeed ought in all instances, to go to the extent of putting the Court of Probate extremely on its guard against pronouncing for informal papers, which are to operate in conjunction with a complete will and codicil; if it were otherwise, it might happen that when these papers came to be construed together in another court, instead of carrying into effect the wishes and intentions of the testator, they might produce an effect totally contrary to them. Great caution therefore should be observed, and the Court should clearly be satisfied that the testator intended the paper should make a part of his will; and that once established, it cannot look to the effect.

Upon the whole of this case, the Court is of opinion that this instrument is to be considered as an incomplete, imperfect, and unfinished paper.

The testator had executed a complete formal will: he had added two codicils regularly drawn up by himself and fairly transcribed, to which he had affixed his signature. Considering, therefore, that the paper now propounded is a mere writing in pencil, on one of the instruments not dated, nor signed, describing persons by initials, and not even referring correctly to the will, it appears to be a mere loose memorandum of something that passed in his mind at the moment he was writing, and which possibly never again recurred to his recollection. And when the allegation propounding this paper offers nothing in support of it, beyond the mere handwriting and sanity of the testator; states no circumstances that can fix the date, or shew whether it was written four years before his death, or a few days only previous to his insanity; and in no manner whatever accounts for the imperfect form in which it is produced; I am of opinion that the circumstances [39] in the plea, taken in conjunction with the paper, would not be sufficient, if proved, to establish the codicil, and therefore I must reject the allegation.

SANDFORD v. VAUGHAN AND OTHERS. Hilary Term, Feb. 29th, 1809.—An allegation, propounding four papers, as containing together a will, admitted to proof.

[Applied, *Castle v. Torre*, 1837, 2 Moore, P. C. 156. Commented on, *Leslie v. Leslie*, 1872, Ir. R. 6 Eq. 336. See further, p. 128, post.]

Sir John Chichester, Bart., died on the 30th of September, 1808, possessed of large landed estates, and personal property to a very considerable amount. He left the following papers of a testamentary import:—

No. 1. "I, Sir John Chichester, of Upper Grosvenor Street, in the county of Middlesex, do give and bequeath to my friends, hereinafter mentioned, the following legacies, to be paid out of my personal estate, within one year after my decease. To the Rev. John Sanford, of Sherwell, the sum of ten thousand pounds sterling money, together with my furniture, in Grosvenor Street, and at Wickham in Kent, plate excepted. To the Rev. Thomas Hole, of George Ham, in the county of Devon, five thousand pounds. To the Rev. Henry Hutton, of Guy's Hospital, five thousand pounds. To the Rev. Thomas Boyce, of Brendon, in the county of Devon, one thousand pounds. To the Rev. Charles Davie, of Heanton, in the county of Devon, one thousand pounds. To [40] my servant, Robert Belringer, the sum of seven hundred pounds. To all my other servants, two years' wages; except Margaret Philips, to whom I give an annuity of thirty pounds a year, during her life. To Nicholas Mackin, late servant to my father, thirty pounds a year during his life. To Mr. Thomas Hole, son of the Rev. Thomas Hole, the sum of one thousand pounds. To Mrs. Pilcher, daughter of the said Thomas Hole, one thousand pounds. To Mrs. Vaughan, Mrs. Fry, and Mrs. Edwards, daughters of my late uncle William Chichester, five hundred pounds each. To Charlotte and Jane Sanford, daughters of the late John Sanford, of Ninehead, three thousand pounds each.

"27th May, 1808.

"JOHN CHICHESTER."

No. 2. "I, Sir John Chichester, of Upper Grosvenor Street, in the county of Middlesex, do give and bequeath to my friends, hereinafter mentioned, the following legacies, to be paid out of my personal estate, within one year after my decease.

"To the Rev. John Sanford, of Sherwell, in the county of Devon, the sum of ten thousand pounds sterling, together with my furniture, in my houses in Upper Grosvenor Street, and at Wickham, plate only excepted. To the Rev. Thomas Hole, of George Ham, in the county of Devon, five thousand pounds sterling. To the Rev. Henry Hutton, of Guy's Hospital, five thousand pounds. To the Rev. Thomas Boyce of Brandon, in the county of Devon, one thou-[41]-sand pounds. To the Rev. Charles Davie of Heanton, in the county of Devon, one thousand pounds. To Mr. Thomas Hole, son of the Rev. ——— Hole, one thousand pounds. To Mrs. Pilcher, daughter of the said Thomas Hole, one thousand pounds. To Mrs. Vaughan, Mrs. Fry, and Mrs. Edwards, daughters of my late uncle William Chichester, five hundred pounds each. To Charlotte and Jane Sanford, daughters to the late John Sanford, of Nynhead, three thousand pounds each. To my servant, Robert Belringer, seven hundred pounds. To my servant Margaret Philips, an annuity of thirty pounds a year, during her life. To Nicholas Mackin, servant of my late father, an annuity of thirty pounds a year, during his life. And I appoint the aforesaid John Sanford, clerk, my executor. In witness whereof I have hereunto set my hand and seal, this twenty-eighth day of May, one thousand eight hundred and eight.

"Witness, Abraham Scott.

"JOHN CHICHESTER, L. S.

"May 29th, 1808.

"I give to Mr. Scott, of St. Alban's Street, five hundred pounds.

"JOHN CHICHESTER."

No. 3. "Whereas I have, by a paper signed and sealed by me, dated the twenty-eighth and twenty-ninth days of this instant May, given several legacies to persons therein described; now I do hereby give to Mr. William Sanford, of [42] Bond Street, wine merchant, the sum of 3000l. To Mrs. Jekyl of Bath 1000l. To Elizabeth Sanford of Bath, spinster, 1000l. and to Major Sanford of Bath 1000l. To Mrs. Standard, daughter of Mrs. Mason, 100l. To Mr. Abraham Scott 500l. in addition to the 500l. that I gave to him by the paper signed by me, the 28th day of this month. I give to Sir Henry Oxenden, of Broome, in the county of Kent, Bart., to the Dowager Lady Langham of Wimbledon, and to my friend Dr. Bridges of Clifton, each, a ring of the value of fifty guineas as a small token of my remembrance. Witness my hand and seal this thirty-first day of May, one thousand eight hundred and eight.

"JOHN CHICHESTER, L.S.

"Signed and sealed in the presence of S. Harman."

"As I have this day given directions to Mr. Harman to prepare a will for me, disposing of my paternal and maternal estates: but lest I should die before the same can be got ready for my signature, I do hereby give all the timber growing upon the estates of my mother, which I inherit from her, that is fit and proper to be cut down, to George Chichester Oxenden, second son of Sir Henry Oxenden, Bart., for his own absolute use and benefit.

"JOHN CHICHESTER.

"Witness, S. Harman."

[43] No. 4. "I give my estate of Ashton, in the county of Devon, to George Chichester Oxenden, second son of Sir Henry Oxenden, Baronet, of Broome, in the county of Kent.

"I give the house in Seymour Place, for which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber which I have ordered to be cut down) to the Rev. Dr. Sandford, of Sherwill, in Devonshire.

"Signed Sept. 3, 1808.

"JOHN CHICHESTER, L.S.

"In the presence of Thomas Humby, Wm. Williams, Charlotte Whitehouse."

No. 5. The draft of a will of very considerable length, interspersed with frequent interlineations and erasures, and concluding thus—

"In witness whereof I have hereunto set my hand and seal; that is to say, my hand to the sheets thereof, and my hand and seal to the last sheets thereof, this day of _____, in the year of our Lord, 1808."

Then followed an attestation clause, but not subscribed by witnesses.

No. 6. A fair copy of the last-mentioned paper prepared for execution.

An allegation was brought in on the part of the Rev. John Sandford, the executor named in No. 2, propounding 1, 2, 3, and 4, as containing together the last will and testament of the deceased.

[44] Swabey and Phillimore for the next of kin, (a) opposed the admission of that part of the allegation which propounded No. 1 as forming any part of the will of the deceased, on the grounds that it was obviously the mere instructions or rough draught from which No. 2 was transcribed: that it would be a dangerous precedent to allow instructions to go to proof together with the will which was framed from them. To what purpose would it be to encumber the proceedings with superfluous and unnecessary evidence? Safer far was it for the Court to take its stand here, as it were on the threshold of the cause, and reject one of these instruments altogether. The force and effect of it might be as well discussed in this as in a subsequent stage inasmuch as not a single circumstance was alleged in the plea, which tended in any way to shew that the deceased had any idea that both of them would stand as his will: the question therefore, was one to be decided on principle; and if reference was had to the civil law for authority, whatever might be the inclination of that law in some instances, as to (b) cumulative lega-[45]-cies; yet as to this particular point it spoke a positive language, since the following passage from the Digest stated a case analogous to the one at issue:—"Binæ tabulæ testamenti eodem tempore exemplarii causâ scriptæ, ut vulgò fieri solet, ejusdem patris familias proferuntur; in alteris centum, in alteris quinquaginta aurei legati sunt Titio: quæres utrum et quinquaginta aureos, an centum duntaxat habiturus sit? Proculus respondit; in hoc casu magis hæredi parcendum est, ideoque (Dig. lit. 31, tit. 1, leg. 47) utrumque legatorum nullo modo debetur, sed tantummodo quinquaginta aurei." Sir John Chichester evidently never intended the legacies to operate cumulatively; but, if probate were granted both of No. 1 and No. 2, they might, from that circumstance alone, receive in a court of construction such an interpretation as would double the bequests, and defeat the intentions of the testator; it was needless in this case to resort to extrinsic evidence for proof of the tes-[46]-tator's mind: the internal evidence arising from the instruments themselves was irrefragable. Did not the appointment of an (d) executor, in No. 2, shew that that paper, and not No. 1, was the real testament? and who could read the preamble to No. 3 without being convinced that it was the intention of the deceased that No. 1 and No. 2 should not both have a testamentary effect?

Arnold and Adams for the executor, deprecated the idea of rejecting a paper of this nature in the handwriting of the deceased, without allowing it to go to proof; and contended that before the Court took so decided a step, it must be quite satisfied that No. 1 could not have any testamentary operation whatsoever; many of the arguments offered on the other side were premature, more especially those which related to cumulative legacies; they might, perhaps, be introduced with more effect into a subsequent stage of the proceedings; but at present it was essentially and indispensably necessary that the Court should have all the papers before it in order that it might arrive at a correct opinion, whether or no they were all entitled to probate.

Judgment—*Sir John Nicholl*. The ultimate question will be, whether these four papers can stand as the will of Sir John Chichester? But that rests on very different

(a) The next of kin who were entitled to as much of the property of Sir John Chichester as might be undisposed of by will were all cousin germans; viz. Mrs. Vaughan, the Dowager Lady Langham, Mrs. Jekyll, Sir Henry Oxenden, Bart., Mrs. Fry, Mrs. Edwards, William Sandford, Esq., Miss Eliz. Sandford, and several others.

(b) Generally by the civil law the burthen of proving the case rested on the plaintiff on this principle: "Ei incumbit probatio qui petit, non qui negat;" but where a specific legacy was bequeathed in a will, and repeated totidem verbis in a codicil, the rule of law was considered to be changed; and the heir was expected to bring proof to shew that the testator did not intend the two bequests to take place. "Quinquaginta testamento tibi legata sunt; idem scriptum est in codicillis postea scriptis, referat, duplicare legatum voluerit, an repetere; et oblitus, se in testamento legasse, id fecerit, ab utro ergo probatio ejus rei exigenda est? primâ fronte æquius videtur ut petitor probet, quod intendit, sed nimirum probationes quædam a reo exiguntur. Nam si creditum petam, ille respondeat solutum esse pecuniam: ipse hoc probare cogendus est, et hic igitur, cum petitor duas scripturas ostendit, hæres posteriorem inanem esse, ipse hæres id adprobare judici debet." Dig. lit. 22, tit. 3, leg. 12. See also, as connected with the subject of cumulative legacies, Dig. lit. 30, tit. 1, leg. 34.

(d) Swinburne, part 1, s. 3, p. 14.

ground from the point which is more immediately before the Court; viz. whether I can in the present [47] stage of the cause, decide that one of them must be rejected.

In order to establish the four papers, the Court must be satisfied that it was the intention of the deceased that all of them should compose his will: supposing, therefore, that no other facts should be proved than those which are stated in this allegation, the court will have very little difficulty in deciding that No. 1 cannot form a part of the will.

No. 2 is almost verbatim a transcript from No. 1; it is of posterior date, and contains the appointment of an executor. It is true that it omits legacies to several servants which are to be found in No. 1; but it is to be observed that No. 3, a paper regularly signed and attested, has a direct reference to No. 2, but none to No. 1.

If the Court were bound to decide on these circumstances, it would consider No. 1 as the mere draught from which the more formal will was made; and I take it to be quite clear that, where instructions are subscribed as preparatory to a will, the execution of that will entirely supersedes the instructions.

It might be dangerous to send both these papers to a Court of Construction, lest they should be considered as doubling the legacies: that they were not intended to be cumulative is evident from this, amongst other circumstances, that there is a specific legacy of the same furniture in both instruments; if both papers were intended to operate, this bequest would never have found its way into the second paper.

[48] It is not, however, necessary to decide this point now; but I have thought it material to state my present impressions, in order that the parties may be able more perfectly to instruct the cause.

I see no objection to let it stand in the allegation, that the deceased with his own hand wrote No. 1: I am not bound on that account to pronounce for it. Facts may come out upon the examinations of the witnesses, which may put the case in another light; but if the Court sees them in the same point of view in which they now appear, it will not pronounce for it.

Upon this understanding I admit the allegation to proof.

An allegation propounding an imperfect and unexecuted paper, rejected.

Another allegation was offered on a subsequent day, in this cause on the part of James Buller, Esq., William Ashford Sandford, Esq.; and the Rev. Thomas Hole, three of the executors named in No. 5 (see page 43), for the purpose of propounding that instrument as the last will and testament of the deceased.

This allegation consisted of fourteen articles, and detailed a variety of circumstances which had occurred within the four last months of the deceased's life to account for the unfinished state of the instrument.

Swabey and Phillimore for the next of kin, contended that the allegation was objectionable [49] both as to form and substance; as to form, on account of the vague and diffuse style in which it was drawn up; as to substance, inasmuch as if all the facts contained in it should receive the most full and ample proof, they would, nevertheless, be utterly insufficient to establish No. 5 as the will of Sir John Chichester.

Burnaby and Stoddart, on the behalf of the executors named in No. 5, argued for the admissibility of the allegation.

Judgment—Sir John Nicholl. The question which the Court has to decide is, whether this allegation is admissible? Objections have been taken both as to the form and substance of it: it is said to be too diffusely drawn—and so undoubtedly it is; many circumstances, particularly in the early part of this history, are too minutely detailed; whereas, in other parts, where it ought to be more minute and specific, it is too much compressed. It is highly desirable undoubtedly to compress pleas of this nature as far as may be consistent with a perspicuous exposition of the leading facts of the case: the more distant parts of the statement, which cannot bear strongly on the point at issue, ought not to be too diffusely spread out; and where the object is to deduce a continuance of intention, it is obvious that the latter part of the period becomes the most important; and it is there where we should expect to find the most stringent facts.

Another objection to the formal part is the enumeration of all the next of kin by name at the [50] conclusion of every article; and this occupies nine or ten lines in each of them. It has been a very convenient rule of modern practice to omit the repetition of this recital; and it is most extremely desirable that every thing should

be omitted which, in however trifling a degree, may tend to increase the expense of the parties contesting the suit.

If, however, the objections were merely technical, or confined to the circumstance of the plea being too diffuse or too much compressed, the Court would refer it back to the proctor, to be amended and altered under the advice of his counsel.

To proceed, therefore, to the substance of the allegation: since it is clear that no advantage can result to the parties from the admission of it, unless there is a prospect that it will establish their case.

Where an unfinished draft is propounded, it must be shewn that the deceased was prevented, by invincible necessity, or by the act of God, from completing it. A person certainly may, in the last moments of his life, so recognize a testamentary paper written twenty years before, as to give it effect and validity, without any formal execution: the length of time during which it had continued unfinished would not of itself be sufficient to induce the rejection of such a paper, although it would create a circumstance of strong presumption against it.

[The Court then commented at considerable length upon the several circumstances which had been alleged in the plea, and concluded with the following observations:—]

Upon the whole, considering that there are two [51] papers executed and attested in May; that they contain no disposition of the residue; that the draft in question was prepared four months anterior to the death of the deceased; that he had abundant opportunity to execute it; that subsequent to its being thus prepared, viz. on the 3d of September, he executed a will for the disposal of real estates; and that during his last illness he made no express reference to this draft: I think the allegation does not set up a case which is likely to succeed; indeed, if all the facts laid in it should be proved, I see no prospect that No. 5 could be established.

I shall not, however, proceed absolutely to dispose of this allegation; but shall allow the parties an opportunity of amending and supplying the deficiencies of it. Feeling, however, it my duty to adhere firmly to the principles I have laid down, if the deficiencies I have pointed out cannot be (b) supplied, I shall decidedly reject the plea.

MAIDMAN v. ALL PERSONS IN GENERAL. Prerogative Court, Easter Term, March 23rd, 1809.

Thomas Gilbert died in 1771, having by will bequeathed a legacy in the following terms, viz. :—"To the preacher at Kingsland Chapel a long [52] annuity of four pounds five shillings and sixpence per annum, on condition that my wife keeps her pew without any further subscription, so long as divine service is performed there every Sunday morning, or till the time limited for their expiring."

Henrietta Gilbert, his wife, and James Gilbert, were the executors appointed by this will and a codicil, and the wife was residuary legatee.

In October, 1771, the widow alone proved the will and codicil: she afterwards intermarried with Thomas Bolas, and died in the course of the year 1772. Bolas, as administrator of his wife, took out letters of administration with the will and codicil annexed of the unadministered goods of Thomas Gilbert. Bolas is since dead; and no legal representative to Henrietta his wife appears to exist; and for want of such legal representative to administer to the unadministered goods of Thomas Gilbert, the preacher at Kingsland Chapel cannot realise his annuity.

Accordingly, the Reverend James Maidman, the officiating minister at the said chapel, took out a decree, citing all persons interested in the goods of Thomas and Henrietta Gilbert, deceased, to take out letters of administration with the will and codicil annexed of the said Thomas Gilbert, or to shew cause why the same should not be granted to the Reverend James Maidman, limited to the interest of the said Thomas Gilbert, in the annuity of four pounds five shillings and sixpence, and so long as divine service should be continued to be performed in the chapel, or until the time limited for their expiring.

[53] An application was now made to the Court, by motion of counsel, to permit the administration to go to the syndic of the governors of St. Bartholomew's Hospital, who are the patrons of the chapel, instead of to the officiating minister.

(b) In consequence of this permission a second allegation was tendered to the Court, on the behalf of the executors, named in No. 5, which, after undergoing considerable discussion, was rejected as inadmissible.

The Court hesitated on the ground that the decree had issued on the behalf of Mr. Maidman, and thought it questionable whether it would not be necessary to take out a new decree.

April 19.—*Sir John Nicholl*. I shall allow the administration in this case to go out to the syndie of the governors of St. Bartholomew's Hospital, instead of to Mr. Maidman. In point of practice, it is not uncommon upon a decree issuing to shew cause why administration should be committed to A. B. a creditor, to substitute C. D. another creditor, on the day assigned for the appearance of the parties interested, and to suffer administration to pass to C. D., though not the person in whose name the decree originally went.

This is an analogous case.

GREEN v. SKIPWORTH AND OTHERS. Prerogative Court, Hilary Term, March 23rd, 1809.—An allegation propounding a will made by interrogatories, admitted to proof.

Thomas Green, of Little Thurroch, in the county of Essex, died on the 11th of December, 1808, leaving personal property to the amount [54] of nearly 8000l. His widow prayed probate of the following testamentary schedule written in pencil:—

"I shall leave Mrs. Green all the stock, effects, and improvements, and as to any thing else, I shall speak to you again, sir."

"GEORGE KAVANAGH, JOHN MILLS EVANS."

"Do you wish now to give any further directions as to farms or otherwise?"

"Not at present."

"GEORGE KAVANAGH, JOHN MILLS EVANS."

"Quere—At the instance of Mrs. G. and Mr. Wilson."

"In case of any thing happening to you, who do you wish to have the farms—the Skipworths, Mr. Wilson, or who?"

"Answer—Mrs. Green."

"GEORGE KAVANAGH, GEORGE DANDRIDGE, JOHN MILLS EVANS."

The allegation in which the schedule was propounded pleaded—

"That the deceased having been taken suddenly ill on the 10th of December last, sent a message by Mr. Dandridge, a neighbour, to Mr. Evans, an attorney, desiring his immediate attendance to make his will.

[55] "That Evans, immediately on receiving the message, went to the deceased, and found him extremely ill; and although of perfect mind, scarcely able, from bodily pain, to hold much conversation; that the deceased himself first addressed Evans, by observing that he found himself scarcely able to talk to him; whereupon Evans requested him not to hurry himself, and sat down on the side of his bed; and, after a short interval, observing the deceased again preparing to speak to him, said that it might save him unnecessary exertion, and probably be the best means of carrying his purpose into effect, if he would allow him to ask him a question or two, to which the deceased signified his assent; that Mr. Kavanagh, the apothecary who attended the deceased, was in his room, and Evans in his presence proceeded by asking the deceased whether it was his wish to give any instructions for his will? to which the deceased immediately replied, 'I shall leave Mrs. Green all the stock, effects, and improvements; but as to any thing else, I will speak to you again, sir.' Whereupon Evans wrote down such his reply with a black-lead pencil; and the same having been read over to the deceased, he signified his approbation thereof, and Evans and Kavanagh subscribed their names in pencil; and Mr. Wilson, a relation, being in the house, was called up into the room, and the clause was again read over to the deceased, and he was asked by Evans if that was what he wished, to which he distinctly answered, 'Yes.' That he was then also asked if he wished to give any farther instructions as to [56] farms or otherwise; but appearing to suffer an increase of pain and bodily illness, he replied, 'Not at present.' That this question and reply were written down by Evans, and attested by him and Kavanagh.

"That the several persons then left the room, and shortly after the deceased's wife came into the parlour to them, and requested them to return into the deceased's room, as he had expressed a desire to give further directions. Accordingly they went back, and found the deceased somewhat revived, but still in great pain; and Mr. Dandridge, who was in the house, was also called up; that Evans, having noticed how the deceased had appeared to suffer from his efforts to speak, observed that every

means should be used to save him as much as possible from such exertion ; and therefore, if it was approved of, he would ask the deceased any one or more questions they might wish, and would endeavour to put the same to him in as few words as possible ; which proposal was assented to by all persons present, and also by the deceased himself ; that thereupon the following question was put, being first written down with a black-lead pencil, by Evans, ' In case of any thing happening to you, who do you wish to have your farms? the Skipworths, Mr. Wilson, or who?' to which he replied, ' Mrs. Green : ' and the question being again read over to him, he repeated the same answer ; that Mrs. Green being requested to withdraw, the question was again put to him in her absence, and he again replied in the same manner ; whereupon Evans [57] wrote down the reply, and together with Kavanagh and Dandridge subscribed it.

" That immediately after the premises the deceased's bodily pain much increased, although he still retained the right use of his mental faculties ; but shortly afterwards he became wholly worn out with pain, and was rendered incapable of proceeding further in the giving instructions for and executing a more formal will, and he died on the middle of the following day."

Three nephews (the next of kin) of the deceased contested suit against the widow.

Adams and Jenner for the nephews, argued that this was not a testamentary paper, and that the allegation did not uphold it as such.

Arnold and Swabey for the widow. The paper is in an extraordinary form ; but the circumstances under which it was written are so extraordinary as to justify that form. The testator was in extremis and so affected, that although he was in the full exercise of a testamentary capacity, he was scarcely able to articulate. The law allows a will to be made in any manner ; undoubtedly, therefore, it may be made by interrogatories. Although the deceased intended these answers to be formally extended into a regular will, yet this intention having been defeated by the intervention of death, they must be considered as instruction ; and as such are entitled to the effect and operation of a will.

Judgment—*Sir John Nicholl*. This paper is certainly very defective in point [58] of form ; but it is intelligible, and is rendered still more so when explained by the circumstances stated.

The objections taken are, first, that on the face of it it is not testamentary.

Secondly, that the allegation does not profess such an explanation as would entitle it to probate.

A will made by interrogatories is valid ; but undoubtedly wherever a will is so made the Court must be more upon its guard against importunity,^(c) more jealous of capacity, and more strict [59] in requiring proof of spontaneity and volition than it would be in an ordinary case. But if there is clear capacity, if there is the *animus testandi*, and if the intention is reduced into writing, the Court must pronounce for it.

(c) Swinburne is very full and explicit upon this topic. " The third case is when he that is at the point of death, and hardly able to speak, so as he may be understood, doth not of his own accord make or declare his testament, but at the interrogation of some other, demanding of him whether he make this person or that his executor, and whether he give such a thing to such a person answereth, Yea ; or, I do so—in which case it is a question of some difficulty whether the testament be good or not ; neither can it be answered simply, either negatively or affirmatively, but diversely in divers respects ; for if he which did ask the question of the testator be suspected, or be importunate to have the testator to speak, or do make request to his own commodity ; as if he say, Do you make me your executor ; or, Do you give me this or that? and thereupon the testator answer, Yea. In this case it is to be presumed that the testator did answer yea, rather to deliver himself of the importunity of the demandant, than upon devotion or intent to make his will, &c. &c. &c."

" But if the person that maketh the motion be not any way suspected, and it doth appear withal by some conjectures that the sick person had a desire to make his will, as if the sick person sent for his friend, who, being come unto him, asketh him whether he make this or that man his executor, which otherwise were to have the administration of his goods if he died intestate ; to whom the sick person answereth, Yea ; or, I do make him my executor : in this case the testament is good." Swinburne, part ii. sec. 5.

The testamentary act in this instance originates entirely with the deceased ; it is proceeded in by question and answer, on account of the extreme difficulty he experienced in the articulation of his words, and not from any want of volition.

If the facts pleaded shall be proved, they will be sufficient to shew that these answers were intended for instructions : and, in point of law, if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions will operate as fully as a will itself.

It has been observed that the act was rather that of the persons by whom the deceased was surrounded than of the deceased himself. But under the circumstances the precautions used were very proper ; the exertions of speaking might have been fatal, and have prevented him from proceeding to express what his intentions were ; the resort therefore to question and answer was highly judicious ; it was the best practicable mode of collecting his wishes and intentions, as far as he was capable of expressing them, and was adopted with the concurrence of the persons present, as well as of the testator himself.

[60] For the present, then, assuming, as I am bound to do, that this allegation (*d*) contains an exact representation of the facts, I am of opinion that this paper, as far as it goes, does contain instructions for a will, and therefore if the statement shall be established by proof, the Court must comply with the prayer of the allegation, and grant probate of the paper propounded.

DEVEREUX v. BULLOCK AND BULLOCK BY HIS GUARDIAN. Prerogative Court, Easter Term, April 19th, 1809.—Unfinished instructions not entitled to probate.

[Applied, *Castle v. Torre*, 1837, 2 Moore, P. C. 133.]

Richard Bullock, a merchant and shipbroker, of the city of London, died on the 13th of May, 1806, possessed of personal property exceeding in amount £30,000, and a small (*e*) freehold estate. On the 31st of May, in the same year, the Reverend John Bullock, brother of the deceased, and the only next of kin, administered to his effects, as having died intestate ; he and a niece (the daughter of another deceased brother) being the only persons entitled to the distribution of his property.

[61] The present suit was instituted in 1807 by the Reverend John Devereux, who cited Mr. Bullock to shew cause why the letters of administration granted to him should not be revoked ; and asserted himself to be a legatee in the following will or testamentary schedule :—

“This is the last will and testament of me, Richard Bullock, of Cushion Court, Broad Street, London, merchant. I give and bequeath to the Reverend John Douglas, of Castle Street, Holborn, in the city of London, two thousand pounds bank stock. I give and bequeath to my brother, John Bullock, for and during his natural life, one annuity or clear yearly sum of two hundred pounds, to be issuing and payable out of, and charged, and chargeable upon the long annuities standing in my name in the books of the Governor and Company of the Bank of England, and to be paid and payable to him when, and as the said long annuities shall become due and payable ; and from and after the decease of my said brother, I give and bequeath the said annuity of two hundred pounds unto the said John Douglas, his executors, administrators, and assigns, absolutely for ever. I give and devise unto my servant Sarah Robinson, and my godson Richard Lynott, all those my two freehold messuages or tenements with the appurtenances, situate and being in Cushion-[62]-court aforesaid ; to hold to them for and during their natural lives, and the life of the survivor of them ; and from and after the decease of the survivor of them, I give and devise my said two messuages or tenements, with the appurtenances, unto the said John Douglas, his heirs and assigns for ever. I give and bequeath unto the Reverend John Devereux, of White Street, Moorfields, London, all my interest in the lead mines company, or society, held in Martin’s Lane, Cannon Street.”

It appeared that the deceased had duly executed two wills ; one on the 18th, the other on the 21st of November, 1799 ; the latter of which continued in existence till

(*d*) This cause came on for hearing in Michaelmas Term, viz. on the 16th of December, 1809, when the facts detailed in the allegation being fully substantiated by the evidence of the several persons who were present during the transaction, the Court decreed the paper propounded to be entitled to probate.

(*e*) About £120 per annum.

within a few weeks of his death ; these instruments were both before the Court in a cancelled state ; the contents of them were nearly similar.

The evidence adduced to give testamentary effect and validity to the paper now propounded was as follows :—

Mr. Andrew Lee deposed, “That about the end of March or beginning of April, 1806, Mr. Michael Collins, his clerk, being then about to live in the service of Richard Bullock, was, in consequence thereof, several times with the deceased ; and on one day, happening about that time, the deceased sent his will, dated the 21st day of November, 1799, to the deponent, opened and cancelled, by the signature of his name being struck through ; [63] and the same was so brought by Michael Collins, together with a verbal message to draw or prepare a new will for him ; that being then confined by the gout, and unable to go out, he sent a message back to inform him thereof, and that it was impossible for him to make a new will without proper or further instructions ; and having afterwards, during the time he was so confined by severe indisposition, received many pressing messages to attend the deceased and make his will, he, as soon as he found himself able to go out in a coach, sent a verbal message to the deceased to inform him that he would wait upon him on that day, which was the 5th of May, 1806, if agreeable to the deceased ; and the answer he received to such message was delivered to him verbally by Michael Collins, informing him that Mr. Bullock had been so fatigued by persons calling to see him that day, that he had then composed himself to rest, and would be glad to see the deponent on the next day ; and accordingly on the next day, being the 6th of May, 1806, he went in a coach to the deceased, and was conducted into the bed-room, where he lay confined to his bed by illness ; and he then sat down and conversed with the deceased on several subjects, for some little time ; and the deceased not having in any manner alluded to his desire of having a new will made, and the deponent being rather surprised thereat, as he considered the several messages he had received to attend the said deceased and make a new will for him, came from him, took occasion to mention the subject himself, by asking [64] if he did not wish to have a new will made ? to which the deceased answered, he did ; and having then given the deponent some instructions verbally, as to the alterations he wished to have made in the disposition of his property ; and the deponent having then brought with him the cancelled will, dated the 21st day of November, 1799, immediately proceeded to draw or prepare a new will from the verbal instructions which the deceased then gave him, in respect to such alterations he wished to have made in the disposition of his property by such aforesaid cancelled will, and the deceased having directed that an annuity of £50 should be given to his servant, Sarah Robinson, for and during her natural life, and he having accordingly inserted such bequest in the will he was so preparing, and finding immediately afterwards, from the deceased’s own instructions, that the said annuity was to be made chargeable on his two freehold messuages or tenements, in Cushion Court ; and that a like annuity, chargeable on the same premises, was to be given to the deceased’s godson, Richard Lynott ; and also that the said two freehold messuages were to be devised to them, the said Sarah Robinson and Richard Lynott for their natural lives, and the life of the survivor of them, he, the deponent, thereupon, of his own accord, and without any directions from the deceased, struck out the legacy or bequest of £50 a year to the said Sarah Robinson, because the said two intended annuities were, as aforesaid, to be charged on the said two freehold messuages, so as aforesaid, intended to be devised [65] to them the said Sarah Robinson and Richard Lynott, and then proceeded in preparing the will from the verbal instructions of the deceased ; and having then come down to a legacy or bequest of the interest in the lead mines company or society, held in Martin’s Lane, Cannon Street, London, which the deceased directed to be given to the Rev. John Devereux ; and the same having accordingly been inserted in such intended will, he directed that Mr. James Williamson and Richard Lynott should be appointed his executors ; but not having disposed of the residue of his personal estate, or given any directions respecting the same, the deponent asked him if it was his intention to leave the same to his executors, or that they should take it ; and on the deceased answering no, the deponent told him that he must leave some kind of legacy to the said Mr. Williamson, otherwise he would take the residue of his personal estate as it was not disposed of ; and the deceased, after some consideration, not having made up his mind as to what legacy should be given to the said Mr. Williamson, or whether he would give any further or other legacies by his intended will, told the deponent to

take the papers away with him, meaning the new will, and a copy of the deceased's late brother's will, which he had made Mary Robinson, the daughter of his servant find for him in the early part of this transaction ; and he saith, that to the very best of his recollection he thinks (but cannot depose thereto with certainty) that when he had finished writing the will, so far as the deceased gave him instructions, he read the same all over to [66] him, but not for the purpose of obtaining his approbation thereof, not thinking it of any consequence till the will should be completed ; but he is certain that the deceased well knew and understood the contents thereof, as he dictated the same, and more especially if the deponent read the same to him, which he really thinks he did, for he, the said deceased, was, during all the time hereinbefore deposed of, of sound, perfect, and disposing mind, memory, and understanding ; and capable of doing anything requiring thought, judgment and reflection. That when he took the will away with him as directed by the deceased on the 6th of May, the deceased, though evidently desirous of a little time to consider what legacy he should leave to the aforesaid Mr. Williamson, and how he should dispose of the residue of his personal estate, did not, as the deponent recollects, desire him to call again in a few days, or in a short time, that his will might be completed, or to that effect ; for if he had, the deponent would have called on him the very next day for that purpose, whereas he waited, expecting to be sent for, till Saturday the 10th of May ; that he never received any message from the deceased on the subject of his will, or to attend him from the 6th till the 10th of May, for, if he had, he should certainly have gone on either of the intervening days, that is to say, on the 7th, 8th, or 9th of that month, for, though he continued weak in his feet, he was not confined to the house, but could go out in a coach. That on the 10th of May he did receive a verbal message as from the deceased (but did not see the messenger), saying that Mr. Bullock wished [67] the deponent to come to finish his will, and that his brother was with him, and wished him to come ; and accordingly he took a coach and went to the deceased's house, where he saw the Rev. John Bullock, of whom he enquired if his brother was in a competent state to make a will, to which Mr. Bullock answered he was, and the deponent then went up stairs into the deceased's bed-room, where he lay confined to his bed by the illness of which he died ; he sat down by the deceased's bed-side, and either Mr. Bullock or Sarah Robinson the deceased's housekeeper told the deceased that Mr. Lee was come, upon which, as he lay in bed, he turned his head and looked at the deponent, and then the deponent introduced the subject of his will by asking him if he would choose to leave his niece anything, or to that effect, but the deceased made no answer but turned his head away again, and did not utter a word during the whole time the deponent remained with him ; upon which the deponent, imagining that the deceased did not choose to do anything further respecting his will at that time, left the room and came away, but he did not imagine that the deceased was at such time incapable of proceeding with his will, as he did not know that he, the deceased, was in the exhausted state of body and mind pleaded and set forth in the fifth article of the allegation, for the deponent did not remain with him so long as a quarter of an hour at the time articulate, and never afterwards saw him ; and he says the testator did give, will, dispose, bequeath, and do in all respects as in the said paper-writing marked A is contained, but he cannot take [68] upon himself to swear that the deceased never departed from his intentions therein expressed, or that the said deceased would have executed the said paper-writing as his last will and testament had the same been completed even on the next day, because he was a person very changeable, but if it had been completed at the time the deponent wrote the said paper-writing, he does not doubt that the deceased would then have executed it."

Sarah Robinson deposed, "That some time in February, 1806, the testator was taken ill of the illness of which he died, and was confined to his room, and very much and almost chiefly to his bed, from that time till his death, though he was occasionally dressed and sat up a little in his room. That one day happening about a fortnight or three weeks before Easter day next before his death, the deceased gave her a key of a box which stood in his room, in which he kept his papers of consequence, and told her to give him thereout a certain paper which he described to her ; and when she had so done, he told her that it was his will, and desired her to take notice of what he was then going to do, and then he run a pen with ink through his name subscribed thereto, and said, there, take notice that I have run my pen through my name, and this will is now no more. I shall make a new will when Mr. Lee can come. And after he had so

cancelled his will, he several times sent (and among others sent the deponent and her daughter) to Mr. Lee's house to enquire how he was, and the answer that was always brought back was, that he was extremely ill, and unable to get out, or to that effect. [69] That on Easter Sunday he complained to the deponent of having found a great alteration in himself for the worse, and expressed a great anxiety for Mr. Lee to come to make his will, and said that he intended to leave the deponent fifty pounds a year, and asked her if she thought that enough, to which she answered it was; and he said if she thought it was not enough she should have more; and he further said he thought that he should leave his godson, young Lynott, one of the houses in Cushion Court, and that he would leave something to the bishop, meaning the Roman Catholic bishop, the Rev. John Douglas, for the Blind Charity in St. George's Fields; and about six o'clock in the evening of Easter Sunday he sent the deponent to Mr. Lee's to enquire how he was, and whether he was able to come out; but the answer was that Mr. Lee was so bad he was unable to come out or to help himself to any thing; and again, very late in the said evening, and also in the evening following, the deceased sent the Rev. John Devereux to enquire how Mr. Lee was, and whether he was able to come to him; but Mr. Lee continued confined by indisposition for some weeks, and was not able to come to the deceased till within a week or ten days before his death, about which time Mr. Lee came in a coach, and was from thence assisted up stairs to the deceased's bed-room; that after Mr. Lee had left him, the deceased told the deponent that he had talked to Mr. Lee so long, and was so exhausted, that he could not talk to him any longer, and that Mr. Lee was to come to him the next day, [70] but that he had taken care of the deponent, or he expressed himself to that effect. That the deceased, expecting Mr. Lee daily to come and finish his will for him, expressed great anxiety at finding he did not come, and a messenger was sent every day, after the said day when Mr. Lee came as aforesaid and began to make the said will for the deceased, to know how Mr. Lee was, or information thereof was daily brought to the deceased's house by the clerk or servant of the said Mr. Lee, who used to call to enquire how he was. That on the Thursday or Friday next before the day on which the deceased died (which happened on a Tuesday, he having become extremely weak and low, and evidently near his dissolution), the deponent took occasion to mention to the Rev. John Bullock that he had not signed his will, and the Rev. John Bullock thereupon recommended that Mr. Lee should be sent to, and the deponent thereupon sent her daughter for that purpose, who brought back an answer that Mr. Lee was too ill to come out, and Mr. Lee did not come till Saturday, the 10th of May, and he was then shewn into the deceased's bed-room, but he was then so exhausted and weak, that though he was spoken to, and understood what was said, he was unable scarcely to give any answer, and it was therefore judged improper to proceed with his will, and he continued in that state all that day, and on the next he became speechless, and so continued till he died on the 13th of the said month of May (being Tuesday), without having had sufficient capacity of mind to complete his aforesaid will."

[71] Mary Ann Robinson (the daughter of the preceding witness) deposed, "That about noon on Thursday the 8th of May, her mother told her to go to Mr. Lee's house and to inform him that the Rev. Mr. Bullock wished him to come to the deceased's house immediately if he was able to come out, but did not say for what purpose he was wanted; accordingly she delivered this message to Mrs. Lee, who returned for answer that Mr. Lee was very ill and unable to come out.

"This witness spoke also to Mr. Lee's coming on the 10th, and remaining a very short time in the bed-chamber of the deceased, and added that the deceased was during that day in a very weak and exhausted state, notwithstanding which he did in the course of that day speak to the deponent about some money he wished her to carry to the bankers, which she accordingly did."

John Lynott deposed to the deceased's having sent to him during his last illness to ask him to be one of his executors, and to his telling him that he had given instructions for the making of his will, and that he intended to invest a sum of money in the name of the trustees for the use of the Roman Catholic College.

Dorothy Lynott (wife of the preceding witness) deposed to the deceased's expressing to her his wish that her husband should be one of his executors, to his telling her that he had taken care of her little boy, to whom he was godfather, and to the great anxiety the deceased testified for several days pre-[72]-ceding his death to see Mr. Lee for the purpose of finishing his will.

Swabey and Adams for the next of kin.

Arnold and Daubeny contra.

Judgment—*Sir John Nicholl*. The question is whether this paper can be established upon this evidence? it contains mere instructions; it is not complete even as a paper of instructions, for they are only a part of the intended disposition. Such a paper, however, might be established by circumstances; but for this two points are absolutely necessary. First, the Court must be completely satisfied that the deceased had finally decided to give these legacies. Secondly, that he never abandoned that intention, but was only prevented by the act of God from proceeding to the completion of his will.

If the instructions had been completed, and the drawer only dismissed to prepare a more regular will from them, that would be an act preparatory to execution and a confirmation of his intentions, and consequently would stand on stronger grounds than this case where the instructions have only been proceeded in in part, and the drawer is to return for the purpose of receiving further instructions; for here the whole matter lies open to the re-consideration and revision of the deceased. The perusal of the former part, and the consideration of other bequests, might naturally enough induce a change in the legacies. Unless therefore there was the strongest possible evidence that the intention of the deceased, as far as it went, was [73] fixed, the Court would not grant probate of a paper of this description. Again, when the deceased stops in the middle, it is a presumption that he did not intend to proceed to execution; for it is never to be forgotten that the strong presumption of law is against a paper of this nature, and the onus probandi lies on those who set it up to shew, on the one hand, the full and entire determination of mind on the part of the deceased, and, on the other, the inevitable incapacity which prevented him from executing it.

Does the evidence in the present case satisfy these demands? Mr. Lee, the drawer of the instructions, was the confidential attorney of the deceased; his impressions therefore will have great weight in forming the opinion of the Court; according to his testimony, the anxiety of the deceased was not strong, his heart was not in the transaction when Lee went to him on the 6th of May, the deceased commenced a conversation on other subjects, and made no allusion to his will till Mr. Lee directed his attention to that topic.

The two Robinsons and the two Lynotts indeed say that the deceased expressed great anxiety for the arrival of Lee; but it is to be observed that these witnesses are disappointed persons, to whom the deceased had always held out hopes of legacies; their evidence therefore is to be received with caution; though there is no imputation against them that they speak corruptly, yet they naturally speak under a bias. Mr. Lee is not certain as to reading over the paper to him, he only thinks he did; he says the deceased hesitated as to the disposi-[74]-tion of his residue, as to a bequest to his executor, and also as to whether he should give any further legacies. The conclusion of the instructions was postponed, not because he was exhausted, but because he had not fully made up his mind. This happened on the 6th of May; Mr. Lee received no message again till the 10th, or he should have repeated his visit; and during the interval the deceased was perfectly in a state to have proceeded with his will.

The two Robinsons and two Lynotts say that the deceased was exceedingly anxious to complete his will, that repeated messages were sent to Mr. Lee, but that the answer returned to them was that he was laid up with illness and unable to come; but all this is at complete variance with the evidence of Mr. Lee himself, who says he was not ill, and that he should certainly have gone to the deceased had he received any message to that effect.

When this inconsistent evidence is produced by the party setting up the paper, on what has the Court to rely? Upon the fact undoubtedly that for four days, though the deceased continued perfectly capable, no further progress was made in this will. On the 10th Mr. Lee received a message as from the deceased, and going to him was informed by his brother, in reply to a question he put to him, that the deceased was sufficiently in a state of capacity to proceed; this is material to shew capacity, as the brother could have no motive for representing him to be in a better state than he really was, for his interests would most probably have been [75] affected by any will. The deceased is not insensible, he attended to the information given him of Mr. Lee's coming, he turns round and looks at him but says nothing; when

Mr. Lee questions him about his will he is not unmindful of it, but he turns away his head, which Mr. Lee attributes not to incapacity but to dislike to proceed.

The other witnesses attempt to account for this behaviour by representing him to be in an exhausted state; but, nevertheless, one of them mentions a fact which shews that he was capable of an act of business, namely, that on that day he had given her money to carry to his bankers.

Here then is not only an omission, but a direct refusal to complete this paper; how is it possible for the Court to support it? how can the Court say that thus far at all events the deceased had decided to dispose of his property? Further, if these legacies were supported by the uniform dispositions of former wills, some weight might be attributed to this circumstance; but it is not so, not one of the bequests is precisely the same in the former wills; they are not supported even by the more recent declaration deposed to by Sarah Robinson, giving her full and entire credit for the accuracy of these declarations.

The character of the deceased has been adverted to; and, if he had been a person uniform, steady, and invariable in his habits, some reliance might have been placed on this; but the reverse appears to have been the fact, without relying on the declaration spoken to by Sarah Robinson, that the deceased was such a shuttle-cock, that he promised [76] her one moment what he would not do another, it appears from the more satisfactory evidence of Mr. Lee that he was a person of a very changeable mind. How then can the Court say that he had not departed from his intention; but that his fixed mind and will went along with this paper? In the very course of giving these instructions there are important fluctuations of intention.

From such circumstances the Court could hardly establish any paper which had not received formal execution, without great danger of injuring the rights of the next of kin, to whom, it must be remembered, the law gives the property if there is no testamentary disposition.

In this case, where there are only a few first instructions, and they are not conformable to any former dispositions, nor precisely supported by any recent declarations, where they receive no partial approbation and confirmation as far as they go, the deceased stopping from not having made up his mind as to the rest of his will, making no further appointment with the drawer, and living five days without any further act, and when the drawer did attend him afterwards, declining to proceed, the Court can have no difficulty in deciding against this paper, and in decreeing the administration to the brother and next of kin of the deceased.

[77] DEVEREUX v. BULLOCK. High Court of Delegates, Easter Term, May 21st, 1810.

An appeal was interposed to the High Court of Delegates, from the sentence of the Prerogative Court.

The cause came on for hearing on the same evidence as in the Court below, before the Judges Delegates, viz. Sir Alan Chambre, one of the Justices of the Court of Common Pleas. Sir Robert Graham, one of the Barons of the Court of Exchequer. Sir John Bailey, one of the Justices of the Court of King's Bench. Doctors Burnaby, Jenner, Phillimore, and Edwards.

May 24.—The sentence of the Prerogative Court was affirmed; but the Delegates gave no costs.

[78] BEAUMONT v. PERKINS. Prerogative Court, Easter Term, April 26th, 1809.—An article of an allegation pleading comparison of hand-writing by persons who had seen the deceased write; and also by persons skilled in hand-writing who had not seen him write, admitted.

Ann Perkins was the testatrix; her will bore date December 9, 1807, and was opposed by Charles Beaumont, an executor under a former will; an allegation was given in by him, consisting of fourteen articles, the last of which only was objected to. It pleaded—

“That the name, Ann Perkins, subscribed to the pretended last will and testament of Mr. Perkins, the party deceased, dated 9th of December, 1807, is not the hand-writing of the said Ann Perkins, and it is well known or believed not to be of her hand-writing by divers persons of good credit and reputation, who have frequently seen her write and subscribe her name, and are thereby become well acquainted with her manner and character of hand-writing and subscription, and that by a comparison

of the said names Ann Perkins subscribed to the pretended last will and testament of the deceased with the names Ann Perkins set and subscribed by the said Ann Perkins to the wills respectively bearing date the 24th of May, 1802, 28th of October, 1805, and the 15th of November, 1806, and also with the letter written by the deceased, as [79] pleaded in the 5th and 6th articles of this allegation, and with the letter of attorney pleaded in the 10th article of this allegation; it evidently appears to persons judges of hand-writing and fully competent to form an opinion thereof that the said names Ann Perkins set and subscribed to the aforesaid pleaded last will and testament are not of the hand-writing of the same person who so subscribed the said wills of the deceased, bearing date as aforesaid and mentioned in this allegation, and wrote the said letter and subscribed the letter of attorney as hereinmentioned."

Arnold and Edwards against the admission of this article. The depositions of persons skilled in hand-writing who are to judge of the signature of this will by a comparison of it with other signatures of the deceased cannot be considered as evidence, because they would be evidence of opinion only and not of facts. We know by tradition in the Ecclesiastical Courts that, when the Court has found it necessary to form an opinion as to hand-writing, it has, for the purpose of assisting its own judgment, invoked the aid of the registrars of this and of other Courts; a mode infinitely preferable to the one proposed in this plea, because the registrars, from their office, may be supposed to be conversant in hand-writing; and their opinion thus taken will not assume the character of evidence. True it is that evidence of this description has been admitted, [80] as in the case of *Reilly v. Rivett*,^(a) but it was held entitled to very little weight; at all events it is that which cannot weigh against other evidence; and, if it is not to be considered as entirely inadmissible, still the Court will not receive it where it has other proofs, from which it can deduce its conclusions; or in any case where it is not absolutely necessary. Here there is no necessity; because it is directly pleaded in a preceding [81] article that the name subscribed to the will is not in the hand-writing of the deceased, and thus the attention of the Court is directly called to the fact, and it may be proved by witnesses.

Adams and Jenner contrà. The objection taken that this article does not plead a fact, but opinion as to a fact, would apply to all evidence of hand-writing, which at any time is only the evidence of opinion and belief; for, where witnesses speak to their knowledge of the hand-writing of any person from having seen him write on a former occasion, they only speak to their opinion founded on that fact. It has always been the practice of the Ecclesiastical Courts to admit this species of evidence. *Reilly v. Rivett* is not the only case; the same point was decided in *Hewett v. Moore*, and in many others.

Persons, whose business renders them conversant with hand-writing, and who are consequently in the habit of applying their attention frequently and with great particularity to the subject, can form a more satisfactory opinion as to the similitude or dissimilitude of hand-writing than either the Court or the registrars, and may materially assist in relieving the Court from much painful responsibility.

(a) *Reilly v. Rivett*, Prerog. 28th July, 1792.

In the 10th article of an allegation it was pleaded, "That a paper of instructions exhibited in the cause was, in the opinion of persons skilled in hand-writing, written in a studied and fabricated hand, and not in the natural hand of any person, &c. and also that it appeared to be written by the same person who had written the memorandum at the bottom of the paper."

This was objected to, as extending the doctrine of comparison of hand-writing farther than it had yet been carried, viz. to produce evidence to shew that it could not be the hand-writing of any person whatever.

Judgment—*Sir William Wynne*. I do not think so; I conceive it possible for persons conversant in hand-writing to distinguish a studied from a real hand, and to give a satisfactory opinion on such a point. Comparison of hand has always been admitted in the Ecclesiastical Courts in different ways; the only way was to refer it to the officers of the Court; in *White v. Terry and Longmore*, before Sir George Hay, in 1774, the Court referred to the deputy registrars of the Admiralty and the Consistory of London for their opinion as to hand-writing.

It is observable also that it has been admitted in this very cause in the Court of King's Bench; but this Court does not want such a precedent.

The article was admitted.

Judgment—Sir John Nicholl. I do not understand that any objection has been taken to the first part of this article; but only to that part of it which pleads that, on a comparison of the subscription to this will with the deceased's subscription to other wills and to a power of attorney, it appears to judges of hand-writing not to be [82] the subscription of the same person: and this is introduced for the purpose of laying before the Court the opinion of persons skilled in comparison of hand-writing;.

The question is not what the effect of this evidence may be, but whether it is admissible? It is not denied that such evidence has been admitted; indeed no case has been suggested on which it has ever been rejected; the Court is not at liberty to refuse it from any present opinion it may entertain of the little effect it may ultimately produce; one sees no ground for rejecting absolutely evidence of this sort. It has been truly said that all evidence of hand-writing is evidence of opinion; if a person has seen another write twenty years ago, he can only form his belief as to his writing by a comparison with what he once saw: what is this but evidence of opinion? it is not suggested that the comparison should not be made, but it is said the Court may make it; the Court, however, may not feel itself competent to the task; to this it is replied that then it may refer the matter to registrars, as was done in the case of *Heath v. Watts*; (b) but, [83] what is this but evidence of comparison and opinion?

In other Courts resort is often had to the evidence of persons skilled in any particular art; I see no ground for rejecting this; in general there is better evidence than that of hand-writing on which the Court can form its opinion; but it may be admissible to that evidence.

The instruments by which the comparison is to be made must be very strictly proved.

The article was admitted.

IN THE GOODS OF CHARLES JAMES NAPIER, ESQ., heretofore supposed to be Dead.
Prerogative Court, Easter Term, May 3rd, 1809.

In the month of February last probate of the last will and testament of Charles James Napier, Esq., was granted to Richard Napier, Esq., as the brother and sole executor named in the said will, Richard Napier having first made an affidavit in which he deposed that he had received intelligence, which he believed to be correct, that the said Charles [84] James Napier had been (a) killed in an engagement with his majesty's enemies at Corunna (a) in Spain, on the 16th of January last.

On this day, Bogg, proctor for Richard Napier, on the behalf of his party, voluntarily brought in and left in the registry of the Court the said probate; and the Judge, on the motion of counsel, by an interlocutory decree, revoked the probate so as aforesaid granted in error, and declared the same to be null and void to all intents and purposes whatsoever in the law. At the same time Charles James Napier appeared personally; and the Judge, at his petition, decreed the original will together with the probate, being first cancelled, to be delivered out of the registry to him or the said Bogg for his use.

(b) *Heath v. Watts*. Prerog. June 27, 1798.

Five witnesses were examined to hand-writing; two (and one of these a clerk at the bank) deposed that they believed the signature of the will was not in the hand-writing of the deceased, one believed it to be his hand-writing, and two could form no opinion on the subject.

The Court directed the deputy registrars of the Admiralty, the Arches, and of the Prerogative Courts, to inspect several signatures of the deceased, and also two exhibits of considerable length in his hand-writing which had been produced in the cause, and to compare them with the signature to the will, and to report their opinion after such comparison; which they accordingly did, and reported that they had examined very many signatures (viz. 45) of the deceased in the books of the bank, and were of opinion that neither those signatures nor the two exhibits before the Court were written by the same person who had signed the will.

(a) He was left for dead on the field of battle; and reported in the dispatches of Sir John Hope to be amongst the number of the slain.

See *London Gazette*, Jan. 24, 1809.

WHITE v. DRIVER. Prerogative Court, Trinity Term, July 3rd, 1809.—A lucid interval established.

Elizabeth Manning died on the 26th of January, 1805, at the house of Mr. Driver, at Chadwell, in Essex; the only relations who survived her were two sisters and a nephew and niece, the children of a deceased brother: her will bore date the day immediately preceding her death; her pro-[85]-perty was bequeathed in thirds, one third to the nephew, another to the niece, and the remaining third to their mother the widow of her brother, who since his death had intermarried with Mr. Driver. The will purported to be signed and executed in the presence of three witnesses.

The two sisters impeached the validity of this instrument on the ground of the insanity of the testatrix.

Many witnesses were examined who deposed to the childish and extravagant conduct of the deceased at several periods of her life. In 1801 she had been found in the parish of St. John's, Hackney, and taken to the workhouse there where she had been confined several weeks and treated as an insane person. It was in evidence also that in Dec., 1804, the persons who resided in the immediate neighbourhood of Peacock Street, Kennington Road, where she and a sister (who was in the same weak and insane state as the testatrix) then lived, considering themselves and their property in danger of fire from the incapacity and childishness of these two women, lodged a complaint against them to the parish officers, who on the 17th of November conveyed them both to the workhouse at Newington.

Mary Crossland deposed, "That during the time the party deceased remained under her care, viz. from the 17th of December, 1804, to the 21st of January, 1805, she was constantly treated by her and her assistants as an insane or mad person, that she behaved with so much violence as to render it necessary for a straight waistcoat to be put upon her." [86] This witness also expressed her belief, "That, from the weak and childish state of the deceased, she was not on the 21st of January, 1805, capable of knowing with whom or where she was going, and that she was wholly incapable of understanding any question that might be put to her by any person whatsoever."

On the other side, Leonard Lazenby, a clerk in the bank, deposed "that, on the 21st of January, 1805, the deceased came to him at the bank for some money which she had left at three different times in his hands, having said that she would come to him again respecting the laying out of the same for her; but, as he understood, she had been prevented by illness from so doing; she was accompanied by Mrs. Driver and a young woman; she looked as if she had been very ill, which she said she had been, and she told the deponent she wanted her money as she was going into Essex with her relations to try if she could get better; he gave her a draft for £40, being the exact sum due to her, which was dated the 21st of January, and it was duly presented and paid; she appeared to him of perfect sound mind, otherwise he would not have paid her the money."

Mr. Williams, the curate of Chadwell, deposed, "That, on the 23d of January, 1805, he was sent for to administer the sacrament to the deceased, and to pray by her, that he saw her daily from that time till her death, and that he recommended to her to settle her worldly affairs and make her will."

The apothecary who attended her during her [87] last illness, the attorney who drew the will, and the three witnesses who attested the execution of it, all deposed strongly to her capacity.

Arnold and Swabey for the executors, contended that the deceased had a testamentary capacity at the period when the will was executed, and they cited the case of *Cartwright v. Cartwright*. (a) Deleg. 1795.

Jenner and Phillimore for the sisters, insisted that the proof was not equal to the exigencies of the case, that insanity having been established the law imposed upon the adverse party the burthen of proving a lucid interval by the clearest and most incontrovertible evidence. They laid stress on the character and quality of the deceased's mind, which in its best days was weak and feeble and of so inferior a cast that, after it became entirely worn out and exhausted, there could be but little probability that it should again ever recover the use of its rational powers.

July 5.—*Judgment*—Sir John Nicholl (after recapitulating the evidence). The

(a) See the next case.

evidence in this case sufficiently establishes that the deceased had been at times subject to insanity for several years preceding her death, and even down to the 21st of January, 1805, only four days prior to the execution of the will in question; but it does not appear that the disorder was uniform, or always attacked her with an equal degree of violence; she was at large the greater part of [88] her life, and had the management and dominion of herself and her actions. She seems to have had violent accessions of the disorder in the years 1793 and 1794, in 1801, and again in 1804; the evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity: for I agree with the counsel for the next of kin that, wherever previous insanity is proved, the burthen of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done.

It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognises acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact.

In this case the deceased had been subject not only to eccentricities but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she earned her own livelihood; when she came out of the workhouse on the 21st of January she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her; a desire to make a will is not with her an insane topic; it is recommended very properly to her by the clergyman who was sent for to pray by her, and the intention of making it was first communi-[89]-cated by the deceased to an old acquaintance of hers of the name of Turner; the utmost possible precaution was used by Turner in carrying her wishes into effect, by securing the attendance of an attorney, two medical gentlemen, and the clergyman.

The deceased herself declares and directs the disposition of her property: the disposition itself is neither insane nor unnatural; two-thirds are left to the children of a deceased brother, and the remaining third to his widow and her second husband, and these two persons are appointed her executors: her sisters, it is true, are excluded; but they were both married, and possibly had no great claims on her.

The Court has the concurrent opinion of these several persons, viz. Mr. Turner the deceased friend, Mr. Williams the clergyman, the solicitor, the two apothecaries, and the nurse, and that too with all their suspicions awakened, and their vigilant observation called forth that the deceased was perfectly sane and rational throughout the whole period of the transaction; some of them also prove that she was equally sane and rational a day or two before, and continued so till her death on the subsequent day.

Notwithstanding, therefore, all the jealousy which the Court should feel as to the act of a person once proved to have been insane, still under this evidence it is impossible not to concur with these witnesses in opinion that the deceased was of sound mind; and, consequently, I am bound to pronounce for the validity of her will.

[90] DAME BYZANTIA CLERKE, HERETOFORE CARTWRIGHT, AND CARTWRIGHT v. CARTWRIGHT AND OTHERS.(a) Prerogative Court, Hilary Term, Feb. 23rd 1793.—A lucid interval established.

[Discussed, *Banks v. Goodfellow*, 1870, L. R. 5 Q. B. 557.]

Judgment—*Sir William Wynne*. The question in this cause arises upon the will of Mrs. Armyne Cartwright deceased, which has been opposed and propounded on behalf of the contending parties.

The will is on all sides admitted to be in the handwriting of the deceased; and it is in these words.

(a) The editor esteems himself singularly fortunate in being enabled to lay before his readers a full and correct report of the judgment of the Court of Prerogative in this remarkable case: the high authority of the decision, and the frequent reference which is made to it in the Court of Probate will, he apprehends, render such a report extremely valuable; and he trusts he shall be justified in having thought it more advisable to insert it in this place, though in violation of chronological arrangement, than to have printed it separately in an Appendix.

"Wigmore Street, August 14, 1775. I leave all my fortune to my nieces, the daughters of my late brother Thomas Cartwright, Esq., except £100 each to my executors, and one year's wages to my servants and mourning. I appoint Mrs. Mary Catherine Cartwright my nieces' mother, and Thomas George Skipwith, Esq., of [91] Newbold Revel in Warwickshire, my executors, and trustees for my nieces until they come of age or marry; if any of them should die sooner their share to go to the survivors or survivor. *THE WILL WAS DULY READ BY THE DECEASED* "ARMYNE CARTWRIGHT."

It appears to have been inclosed and sealed up in a cover; and upon the back of the cover is written in the handwriting of the deceased, "This is my will. A. Cartwright." The will is written in a remarkably fair hand, and without a blot or mistake in a single word or letter. Pleas have been given in on both sides, and there is a pretty full account of the family and connections of the deceased, and her affections, and I think it clearly appears the will is as proper and natural as she could have made, and it is likewise as conformable to her affections at the time. It appears her father was twice married; the issue of the first marriage was Thomas Cartwright and herself; the issue of the second was William Cartwright and his brother and sisters, who are the other parties in this cause. It appears that the mother of the deceased (the first wife of her father), was a lady of considerable fortune; and that he, in consequence of that fortune, made a very large settlement upon the younger children of that marriage to the amount of £20,000, which was the bulk of the deceased's fortune, she being the youngest issue of that marriage, the whole of it vested in her; and the effect of the will is to give this fortune, which the father gave to the younger children of his first marriage, to the younger children of her brother who was [92] the heir of the estates. It seems that £200 a year interest for part of this was paid to her by the steward of those estates, and something more was upon bond from her brother. In respect to the affection she had for the several branches of the family, it appears by some persons, particularly Lord and Lady Macclesfield and another lady (Miss Heathcote), that the deceased was particularly attached to her brother and his family. The account is this, Lord Macclesfield says, "He had been bred up in habits of friendship and intimacy with her from the early part of her life;" and he says, "Judging from the general tenor of her expressions and conversation, she was by no means pleased with her father's second marriage; and he never heard her express one word of affection for her mother-in-law or any of the children by such marriage; and that on the occasion of the death of Sir Clement Cottrell Dormer, the father of her said mother-in-law, she expressed to this deponent a very great displeasure at her father's obliging her to put on mourning, and said Sir Clement was no relation of her's. That she upon all occasions expressed the greatest affection for Thomas Cartwright, Esq., her brother by the whole blood and his children, and the general tenor of her expressions and conversations were such as convinced the deponent she always had a very strong attachment to and predilection for her said brother by the whole blood and his said wife and children beyond that she had to and entertained for her said mother-in-law and brothers and sisters by the half blood." To the same effect exactly Lady Macclesfield speaks; she says, "That her conversation and conduct were [93] such as shewed and strongly impressed on the mind of the deponent a belief that she considered her brother by the whole blood as much nearer and dearer relation than her brothers and sisters by the half blood." And they speak to what the gentlemen have called for; for it has been said the affection of the deceased and her attachment was confined first to her father and afterwards to her brother; but what these two noble persons have been speaking positively to is the predilection there was for the children of her brother above her half brothers and sisters. It does not rest upon this; they have proved, and what to be sure is natural, her dissatisfaction at her father's second marriage, and that she, at that time a young lady grown up, was displeased at that marriage. It very clearly appears, however, as to a personal disgust, if any there were, that it was at that time entirely got over; for I think the conduct of Mrs. Cartwright appears to have been perfectly good as could possibly be, and she seems to have gained her confidence by her attention to her during her unhappy malady, which was affectionate and proper. It is said that she had an affection for her half brothers and sisters; but I see nothing of that; I see no visits made by the brothers and sisters at the time she separated from the father's family and had an establishment of her own; it is proved that the other children did visit her, and that

they dined with her, and that she treated them with a great deal of attention, and was fond of them, a thing very uncommon with her in regard to children, as it seems she was by no means partial to children; and I think it is [94] most completely established there was a greater predilection for the children of her brother Thomas Cartwright than for her brothers and sisters by the half blood. The evidence in support of the will rests upon full proof that it is the handwriting of the deceased, which is not at all denied, and on a recognition by the deceased which I shall come to by and by. It was pointed out and urged as a sort of complaint, as if there was something artful in the mode of pleading, and as something not altogether right in the conduct of the cause, in not having examined to the factum of the will the only person capable of giving any account of the manner in which it was actually obtained; but I do not see there is any ground for that complaint; I do see, I think, from what appears from the evidence of this person, there was strong reason for the parties who propound this will not to have thought fit to examine that person; they were not called upon to do it; it is not like a subscribing witness to a will, though I have known that not done. If you have a mind to interrogate the witness, you may call upon the party to produce the witness to be examined upon interrogatories; they must produce the witnesses to submit to interrogatories if called upon, though they are not bound to do it without; and certainly it is not a complaint for the party to make who has produced and examined this very witness, and on her examination obtained an account as to the factum. The only witness then that has given any kind of account of the writing of the will is Charity Thom, who was present at the time; there was another witness of [95] the name of Gore, but she is dead; therefore Charity Thom is the only person who can give any account of what passed; and the account she gives is extremely material; for I cannot agree with what was said by Dr. Nicholl, that this will relies entirely upon the face of the will itself, and upon the evidence of Mrs. Cottrell, and the proof of handwriting, for its support. I think the evidence of Charity Thom goes very materially to support it; her evidence is in these words; she says to the 15th and 16th articles of the first allegation, "That whilst the said Dr. Battie visited and attended the said deceased, he desired the nurse and the deponent and her other servants to prevent her from reading or writing, as he gave it as his opinion that reading and writing might disturb and hurt her head; and in consequence thereof she the said deceased was for some time kept from the use of books, pens, ink, and paper; that, however, sometime prior to the writing the will in question in this cause, but precisely as to time the deponent cannot speak, she the said deceased grew very importunate for the use of pen, ink, and paper, and frequently asked for it in a very clamorous manner; that Dr. Battie endeavoured to dissuade and pacify her, and told her that whatever she wrote he must appear as a witness against, but that if she would wait till she got well he would be a witness for her; that the said deceased continuing importunate in her desire to have pen, ink, and paper, the said Dr. Battie in order to quiet and gratify her consented that she should have them, telling the deponent and Elizabeth Gore the nurse [96] that it did not signify what she might write as she was not fit to make any proper use of pen, ink, and paper; that as soon as Dr. Battie had given his permission that she should have pen, ink, and paper the same were carried to her, and her hands which had been for some time before kept constantly tied were let loose, and she the said deceased sat down at her bureau and desired this deponent and the nurse to leave her alone while she wrote, and they to humour her went into the adjoining room, but stood by the door thereof so as they could watch and see the said deceased as well as if they had been in the same room with her; that the said deceased at first wrote upon several pieces of paper, and got up in a wild and furious manner and tore the same and went to the fireplace and threw the pieces in the grate one after the other, and after walking up and down the room many times in a wild and disordered manner, muttering or speaking to herself, she wrote, as the deponent believes, the paper which is the will in question; but the deponent further saith that at the time now deposed to the said deceased had not shewn any symptoms whatever of recovery from her disorder, and in the deponent's opinion she had not then sufficient capacity to be able to comprehend or recollect the state of herself, her family or her affairs, and during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures hewed many signs of a disordered mind and insanity." She says to the 25th interrogatory, "That the deceased was occupied upwards of an hour, nearly two hours

as well as the deponent can [97] at this distance of time recollect, in making the will in question, that is from the time of the pen, ink, and paper being given her until she left off writing; that the respondent and Elizabeth Gore and nurse went out of the room into the adjoining room, and left the said deceased alone in the room but not out of their sight; that she said she was going to write, but the respondent does not recollect whether she said she was going to make her will, but the respondent understood that she was writing a will; that when the said deceased was left in the room by herself she was so agitated and furious that the respondent was very fearful she would attempt some mischief to herself, but she did not do any; that a candle was given to the said deceased to seal what she had written, but the respondent cannot recollect what length of time the candle was by her; that the respondent and also the nurse were always cautious of trusting a candle near the said deceased, but on this occasion they did permit her to have a candle notwithstanding she shewed many marks of derangement and insanity at the time, this respondent and the nurse being at hand and watching her to prevent any mischief; that the said deceased seemed very earnest in what she was about, but by no means closely settled, as whilst she was writing she frequently started up and walked up and down the room in an agitated manner; that it was not customary to untie the said deceased's hands, or to leave her alone when she desired it, at times when she was greatly agitated and disordered, although sometimes in consequence of her earnest intreaties [98] the respondent and the nurse would untie her for a little, and on the occasion now particularly deposed to she was so untied in consequence of the permission which Dr. Battie had given her to have pen, ink, and paper, but she was not left alone, as the deponent and the nurse stood at the door of an adjoining room behind the said deceased, but not above two or three yards distant from the bureau where she sat to write."

The fact, then, as it appears by the evidence of this witness, is, that the paper was written by the testatrix herself, no other person being present but the witness who gives the account and Elizabeth Gore who is since dead, neither of whom gave her any manner of assistance; and she tells you that the deceased having first of all shewn great eagerness and anxiety for pen, ink, and paper, did write this will the moment she obtained them without any assistance from any one; but it is said that the condition of the deceased at this time was such that she was utterly incapable of doing that or any other legal act, because it must be rational. They have certainly completely proved that the deceased was early afflicted with the disorder of her mind, I think about the year 1759, and she continued under the influence of that disorder pretty near two years, and after that she returned to her father's house, being supposed to be perfectly recovered, and that she continued to reside there from that time to his death; that after that, being in possession of her fortune, she went, about the year 1768, to housekeeping herself, and continued so to do as a rational person till 1774, and in the month of [99] November in that year she went on a visit to her relation Lord Macclesfield at Shirburn in Oxfordshire, and continued at his house about three weeks; that on the 26th of November she returned to London in a disordered and disturbed state; at first she was attended by a physician, Dr. Fothergill, who found it was a disorder of the mind, and what he had not directed his attention or study to. It is proved that in the latter end of January or beginning of February, 1775, Dr. Battie was called in, and he treated her as an insane person, and sent a nurse to take care of her in the way they always do send nurses to patients disordered in mind. In general her habit and condition of body and her manner for several months before the date of the will was that of a person afflicted with many of the worst symptoms of that dreadful disorder, and continued so certainly after making the will, which was the 14th of August, 1775. They have certainly made out that. Now what is the legal effect of such a proof as this? Certainly not wholly to incapacitate such a person, and to say a person who is proved to be in such a way was totally and necessarily incapacitated from making a legal will. I take it the rule of the law of England is the rule of the civil law as laid down in the second book of the Institutes (Instit. lib. 2, tit. 12, sec. 2), "*Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.*" There is no kind of doubt of it, and it [100] has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is

sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is the rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. The manner he [101] has laid it down is (it is in Swinburne, part ii. sec. 3, the part in which he treats of what persons may make a will), the last observation being, "If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament." Unquestionably there must be a complete and absolute proof the party who had so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I do not know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month; I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended; I look upon it if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, [102] that is completely sufficient. What does appear to be the case from the evidence of these witnesses? As to Charity Thom, who seems to me to be principal witness, she gives an opinion of her own, and that opinion is against the validity of the act, and she expressly says over and over that the deceased at the time this was done was not sane and was not capable of knowing what she did; that is the result of her evidence. The Court, however, does not depend upon the opinion of witnesses, but upon the facts to which they depose. All the facts which are deposed to (it does appear to me) are sane; the witnesses' opinion arising from her observations does not give any foundation at all for saying the testatrix was insane at the time of making the will; her opinion that the deceased was insane at such time was founded on bodily affections which were extraneous. What is the fact? she says that the deceased whilst employed about the act rose frequently and walked backwards and forwards about the room, that she did not set down closely to the business, that she started up, and that she tore several papers and threw the pieces into the grate, then wrote others, and did not appear to her to act in such a way as a person who was calm would do. In my apprehension, it appears from this account her manner of doing it was this: she wrote several papers, and if she saw any mistake, however trifling, she was dissatisfied and probably vexed she did not write in such a way as fairly to answer her own intention; the paper itself has no mark of irritation; a more steady performance I never saw in [103] my life; and it seems hardly consistent that a person wild and furious and in such a degree of insanity as she is stated to be should write in such a way. It seems to me a very extraordinary thing, but whatever outward appearance there was it had no effect on the writing itself; she has wrote it without a single mistake or blot or any thing like it. What is the construction? that she was endeavouring to write her will, which she had taken a determination to do; that she made mistakes and destroyed those papers in which she had made them, that she knew how to correct them, and did correct them, and

at length wrote and finished as complete a paper as any person in England could have done. Is this insanity? In my apprehension, it is not; it seems to me she was vexed at her mistakes, which I think shews that she had at that time her senses about her, and I think it appears likewise she was not then in fact in the disturbed condition she was before and after. They say they were generally forced to keep the strait waistcoat upon her, that even then she would thrust out her arms if she could, and strive to thrust her fingers in their eyes, and in short do every thing that would do mischief. Is there any mischief in the present case when the strait waistcoat is taken off? Nothing like it; as soon as it is taken off she says, "Give me pen, ink, and paper;" and when it is given her she says, "Leave me, for I am going to write;" and they go out of the room; she is not disturbed at her watching her, but pursues her own intention and completes the paper; she enquires the day of the month, and an almanack [104] is given to her by one of the nurses who was watching her, and the day of the month was pointed out to her; she then calls for a candle; and they say they used to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper; but still in this case they give her a candle that she may use it in order to seal the paper; no harm was done of any kind, and none attempted; every thing that was done was for the purpose of completing the act; and am I to conclude she was insane, because she might have bodily affections, irritations of nerves, when every thing which was rational is done, and as collectedly and as exactly as any person of the clearest sense would have done, and of her own head entirely. The gentlemen have said all this is mere form. Is it mere form that a person so situated as she was should of her own accord write a will containing the most rational disposition of her property, leaving all her fortune to her nieces, the daughters of her deceased brother, who were the most natural to her, omitting her nephew who was possessed of a large fortune? Is it mere form that she should appoint for her executors and trustees the mother of those nieces, and her nearest relation by the father's side, describing accurately the place where he lived, and that she should create a survivorship amongst them if any should die before twenty-one. Is this only form? It is the very essential part and substance of a will, and that will as rational a will as she or any other person could have made. Therefore, taking the fact to be that it was done [105] of her own accord, it leaves nothing to be proved; that being established puts the matter beyond all possibility of doubt, and I think there can be no question but that she had a legal capacity; but, say they, we can hardly admit this is quite such a paper as it appears, and that it is the mere spontaneous act of the testatrix herself; they surmise, and to be sure it is as groundless a surmise in point of evidence as possible, that it was done at the suggestion of Mrs. Cottrell, but it appears that she was at that time out of town and had been so for a month before; but is the Court to suppose that without evidence, and is there any thing to support it? certainly not, and I cannot presume any such thing. If you have a mind to prove this was by the suggestion of Mrs. Cottrell, you may; if you do not, I must take it to be, what appears from the evidence, the pure and spontaneous act of the party herself, and that Mrs. Cottrell knew nothing of it till she was informed of it.

I do think the remaining part of the evidence is of no very material avail, for I am perfectly persuaded myself, the will having been designed by the deceased herself, and made, written, and delivered in the manner it was, that would have been sufficient to have established an interval of reason if there had been no other evidence; but that is not all, for there are various instances which in my apprehension shew that this unhappy lady had frequent instances of rational capacity. The first and the strongest is that conversation with Mrs. Cottrell, in October, 1775. It was a conversation that Mrs. Cottrell had with the deceased respecting her [106] daughters, when Mrs. Cottrell observed to the deceased that a suit in Chancery had been decided against them, and uttered something of a dissatisfied expression which is not unlikely to fall from a fond mother, "That it appeared as if they were destined to lose every thing." I think it was a just and well founded observation of the King's advocate (Sir William Scott) that even the fact of entering into a conversation of this kind is a proof that she at that time must be considered as being capable of holding the conversation, for otherwise she could not have done it; the manner in which that conversation was introduced has been mentioned, namely, the misfortune that had befallen the daughters of Mrs. Cottrell; she says, "The deceased made some reply

which the deponent, not perfectly understanding, she requested the deceased to repeat, and the said deceased then said 'she had done all she could for the deponent's children;' and upon the deponent's asking her what she had done, she repeated she had done all she could for the deponent's children. Upon which Mrs. Cottrell said (if that part of her testimony be true, which I have no manner of reason to disbelieve), 'what have you done, Miss Cartwright; you have not made a will, have you?' or words to that effect; and the said deceased replied, 'Yes, I have.' And she called to the servant, Charity Thom, to bring the will; accordingly it was brought; and then Mrs. Cottrell says, 'Who are the witnesses;' and the deceased said, 'There was no need of witnesses, [107] for her estate was personal, and the will was all in her own handwriting,' or words to that effect; that the deponent asked her 'if she was sure there was no need of witnesses;' and the deceased immediately made answer 'Yes, I am sure of it, my estate is all personal, and the will is in my own handwriting;' and that the deceased then delivered the will to Mrs. Cottrell; and upon her expressing some hesitation in receiving it, the testatrix desired and pressed upon her to receive the same."

If this be true, it is impossible for any body to act in a more rational manner, with a perfect recollection of what she had done, and a perfect knowledge of what was necessary in order to make it a valid act; she knew better than Mrs. Cottrell did, and it is impossible, I think, to doubt whether she had a rational interval or not; whatever the length of it might be it was sufficient to enable her to hold a rational conversation, which is made more material, being coupled with the delivery of the will. Mrs. Cottrell, the lady who gives the account of this conversation, is very nearly connected indeed with the parties interested under the paper, being their mother, and feeling, as every parent must feel, for the interests of her children, cannot be presumed to depose but under some degree of bias, and notwithstanding her rank and situation in life it is very material for the Court to enquire how she is supported. I myself confess that I conceive her evidence to be perfectly proper in every respect; but, prejudiced as she must be supposed to be in favour of the parties interested under the will, it is extremely to be desired, and [108] the Court does always require further evidence where it can be had from persons that have not the same prejudice. Mrs. Cottrell has mentioned expressly that Charity Thom was present at the time of this conversation, and that she was the person who was called upon by the deceased to deliver the paper. I do not observe that that particular fact of her being called upon to bring the will is interrogated to; but the other fact of the deceased having desired Mrs. Cottrell to take the will is put as an interrogatory to the witness, and in answer to that she says "she does not remember any thing of that kind passing." A good deal of observation has passed in respect to the credit of this witness, and there is one part of her evidence which I do think so highly improbable it does seem to throw some degree of discredit upon her testimony, it is that part respecting Mrs. Elizabeth Cartwright; Mrs. Elizabeth Cartwright, in answer to the 16th interrogatory, says "after her coming to town in October, 1775; but when in particular she cannot set forth; she, this respondent, was informed by Charity Gould, the deceased's attendant, and her nurse, Elizabeth Gore, that the said deceased had written a will, and that Dr. Battie had declared to the said deceased he would be against it, for that she was not fit to make a will." And to the 23rd interrogatory, she says, "she apprehends it must have been shortly after she came to London, in October, 1775;" then, putting it in the same way, she says, "she heard from Charity Gould or Elizabeth Gore that the deceased had made a will."

[109] Now Charity Thom in her answer to the 26th interrogatory, says, "That she may have mentioned the circumstance of the said deceased having written the aforesaid paper to the interrogate Elizabeth Cartwright, but that she has not any recollection of her having so done, nor has she any knowledge by whom or at what time the said Mrs. Cartwright was informed thereof, and she cannot possibly depose whether the said circumstance did or did not come to the knowledge of the said Mrs. Cartwright or any of her branch of the family prior to the year 1777."

Now though I think it is not improbable that it may have escaped the memory of the witness whether she herself told Mrs. Cartwright, yet that she should find herself not able to depose whether this came to the knowledge of Mrs. Cartwright before 1777 is extremely odd, it being clear from Mrs. Cartwright's evidence that, upon her coming to town, there was so much conversation respecting the will with this witness;

and yet for her to depose in this way, that she cannot possibly say whether Mrs. Cartwright knew anything of the matter, does, in my apprehension, a good deal shake the credit of the witness. It is highly improbable but that she must know the fact very well.

Mrs. Cartwright then goes on, and says in answer to the 16th interrogatory, "That she also learned from the said Charity Gould or Elizabeth Gore or one of them that the said deceased had given such will to Mrs. Cottrell, but when she knows not; and she thinks, according to the best of her recollection, that she was also informed by [110] the said Charity Gould or Elizabeth Gore or one of them that the said Mrs. Cottrell had said something about the said will not being witnessed, but what in particular she cannot set forth, and that she, the said Mrs. Cottrell, made also some allusion to the said deceased of the decree in Chancery which had gone against her children." Now this is what I was looking for, and that is a confirmation of that very material part of the evidence respecting the conversation of the 24th; for it is certain that Mrs. Elizabeth Cartwright, soon after her coming to London, was informed either by Gould or Gore of all the circumstances; she was informed that the will was delivered by the deceased to Mrs. Cottrell; she was informed there was a conversation, and that such conversation did pass between Mrs. Cottrell and the deceased as she has represented to have introduced the subject of the will; and this being confirmed in the very material manner I have now observed upon, I think I have no room at all to doubt of the truth of the matter. It is such a proof that on the 24th the deceased did enjoy a perfect knowledge of what was done, and what was necessary in order to establish it, that there could not be well a stronger proof of a lucid interval.

Another circumstance in this cause is the will which the deceased made early in her disorder, and I think there can be no question of her having a lucid interval at the time she sent to Mr. Welby, an attorney and a man of credit, to make the same; she told the attorney she wanted to make her will; she gave him instructions by word of mouth; there [111] was a discourse between them at the time of the attestation; it was perfectly executed, and he says he had not the least idea there could be any question at all as to her capacity to make a will at that time. The contents of that will had nothing irrational in them, because the attorney expressly says there was nothing of insanity appeared, he says he made the will and actually took his instructions while she was in bed, and that he took it home with him, and that a few days afterwards he received a letter desiring the will, which she afterwards burnt; that was an insane act, but in my opinion when she made it she had a capacity to do, and actually did a sane act; for she gave instructions for the will which do not at all impeach her sanity, though she wrote, a few days after, a letter, which is a rational letter upon the face of it, desiring him to bring the will back; the account which is given by Jane Jones respecting the burning of the will is what conveys the opinion of the witness that she was at that time insane, for she says, "That a few days after the deceased came to London from Sherborne Castle the deceased called the deponent into a room and put a paper into her hand which she desired her to burn; that the deponent went towards the fire to burn it, and the deceased took hold of her by the shoulders and held her whilst it was burning, and in a furious manner kept calling out to the deponent, There, you devil, do you see it burn, you will go to the parish now, you devil," or some frantic expressions of that nature, during which time Charity Gould, the said deceased's at-[112]-tendant, was present; that she did not assign any reason for causing the deponent to burn the said paper. And this deponent further saith that she believes the paper which she so burned was a will, which she understood had been made for the said deceased.

The account given by Charity Thom is, I think, not quite so strong and more equivocal; it is that the deceased said she should be happier.

The conversation that passed between the deceased and Mrs. Cottrell respecting this business is this; she says, "Upon the 5th of December, 1774 (which was just after she came to town), the deceased told the respondent in general terms that she had made her will the day after she left Sherborne Castle in favour of the respondent's children, and afterwards more circumstantially on the 24th of the same month, when she told the respondent the medicines that Mr. Graham, the apothecary, had given her had disordered her head, for that on the Saturday she had come from Sherborne Castle she was very well in her head, and that on the Sunday, the

following day, she was very sensible, as Mr. Welby the lawyer could witness, as he came to her on that day by her appointment, and he knew she made her will and that she made it as she ought, as he knew she should then do; but that when she took those medicines, she sent for her will, and that she did not know why, but in a sudden flight she had jumped out of bed and had thrown the same into the fire, that she was very miserable she had done so, as she knew [113] that it was very wrong and that she had now lost her senses and could not make any other will, or she expressed herself to that or the like effect, and the respondent is more particular as to such last mentioned conversation as she made memorandums of the same at the time." Now this has been represented as an absurd piece of evidence to shew that the deceased was at that time rational and sensible, because she declared herself that she was not so, and was therefore incapable of making another will. That the deceased was then very much disordered is unquestionably true; but she was not perfectly irrational, she knew what she had done, she remembered all the circumstances and, it must be supposed, the contents of the first will, and that they were something which she was desirous of carrying into execution. Mrs. Cottrell speaks positively to two dates of conversations; she mentions the beginning of December and the 24th, and besides that several other times the deceased did express her misery, and was sorry she had destroyed the will.

The fact that she was capable of doing an act that required thought and judgment is, I think, further established by the receipts which are exhibited, and of which a good deal has been said in this cause; they bear date, one of them 26th December, 1774, one 27th October, 1775, one 15th December, 1775, one 6th April, 1775, one 3d October, 1776, and one 24th December, 1776; all but one after the date of the will, and all of them are of the deceased's handwriting; there are two dated in March, 1775, which are not. It was said by [114] Dr. Nicholl that those which were not in the deceased's handwriting were not accounted for, and he rather seemed to throw out some suspicion that those which are in the deceased's handwriting might possibly have been obtained by Mrs. Cottrell with a view to give countenance to the will itself; but it is very fairly accounted for in evidence, for when Dr. Battie attended the deceased at the beginning of January, he refused her the use of pen, ink, and paper, therefore the two receipts that were written in March are in the handwriting of Mrs. Cartwright, not with any view of contrivance, but in order to assist the testatrix who was then kept from the use of pen, ink, and paper by medical direction; the first thing the testatrix did when she was permitted to have pen, ink, and paper was to write the will of the 14th August, 1775, and from that time she wrote receipts in as regular a manner as any person living could have done, and with a great deal of recollection; she mentions who was the receiver, the date, and the estate upon which it was secured. What is recollection and knowledge of a fact if this be not?

There are three receipts exhibited, and those are said to have been thrown by her about the room, and of which she knew nothing; they are produced and brought before the Court to shew that she was not capable of writing receipts rationally; those receipts are all written upon the same day, namely 26th April, 1776, and in my opinion they shew capacity. It appears to me they were attempts, begun and not finished, in order to write the receipt of that date, which she completed and [115] which is before the Court. It appears then most clearly her manner of writing those receipts was the manner in which she wrote the will; she was extremely accurate in doing it, and when she had made some trivial mistake she abandoned the one she had begun and began another. The mistake in the receipt, which is the nearest completed, was in the last figure, she intended to write 1775 and had wrote the three first figures and began to write 6, therefore she gave up the whole and wrote a fresh one; the utmost that can be said is that what she did was with the greatest accuracy, and perhaps more than any other person would have used, but there is nothing like an irrational word in the whole, nothing foolish or wild. Was she dictated to? certainly not by Mrs. Cartwright, because she says she never saw her write any thing but her name; therefore that they were dictated by her would be mere suggestion, and Charity Thom says she used to be writing or attempting to write by herself, and used to say she could not write and gave over; mention is made by the witnesses of the great deal of difficulty and great persuasion they were obliged to use; and Mrs. Cartwright has said the method that was used to get her to write was persuasion. Is

that discourse which is addressed to an insane person? It is that which may be addressed to an indolent or obstinate person, but surely not to one insane; nor is it the conduct of an insane person to do what they are desired to do; there are acts, I think, which plainly shew the deceased had lucid intervals, that is, there were intermissions of the disorder upon [116] which she was able to act rationally; besides this, it appears clearly she used to discourse like a rational person. There is one instance in particular, spoken to both by Mrs. Cottrell and Mrs. Cartwright; but I will mention the manner in which it is deposed to by Mrs. Cartwright, she says, about nine or ten years ago her son was offering himself as a candidate for All Souls' College, Oxford, and she asked the deceased in what manner they were related to my Lord Fairfax; she says the deceased entered upon the conversation in the most rational manner, she answered her questions, and in all respects discoursed like a sensible person; she explained the descent of the family, and the respondent did think she was capable of giving a sufficiently accurate account. Is not this what requires a very accurate memory and recollection?

The other witnesses speak of the same things, but the turn they would give it is that this was a part of the insanity, but you are to observe not one of the witnesses say she ever mentioned any thing that was not true. Mr. Morris states that the deceased was extremely correct in her ideas about families and their intermarriages, and the respondent hath received information from her, when talking on such subjects, of circumstances which he did not know at the time and which he has afterwards found to be very correct and true, and he was surprised at the said deceased's precision on those points. Why? if she could converse for a considerable time; he says he used to be with her sometimes for half an hour or more. There is [117] another witness (Pooley) at whose house the deceased was placed, and she gives a very strong instance of her memory, which continued with her till almost the last hour of her life; the deceased had not seen the deponent from the time she lived in her house, and then she had a little boy with her; the deponent was standing at the door talking with Charity Thom, and the deceased put her head out of the window and said, "What is become of the little boy." So in a variety of instances the deceased would and did converse rationally. They say the great height of her phrensy used to be to her servants, but when any of her relation approached she would be calm; and Mrs. Cartwright says, "She has heard her extremely loud, and when she came in she would be extremely calm." Is that the conduct of a person who has no distinction of persons? What does it prove? That there is almost no person so mad as not to have some degree of reason. If she had some degree of awe for any persons, perhaps they were those she had an entertainment from and could converse with like a rational person; if she could converse rationally that is a lucid interval; and that she so did and had lucid intervals I think is completely established. If she had particular subjects or topics in her mind, and at such times would talk rationally upon them, and when those topics were out of her mind would fly into outrages of phrensy and extravagance, does that all shew that at the former time she was deprived of rational capacity? in my opinion, not; at one time she had capacity enabling her to make [118] a will, at others not; at one time she was in fits of phrensy, and at another out of them.

How then stands this case as to those cases which have been cited, and as to the facts necessary to establish a lucid interval.

In *The Attorney General v. Parnter*.(a) The circumstances of the case are not very accurately mentioned in the report. It differs, however, as materially from this as any two cases can do. The act was the execution of a power of attorney. The subscribing witnesses said the party appeared to them to enjoy her faculties sufficient for the purpose, and they explained the nature and effect of it to her, and asked her if she did it with her free will and consent, to which she readily answered, "Yes;" and then executed it. And this is all the evidence as to her sanity. They bring an instrument ready written, tell her what it is, ask her if it meets her consent, she says, "Yes," and does it freely. Is that the present case? No. If this will had been prepared by Mrs. Cottrell, and brought to the deceased, and read to her, and she had been asked if that was her mind, and had executed it, that would have been a different

(a) On a motion for a new trial. Hilary Term, 1792. See Brown's Chancery Cases, vol. iii. p. 441.

case from the present. In this case the act is done and completed by the deceased herself; it is not a mere acquiescence or form of execution only; there is not the least colour of proof that it had been suggested to the deceased by any person living.

The ground for a new trial in *Parther's case* [119] was that the jury, having been directed to enquire into the fact, they gave a general verdict that she was not a lunatic at all directly against the evidence. And what the Lord Chancellor said is just. The persons there who witnessed the act, apprehended it was proper in itself, and scarcely watched the means with sufficient attention. Undoubtedly the rules laid down there were with a view to the facts of the case; but I do not see how a stricter proof can be given than has been in the present case.

Clarke v. Lear and Scarwell (March, 1791) was the case of a man who had been clearly disordered in his mind for a length of time; he goes to Little Hampton to bathe in the sea, and there he sees a young woman at the house where he boarded, of whom he had no prior knowledge, and wants to marry her, at a time when he was insane, is brought up to town in a strait waistcoat, and there afterwards writes a paper by way of codicil giving her a legacy. This is delusion. It is said that paper is as well written as this will; but who was it made in favour of? it was for a person whom he hardly knew, and of whom he had conceived a favourable impression at a time when he was clearly in a state of derangement, but to whom he had no cause whatever to give a benefit. In cases of this sort you are to enquire, was it a rational and sensible act, and if you can make it appear that it is a rational and sensible act, then you go the whole length the law requires.

[120] In *Coghlan v. Coghlan*—No man could be more completely proved to be insane than the deceased in this case before the will was thought of; I remember it most perfectly, he was sent to Brook House, and there he was attended by Dr. Monro, an apothecary, and a woman, and they all of them say he was a person as insane as they had ever seen; he was likewise visited by a gentleman, Mr. Winthrop, who was known to him, and with whom he entered into a rational conversation respecting his family, and exactly as he had told Mr. Winthrop he gave directions to an attorney to make his will, which was to the benefit of his family, except his grand-daughter; but she had had a fortune left her, and he had frequently declared he would leave her but £100 as she was fully provided for; the will in that case was drawn, and when it was first brought to him he was in some degree recovered; it was then read over to him, and he declined executing it at such time, but he did execute it afterwards, and it appeared to be the intent and desire of the testator, who had an interval to express himself; the attorney said he gave him instructions in a very composed manner; and upon that ground the will was pronounced for; there was no disorder at the time, though he was afflicted with a distemper of the mind to a very great degree, and the will was consistent with his intentions when of capacity.

In *Greenwood v. Greenwood* the last verdict established the will, and I do not see any one of the cases which militates against the present.

[121] I am of opinion in this case that the deceased, by herself writing the will now before the Court, hath most plainly shewn she had a full and complete capacity to understand what was the state of her affairs and her relations, and to give what was proper in the way she has done. She not only formed the plan, but pursued and carried it into execution with propriety and without assistance. In my apprehension that would have been alone sufficient, but it is further affirmed by the recognition and the delivery of the will. Therefore, under all these circumstances, I have no doubt in pronouncing this to be the legal will of the deceased.

[122] CARTWRIGHT AND CARTWRIGHT v. DAME BYZANTIA CLERKE AND CARTWRIGHT. High Court of Delegates, Michaelmas Term, November 13, 16, 20, 25, 30, December 1, 8, 9 and 11, 1795.

From the sentence of the Prerogative Court an appeal was interposed to the High Court of Delegates.

The cause came on for hearing before Mr. Baron Perryn, Mr. Justice Grose, Mr. Justice Rook, Doctors Harris, Fisher, and Arnold.

The King's Advocate (Sir William Scott), the Attorney General (Sir John Scott), and Mr. Mansfield argued in support of the will.

Dr. Nicholl, Dr. Lawrence, and Mr. Grant contra.

The King's Advocate and the Attorney General were heard in reply.

The Court took time to deliberate.

December 22.—The sentence of the Prerogative Court was affirmed; but the Delegates gave no costs.

[123] EARL OF WARWICK *v.* GREVILLE. Prerogative Court, Trinity Term, July 11th, 1809.—Primogeniture gives no right to an administration.

Judgment—*Sir John Nicholl*. The question in the present case arises upon the grant of an administration to the goods of the Right Hon. Charles Greville who has died intestate.

The deceased left two brothers, one sister, and a nephew the son of a deceased sister; the property must be distributed amongst the four; and there are three persons to whom administration may be granted:

The Earl of Warwick, the elder brother, prays that it may be granted solely to himself, or to himself jointly with his brother Mr. Robert Greville: the younger brother, Mr. Robert Greville, prays that it may be granted solely to himself, and he is supported in this prayer by the nephew Mr. Churchill, who is entitled to an equal distributive share of the property: the sister, Lady Frances Harpur, prays first that it may be solely to her brother Robert, then solely to Lord Warwick, or jointly to him and her brother Robert, and lastly, solely to herself, or jointly to herself and the elder or both brothers.

The statement is rather complicated, but the result of it is that there is a moiety of the interests concerned praying the sole administration for Mr. Robert Greville; a quarter of the interests pray—[124]—the sole administration to Lord Warwick; a quarter praying the sole administration to Lady Frances Harpur; a quarter the joint administration to the two brothers; a quarter a joint administration to the elder brother and the sister, or to both the brothers and the sister, for Lord Warwick unites in praying that it may not be jointly to himself and his sister.

The (a) statute leaves it to the ordinary to grant [125] letters of administration to the next of kin; all here have an equal interest; all except the nephew stand in an equal degree of relationship; none have a legal preference; the selection rests with the discretion of the Court; that discretion, however, is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in exercising it the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution; the primary object is the interest of the property.

The claim of Lord Warwick to the sole administration rests merely on the circum-

(a) The jurisdiction which the Ecclesiastical Court exercises over the effects of persons dying without a will rests on a very ancient foundation: in the early periods of our history the ordinary had by common law the absolute disposal of the personal property of all intestates; and, under the pretext of applying their goods to religious purposes (in pios usus), possessed itself of them, not only in cases where the deceased left a widow and children or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet; but when the free spirit of our constitution, which had been long labouring under the pressure of the feudal institutions and the shackles of Papal superstition, commenced those struggles which ultimately led to its emancipation, the abuses practised by the ordinary in the administration of the effects of intestates became in their turn subjected to correction and control.

The 32nd article of the Magna Charta extorted from King John expressly provides against them; but it is a curious fact, and one which strongly marks the influence of the Papal power in England at that period, that this article was wholly omitted in the Magna Charta of Henry III.

13 Edward I. st. 1, c. 19 (commonly called the Statute of Westminster), made the estates of intestates liable to the payment of their just debts.

31 Edward III. st. 1, c. 11, compelled the ordinary to depute the next and most lawful friends of the deceased to administer his goods.

21 Henry VIII. c. 5, placed the law on the footing on which it now stands.

stance of his being the elder brother ; none of the other parties interested support that application ; Lady Frances did execute a proxy, praying that it might be either solely to herself or jointly or solely to her brother, but she has since retracted that, and her last proxy is that it may be solely to herself or jointly with him or to both her brothers.

Primogeniture gives no right ; if things are precisely equal ; if the scale is exactly poised, being the elder brother would incline the balance, but it would not weigh against the wish of the majority of interests. In the present case there are two [126] interests out of the four praying that the sole administration may be granted to the younger brother, and against that majority the claim of primogeniture could not stand, this would give a decided preference, if nothing else did, to the younger brother.

But it has been said there is not a majority of interests this way, inasmuch as there is an equal number of interests praying for a joint administration ; this is not correctly the fact : no two parties have joined in praying for a joint administration, Lord Warwick does not pray to be joined with his sister ; the other brother does not pray to be joined with Lord Warwick or the sister ; it is Lady Frances only who prays to be joined either with Lord Warwick or with both the brothers.

Assuming, however, that Lord Warwick and his sister did unite in praying for a joint administration, the interests indeed would be even, but it would be an application for a joint, opposed to an application for a sole, administration. It has been correctly stated that the Court never forces a joint administration because, if the administrators were at variance, it almost put an end to the administration. Further, the Court prefers *ceteris paribus* a sole to a joint administration, because it is infinitely better for the estate ; administrators must join and be joined in every act, which would not only be inconvenient to themselves, but, what is of more consequence, must be inconvenient to those who have demands on the estate either as creditor or as entitled in distribution.

Supposing, then, there was in the present case an [127] equality of interests, and that the Court had to choose between a sole and joint administration, still the sole, all other circumstances being equal, would be entitled to the preference ; here are also considerable creditors who support the application for the administration being granted to Mr. Robert Greville. I collect that there is some doubt whether the estate may be solvent or not much more than solvent ; it may be of considerable importance that the affairs should be managed in the most speedy and advantageous manner ; the wishes of the creditors are not in all cases of weight, but they are entitled to consideration where the estate is considerable, the demands heavy, and the solvency in the slightest degree doubtful.

These considerations are sufficient where a moiety of the interests, supported by considerable creditors, join in praying the sole administration to be granted to one of the brothers to whose fitness not the slightest objection has been raised ; there are other considerations which it is not necessary to enter upon except so far as to state that they tend to the same conclusion ; there are reasons, however, for not unnecessarily discussing them. I wish, however, distinctly to state that the Court, in feeling itself called upon in the discharge of its judicial duty to grant the administration to Mr. Robert Greville, is not governed by any circumstances which reflect in the slightest degree on the honor and character of the noble earl who is the other party to this suit.

Administration decreed to Mr. Robert Greville.

[128] SANDFORD v. VAUGHAN. (a) Prerogative Court, Michaelmas Term, 1809.

—Three papers established, as containing together a will.

This cause came on for hearing on the evidence adduced in support of the allegation, which had propounded papers 1, 2, 3, and 4, as containing together the will of the deceased.

Ten witnesses were examined ; but the only portion of their evidence, to which it is material to advert, is that of Mr. Scott.

Who, after stating that the deceased had consulted him in April, 1808, as to the form of his will, and had requested him to write the preamble for him and the names

(a) See pages 39 and 48.

of the legatees, leaving blanks for the sum he intended to bequeath to each, proceeded thus: "That, on the 28th of May, the deceased produced the paper writing, so as aforesaid, written by the deponent on the 14th of April, with the blanks for the legacies all supplied, and the paper itself dated and signed; and he directed him to make some alterations therein [here the witness specified the alterations], and having so done, he read it over to the deceased, being the paper No. 1. That Sir John Chichester immediately desired the deponent to transcribe it, on account of the alterations and interlineations, which he accordingly did, the deceased dictating to the deponent, and transposing some of the bequests. [129] That the legacies of two years' wages given to the servants in No. 1 were omitted in the deceased's dictation of No. 2. That, finding No. 2 was to be of a more formal and secure nature than No. 1, he suggested to the deceased the propriety of appointing an executor; which he approving, named the Rev. John Sandford and the deponent. That the deponent observed that one was sufficient, and begged to decline; and that the deceased then desired him to write down Mr. John Sandford alone: he then read the paper over to the deceased, and suggested the propriety of having the same witnessed to render it more secure, and offered to witness it himself; but the deceased said that as he intended to give the deponent something, he could not be a witness; to which the deponent replied that he might give him something by a subsequent paper, and then he should be a good witness. The deceased said it should be so, and then signed and sealed No. 2; and the deponent signed his name as a witness. That after such execution, the deponent discovered that in transposing the legatees' names, the legacies of two years' wages to the servants were omitted, and mentioned it to the deceased, who observed that it was of no consequence, as they could be inserted in the will to be made, alluding to the one to be prepared by Mr. Harman."

Judgment—Sir John Nicholl. The case has already received much discussion on two preliminary points, and is now reduced to a very narrow compass; it is unnecessary to repeat [130] what took place in the earlier stages of the cause, further than to observe that subsequent investigation has confirmed the Court in the propriety of the conclusions it drew from the face of the papers.

Witnesses have been examined to prove that the papers were executed by the deceased, with an intention of giving them a testamentary effect, and that he was a competent agent.

The proof is perfectly satisfactory; and there can be no doubt that Nos. 2, 3, and 4 must be pronounced for. The only question is whether No. 1 is to be considered as a part of the will, or to have been superseded by a subsequent paper; or, in other words, whether No. 2 was intended to be taken in addition to No. 1, or as a substitute for it?

The account given in evidence by Mr. Scott, the apothecary and confidential friend of the deceased, most fully confirms that which appeared from the papers themselves—that No. 1 is the mere draft of No. 2; that 2 was substituted for 1, and superseded it; and that the deceased had not the slightest intention of giving effect to both instruments.

It is said the servants will lose their legacies through a mistake, and so they will; but the Court cannot help this.

It is further said that I might pronounce for the clause as omitted by mistake; and the Court would go a great length to do so, as it has done in other cases, if it were owing to the mistake of a third party. But here the mistake was that of the de-[131]-ceased himself. He dictated; if an omission, it was his own. The paper was read over to him, he formally executed it, and it is attested. It would be a most dangerous step, and one not sanctioned by any precedent, upon parole evidence alone, to supply a clause which has been omitted; but the deceased himself was aware of it; it was pointed out to him, and he himself proposed the remedy; to insert them in a formal will. This would render it still more dangerous; he wrote subsequent papers, and executed others prepared by Mr. Harman; these omitted legacies were not supplied.

Under such circumstances the law must presume that they were intentionally omitted; it can only safely look to facts and to written papers not to parole declarations.

The principle must be applied however the Court may think that the omission in this case was accidental in the first instance and forgetfulness in the second; there may be strong claims upon the liberality of the next of kin to pay these legacies to the servants, more especially as the residue may possibly be undisposed of, and come to them more from the inactivity and indecision of the deceased than from his real

intention ; but with this the Court cannot interfere judicially, not even in the way of recommendation.

Upon the whole I think No. 1 not entitled to probate, but pronounce for 2, 3, and 4 together, as containing the will of Sir John Chichester.

[132] WILSON v. BROCKLEY. Trinity Term, July 11, 1810.—An allegation pleading the nullity of a marriage admitted to proof.

Amelia Brockley, otherwise Girard, died, having made a will in which she appointed Edward Wilson sole executor.

A caveat was entered against this will by Robert Brockley, who alleged that he was the lawful husband of the deceased, and he further propounded his interest in an (Prerog. Hilary Term, 1810) allegation in which he pleaded his marriage with Amelia Brockley, then Amelia Langley, by banns in September, 1870, his cohabitation with her, and separation from her, and the fact of her having been illegally married in the year 1795 to William Girard, by her maiden name of Langley.

In reply to this Edward Wilson, the executor under the will, now tendered a responsive allegation, pleading—

First, that part of the marriage act which requires the publication of banns, and regular notice to the minister of the true christian and surnames.

Secondly, that Amelia Girard, widow, falsely called Brockley, was the illegitimate daughter of Martha Burt and John Langley ; that Martha Burt swore the child to Langley, and that Langley compounded with the parish for her maintenance, [133] that Mary Burt shortly afterwards married a person of the name of Bannister, and that in consequence of this marriage her illegitimate daughter assumed the name of Bannister, and from that period constantly passed and was only known by the name of Bannister.

Thirdly, that the banns pleaded to have been published between Robert Brockley and Amelia Langley, who was only known by the name of Amelia Bannister, were on that (a)¹ account unduly published, and consequently the marriage was absolutely null and void.

The question before the Court was as to the admissibility of this allegation.

Swabey for the husband. The allegation does not plead that she was not baptized as Amelia Langley, and the register of her baptism is not offered to the Court ; an illegitimate child has no name unless by baptism ; by baptism she acquires a name which can only be changed at confirmation.

Besides, the allegation is inadmissible on principle, as the proceedings are not instituted inter vivos, but after the death of one of the parties.

Burnaby contra, for the executor. The Court has clearly jurisdiction ; it has exercised it in *Haydon v. Gould*, *Copps v. Follon*, and a variety of instances.

It is not necessary to plead the entry of the baptism, because an illegitimate child, if she has acquired no name by reputation, can only be entitled [134] to the name of her mother. It was held so in *Wakefield v. Mackay* : (a)² in that case an illegiti-

(a)¹ 26 Geo. 2, c. 33, s. 1. 26 Geo. 2, c. 33, s. 2.

(a)² *Wakefield v. Mackay*, otherwise *Lascelles*, otherwise *Thorpe*, otherwise *Jackson*, falsely calling herself *Wakefield*. Consistory Court of London, Michaelmas Term, Nov. 17th, 1807.

[S. C. 1 Hag. Con. 394.]

Judgment—*Sir William Scott*.* This is a suit for a nullity of marriage instituted by Daniel Wakefield, Esq. against Isabella, described in the libel as Isabella Mackay, falsely calling herself Wakefield.

The parties were married in the church of St. James's, Clerkenwell, on the 29th of May, 1805, after a proclamation of banns under the names of Daniel Wakefield and Isabella Jackson. It was observed in argument that this was not a new connexion ; and it certainly was not, either with relation to the time of their acquaintance which preceded this marriage connexion, or to the nature and description of that connexion.

* This judgment is copied from a note taken in shorthand by Mr. Gurney.

[135]-mate child was baptized in the name of her mother, and though in the course of her life she [136] had used a variety of names, still the Court held that the banns

Mr. Baster, who appears to be a fellow student of Mr. Wakefield's at one of the inns of Court, has been examined; and he deposes upon the fifth interrogatory that he had understood from Daniel Wakefield, the producent, that he first became acquainted with the ministrant six or seven years ago; this brings it to about the year 1800; it appears that she and Mr. Wakefield cohabited together during the former and latter part of that period; for it appears that she during the former part of that time, passed by the name of Lascelles at the lodgings where he, the producent, there kept her as his mistress; who is the seducer and who is the seduced in this case does not at all appear; what the age of Mr. Wakefield is is not disclosed upon the evidence, but this woman appears to have been of extreme youth at this time, I think by the dates assigned not more than fifteen years of age, which lays some ground for probability that she was not the first who took the active lead in forming this connexion.

What name she bore at the time Mr. Wakefield was introduced to her, or under what circumstances she was living, does not at all appear; very soon afterwards, namely, in February, 1802, she took the name of Lascelles, Mr. Wakefield, at the same time assuming the same name and passing as Mr. Lascelles, the husband of Mrs. Lascelles; he introduced her as his wife to a boarding school, where he visited her, he passing under that name. In 1803 she went to Salisbury under the name of Thorpe; the manner in which she assumed the name of Thorpe is described in her answers to be this, "That upon her going into the country Mr. Wakefield tendered to her a list of names for her acceptance, recommending the name of Baddeley; that she disapproved of that name and chose in preference the name of Thorpe;" she went to various country places and, as some part of the evidence would rather seem to disclose, as an actress in a country theatre; she returned to London in 1804; they then cohabited together, he under the name of Mr., she under that of Mrs. Thorpe, he taking a house and keeping a house, paying bills, and carrying on other transactions in that name.

In September, 1804, a Roman Catholic marriage took place between them, and she assumed the name of Wakefield with his perfect knowledge and consent: after this ceremony, solemnly though not validly performed, she attracted the attention of this witness Mr. Baster; he admits upon an interrogatory that, after the said marriage according to the rites of the Roman Catholic Church, he himself made professions of love and affection to the ministrant, and endeavoured to prevail upon her to leave Mr. Wakefield and marry him, the respondent; and in or about the month of April, 1805, he caused the banns to be published in the parish church of Iver for the marriage of himself with the said Isabella Wakefield, the ministrant, by the name of Isabella Jackson.

That this offer on the part of Mr. Baster was produced by any effort on her part is, I think, repelled by the account which Mr. Baster gives, that he was the person that endeavoured to prevail upon her; he describes her as a woman of an engaging person and interesting manners; the only unfair practice imputed to her is that she fraudulently concealed her birth and parentage, and pretended a connexion with divers noble and illustrious families; to that part Mr. Baster is the only witness, and he proves that she did state herself to be the daughter of the Honourable Mrs. Sandford, connected with the Marquis of Thomond and other considerable persons.

That this was done for the purpose of effecting any marriage, or the particular marriage upon which I have now to decide, does not appear; it might be the gratification of an idle vanity, the purchase of a little present importance amongst the persons with whom she was living, and not at all with any view to the effectuating any marriage; for upon the whole of the evidence I see no anxiety on her part to procure the marriage, she had been content to live upon lower terms with Mr. Wakefield; Mr. Baster's admission upon the eighth interrogatory proves, I think, that her ambition was not very active in procuring this marriage, for he answers that he believes Mr. Wakefield frequently entreated and endeavoured to prevail upon the ministrant to consent to be married to him, and that it was in consequence of such entreaties they were afterwards married to each other, and when she is married she does not use the name of Mrs. Sandford, whose daughter she had represented herself to be, but the name of Jackson.

having been published in the name [137] of her mother they had been published in her proper name.

I see, therefore, no reason to think that this fraud was practised with the intention imputed in the libel, namely, that she falsely pretended that her real name was Jackson, and that she was related to divers noble and illustrious families, and to a person who had married an opulent West India planter of the name of Wells, stated to be her aunt, and that she, having completely gained the affections, prevailed upon the said Daniel Wakefield to consent to be married to her, and she accordingly was so married; the representation being that on the contrary it was he who endeavoured to prevail upon her, and that she consented to this marriage in consequence of his solicitation.

I see no reason to think that this fraud had that effect upon Mr. Wakefield, because, from his answers, I collect it to have been his general persuasion that she was the daughter of this person the same as she is described to have been in this libel; but taking the fact to be otherwise, that a fraud had been practised with this view and that it had been successful, that Mr. Wakefield had been captivated by this pedigree which she had assumed to herself, still that will not in the least of itself affect the validity of this marriage. Error about the family or fortune of the individual, though produced by disingenuous representations, does not at all affect the validity of a marriage. A man who means to act upon such representations should verify them by his own enquiries; the law presumes that he uses due caution in a manner in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced. I must, I think, lay all that, both in point of fact and in point of law, out of the question; and I must consider this case as confined to the legal question arising upon the fact of her being married under the name of Jackson, by proclamation of banns, when she had borne the several names I have before recited. To prove a nullity of marriage it must be shewn to the satisfaction of the Court that Jackson is an untrue name.

The libel pleaded that she was the natural and lawful daughter of John and Ann Mackay, with whom she is proved to have lived much, and whom she is proved to have treated with great filial affection, as she did likewise a brother and a sister with much sisterly affection; the fact established, however, by the evidence of her mother and of two other persons who are examined is, I think, clearly what I am bound to take as the real fact of the case upon this evidence, that she was the daughter of Ann Mackay, whilst a spinster under the original name of Jackson; there is no evidence who was the father of this child, but at any rate she is not to be considered as the natural and lawful daughter of John and Ann Mackay.

It was said by the counsel that the party, having set up a legitimacy, had no right to avail himself of what turned out to be the fact, the contrary evidence of illegitimacy. I am of opinion that Mr. Wakefield has a right to use any evidence introduced into the cause by either party, if he can arrive at the conclusion that Jackson was not the true name by any other means, and that he has a right to avail himself of the benefit of that conclusion however obtained.

It occurs to me that there are three possible ways in which this case may be put on the one side and on the other.

First, that any one of these names was a sufficiently true name so long as she continued to go by it.

Secondly, that none of these names can be considered as a true name, for that the circumstances of her birth and fortune were such that she never acquired what the law can consider as a true name; and

Thirdly, that only one of these several names can be deemed the true name of the party, and that the Court is bound to ascertain that name in order to determine upon the validity of this marriage.

That any of these names is a sufficient name for the purpose was submitted upon an authority entitled to great respect, namely, that of Sir Joseph Jekyll, Master of the Rolls, who, in the case of *Barlow v. Bateman* (3d Peere Williams, 65, 6), lays down certainly in very unequivocal terms that any one may take upon him what surname and as many surnames as he pleases; and for the time during which he uses such a surname, if he has a right to use it, it is what cannot be denominated an untrue name.

I am far from meaning to trench upon the authority due to that great man when

[138] *Judgment*—*Sir John Nicholl*. The suit is instituted to prove the will of Ame-[139]-lia Girard. The will is propounded by the executor, and opposed by I say that the solid grounds on which this proposition of law is stated do not appear to have occurred to him just at the moment of the delivery of that judgment; because the reason stated in that report can hardly, I think, be deemed satisfactory to produce such a conclusion; it is stated that the reasons are, first, that surnames are not of very great antiquity; it is now pretty well established that surnames were fully in use even among the common people by the reign of Edward II., which is now five hundred years ago, a pretty reasonable period for the establishment of any legal usage. It is observed that in ancient times the appellation was by the christian name and place of habitation, as Thomas of Dale, which Thomas of Dale is of itself a surname, a local surname, but not less a surname on that account, for surnames were local, taken frequently from places of habitation, or from other circumstances that belonged to the individuals to distinguish men who were not at all distinguished by christian names. The christian names are scattered about among the mass of the people with such profusion that the christian name is no distinction at all, and the very introduction of the surname was to discriminate that which was not before discriminated.

It is observed that the usage of an act of Parliament for a name is but modern; certainly it is, and so are acts for any other private family concerns, they are of modern introduction, but there has been a practice of great antiquity, that is the grant of a surname by the crown, passing through one of its public offices; certainly the ancient style of the ancient offices of the crown are some authority upon the subject; however, I would observe likewise upon the confusion that must be produced to a degree that would compel a legislative correction if the practice at all followed this rule, that every one might take what surnames he pleased, the whole world would be at hide and seek about identity in the concerns of almost every individual. I am, however, perfectly content, as I ought to be, to take this assertion coming from so venerable a person, confirmed as it is by other documents of the like kind; but, taking it as generally true, I think that the particular case of the marriage act might be admitted to form an exception. The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights; it therefore requires that the true name should be given them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of these provisions; accordingly this Court has conceived itself to be carrying the intention of the law into effect when it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended, upon the ground that such proclamation was no proclamation referring to that marriage but to another transaction, the marriage therefore was without proclamation of banns and consequently illegal; there was a fraud, a want of fidelity and truth in the application of the banns to the marriage, though there might be no fraud in the original intention; it is therefore, I think, clear that if there is a true name that true name must be used: it may be a name less notorious to the world than some name which the party has thought fit to assume, but it is not less the true name on that account, it is the name which it is presumed her relations, her parents, and her guardians are the best acquainted with, and therefore the name which ought to be applied on such an occasion, provided she is possessed of such a name.

But it may be said, in the second place, that, under the circumstances of this person's birth and fortune, she never did become possessed of that which the law would consider as a true name. It is, I think, a possible case that there may be no true name ascertainable as belonging to an individual; suppose the illegitimate child of a person who had been tossed about the world in a variety of obscure fortunes and situations, who has at different times been passing under different names; the child of such a person at a marriageable age may not be possessed of any name so clearly established by usage as to be depended upon for so serious a purpose as that of invalidating the marriage.

What would be the rule of law in such a case? in my opinion it would be that such a person would be out of the statute. The law presumes, as is generally true, that every person has a name; but the law which presumes that, and calls for that name, does not compel parties to impossibilities; and, if the party is not possessed of that which can be considered as a true name, in my apprehension it would not be

Robert Brockley, who alleges [140] that he is lawful husband of the deceased ; his interest is denied and propounded ; an allegation [141] has been given in pleading his

unfair to say that the marriage of such a person would stand upon the old footing of the canon law, which required banns as matter of regularity, but not as matter of necessity to the validity of a marriage. Perhaps those who have attended to the evidence, and to the long and elaborate arguments which have been constructed upon it, may be disposed to entertain an opinion that this very case approaches something towards that description ; an illegitimate child, very little history applying to the early periods of her life, assuming a succession of five different names before she marries ; certainly it must be admitted that it is no easy matter to ascertain what has a right to be considered as the true name of this individual under all the circumstances.

It may, however, be said that the legislature has held out that every person has a true name, and that it is the duty of the Court in this case for the determination of the suit to decide which of these several names is that which is best entitled to that character.

Five names have been stated ; three of those have, I think, been very much dismissed out of the argument, the names of Lascelles, Thorpe, and Wakefield, though she used them for a considerable time ; they were all of them presents from Mr. Wakefield ; the last of them in consequence of the ceremony of the Roman Catholic marriage which had taken place between them. But the question has turned, as I think it ought to turn, upon the competition between the names of Mackay and Jackson, which of them is to be considered in the character of the true name of this individual.

I will state the evidence which applies to these names ; six witnesses have been examined, two only of these six witnesses speak of her under the name of Mackay ; of the other four, Pudderphat and Garnett knew her only under the name of Lascelles during the years 1801 and 1802 ; she lodged with Pudderphat during the year 1801 ; and with Garnett during part of the year 1802 by that name. Mr. Baster appears to have known her by the name of Thorpe, till she took the name of Wakefield upon the Roman Catholic marriage. On the 6th of September, 1801, Turner, who was a porter at the inn of Court, carried messages to her from Mr. Wakefield ; but under what name or names she then passed, or where she was living, this witness does not describe. There are only two witnesses who speak to the name of Mackay ; the one is a Mrs. Gray, who was an assistant to Mrs. Bayley who kept a Roman Catholic female boarding school at Hammersmith, who proves that she was a boarder for an entire year under the name of Mackay, till January, 1794, being then a child of about eight years of age. The other witness is Mr. Andrews, a perfect stranger to the family, but who was introduced to the knowledge of her by a memorable transaction of her life ; he is the surgeon of the police-office in Bow Street ; he was brought in to attend a child who had been forcibly violated by a person of the name of Murphy, who was afterwards convicted of the crime ; this was in August, 1794, and he identified this person to be the child that he had attended, bearing the name of Mackay. Copies of affidavits which were then made, in which she describes herself as Isabella Mackay, and her mother describes her under the same name, are produced to the Court ; and it was observed very justly by the counsel for Mr. Wakefield that this was a very serious transaction ; but the name of the party injured was certainly not the most material part of this serious transaction, for the crime was the having deflowered a child of that tender age ; be it Mackay, be it Jackson, it made no sort of difference in the offence of the party, or the punishment he was subjected to in consequence of it. These are the only witnesses who speak to the name of Mackay, one during the whole course of the year 1793, the other in a detached transaction in the summer of 1794. It is a possible thing that this defect of evidence may have arisen from the course of the cause ; for having pleaded, as I presume they supposed at the time, that she was a legitimate child, they might have perhaps relied upon the presumption of law necessarily arising from thence, that she must be of the name of her father and mother ; but, the fact failing, the inference fails, and that fact is as necessary to be proved, and directly proved, as any other fact in the case.

Now there is no evidence whatever arising from the depositions that are produced before the year 1793, when she was a child of eight years of age, and this transaction

marriage with the deceased in 1780, by banns, under the name of [142] Amelia Langley. If that marriage was valid the deceased was a married woman, and had no right [143] to make this will; whereas, if the marriage was not valid Brockley, has no interest to oppose the [144] will, and cannot be admitted as a contradictor to it.

[145] The great question therefore is, whether the marriage is valid or not? and this doubtless is a fact which may be put in issue. It was so held in *Copps v.*

which I have just noticed in August, 1794, that applies the name of Mackay to her. There is an entire blank in the history from that time till she emerges as Mrs. Lascelles in the year 1801; it is true that there is upon her answer an admission to this effect, that she did at times during her childhood pass by the name of Mackay.

In the first place I must observe that this admission is that which I have hardly a right to notice, because it is perfectly extra-articulate and gratuitous, there being no allegation in the libel which requires an answer to such a proposition, and therefore the admission finds its way there without any effect. Next I must observe that the admission is pregnant with a contradiction; for, when she admits that in her childhood she passed by the name of Mackay, she insinuates that she passed at other times by some other name, but that name does not appear; it goes no further than this, supposing that an admission which I could notice, that at times she, as was natural, living in their family, did pass by the name of Mackay. Such is the whole amount of the evidence that applies to this name.

Now, what is the evidence that applies to the name of Jackson? She is born an illegitimate daughter, the mother gives her the name of Jackson naturally and properly, because, though in point of law she is nullius filia, yet in fact and in nature she is the daughter of the mother who produced her, and therefore properly and usually designated by the name which the mother bore. The mother swears that at her birth she was described as Isabella Jackson, not, I presume, in the baptismal rite itself, where only the christian name is conferred, but in some register, some record, some formulary or other, that was applied to that ceremony; the mother swears that at the other sacrament for adult Christians she took it under the name of Isabella Jackson, being the practice of the Roman Catholic Church, she received the sacrament as a Roman Catholic, and did other solemn acts in the name of Jackson.

In 1804 she is married by a Roman Catholic marriage to Mr. Wakefield, under the name of Jackson, without any adequate motive for the fraudulent use of that name, as far as appears, or without any reason for it than her own apprehension that it was the name that properly belonged to her; her mother attending at that ceremony, sanctioning the use of that name, and meaning most certainly not to destroy the validity of that marriage afterwards by the use of an improper name upon the occasion. Her mother swears that it was generally understood afterwards that her real name was Jackson; how that may be I cannot say, but this clearly appears that Mr. Baster understood it to be so, because, when he gave in the banns to be published at Iver the year following, he described her as Isabella Jackson, therefore he certainly understood at that time that the name of this person was Jackson.

Lastly, when nearly a year after the Roman Catholic marriage she comes to this marriage she again appears by the name of Jackson, she is proclaimed in the banns and married under that name.

Then taking all this evidence together, that it was the name of her mother, that it was the name impressed upon her at her birth, that she has used that name in the most solemn acts of her life civil and religious, and at various periods of her life, which has not been a long one; I say, taking that evidence and comparing it with the evidence on the other side, which embraces only a very short period of her life, the Court would not be warranted to say upon this evidence that Jackson is so clearly demonstrated to be the untrue name of this person if she did possess a true name as to destroy the validity of the marriage. I am the less disposed to sustain the objection to the validity, because Mr. Wakefield has his remedy; if it is a nullity upon this ground it is a nullity ipso facto and ipso jure under the statute, and which may be pleaded upon any occasion in which she claims to be considered as his wife; it is a matter which may be put in issue and may be established upon other evidence; but upon this evidence I am clearly of opinion that the name of Jackson is not demonstrated to be other than the true name of the party, and therefore I dismiss her from all other observations of justice in this cause.

Follon; (b) in that case the marriage was [146] by banns, but the entry recited that they had been published under the names of James Fanon and Mary Deacon, whereas Follon was the true name of the man, and so it was subscribed to the entry of the marriage. The Court admitted the allegation pleading the marriage; indeed it would be strange if such an allegation were not admissible, for the act of parliament declares the marriage, if the banns are not duly published, to be void to all intents and purposes whatsoever.

Here a right depends upon the marriage, banns are pleaded to have been unduly published under a false name, it is not admitted that the name of Langley was even a name acquired by reputation, illegitimate children as often go by the name of the mother as by that of the putative father, she would probably have passed by her mother's name, that of Burt, but here a new name of reputation is acquired and that at a very early age; the time indeed is not precisely specified, but it is alleged to be shortly after her mother swore the child to Langley, and it is pleaded that she was not known by any other name than that of Bannister, which became her name of reputation and habit; if this turns out to be so, the publication of her banns under the name of Langley must have been a complete evasion of the act of Parliament; no person would know her by that name, and the law certainly requires a publication by the name under which the party is known; the intended marriage must be publicly notified, and can only be notified by using the name by which the party is known; it is not necessary to decide what would be the [147] effect of using the name of her lawful parents, whether it would be a true name within the meaning of the act where a different name had been acquired by reputation, but there can be no doubt but that a name acquired by reputation may be superseded by another name of habit and reputation; this was so held in the case of *Frankland v. Nicholson*,^(c) where the Court (Sir William Scott) said, "There must be the true name, a notification of the person by a proper description; a name may possibly be acquired by reputation and habit which may supersede the original name; there may be cases where the publication of the real name would defeat the object of the statute; if such a case were made out, I might hold that the name of habit was a sufficient publication."

In my note of this case the Court is not recorded to have said expressly that the publication by the original name would not be a due publication, but the reasoning goes to that extent, and so indeed does the principle; in that case the Court was of opinion that the name of Ross had not been acquired even by reputation, but that it had been falsely and fraudulently assumed.

In the present case Bannister is the only name by which the party was known, so at least it is pleaded, and the name too by which she had constantly passed from her earliest infancy; the banns were published by the name of Langley; if so, this would be no notification, for she was never known by or acquired the name of Langley.^(e)

(b) *Prerog.* Hilary Term, Feb. 6, 1794, *Coppe v. Follon*.

On the admission of an allegation.

Judgment—*Sir William Wynne*. The allegation propounds a marriage between James Follon and Mary Deacon; it pleads courtship, and that they were married at St. Leonard's, Shoreditch, pursuant to banns regularly published; but that in the entry of the banns in the register it was said to be solemnized by banns published between James Fanon and Mary Deacon; that it was so entered by the minister, but that it was signed by the man James Follon his true name.

But it is alleged that the banns were regularly published; then they were so by the right name; there is nothing to shew the Court that they were not; the minister might mistake in entering; the court will not presume an improper publication, and it is alleged to be regular. The parties take upon themselves to prove the identity; the courtship, cohabitation, and issue, are pleaded; the entry will not void the marriage. [In Michaelmas Term (viz. December 13,) 1794, the case came on to be heard on the evidence. The marriage was proved, and the administration granted.]

I shall admit the allegation.

(c) A cause of nullity of marriage, decided in the Consistorial Court of London, Easter Term, May 29, 1804, the woman's real name was Nicholson; but she had passed herself to the man under the name of Ross, and by this name her banns had been published.

(e) In ——— v. *Longley*, before the commissary of Surry, Easter Term, 1794, the

How the facts of the case may turn out it is impossible for the Court to anticipate ; at present I can only say that sufficient ground is laid for the admission of this allegation. (f)

[149] TREVELYAN v. TREVELYAN. Prerogative Court, Trinity Term, July 18th, 1810.—A will destroyed in the lifetime of the testator, but without his knowledge ; substantiated and admitted to proof.

Edward Trevelyan, Esq., died at Clifton, on the 13th September, 1807 ; no will was found to be in existence at the time of his death, but it was pleaded that his will had been destroyed during his life time without his knowledge.

The two following codicils were before the Court :—

of in my former will,

not disposed of the produce of my

“I bequeath whatever money I die possessed of, as well commissions in his Majesty’s service, as whatever may be in my agent’s hands, or elsewhere due to me, in share and share alike between my brothers Walter and George Trevelyan after paying my just debts ; my fishing rods and dogs to Stackpoole ; my curricule and and brood mare

horses to Walter and George, these having to pay my debts ; my two colts to Stackpoole. I desire that Richards my late servant a soldier in the same regiment with myself may have his discharge purchased for him if he wishes it.

“September 10th, 1807.

“ED. TREVELYAN.

“Witness, Ann Bowsher, Grace Barton.”

[150] “To my late servant Richards, as well as his discharge, I bequeath all the cloaths, regimentals, or otherwise, I may die possessed of ; and to Stackpoole my guns.

“Ann Bowsher.

“E. TREVELYAN.

“September 10th, 1807.”

Mr. Gordon deposed, “That he was intimately acquainted with the deceased ; that, to the best of his recollection as to time, on the 22nd of June, 1807, he dined at the Rev. George Trevelyan’s, at the parsonage at Nettlecombe, and he thinks Miss Lyttelton and Lady Elizabeth Percival were there on a visit, and the deceased was also of the party ; when the ladies had left the room after dinner the conversation turned upon the deceased’s brother’s, the Rev. Geo. Trevelyan’s, children, and the deponent observed that Henry Trevelyan, one of them, who was the godson of the deceased and also of the deponent, was a fine child, the deceased agreed with him ; after talking for some time of the child, the deponent laughing said, if the deceased would leave Henry his heir, he would leave him also £1000 ; the deceased agreed to this, and the deponent called for pen, ink, and paper, and made the deceased’s will, and witnessed it. To the best of his recollection the will was as follows :—

“This is the last will and testament of Edward Trevelyan of His Majesty’s first regiment of Foot Guards ; I give bequeath and devise all my property both real and per-[151]sonal wherever and whatsoever unto my dear godson Henry Trevelyan, the son of my brother George Trevelyan of Nettlecombe, and I appoint the said Henry Trevelyan my godson my residuary legatee.’

“That having made this will, he read the same all over to the deceased ; that the deceased understood it, and approved of it, and set and subscribed his name thereto in the presence of the deponent, who also subscribed his name to it as a witness ; that during this proceeding the Rev. George Trevelyan reprimanded both the deceased

banns were published by the name of Long instead of Longley, and in a parish to which the parties did not belong ; this was held to be a false and fraudulent publication, and the marriage pronounced to be null and void.

(f) This allegation was not substantiated by proof. The cause came to a final hearing in Hilary Term, 1811, when it clearly appeared that, though the party deceased after the marriage of her natural mother with George Bannister went to live with and was brought up by her husband, yet that she never assumed nor was ever called by the name of Bannister, but, on the contrary, from her youth till the day of her marriage, had constantly passed and was known only by the name of Amelia Langley.

Accordingly the interest of Brockley was pronounced for, and administration decreed to him as lawful husband of the deceased.

and the deponent for their folly and left the room; that on tea being announced they joined the ladies, and upon entering the room the deceased observed, 'We have made a man of Henry,' and they all laughed, but no one was told of the particulars of the will; that upon the deponent's return to his house he began to reflect that the joke had been carried to a sufficient length, and that it was incumbent on him to destroy the will, supposing the deceased not really serious, and he accordingly destroyed it; that he destroyed it unknown to the deceased, but whether the deceased did or did not remain ignorant thereof till his death he cannot say, as he, the deponent, never affected the least concealment of his having destroyed the same."

William Stackpoole deposed, "That when the deceased was lying in his last illness at Clifton he was with him, as were also his brother the Rev. Walter Trevelyan and his wife; and Mr. Walter Trevelyan suggested to [152] the deponent the propriety of his brother's making his will; upon which the deponent immediately went into the room and mentioned it to him, to which he replied that he had made his will when he was ill two years before in Somersetshire, which was written out by Gordon, and that it was in favour of one of his brother George's children to whom he was godfather, that Mr. Gordon had compounded, in case he made him his heir, to add £1000 to it; to which the deponent replied, the produce of his commission he thought nevertheless undisposed of, or any pay that might be due to him; therefore he took pen, ink, and paper, and drew the first codicil in question." Mr. Stackpoole then proceeded to depose in the fullest manner to the deceased's approbation and signature of the codicil, and continued his evidence thus, "That the deponent then went into the next room, where were Mr. and Mrs. Walter Trevelyan, and read to them the codicil, when it occurred to the deponent that it made no mention of the will the deceased had often and so lately said he had executed and left with a Mr. Gordon, and that he had not bequeathed his clothes, of which he usually had a great many. He therefore returned to the deceased and put the following questions to him by way of ascertaining his recollection in the presence of Ann Bowsher his nurse, all of which he had repeatedly solved to the deponent; 'Where is your will? at Edward's?' 'At Mr. Gordon's, a particular friend of George's, in Somersetshire.' 'Is it the will you have before mentioned to me to have been drawn by Mr. [153] Gordon?' 'Yes. The contents I have often told you of;' or words to that effect. 'Is it your intention that this should interfere in any way with that?' 'No; certainly not;' or words fully to that effect. That the deponent immediately made the interlineation 'not disposed of in my former will,' and asked the deceased whether such were his intention; to which he replied, 'Yes.'" Mr. Stackpoole then deposed to the writing and execution of the second codicil of the 10th September, 1807.

Ann Bowsher, nurse of the deceased, spoke to the attestation of the two codicils above mentioned.

Judgment—Sir John Nicholl. There can be no doubt in law that if a will duly executed is destroyed, and in the lifetime of the testator, without his authority, it may be established upon satisfactory proof being given of its having been so destroyed, also of its contents.

The question then comes to the facts, and in this case there is abundant proof of the execution and contents of the instrument, as well as of the destruction of it without the authority or knowledge of the deceased. It is not necessary to decide whether the Court could receive evidence against the fact of execution on the ground that the transaction was throughout a jest; it would be very dangerous to admit any such evidence of intention against the act; though there might be such a possible case, especially if the paper itself [154] contained any thing ludicrous or absurd in its dispositions; against this instrument this species of argument cannot be maintained with effect, for the property is bequeathed to the testator's own nephew and godson.

It appears also from the evidence of Mr. Stackpoole that the deceased was very serious in this disposition of his property; the codicils too are a complete recognition and proof also that he had no knowledge or idea of the destruction of the paper.

Under such proof the Court is bound to pronounce for the will "as contained in the deposition of the witness" (this is the mode I believe which has been adopted on similar occasions); and for the two codicils which are sufficiently proved.

[155] DABBS v. CHISMAN AND JENNENS v. LORD BEAUCHAMP. Prerogative Court, Michaelmas Term, Nov. 14th, 1810.—A person in possession of an administration is not bound to propound his interest till the party calling in question the grant has first propounded and proved his.

[Applied, *Menzies v. Pullbrook*, 1841, 2 Curt. 848. Referred to, *Hawke v. Wedderburne*, 1868, L. R. 1 P. & D. 595.]

These two cases, differing in their circumstances and wholly unconnected with each other, yet as involving the same rule of practice, were argued at the same time.

In the first, viz. that of *Dabbs v. Chisman*, Elizabeth Moore was the party deceased; she had died a widow in June, 1806, having executed a will and codicil, but appointed neither executor nor residuary legatee; suit was contested between Chisman and Lygett, each claiming to be her nearest relation; pleas were given in and witnesses examined on both sides; and in June, 1807 (Prerog. June 26, 1807), the Court pronounced for the interest of Chisman as cousin german and next of kin to the deceased, and he took out an administration to the effects with the will and codicil annexed.

In Michaelmas Term, 1809, the present cause was instituted by Elizabeth Dabbs, who asserted herself to be a second cousin of the deceased, and called upon Chisman to propound his interest. The question now was, whether the Court would call upon Chisman to propound his interest before it decided that Dabbs had proved hers?

In *Jennens v. Lord Beauchamp*, William Jennens died in July, 1798, possessed of a considerable [156] landed estate and an immense personal property; he left a will by which he disposed of his freehold estates, but it contained no bequest relative to his personal property, nor did he appoint any executor or residuary legatee. Accordingly, letters of administration with the will annexed were granted to William Lygon, Esq. (since created Baron Beauchamp), and the dowager Viscountess Andover as cousins german once removed and the only next of kin entitled in distribution, and they continued in undisturbed possession of the administration till May, 1810, when the present suit was instituted and Lord Beauchamp, the surviving (a) administrator, was cited to bring the administration into Court at the prayer of several persons of the name of Jennens, who denied the interest of Lord Beauchamp and Lady Andover, and asserted themselves to be cousins german thrice removed of the deceased.

The question in this, as in the other case, was, whether the administrators were liable to be called upon to propound their interest before the other parties had propounded and proved theirs?

Adams, Stoddart, and Jenner for the parties calling in the administrations. The general practice in an interest cause is that the parties should be brought before the Court *pari passu*; thus if any one in the possession of an administration is called upon to bring it in at the suit of a person having an interest, whether [157] that interest be more or less remote than his, the administrator is bound to shew and to propound his interest.

Court. Have you found any case where the administrator has been compelled to give in an allegation and to proceed *pari passu* with the adverse party?

ARGUMENT RESUMED.

No case perhaps precisely to that point, but it is a general rule that in interest causes allegations shall be exchanged and the parties proceed *pari passu*; were only upon the general rule. It is for the other party who except against the application of it in cases where the administration has been already granted to support their application by precedent.

Swabey and Phillimore *contra*, stated their apprehension both of principle and practice to be completely at variance with the doctrine laid down on the other side. Any person who is possessed of an administration, whether obtained *foro contradictorio* or not, has a judicial authority for his acts, and is to be considered in law as a *bonæ fidei* possessor. *Qui certat iudice auctore bonæ fidei possessor est*. This doctrine has been recognized in many cases in this Court; in *Hibben v. Calemberg*, Prerog. 1754; *King v. Kindleside*, Prerog. 1764; *Forrest v. Wilson*, Prerog. 1766; *Jones v. Chapman*, Prerog. 1766; *Osborne v. Golding*, Prerog. 1768; *Cecil's case*, Prerog. 1784. And it was held in *Elme v. Da Costa*, Prerog. 1791, that where an administration [158] had been granted to a creditor he acquired the same right to oppose as the next of kin would have had, had he obtained possession of the grant. These cases fully support

(a) Lady Andover had died leaving her daughter, the Hon. Frances Howard (wife of Richard Howard, Esq.), her sole executrix.

the rule, which has its foundation in the favour with which the law views a possessory right ; possession is presumption of a legal title, not to be ousted till a superior title is shewn.

Judgment—Sir John Nicholl. An important rule of practice is involved in the decision of these two cases. I have thought it adviseable to take them together as they do not materially vary ; in the one the interest of the party has been propounded, and pronounced for, but against other persons than those now contesting the suit ; in the other the administrators have been in possession of the grant of the administration upwards of ten years. In both cases therefore there is a strong presumption in favour of the interest ; in both a long acquiescence on the part of those persons who now call in the administration.

The question for consideration is whether under such circumstances the administrators are liable to be called upon to propound their interest, before the parties calling it in question shall have propounded and proved their own ?

It has been asserted on one side that by the uniform practice of this Court where both interests are denied both parties are bound to bring in their allegations and to exchange them at the same time ; this has been admitted on the other side where both the parties appear before there has been any grant of an administration ; but where there has [159] been such a grant, and the parties contesting it appear long subsequent to the issue of it, it has been contended that they must satisfactorily shew that they have an interest themselves, before they can require the party possessing the administration to propound his interest and give in an allegation.

The general rule indeed can hardly be denied that where two parties appear before any administration has been granted, both are to propound their interests and to proceed *pari passu* ; and this whether the mutual interests are denied, or whether an interest is denied and the will opposed ; nor does the rule vary whether the asserted next of kin are in the same or in different degrees of relationship.

In *Waller and Smith v. Heseltine and v. Burgh*, (a) the Court decided that the question concerning a will, and the question of interest between the Crown and the next of kin, must all go on together ; but this was a case where no administration had been granted, the question here is whether the same rule obtains where an administration has been granted ? and upon all the search and inquiry I can make I find no such rule.

In point of principle the Court considers the administrator as a favoured person ; in many instances he stands on a different ground from a person not invested with that character ; a creditor cannot deny an interest or oppose a will, but a creditor in possession of an administration may do [160] both, and he is not bound to bring in the administration till an admissible allegation has been brought in either propounding a will or propounding an interest. It was so laid down by the Court in *Elme v. Da Costa* ; (b) *Mrs. March's case* has been referred to, and is to the same effect ; so is that of *Norman v. Bourne*, Prerog. 1714 ; I am in possession also of a manuscript note of Sir Edward Simpson's, (c) which lays it down that where the administration has been granted to a creditor, he is the same to oppose a will as the next of kin.

These cases shew that an administrator stands on a more favoured footing than a person who is not clothed with that character. It has been said that they must proceed *pari passu* ; but the very requisite of an admissible allegation proves that it is not *pari passu*, for it removes part of the ordinary precaution, which is to exchange cases before there is any disclosure of the facts pleaded ; the cases cited prove this point, and seem hardly denied.

But I find an old case more in point, *Hibben v. Calemberg*, (d) before the Delegates,

(a) Prerog. March 31, 1789. See this case reported next to that of *Hibben v. Calemberg*.

(b) Prerog. 1791, the reader will find a full report of this case after that of *Waller and Smith v. Heseltine and v. Burgh*.

(c) The following is an exact transcript of the manuscript note referred to ; the marginal observation is also Sir Edward Simpson's.

Adn. granted to a creditor, a will being produced he opposes it ; a commission to Jamaica to prove it, he gives no allegation ; he has the same right to oppose without being subject to costs, as where opposed by next of kin ; the same where an executor having probate opposes a later will.

(d) See the next case.

1754. Ge-[161]-neral Frampton was the party deceased, Mary Grace set up a paper as his will, Lady Calemberg (*e*) as first cousin once removed opposed this will; Grace admitted her interest; after a long litigation the Court pronounced against the will, and decreed administration to Lady Calemberg. The case was appealed to the Delegates the sentence was affirmed and the cause remitted. A suit was then commenced by Hibben against Lady Calemberg, who alleged herself to be a sister by the half blood, and claimed the administration; Lady Calemberg denied her interest; and she would have denied Lady Calemberg's interest, but as that had been admitted in the contest concerning the will (in which Hibben had not intervened to oppose her interest), and been pronounced for by this Court on Grace's admission, and as that sentence had been affirmed by the Delegates, the Court thought it was *res adjudicata* that Lady Calemberg was cousin german once removed and next of kin unless it could clearly be shewn that the deceased had left a nearer relation, and consequently that Lady Calemberg was not liable to be called upon to prove her interest.

Though I find it difficult to agree in all the reasoning of the learned person (Dr. Andrews) from whose ma-[162]-nuscripts I have derived this case as to the principles of the decision; yet the decision itself establishes that the Court will not in all cases put a party in possession of an administration upon proof of interest *pari passu*.

Not because the interest could be considered as finally established by the admission of a party setting up a will, and who therefore had no interest but under the will; nor in a suit to which the person after claiming to be next of kin was no party; nor by the decision of the Court when the question at issue was not who was next of kin, but whether the deceased died testate or intestate; but the Court expressly decided that the party who had been in possession of the administration for a great length of time, during which the asserted next of kin had not intervened, was not now to be put upon the proof of her interest in the first instance, nor till the interest of the adverse party has been decided upon; for the Court decided finally that Hibben had failed in proof of her interest, during which suit Lady Calemberg was never called upon to prove hers.

The true principle I take to be, first, the presumption of law that that which the Court has done has *primâ facie* been rightly done, and shall not be questioned till it becomes absolutely necessary. Secondly, a presumption of fact arising from the acquiescence of the adverse party from the circumstance of his not intervening in the suit, or his not raising the question for such a length of time.

In the case referred to, Lady Calemberg could [163] never have been put upon the proof of her interest by Hibben; for if Hibben had established hers, being nearer in degree to the deceased, Lady Calemberg's interest must have been extinguished; if, on the other hand, Hibben should fail, as she eventually did, to establish her interest, then the former administration remained in force, she having no right to call in question that administration.

Forrest v. Wilson (Prerog. 1766) was in effect the same decision; the Court said that "the administratrix had been ill advised to propound her interest before her opponent had established hers;" this therefore goes a great way to shew that she was not under the necessity of propounding her interest till the adverse party had proved hers.

In the present case the interest asserted is a more remote one, therefore when established will not decide the question, it will only then have established a right to put the other party upon the proof of the nearer interest; but still the principle is the same, namely, that you shall not question the right of the party in possession till you have established your own interest either by admission or proof.

It is said however that if the nearer interest is well founded it would be unnecessary to prove the more remote; but that argument proves too much, for it would go the length of establishing that where no administration has yet been granted the remote interest is not to go on *pari passu* with the nearer one; second cousin would

(*e*) In Sir George Lee's manuscript note of this case the party is called Mrs. Calemberg; but as the learned Judge cites also from the manuscript notes of a person to whom the decision must have been familiar, I have not thought myself at liberty to vary the appellation, the more especially as the inaccuracy, if it be one, is wholly immaterial; it may have been that she became Lady Calemberg at a subsequent period.

say, why should [164] I go to the expense of proving my interest? for if my opponent establishes himself as first cousin *cadit quæstio*, it is immaterial whether I am a second cousin or not; yet no such rule as this is pretended to exist, that the nearer interest must be pleaded and proved before the more remote; the case of *Cecil* (Prerog. 1784) is satisfactory as to that point; the widow did not propound her interest; the next of kin propounded and proved theirs; the Judge after deliberation was of opinion that the widow was at liberty to propound hers. As to its being more convenient that both should go on together, that may be so or not according to the event; but if any inconvenience arises, to whom is it imputable but to the party who has lain by for years? certainly not to the party who has obtained the administration in the regular course, who has been possessed of it for a great length of time, and possibly may have administered the whole estate.

I beg to be understood as by no means deciding that a person in possession of an administration may under no circumstances be obliged to proceed *pari passu*, or that the Court would in no case vary its rule: there may be special circumstances where the privilege would not attach, but public inconvenience would be great if parties were liable to be thus called upon at any period by those who may have no interest whatever in the effects. If the administrator denies the interest, he does it at some peril of costs; he may also do it at some inconvenience to himself, that of delay, for if the [165] adverse interest should be established, he will be liable to be put on the proof of his own after considerable loss of time, for I think it cannot be maintained that possession of an administration obtained without others being parties either actually or virtually to the grant can conclude those parties; indeed this is admitted by the very circumstance of putting the other party upon proof of the interest.

On the best consideration that I have been able to give this important point of practice, and from the best researches and enquiries that I have been able to make into it, I am disposed to hold that where administrations have been regularly and fairly granted, and where there has been delay in the party opposing them, the administrator is not bound to propound his interest till the interest of the adverse party is established, and it being a matter within the legal discretion of the Court; the interest in one of these cases having been actually propounded and pronounced for by the Court in another cause, and in the other the administrator having been in possession of the grant above ten years, I shall put neither of them upon proof of their interest till the adverse parties have established their own.

[166] HIBBEN v. CALEMBERG. (a) Trinity Term, July 10, 1754.—A party in possession of an administration not bound to propound her interest till the party calling it in question has established her own.

[S. C. 1 Lee, 655.]

Dr. Simpson for Hibben. Hibben prays that Calemberg may proceed to propound her interest and give in an allegation for that purpose, otherwise that administration to General Frampton may be granted to her as sister of the half blood and next of kin. In a former cause Mrs. Henrietta Calemberg as cousin german once removed opposed the deceased's will which was propounded by Mrs. Grace as executrix; the will was pronounced against in this Court and administration decreed to Calemberg who was confessed by Grace to be next of kin; Grace appealed from this sen-[167]-tence, and it was affirmed by the Delegates. The present cause began between Hibben and Calemberg by a caveat entered by Sherman, a creditor; Hibben warned it, and

(a) The editor is indebted to the kindness and liberality of the Rev. Sir George Lee, Bart., of Hartwell (Bucks), the great nephew of the eminent Judge whose names he bears, for the report which he is enabled to lay before his readers of this case; it is literally transcribed from a book in which Sir George Lee, while he filled the situations of Dean of the Arches and Judge of the Prerogative Court of Canterbury, was in the habit of recording with his own hand, not only his decisions and the grounds on which they were founded, but an abstract of the most stringent parts of the evidence, and of the arguments which had been adduced by counsel on the one side and the other in support of the respective parties contesting the suit.

The value of so authentic a record of the principles on which this decision rested is considerably enhanced by the great importance attached to the authority of this case by the Court in giving its judgment in the preceding cases of *Dabbs v. Chisman* and *Jennens v. Lord Beauchamp*.

prayed the administration to be granted to her as sister ; Tyndall voluntarily interposed, and alleged Calemborg to be the deceased's first cousin once removed and next of kin, and that administration was decreed to her, and prayed Hibben's answer : Cæsar for Hibben denied Calemborg's interest ; Tyndall said he would propound Calemborg's interest, and denied Hibben's : the Judge assigned to hear on the admission of Tyndall's allegation ; Tyndall now says his client is in possession of a decree for the administration, and he is not bound to propound her interest ; we say Calemborg's interest was never in debate in the former cause, and that Hibben was no party to that cause, and that the decree of the administration to Calemborg was only a common decree ; we insist that both by law and the assignments of the Court, Tyndall is obliged to propound his client's interest, and that we have a right to what we pray.

Dr. Jenner for Calemborg. Administration was decreed to Calemborg, and that decree affirmed in the Delegates ; the remission was brought in, and the Court decreed to proceed according to the tenor of former acts. Hibben then prayed administration ; the parties mutually denied each other's interest ; Calemborg was thereby admitted to be a contradictor. The Court has made no assignment on us to propound our in-[168]-terest, we have an allegation drawn but are not obliged to give it in.

The acts were then read, viz.—

By-day after Hilary Term, 28th February, 1754, on the remission being brought in, the Court decreed to proceed according to the form of former acts ; Tyndall alleged his client to be cousin german once removed to the deceased, and that administration had been decreed to her ; both proctors denied each other's interest.

April 4th, Tyndall asserted that he gave an allegation.

First Session of Easter Term on admission of Tyndall's allegation, the Judge admitted Cæsar's allegation and continued the assignment as to Tyndall's allegation.

Fourth Session of Easter Term, Tyndall declared he waved giving any allegation at present, on petition of both proctors.

Dr. Simpson in reply. There are three questions : 1st, whether we have not a right by law to call Calemborg to propound her interest ; 2nd, whether her proctor is not bound by the assignments of the Court to propound it ; 3dly, if she does not propound it, whether we have not a right by law to have the administration.

The former cause cannot affect Hibben, because she was not a party ; administration was decreed to Calemborg on an assertion only that she was next of kin, no proof was made thereof, that decree is incomplete because administration was not [169] under seal and may be reversed ; we shall be entitled to administration if we shew never so remote a relationship because Calemborg has shewn no relationship. On the 4th of April the Court assigned to hear on the admission of Tyndall's allegation which was to propound Calemborg's interest.

Dr. Simpson also, with Dr. Pinfold and Dr. Hay (who were counsel with him), insisted much that although when a person is in actual possession of letters of administration under seal he may not be obliged to propound his interest, yet in this case the matter is *res integra*, because the Court has gone no further than to decree administration to be granted to Calemborg.

Judgment—Sir George Lee. I was of opinion that Tyndall was not obliged by the assignments of the Court to propound his client's interest ; I had not ordered him to do so, I had only assigned to hear on the admission of an allegation which he asserted he would give, but notwithstanding that assertion he was at liberty to alter his mind and not give it. Secondly, I was of opinion that he was not obliged by law, because my sentence which decreed the administration to Mrs. Calemborg was become irreversible, it having been confirmed by the Court of Delegates, whose decree was a bar to all the world against objecting to Calemborg's right to have the administration, unless a nearer relationship than she claimed should be proved ; indeed, if Hibben can prove herself to be sister to the deceased, the decree for [170] the administration both in this Court and the Delegates will be void by the statute which precisely requires the ordinary to grant administration to the next of kin ; but unless Hibben proves herself to be nearer of kin to the deceased than Calemborg suggests herself to be, the decree of the administration to Calemborg must stand unshaken and administration cannot be granted to any one else, and consequently it is quite unnecessary for Calemborg's proctor to propound her interest which is established by a sentence of the Superior Court, and therefore I rejected Cæsar's petition.

He protested of appealing, but did not appeal.

WALLER & SMYTH v. HESELTINE v. BURGH. Prerogative Court, March 31st, 1789.

—Parties propounding different interests to proceed *pari passu*.

The Crown claimed the goods of John Newport, deceased, a bastard and intestate; Waller and Smyth claimed them as executors of Smyth, his next of kin, and Burgh appeared and propounded a will. The Crown and the executors of the next of kin now prayed the Court to suspend any proceedings between them till it had decided on the validity of the will.

Sir William Scott (King's Advocate) for the Crown. If the will should be proved the claim of the Crown and of the next of kin would alike be anni-[171]-hilated; they depend alike only on the supposition of an intestacy; it is but reasonable that these parties should not go on trying a question, which if the will should be established would affect no one, but be a mere speculative question; the only question between the Crown and the next of kin is the illegitimacy of the party, which is so different from the other point that the party propounding the will can derive no benefit from the discussion of it.

Dr. Battine in support of the will. In the evidence now taken, of which publication is prayed, facts may come out of advantage to the party propounding the will, particularly if they should shew the age of the party, and the time when the commission of lunacy was taken out, the parties must prove their own interest before they are allowed to oppose the will; they cannot both have an interest; if one has it is clear the other has not.

Dr. Harris and Dr. Arnold for the executors of the next of kin joined in the prayer of the counsel for the Crown, and contended that these proceedings were analogous to those in the Prize Court, where, in the first instance, when an appearance is given for a joint captor the Court condemns the ship, generally reserving the question to whom.

Judgment—*Sir William Wynne*. The first appearance here was for the next of kin; the Crown then claimed; and afterwards an appearance was given for a person claiming to be executor under a will. An allegation has been given in by the King's proctor, and witnesses have [172] been examined, and now there is a prayer to suspend proceedings between the Crown and the next of kin till the validity of the will shall be determined.

It is necessary therefore for the Court to consider whether this prayer is according to the usual form of practice? the interest of all has been propounded, or the Court could not have proceeded; if the will had been produced at first, and caveats had been entered, the parties who had then appeared must have propounded their interest before they could oppose, or oblige the other party to proceed. If there are two wills, the executor of the first cannot call upon the executor of the other to prove the latter without propounding his own interest. In *Adams v. Adams* the will was propounded by the residuary legatee, and opposed by a person claiming as brother; the brother required the residuary legatee to propound the will; this was denied because the brother's interest had not been pronounced for, the Court ordered them to proceed *pari passu*.

Here the proceedings commenced between the Crown and the next of kin; the executor comes after, and finding the interest between the parties denied, has a right to consider it so, they have no interest in the cause longer than they are at issue; but the interest being propounded, the Court is now desired to suspend proceedings. The suspending the interest would be much as if it had not been propounded at all; if it should be suspended and cease to be at issue the party propounding the will might ask, what right have you to oppose or demand probate? The cause having been six [173] years in contest, they pray to lay their finger on one part and go on with that. The whole cause must be taken together; this petition cannot be granted; the manner of proceeding precludes making the objection at first, but the giving in the allegation and examining the witnesses and then applying to have the contest suspended seems to be an afterthought.

It has been argued that the party should not give evidence against herself; but all the evidence in the cause is the evidence of all parties; the suspending a part of the case so as only to affect one of the parties is not agreeable to practice.

I shall reject the application.

ELME v. DA COSTA. Prerogative Court, Easter Term, 1791.—A creditor in possession of a grant of administration entitled to contest suit against a person asserting himself to be next of kin.

[Applied, *Menzies v. Pulbrook*, 1841, 2 Curt. 848. Referred to, *Hawke v. Wedderburne*, 1868, L. R. 1 P. & D. 595.]

Louis Nicolini died in 1783, a foreigner, leaving two daughters. In June, 1786, administration of his effects was granted to Da Costa, a creditor; the daughters having been cited to see proceedings in the usual manner. In February, 1787, Da Costa filed a bill in Chancery to recover effects, &c.; the cause was set down for hearing. In May, 1790, a citation issued against him from the Prerogative Court to produce a will which he had had two years in his possession not signed by the testator; in answer to this he appeared, and prayed to be dismissed, or to [174] be admitted a contradictor to the will, and to keep the administration till the suit in Chancery should be determined; it was replied that he was bound to bring in the administration and had no right to be a contradictor; that the administration had been fraudulently obtained, as he had taken an oath that the deceased had died intestate, whereas a will was produced; besides, there were next of kin, the deceased having left two daughters, and though they were dead, one of them had left children.

Sir William Scott and Dr. Nicholl. The creditor in possession of the administration is entitled to be admitted a contradictor to make the party prove the will; it was so held where administration was claimed by the next of kin against a creditor in *Mrs. March's case*, viz. Schwartz, a German, died; upon an affidavit of his intestacy administration was granted to Robinson, a creditor, after the same steps which have been taken here, a citation issued against him to bring in the administration and shew cause why it should not be granted to the next of kin, and the creditor was admitted to defend his cause by putting the next of kin on proof of his interest; besides in the present case there is nothing to shew that it was the will of the deceased or that there may not have been a later will; there should be a probate from the foreign Court; it may not be valid according to the form required in the country where the deceased died.

Dr. Harris and Dr. Swabey contra. The question is whether the administration is void or not? all persons interested were not cited, [175] viz. the children of the deceased's daughter; whether this omission was owing to fraud or negligence the effect is the same; it must void the administration following such a citation; a creditor has no right to contradict the will or oppose the next of kin; it is said that the Court must enquire whether it is a good will in the place where it is made, but if it is good *jure gentium* that will suffice. The administration has been ill granted, as it was grounded on a general citation on the Royal Exchange without any actual notice to the party; it is within our own memory that notices used to be sent to the place where the parties entitled in distribution were resident, and if no answer were returned within a reasonable time the administration was then granted; and with respect to foreigners, the method practised was that of giving notice to the resident minister of the country to which they belonged.

In *Lisdale v. Baloo* the party died intestate, Baloo took out a process, it was served on the Royal Exchange, and no appearance being given the administration was granted to him; six months afterwards a niece of the deceased cited Baloo to shew cause why it should not be revoked, as it was not rightly taken out on the general process, since notice should have been given to the niece who lived at Rochelle, as he knew, for he had corresponded with her, and the Court (Dr. Bettesworth) said "that the administration should not have been granted on a general service without particular notice when it was known where the parties resided."

[176] In *Blake v. Hartwell*, Prerog. 1750, an administration viis et modis without any original citation was revoked on that ground only.

Judgment—Sir William Wynne. This is a process to compel a party to bring in an administration and shew cause why probate should not be granted of a will produced; an appearance is given under a protest to the regularity of the proceedings; the administration issued on the non-appearance of the daughters of the deceased after a public citation.

Two questions have been argued—

First, that the administration was void originally.

Secondly, that if it was not void originally, still that a creditor has no right to deny a will, and therefore the administration must be revoked.

With respect to the first point, the objection is that there has been no other than a general citation, and it is said that the practice has been otherwise lately; but this administration was granted sometime ago, and, I suppose, according to what was then considered the practice of the office; but it is worthy the attention, and shall occupy the attention of the Court, whether this method shall or shall not be adopted; it is laid down in books, and is not to be denied, that parties may be put in contempt by a public citation only; it was according to the practice of the office when it was done here, therefore the objection does not hold; the citation was taken out, not by the next of kin, but by the executors.

[177] The effect of the decree is to bring in the administration and shew cause why it should not be revoked and probate granted of the will. It is evident that the administration must be brought in on the exhibition of a will; bond is required by stat. 22 & 23 Car. II.: can the Court say, because the will was not brought in as soon as it might have been, that therefore the party is barred from proving it? the Court has no such authority.

In the present case it was not done by surprise, the administration was not applied for till three years after the death of the party; and the administrator has commenced and carried on a suit in Chancery: a conspiracy is suggested by which the will was produced; but the Court cannot attend to this suggestion. If the will is proved the administration must be revoked; but the question is what can be done now? the administrator must bring in the administration; but the Court will not go any further; it will not revoke an administration on the mere suggestion of a will, when the administrator has been a long time in possession of the grant; this would open the door to fraud.

The right of a creditor is only this; he cannot be paid his debt till a representation to the deceased is made; he can then call on all who have a right to administer; before an administration is granted if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all that he has a right to. But when a creditor has obtained the administration the case [178] is different; he has a right to maintain it against the executor or the next of kin; it is not to be revoked on mere suggestion. The Court has taken pains to find a case where a will has been set up under such circumstances, but without success, which is singular; *March's case* as cited shews that a creditor was admitted to contradict the suggestions of the next of kin; there is no difference in the principle, and the case applies.

In *Newman v. Bourne* (Prerog. 1714) a creditor obtained administration to be decreed to him, and before it passed the seal he was suffered to contest the interest of a person claiming under a nuncupative will; no relations appeared. That case is stronger than the present.

In a manuscript note of Sir Edward Simpson's (see page 160) I find that where an administration is granted to a creditor, and a will is afterwards produced, he has a right to contest it in the same manner that the next of kin might have done, without being subject to costs.

This is founded on reason; whereas a contrary practice would be open to fraud; the administrator when cited must bring in the administration, but the Court will go no further; he may contest the will; whether the will is to be determined according to the laws of Florence or the laws of England is out of the question, he has a right to establish it as he can.

I decree that the creditor shall bring in the administration, but according to the terms of the citation he is at liberty to shew cause why it should not be revoked.

[179] LOVEKIN AND OTHERS v. EDWARDS AND OTHERS. Prerogative Court, Michaelmas Term, 1810.—A party who had been admitted to sue in form *à pauperis* dispaupered.

[Followed, *Clifford v. Mabey*, 1822, 1 Add. 127. Referred to, *Richardson v. Richardson*, [1895] P. 276.]

Elizabeth Cook died on the 19th July, 1809, and left a will and codicil, in which her brothers Samuel Lovekin, John Whitehouse, and her sister Ann Whitehouse, were named executors.

July 27, 1809.—A caveat was entered against the will by James Lovekin another brother of the deceased; suit was contested; the executors propounded the will in a common conditit, and the subscribing witnesses were examined upon it, when James Lovekin was admitted a pauper, and an allegation was given by him in opposition to the will, on which fourteen witnesses were examined; a responsive allegation was brought in by the executors, on which seventeen witnesses were examined, and publication was prayed; the executors then suspended (February, 1810) the progress of the cause and took out a decree citing Mary Edwards a sister, and Joseph, Charles, Richard and Peter Lovekin, nephews of the deceased (and the persons entitled in distribution to her personal estate in the event of her having died intestate), to see proceedings; the executors then re-propounded (June 6, 1810) the will, and the witnesses were re-examined upon it, when Joseph Lovekin, one of the nephews cited, appeared, and upon taking the usual oath was admitted a pauper.

The present question arose upon the right of this person to sue in formâ pauperis; it was opposed by the executors, and on their behalf an act [180] on petition was entered upon stating in effect that "the executors having been informed that Joseph Lovekin and several of his relations were determined to vex and harass them by entering another caveat against the will and codicil as soon as the suit now prosecuting against James Lovekin should be terminated unless they (the executors) would make a compromise with them, they were advised to take out a decree against Mary, Edward, and Joseph, William, Charles, Peter, and Richard, Lovekin to appear and see the will and codicil re-propounded; that Joseph Lovekin had appeared and been admitted to sue in formâ pauperis, whereas they alleged that he was now and had been for upwards of six years a housekeeper and resident in his present dwelling house in Nottingham Court, Drury Lane; that he had a plate on the door of his house, with his name thereon, stating him to be a carpenter; that he occasionally acted as a master carpenter, and sometimes performed funerals; that he paid 18l. a year for the rent of his house, which was assessed at the sum of 16l.; that he had for several years past regularly paid all the King's house taxes, all the poor's rates, paving and lighting assessments, and parochial rates, assessments, and taxes of every description, and was very regular in the payment of the same, and also in the payment of his tradesmen's bills; that he lets some of his apartments to lodgers, for which he gets the sum of 24l. a year; and that the part of his house which he occupied was furnished by himself, and the furniture was worth 50l. or thereabouts; that Joseph Lovekin acted also as a jour-[181]-neyman carpenter, and that he had been for some time past regularly employed by a cabinet maker, who pays him 1l. 7s. a week for his wages; and they further alleged that the said Joseph Lovekin derived a sufficient income from his business and letting lodgings to support himself and his family with credit and decency, and was a person in the receipt of and possessed of property, and worth considerably more than 5l. after the payment of his just and lawful debts."

On the other side it was alleged in the act, "That Joseph Lovekin did not intervene in the cause for the purpose of harassing the executors, but because he had reason to fear that they would induce James Lovekin to a compromise and to drop the proceedings in this cause against the pretended will; it was admitted that he had been for the last five years tenant in the house he now occupied in Nottingham Court, but it was denied that he ever had a plate on the door with 'carpenter' in addition to his name, or that the word 'carpenter' was at all written on any part of his house; or that he had at any time acted as a master carpenter, but it was admitted that, when out of employ as a journeyman carpenter, he had more than once executed a job on his own account, as all other journeymen do, and had occasionally provided a small funeral, but that he was still justly indebted to an undertaker in Fleet Market in the sum of 16l. 8s. 3d., the total amount of goods advanced for all the funerals he ever provided, save one, the account for which was 2l. 14s. 6d., and which had long been settled, and that he was now unable to [182] discharge the said 16l. 8s. 3d.; it was further admitted that he paid 18l. rent for his house, but then the deduction of the land and property tax and the sewer rate was always first paid by his landlord, so that his yearly payment did not exceed 14l. 7s. 10d.; that he had usually paid the poor rates and other assessments and taxes, but from poverty he had not been able to pay them regularly, and that since his residence in his present house, after due examination before the vestry of the parish, he had been discharged and excused from the payment of the said rates on the ground of poverty; and it was admitted that he

let the rooms unoccupied by himself and family, two at three shillings each, two at one and eight pence each, and one at one shilling per week, but that the rent was precarious and uncertain from the poverty of his lodgers, and because the rooms were often long untenanted, and that he could not pay his own rent without letting the lodgings; that all the furniture in the house was not worth more than 13l. 19s. 6d.; and it was further alleged that Joseph Lovekin was in the employ of Job Sabin, a broker, as porter to him in his business, and was now in the receipt of 1l. 7s. per week as wages; but it was denied that he was worth 5l. after the payment of his just debts, and alleged that he was insolvent and indebted to various persons in sums which he was unable to pay."

Several affidavits were given in, both on the one side and on the other, in support of the facts detailed in the act on petition.

[183] *Judgment*—*Sir John Nicholl*. This is a question whether a party who has been admitted a pauper in the usual form shall now be dispaupered. Various affidavits have been gone into, partly upon trivial and collateral facts, and it is not very clear whether the party is or is not insolvent; without however entering into any very minute calculation of its circumstances, which the decision of this question does not require, he seems to be a person pretty even with the world, his house rent is paid by the lodgings he lets, and his earnings as a carpenter are about 70l. annually; and the question is, whether a party thus circumstanced is entitled to appear as a pauper?

To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides, it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out. It is a complete but not an uncommon misapprehension of the law, to suppose that because a person is in insolvent circumstances, and because he can truly and conscientiously swear that he is not worth 5l. after all his just debts are paid, that therefore he is entitled to be admitted, or rather to proceed, as a pauper; it is *primâ facie* ground to admit him as such but no more; if it were other-[184]-wise many persons living in great splendour and luxury would be so entitled; for many persons in business in the enjoyment of an immense income and maintaining a proportionate expenditure would not be worth 5l. after the payment of their just debts.

The decisions however have gone on very different grounds. In *Riley v. Rivet* (b) Riley prayed to be admitted a pauper, and swore he was 1600l. in debt, but admitted that his brother allowed him annually for keeping his books 100l. The Court decided that he was not entitled to be admitted.

In *Barham v. Barham*, (c) the Court stated, [185] "If a person has the means by

(b) Before the Condelegates, 1794.

(c) Before the Consistory Court of London, June 13, 1789, a citation had been taken out by the wife against the husband in a cause of cruelty and adultery; on the question of alimony coming before the Court the husband appeared under a protest as having been cited of a wrong parish, and prayed to be admitted a pauper. According to a note of the judgment in my possession, the Court (Sir William Scott) is reported to have said on the latter branch of the case, "The next question is, whether he is to be admitted in formâ pauperis? it is said this is not discretionary; but that the Court must admit the fact upon oath of the party. I should be sorry if it were so, that the indulgence designed for honest poverty should be allowed immediately upon the oath being taken; I conceive it to be otherwise; the Court may even dispauper. Such cases have been at common law; 2 Salkeld, p. 507; here the man has been brought up in a liberal profession, he had a fortune with his wife, he is healthy and able to gain an income; one who can earn a sufficient livelihood, is not entitled to this indulgence. The Court should be particularly cautious where the remedy is sought in a case like this; a suit for separation and alimony; this would be at once shutting the door against redress and defeating one great object of the suit. It is stated that he received with his wife 400l., says he is indebted 280l., and is proved to have spent 750l. within the last two years, besides what he gained by his profession. A person stating such extravagancies to the Court comes with an ill grace to ask the assistance of other men. I shall reject this application, and assign him to appear absolutely."

honest exertion to acquire a competence he has no claim to be admitted a pauper. Mr. Barham in two years has expended 750*l.*, he is not the kind of person entitled to the indulgence of having the labours of others gratuitously," and over-ruled his petition to be admitted a pauper.

In an *Anonymous case*, (d) in Salkeld, where a motion was made to dispauper a parson who was plaintiff in an action, because he had a living of 40*l.* a-year, though he had sworn he was in debt more than he was worth; Chief Justice Holt was of opinion that his being indebted was no reason; it was enough that he had a considerable estate in possession.

In *Smith v. Smith* (Consistory, Hilary Term, 1794) the Court said, "If a party has a current income though no permanent property he must be dispaupered; this person has about 20*l.* a-year from houses, he gets about 40*l.* a-year by his business as a carpenter, his whole [186] income is about 62*l.*;" and the Court dispaupered.

In *Shaw v. Shaw* (Consistory, Michaelmas Term, 1807) the Court laid it down, "The question is whether to admit a party a pauper? suing in formâ pauperis is a great privilege, and only belongs to real poverty; the common rule both at common law and in this Court is that, after payment of debts, he must not be worth 5*l.*; yet this is not to be understood if there be an income, though after the settlement of his affairs he may not be worth 5*l.* A man worth an income of 5000*l.* per annum may not after payment of his debts be worth 5*l.* The party admits that he had an income of 70*l.* per annum, though he is in debt above 200*l.* beyond his effects, so that he is not in a state of extreme poverty. I shall reject his application to be admitted a pauper."

These cases are quite decisive: though in the present instance the party may be insolvent, yet by his trade, his handicraft, he earns 70*l.* a-year, he is not entitled; there is less reason also, because he is not to be a plaintiff, nor even necessarily a defendant; though there may be some doubt upon the law whether, except in some excepted cases, defendants are entitled to sue in formâ pauperis; but here he is quite a volunteer, merely cited to see proceedings; he is not bound to appear, he is a mere intervener; this is not a favourable case for indulgence. There is another party, a pauper, also contesting suit and nothing to induce a suspicion that the adverse parties are colluding; indeed, the inference arising from these proceedings would [187] be directly the reverse, and it would be great injustice and hardship if the executors were to be harassed by two paupers; the case therefore is in no degree favourable; there is no necessity for any appearance; but if there were ever so great a necessity, I am satisfied that on principle and authority this person has made out no title to be admitted a pauper.

BILLINGHURST v. VICKERS, FORMERLY LEONARD. Prerogative Court, Michaelmas Term, Nov. 23rd, 1810.—Part of a will established, and part held not to be entitled to probate.

[Discussed, *Barry v. Butlin*, 1838, 2 Moore, P. C. 483; *Fulton v. Andrew*, 1875, L. R. 7 H. L. 461.]

Joseph Leonard died on the 6th of March, 1808; on the 21st of the same month Ann Leonard his sister took out letters of administration to the goods and chattels of the deceased on the ground of his having died intestate. A citation was afterwards served upon Ann Leonard calling upon her to bring in the said letters of administration, and shew cause why they should not be revoked, and also why probate should not be granted of the following will to Mr. Billingham, the sole executor named in it.

"This is the last will and testament of Joseph Leonard, No. 3, Great Dean's Court, St. Martins le Grand, Tailor. First, my just and lawful debts paid as soon as may be [188] after my decease, I leave Ann Leonard, spinster, the sum of one shilling; the residue of my property I may possess at my death to be disposed of as under; to Joseph King, of Elgin, 500*l.* 3 per cent. Bank Annuities; William Thomas, the same amount, of Queen Street, Cheapside; to Mr. Freebane, at Mr. Creight, Watling Street,

(d) [Mich. 11 Will. 3 B. R.]

Mr. Northey moved to dispauper a parson, who was plaintiff in an action, because he had a living of 40*l.* per annum. Turton and Gould Justices contra, because he swore he was in debt more than he was worth. Holt, C. J. differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession. 2 Salkeld, p. 507.

the sum of fifty pounds Bank Stock; to Sarah Warner four hundred pounds three per cent. Consols; to William Billinghamurst, of St. Martin's le Grand, five hundred pounds, and to be my whole and sole executor and residue legatee.

"Signed this fifth day of March, 1808.

"JOSEPH LEONARD."

Witness, John Obadiah Jaques, William Marston.

Swabey and Adams (a) argued in support of the will.

Jenner and Edwards (a) contra.

Judgment—*Sir John Nicholl*. The question arises on the will of Joseph Leonard, who died on the 6th of March, 1808; he left a sister, the only person who would have been entitled to his property had he died intestate; the will is dated on the fifth of March. The allega-[189]-tion propounding this paper was special; it pleaded the disaffection of the deceased to his sister, and his dislike of her, his repeated refusal to see her during his last illness, and his declaration that he had cut her off with a shilling; that he was much addicted to the immoderate use of spirituous liquors by which he had injured his health, but that his mental faculties, save when he was under the immediate influence of liquor, were in no degree impaired, and that he wholly abstained from spirituous liquors with the exception of some weak rum and water during the whole of his last illness; that while confined to the house by his last illness he did with his own hand write so much of the will propounded as is contained between the words "This is the last will" and "Bank Stock," but that being in a weak state of body he found himself unable to complete and execute the same, and therefore sent for Mr. Billinghamurst and requested him to finish it; that Billinghamurst advised him to defer it till the Monday following, when he might be able to write it himself, but the deceased persisted in his request that it should be done then, and accordingly the remaining part of the will was written by Billinghamurst from instructions of the deceased, and when it was so done was read all over to and approved by him; but that he declared he had an intention if he lived till Monday to leave some legacies in charity, and desired Billinghamurst to turn over in his mind what public charities were the best objects; but that for fear of accidents he would not defer the execution of his will. The allegation then states the execution in the presence of two witnesses, and [190] pleads that the deceased had been intimate with Billinghamurst for forty years, and that he had a great regard for Sarah Warner, a legatee in the will, who had lived in his service several years, and to whom he had often made proposals of marriage.

In contradiction to this it is pleaded in a single article that there were no instructions given for the will, that it was not read over to the deceased, and that he was incapable at the time of execution.

This is the substance of the pleas to the merits of the case; other pleas have been given in exception to the credit of the witnesses.

The two subscribing witnesses have been examined.

The first says that he was brought by Billinghamurst, and introduced by him to the deceased, who he says appeared as if he knew him but did not speak; that while he took the pen into his hand he fixed his eyes on the paper writing; that he appeared rational and sensible, and the witness thought he was reading the paper. This witness, from other parts of his evidence, appears a fair and cautious witness.

The second witness is a carpenter, he was fetched also by Billinghamurst, he says that the deceased looked earnestly at him, but did not speak, he appeared to read the paper but did not speak; the witness is deaf, but he saw the motion of the deceased's lips and was informed that he was asking where he was to sign.

These two witnesses, therefore, in substance give nearly the same account of the transaction.

[191] The handwriting of the former part of the will and the signature are clearly proved by one witness, and are not ventured to be disproved by plea. This is therefore full proof of an act of execution; and execution, generally speaking, implies every thing till the contrary is proved; proof of reading over, proof of instructions are not necessary unless the capacity is shewn to be doubtful.

In the present instance there are no instructions, and the latter part of the will

(a) The substance of the pleas given in on each side, and the evidence adduced in support of them, are so amply recapitulated in the judgment pronounced by the Court, that it has not been thought necessary to insert them here.

is written by the executor himself, who is principally benefited, and who appears to have been the active agent in bringing the witnesses to the deceased's house.

The case resolves itself into one of capacity; unless capacity be impeached, the proof is such as will satisfy the law; if capacity be wholly impeached, the whole instrument may be invalidated; if capacity be partly impeached, a part of it may be invalidated.

It is alleged by the next of kin that the deceased was not capable of making his will for some time previous to his death: they certainly have produced several witnesses, who speak strongly to incapacity; they depose that for three years he was not capable of making his will; but all these witnesses on the cross examination admit that he had given himself up to excessive drinking, that his derangement was occasioned by drunkenness, and upon the whole there is no reason to conclude that he laboured under any incapacity except when under the influence of excessive drinking, and that when free from the effects of liquor he lost his insanity. This, however, is widely different in a [192] legal view from insanity; he carried on his business himself—he was a tailor till the time of his death, he kept his own accounts, he made his own returns to the assessed taxes; he was a drunken man and played drunken pranks, but was not an insane man; where this habit has continued such a person is liable to imposition, and his capacity becomes more doubtful and equivocal.

The apothecary and another witness state that the deceased for the last ten days was quite capable of making his will; they also speak to his fixed determination not to leave his property to his sister.

Violent quarrels are proved between him and his sister, and a separation had taken place between them; both indulged in drinking to an excess; each frequently threatened to destroy the other's life.

The apothecary endeavoured to bring about a reconciliation which the deceased refused, he spoke of his sister in terms of the utmost dislike, and said he had made his will and cut her off with a shilling.

The apothecary's account is confirmed by Dr. Lettsom, who attended him for seven days prior to the 4th of March. Dr. Lettsom forbade him the use of strong liquors, except a little rum and water.

This evidence given by medical persons who speak to habitual drunkenness till his last illness, and then to his abstinence from strong liquors, coming in aid of the act of execution, obliges the Court not to pronounce against the whole of the will.

The former part of the will is supported by de-[193]clarations of the deceased and the evidence of the paper itself, for the whole is in his handwriting—there is, moreover, the recognition of his having cut off his sister with a shilling, and the circumstance of his pointing to the place where his will was deposited. This part, therefore, could not be set aside unless actual incapacity had been shewn at the time of execution.

The difficulty arises as to the remainder of the will, the appointment of Mr. Billingham as residuary legatee, and all those parts of the instrument which were in Mr. Billingham's handwriting.

The Court must take a cautious view in deciding questions of law and fact; it is an established principle, that, where capacity is doubtful at the time of execution, there must be proof of instructions or of reading over; a man in a languid, torpid state may easily acquiesce in signing his name to a will set before him, more especially when he knows that there is something in the paper which he wishes to take effect; the presumption also is strong against an act done by the agency of the party benefited; the act is not actually defeated as it was by the civil law (a) provided the intention [194] can be fairly deduced from other circumstances. Though the Court will not

(a) Such a bequest was a complete nullity, and placed precisely upon the same footing, in point of law, as those bequests by which testators left property to legatees on the express condition that they in their wills should have bequeathed as much property to them.

Si quis hereditatem vel legatum adscripserit, quæritur an hæreditas vel legatum pro non scripto habeatur, et quid si substitutum habeat hujusmodi institutio? Respondit: pars hæreditatis de quâ me consuluisti, ad substitutum pertinet. Nam senatus, cum penas legis Corneliæ constitueret adversus eum, qui sibi hæreditatem vel legatum scripsisset, eodem modo improbasse videtur, quo improbatæ sunt illæ, quæ ex parte me Titius hæredem scriptum in tabulis suis recitaverit, ex eâ parte hæres esto:

presume fraud, it will require strong proofs of intention. Now in this case, was the deceased's capacity so alive as to prevent him from executing an instrument of the contents of which he was not aware? or, was he so languid and reduced as to acquiesce in whatever might be proposed? His constitution and habits were broken up, he languished and died after an illness of a fortnight; the apothecary visited him on the 3d and 4th of March and the deceased died on the 6th; it does not appear directly that he saw him on the 5th, still less at what time on that day he saw him; the apothecary was not apprised that he meant to do any other testamentary act since he shewed him the will, or rather pointed to it, telling him that he had cut off his sister with a shilling.

What then is the fact? the deceased was gradually wearing out and actually dies within twelve hours after the transaction of the will.

[195] The allegation given in by Mr. Billinghamurst states that he wrote the will from instructions given by the deceased and read over to him; that the deceased read over the will himself and expressed his satisfaction at it, but said that he had thought of leaving some of his property in charities, which he would do on Monday. According to the evidence, the deceased was so worn out that he could not go on to complete his will; the legacies do not go near to dispose of the bulk of his fortune, they amount to about 1200*l.*, whereas his fortune is between 4 and 5000*l.*

Billinghurst fetches the witnesses, two young men, neighbours, and not the persons originally intended by the deceased; the deceased did not speak; at one of the witnesses he looked earnestly; the other he seemed to know; he takes no notice, though they were not the persons he expected.

Billinghurst conducts the whole of the transaction, he reaches the pen, and the deceased looks at Billinghamurst to shew him where to sign, but does not speak or take any notice: the witnesses sign their names and immediately leave the room; this is the whole of the execution; there is no reading over—not a word exchanged—it is all the act of the executor; what is there to satisfy the Court that the deceased knew the meaning of this addition to his will? The attesting witnesses give no proof that the deceased, by an acquiescing "yes," knew the import of this latter end of the paper.

The silence of the deceased and the active agency of Mr. Billinghamurst increase the demands of the law: there is no appearance affirmatively [196] of fraud or imposition. The Court also does not presume fraud; but the Court demands proof.

What are the circumstances relied upon in addition to the execution? declarations that he would give his sister only one shilling, but nothing to shew that he intended to appoint Mr. Billinghamurst executor and residuary legatee, nothing in the way of previous declaration on this point. The matter is brought up to the account given by the subscribing witnesses and there it ends. There is a complete absence of instructions and of all declarations of intention respecting Mr. Billinghamurst; there is no proof that the deceased had any knowledge of the transaction.

At the same time it is to be remembered that he had a great regard and friendship for Billinghamurst, and also for the maid servant (Sarah Warner), and it is not improbable that he might have intended Billinghamurst to be executor, and to have given him and Sarah Warner some legacy, but the Court cannot act upon probabilities; it must have proof.

In the absence of all instructions from the deceased the declaration spoken to by Mrs. Warburton is very material; an exceptive allegation has been given in to the character of this witness; the result of it is that her character is left much where it was. Without an exceptive plea the Court would have been much on its guard for fear of misrepresentation as to a declaration of this sort; Mrs. Warburton states that Billinghamurst told her that "a few hours after the deceased's death, when she was conversing with him on the deceased's mode of life, and the miserable state in which

ut perinde haberentur, ac si insertæ testamento non fuissent. Digest: lit. 34, tit. 8, "De eo quod quis sibi adscripsit in testamento."

The Roman law was extremely jealous on this point. It not only excluded a party from the benefit of his own act, but from the benefit also of an act done by those who might virtually be presumed to be under his influence or control; thus a legacy was as much void if it had been written by the slave or son of the legatee (provided that son had not been emancipated from the paternal authority) as if it had been written by the legatee himself. Dig. lib. 48, tit 10, s 15.

he died, [197] although he was worth so much money, and respecting his being a man of large property; the said Mr. Billinghamurst then said, speaking of Joseph Leonard, He sent for me last night, and he then made something of a will, and he was so very ignorant that he had no idea but that the girl (meaning the deceased's said servant Sarah Warner) and I might sign his will, and that that would be sufficient; or the said Mr. Billinghamurst made use of words to that effect, meaning that the deceased thought them, the said William Billinghamurst and Sarah Warner, competent to become subscribed witnesses to the said will; and the deponent observed that, as they were not proper persons to sign such will, she supposed the deceased had left them legacies; and Mr. Billinghamurst then replied that he (meaning the deceased) had done so, and that he had left him 500l., and had pressed him many times over to know if that would satisfy him, and if it did not he should have more, and that the answer he had given was that he was thoroughly satisfied; and he then added that out of the sum of 500l. he was to bury the deceased and collect in his book debts and settle his affairs, and that he hoped Miss Leonard would make no disturbance about it, but would pay all the legacies, for there would still be sufficient for her, as the deceased had willed not so much as 1500l. sterling, as all the legacies consisted of stock except his own, which was 500l. sterling; and he, the said William Billinghamurst, said at the same time that the deceased was tired that night and could not [198] think of anything more he wished to do, and had desired him to come on the Monday following to finish the will, as he thought of leaving some legacies to charities."

It is singular if the deceased did not think he had finished his will that he should interpose an executor and residuary legatee; it has been argued that the declarations of the deceased might have the effect of supplying the two legacies: the Court feels a strong inclination to pronounce for them, but it has considerable hesitation in this respect, being unwilling to depart from its usual rules. I shall take time to consider as to the point of these two legacies; recommending to the parties to consider (particularly as the sister if the deceased had lived would certainly have been cut off with a shilling) whether they shall not pay them.

I have no hesitation in pronouncing that the party has failed in proof of that part of the will which is applicable to the appointment of the executor and residuary legatee.

I pronounce, therefore, against the last clause of the will; but in favour of the first part of it; and I reserve the consideration of the two legacies.

[199] BILLINGHURST v. VICKERS, FORMERLY LEONARD. Michaelmas Term, 1810.

Judgment on the reserved question—Sir John Nicholl. The opinion of the Court has already been given on the principal part of this case. It has been stated that the first part of this will, which was alleged to be in the handwriting of the deceased, is sufficiently proved; but that there is a failure of proof as to the appointment of the executor and the disposition of the residue.

The Court took time to deliberate respecting the proof of two legacies, viz. 400l. 3 per cents. to a maid servant, and 500l. to the executor Mr. Billinghamurst.

Considering that the capacity of the deceased was extremely doubtful at the time of execution; that there is a total absence of proof of any instructions for these legacies, or anything which could be considered as a substitute for instructions; that these legacies are in the handwriting of one of the legatees; that the whole transaction was conducted by the two interested parties; it would be extremely dangerous to accept declarations, however probable and circumstantial, made by those very persons after the deceased's death, as any and the only evidence to supply the want of instructions, being wholly unsupported by any sort whatever of testamentary declarations, or of recogni-[200]tions made by the deceased himself. The safer course is to adhere to the rule; that when the capacity is doubtful at the time of execution, and there is no evidence of instructions, especially where the act is done through the agency of the party interested, the proof of mere execution is insufficient.

I pronounce, therefore, for that part of the will which is in the deceased's handwriting, and that the executor has failed in proof of the rest.

End of part i. vol. i.

[201] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

AUGHTIE v. AUGHTIE. The (a) Peculiars Court of Canterbury, Michaelmas Term, 1810.—Marriage annulled by reason of affinity.

Judgment—*Sir John Nicholl*. This is a suit for nullity of marriage, by reason of affinity. It is brought by Charlotte Aughtie [202] against William Aughtie, to declare a marriage solemnized between them to be void, on the ground of his being the brother of her former husband.

There can be no doubt, if this is the case, that such a marriage is prohibited by law, and voidable. The facts necessary to be proved are the two marriages, and that the two husbands were brothers.

Three witnesses have been examined, who very satisfactorily prove the case; Gabriel Waterer states that he was the uncle of the two husbands, being half brother to William Aughtie, their common father: Rose Bottom was aunt to the woman, and was present at both the marriages: and, thirdly, Archibald Campbell Russell was well acquainted with all the parties, the woman and both the husbands.

It appears that Gabriel Aughtie married Charlotte Scott, on the 27th of February, 1791; ten children were the issue of this marriage, of whom eight are alive; the husband died in December, 1806. On the 27th of February, 1808, the widow married William Aughtie; the subsequent cohabitation of these parties and the birth of a child are proved; the legality of the latter marriage was canvassed before it took place, and strong remonstrances were used with both parties to prevent it.

[203] Under these circumstances, there is clear and satisfactory evidence of the facts necessary to be proved, and I pronounce for the nullity.

A question being raised as to costs.

Per Curiam. The parties are very much *pari delicto*: the marriage being void, *ab initio*, the husband has acquired no right over the property of wife. Mr. Russell told her the marriage was illegal, and endeavoured to dissuade her from it, without effect; both parties too are involved in the incest. I shall give no costs.

[204] BALFOUR v. CARPENTER, FALSELY CALLING HERSELF BALFOUR. Arches Court, Michaelmas Term, 1810.—The article of an allegation admitted, which pleaded that a licence granted by the Bishop of Winchester's commissary for Surry would not be valid for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary for Surry.

An appeal from the Consistory Court of Exeter.

[See further, p. 221, post.]

Captain William Balfour, of the 40th Regiment of Foot, stationed at Portsmouth, contracted a marriage at that place with Rebecca Carpenter, on the 11th of March, 1803, in virtue of a licence, granted by the Bishop of Winchester's commissary for Surry.

On the 15th of February, 1810, Captain Balfour instituted proceedings in the Consistory Court of Exeter to annul this marriage. The libel alleged the minority of the husband at the time the licence was granted; and that the marriage was solemnized without the consent or knowledge of his father; and so far it was not opposed: but a question arose as to the admissibility of the fourth article, which pleaded as follows:—"That the marriage was solemnized by virtue of a pretended licence, granted unduly under seal of the Court of the commissary of the Lord Bishop of Winchester, in and for the parts of Surry, by the Reverend Thomas Russell, clerk, a surrogate of the said commissary, for the solemnization [205] of the said marriage,

(a) A peculiar, in the ecclesiastical acceptation of the term, is a district exempt from the jurisdiction of the ordinary of the diocese. The peculiars of the archbishops had their origin from the privileged jurisdiction which they exercised in those places where the archiepiscopal palaces and possessions were situated. Within the province of Canterbury there are more than an hundred peculiars: but the term *κατ' ἐξοχην* is applied to thirteen parishes within the city of London, and the several parishes, composing the deaneries of Croydon in Surry and Shoreham in Kent, of these the Dean of the Arches is Judge. In the other peculiars, the jurisdiction is exercised by commissaries; from whose sentence an appeal lies to the Court of Arches.

in the parish church of Portsmouth, in the county of Southampton; and that the said William Balfour, in the affidavit by him made, in order to lead the same, was described of Portsmouth, in the county of Southampton and diocese of Winchester, a bachelor, of the age of twenty-one years and upwards; and the said Rebecca Carpenter, of the town of Southampton, in the same county and diocese, a spinster, of the age of twenty-one years and upwards; notwithstanding neither of the said places, or the said parish church of Portsmouth, is within the parts of Surry, which are within the said diocese of Winchester, or jurisdiction of the said commissary; and that the said Thomas Russell in fact had no authority to grant licence of marriage between the said parties, or for the solemnization thereof in the said church."

[The Court at Exeter rejected this article: from which sentence this appeal was interposed to the Court of Arches.]

Arnold and Swabey for Mr. Balfour. The authority of a surrogate can be no other than that which is delegated to him by his principal. The commissary of Surry only holds such part of the office of the Bishop of Winchester as applies to a part of his jurisdiction; being restrained within certain limits, it is not co-extensive with the bishop's jurisdiction; without these limits, therefore, it cannot be competent to him to grant a licence; and all marriages are void if the licence is not granted by competent authority. Could it be [206] maintained that a probate or letters of administration would be valid at Portsmouth which had been granted by the commissary of Surry? And yet the cases are strictly analogous.

Judgment—Sir John Nicholl. This is a case of nullity of marriage; the citation is general, and does not confine itself to the minority of the party.

The fourth article of the libel pleads the marriage to have taken place in March, 1803, in consequence of a licence unduly granted by the commissary of Surry.

The question for present consideration is whether the judge of the court below did right in rejecting that part of the article which states that the licence had been unduly obtained.

The licence, in form, runs in the name of the Bishop of Winchester, within whose diocese the marriage was celebrated; but it has been argued that it is signed by the registrar of the Commissary Court, whose jurisdiction is confined to the county of Surry.

This is a new case, and the Court would not unnecessarily decide any new case which shakes the validity of any one marriage: I am disposed, therefore, to allow this article to remain part of the libel; but as there is another ground of objection to the marriage on the score of minority, it may be totally unnecessary to decide this question.

The case is not quite clear from doubt, even if it should be decidedly an invalid licence: on the face of the act there would be a question whether [207] a marriage would be void, solemnized without fraud under a licence given by a person not having authority to grant the same.

Another question would be, whether this licence granted in the name of the Bishop of Winchester, is to be considered as the licence of the Bishop of Winchester, or of the commissary of Surry.

If it is the licence of the commissary of Surry, he could have no authority to grant a licence for persons resident at Portsmouth; if it is the licence of the bishop, it would be the licence of a person fully competent to grant it. Which may be the correct interpretation of the act, the Court will not prejudge in the present state of the question.

I shall allow the article to stand as a part of the libel. If the nullity is not proved on the one point, the party shall have the benefit of trying the validity of the marriage on the other.

The Court gives no opinion that a marriage of this description is to be considered an invalid marriage.

The sentence of the Court below was reversed, and the fourth article of the libel admitted.

[208] *LOVEDEN v. LOVEDEN.* Arches Court, Michaelmas Term, 1810.—Alimony given from the date of the sentence and the appeal.
(An appeal from the Consistory Court of London.)

Judgment—Sir John Nicholl. This is a suit brought originally in the Consistory

Court of London, by the husband against the wife, for a separation by reason of adultery.

In that suit 800*l.* per annum was allotted to the wife as alimony: a sentence of separation was pronounced on the fourth session of Trinity Term, 1810: an appeal was immediately declared; and was prosecuted by praying the inhibition on the following court-day, which was returned on the first session of Michaelmas Term.

An application is now made to this Court for alimony. The amount of the sum given in the Court below is not objected to; the only question is, from what time the payment is to commence; whether from the day of the sentence and the appeal, or from the day of the return of the inhibition.

On principle I think it is due from the day of the appeal. The appeal suspends the sentence, but the suit still continues; and, if it is no operative sentence, the husband is obliged to maintain his wife till the suit is terminated. In reason I think [209] it should be due from the date of the sentence, otherwise there might be an interval during which the wife would have no maintenance or support; and this should not be, unless she has waved her right, or forfeited it by some misconduct.

According to practice in the first instance, it is usually allotted from the return of the citation; yet this is not absolutely binding, for Clarke lays it down that it shall be allotted either from the date or from the return of the citation. "Tunc (Oughton, tit. 206, c. 6, Clarke's Praxis, tit. 35) *iudex taxabit sumptus alimonie juxta ejus arbitrium in hunc modum, taxamus sumptus alimonie pro quolibet hebdomada à tempore datæ, vel relatæ citationis primariæ (si hoc sibi æquum visum fuerit) ad talem summam solvendam durante lite.*"

But this leaves it in the discretion of the Court; and very properly. If diligence is used in the return of the citation, it may be sufficient to allot from that time, and which is now the general practice; for till then she may be considered as able to obtain subsistence on the credit of the husband.

But suppose the husband to take out and serve the citation, and that, to answer his own purposes, he delay the return of it; in such a case the wife may be justly entitled from the date of it. This also is provided against by Clarke: "*Caveat (Oughton, 206, c. 8, Clarke's Praxis, tit. 36) tamen iudex, ne circumveniat in taxatione prædictâ, videlicet à die datæ citationis: nam aliquando agentes curant citationes extrahi, et tamen eas exequi, et certificari differunt, per annum, aut cir-[210]-citer: quâ fraude per judicem compertâ taxare solet expensas, et allocare sumptus alimonie à die executionis, sive relationis citationis.*"

I am not aware that Clarke lays down any different rule as to when it is to commence in case of an appeal; but I apprehend that the same considerations would apply in this as in the other case. It must be in the discretion of the Court and depending upon the conduct of the party. If due diligence is used from the date of the sentence, the alimony as well as the suit must be considered as continuing; and this is warranted by the practice, for I find that it is usually so paid: and I find no authority in the books for a different course of proceeding.

Cases have been mentioned in which alimony has been given from the return of the inhibition; others have been alluded to, in which it has been continued; and I have no doubt but that the difference has arisen from unnecessary delay in the conduct of the proceedings.

In *Gresse v. Gresse*, (d) on an appeal from the Consistory, 200*l.* had been given in the Court below: an act on petition was entered into in the Arches Court, in which it was stated on the one side that arrears were due from the alimony given in the Court below; and on the other, that the wife had delayed the proceedings; and that alimony was only due from the date of the inhibition. [211] In that case the Court gave only from the return of the inhibition.

But this decree appears to have been founded on the delay which was alleged against the wife; and if that case resembled the present, I should think that decision sufficient authority to allow alimony only from the return of the inhibition.

Here, however, nothing wears the slightest appearance of delay; on the contrary, every possible diligence has been used. The suit was determined on the fourth

(d) This was a case decided in the Arches Court, but I have not been able to ascertain the exact date of it; I find it cited as an adjudged case in Michaelmas Term, 1780.

session of Trinity Term, in the Consistory; the appeal was prosecuted instanter, for an inhibition was prayed in the Arches on the very next court day, and on the first session of Michaelmas Term the inhibition was returned. Now, because it happened that the sentence was so late in Trinity Term that the inhibition could not be returned till Michaelmas Term, is the wife to be without any means of subsistence for three months? This would be manifestly unjust.

I think, therefore, that alimony is due from the date of the appeal and the sentence, which were on the same day; it being understood that in a case of delay the Court would feel itself warranted in decreeing it only from the return of the inhibition.

[212] *PANCHARD v. WEGER*. Hilary Term, January 30th, 1811.—An executor, for whom an appearance had been given, dismissed. And a party having admitted an interest, held not to be at liberty to retract it.

Isabella Swainston, widow, by her will dated January 6, 1810, gave her niece, Harriet Weger, 20l., in consequence of ill behaviour, and gave all her other effects to her executors, in trust for John Lewis Panchard and Louisa Rosalette, otherwise Rosalie St. Claire, and to her niece, that should be living at her decease (save and except the said Harriet Mary Weger), share and share alike, with benefit of survivorship; and her linen and wearing apparel to be at the discretion of her executors; and appointed John Louis Panchard, Richard Reece, M.D., and John Baker, executors.

By a codicil bearing date 31st January, 1810, she appointed Major John Johnson an executor.

A caveat was entered against these testamentary instruments, which was warned in the name of all the executors. Mr. George Jenner then appeared as proctor for the executors and prayed probate. Mr. Townsend appeared as proctor for Harriet Mary Weger, and alleged her to be the niece and the next kin of the deceased, and prayed an answer to her interest. The proctor for the executors admitted Harriet Mary Weger's interest; but in the following term he retracted this admission and denied the same; he declared also that he proceeded no further for John Louis Panchard.

Townsend prayed to be heard on petition. An act in petition was accordingly entered into by both proctors.

[213] By this petition Jenner prayed that Mr. Panchard might be dismissed from the suit, and that Townsend might be assigned to declare whether he would propound the interest of his client; and Townsend, on the other hand, contended that the interest of his client having been once admitted, he could not be put on proof of it; and that an appearance having been given for Mr. Panchard, he could not be dismissed before the termination of the suit.

Judgment—*Sir John Nicholl*. On this petition, amongst several others, two principal points are made—

First. Whether a proctor, having given an appearance for several executors and now declaring that he proceeds no further on the part of one of them, is entitled to obtain the dismissal of that executor?

Secondly. Whether a proctor, who has appeared for the executors, having admitted the interest of the party opposing the will, can now retract that admission and put the party to proof of his interest?

Mr. Panchard, the executor for whose dismissal the application is made, was in the East Indies at the time of the deceased's death, and is there now; the appearance, therefore, was given without authority from him; no proxy has been exhibited for him; it is not unusual for the Court to dismiss an executor who has not intermeddled with the effects, or gone to such a length in a cause as to render himself liable to costs. I think in [214] this case the fact of his absence in the East Indies is a sufficient justification to the Court for dismissing him; his being party to the suit might occasion delay and inconvenience in the administration of justice; he might be called upon for answers. Considering this, and that he has never given any authority for his appearance, I shall dismiss him.

As to the second point, it appears that from two of the executors an appointment had been made of a proctor before the interest of the adverse party was admitted; the third executor afterwards appoints the same proctor.

I apprehend, from the practice of the Court, a proctor will not admit an interest without authority. I must assume, therefore, the fact not being denied, that the

admission has been made with the privity of all the executors; then the question is, whether they shall now be permitted to retract that admission? In all cases it is the more convenient practice to admit the interest of a party; it saves great expense and delay; by it the party is admitted a contradictor; no ground is asserted for retracting the admission here; no third party can be injured by it; the executors must prove their will; and their admission does not bind any of the next of kin. It has been thrown out in argument on the part of the executors that if the Court should permit this admission to be retracted, the party opposing the will must go on and prove her interest before she can be admitted to oppose the will; I have always understood the practice to be that the parties must go on *pari passu*.

[215] In *Burrows v. Belch* (Prerog. Hilary Term, 1793) the interest was denied and propounded; the will also was propounded; but before a witness was examined, the party whose interest was denied gave an allegation opposing the will. It was objected by Dr. Harris that he had no right to give an allegation in opposition to the will till he had proved his interest; but the Court said, that in cases of this description, the parties were to proceed together, and over-ruled the objection, and I have always understood the rule to be so; it was so held also in *Waller and Smith v. Heseltine*, and *v. Burgh* (see p. 170).

I should have been of opinion, therefore, if the executors had been at liberty to retract their admission, that still the parties must have gone on together; but I shall not permit the interest which has been admitted by the executors to be now denied; as it gives the party no other benefit than the right of opposing the will.

[216] *PASSMORE v. PASSMORE*. Hilary Term, Feb. 15th, 1811.—An extract from a letter propounded as a codicil, rejected.

Henry Passmore, of Exmouth, in the county of Devon, died in the autumn of 1810.

An allegation was given, in propounding a will, dated the 26th of March, 1793, and a codicil, dated the 20th of August, 1798. The will was a formal instrument, regularly executed and attested; but the codicil was part of a letter written by the deceased when he was on board a ship, at the Motherbank, and bound on a voyage to the East Indies, to his brother, who was also his attorney; the letter was of very considerable length: the extract propounded occurred in the middle of it, and was as follows:—

“As to your daughters all, they give me pleasure, to see their very great attachment to their parents. Do not mean, however, to exclude Abraham in that particular; he, I know, has a good heart. Also, with regard to Udrey, he, poor fellow, I believe, is not mentioned in my will hitherto, though think he was born at the time it was made; how he slipt my memory I know not; my design was not to do so. I do now empower you, as my attorney, to make him equal with my other nephews. As to Henry, he is heir to his father's part, and, I suppose, grandfather; if so, he will be best off; indeed I [217] wish it so, for his father's sake. Oh, how do I bewail the loss of that young man.”

An extract from a memorandum-book, in the hand-writing of the deceased, was also exhibited to the Court, viz.

“ Brother Abraham,	£500
Brother George, .	500
Sister Jane, .	750
Jane Mitchell, .	500
Christiana Brooks,	500
Maria Engels, .	400
Abraham Passmore, jun.	450
Udney Passmore,	400
Richard Passmore,	250
Mrs. Abraham Passmore,	100
R. Brook,	100
	<hr/>
	£4,350

“The above I mean to bequeath to the names opposite the sums.

“October 12, 1804.

“HENRY PASSMORE.”

Adams against the codicil.

Stoddart in support of it.

Judgment—Sir John Nicholl. The question arises respecting a paper propounded as a codicil to the will of Henry Passmore.

The allegation pleads the fact of a will in 1793—several bequests that it contained, the death of several parties benefited under it, and that it was [218] formally drawn and regularly executed and attested by two witnesses.

The third article propounds the paper on which the question arises, and states, that the deceased, intending to dispose of the lapsed shares in the will and to provide for a nephew and great nephew, wrote, when on board a ship at the Motherbank about to sail for the East Indies, a letter which, it is contended, may operate as a codicillary disposition.

That the instrument is in the form of a letter is not a conclusive objection against it; various instruments not exactly in the form of a will—letters, deeds of gift, marriage settlements—have been held to be testamentary, if the Court has been satisfied as to the intention of the testator. It has been sufficient if they have contained directions how property should be disposed of in the event of death; nor has it been held necessary that they should be in direct and imperative terms; wishes and requests have been deemed sufficient.

The Court must judge from the form of the paper—from its nature, contents, and appearance—whether it was written and intended as a formal permanent will, which, it must be presumed, the deceased meant should operate unless some act was done to revoke it; or whether it was a deliberative and temporary paper, which expressed the impression and wishes of the moment, and was never afterwards thought of or adverted to. In the latter case, it can only be established by the aid of extrinsic circumstances. This principle, I apprehend, was recognized, restored, and re-established [219] by the Court of Review in the case of *Matthews v. Warner* (4 Vesey, jun. 186).

The paper, in the present instance, is a very long letter, written by the deceased to his brother, who was also his attorney, just previous to his setting sail on an East India voyage: the letter embraces all sorts of subjects, some important and some trifling; it is written with erasures and alterations; in the midst of it the passage which has been propounded occurs.

What would have been the effect of this letter if the deceased had died during the voyage, and while his brother continued to act as his attorney, would have been a different question; but I cannot suppose he intended this as a permanent testamentary act, nor perhaps as any testamentary act at all; though, if he had died on the very voyage, it might have been established, as deeds of gift and instruments sometimes are, in order to prevent intentions from being defeated. But the deceased returned from this voyage; he lived a great many years afterwards; and it is not pleaded that he ever made the least reference to this letter; nor is there the suggestion of any recognition of it: but something of a contrary inference is to be deduced from a book which has been produced, containing a memorandum of persons to whom he intended to bequeath his property; this memorandum is dated October, 1804. The disposition is on a different plan; specific sums are given to each person, instead of dividing the property into parts; he had made a former [220] will, in a regular and formal manner; he intended to make a future will after the same manner.

Upon the whole view of the circumstances, I am satisfied that the deceased never intended this latter to operate as a permanent disposition of his property; there is nothing to repel the presumption against it of an incomplete and imperfect paper; and I shall, therefore, reject the allegation.

[221] **BALFOUR v. CARPENTER, FALSELY CALLING HERSELF BALFOUR.** Arches Court, Hilary Term, Feb. 20th, 1811.—A marriage annulled by reason of the minority of the husband, and the want of his father's consent.

An appeal from the Consistory Court of Exeter.

Judgment—Sir John Nicholl. The Court must recollect that the law is to be administered upon the facts that come before it: it is true that the party bringing this suit is entitled to no indulgence; but he is entitled to the law. If the facts in this case are not sufficient to establish the case, the act of parliament must be considered as annulled. The counsel have been driven to offer arguments perfectly desperate in their nature.

The party was born on the 17th of July, 1783; this is proved by his father. The marriage was in March, 1803, under a licence, proved by the clergyman, the clerk, and the entry.

If this is the marriage of the man born in 1783, there can be no doubt but that he was a minor—and no doubt is suggested as to the identity of Mr. Balfour.

The act of parliament declares the marriage of a minor null and void without the previous consent of the father. The cases cited go no further than [222] to shew that, from circumstances subsequent to the marriage, there has been ground to presume the father's consent. The Court presumes consent, unless dissent is proved.

Here there is proof of the ignorance of the father, and I think of his dissent, for it appears that he was totally ignorant of this marriage till two years after it was solemnized. The Court will go a great length in presuming consent, but here is proof that there was no previous consent.

It has been stated in argument that, on the son's coming of age, the father took no steps to dissolve the marriage. But how could he? the son being of age, the father was not competent to prosecute the suit. No court of justice would be warranted in distorting the law to the extent contended for in this case: it is proved that the father was so incensed at the marriage that he would not see his son for four years afterwards.

Another ground has been taken, which is rather an extraordinary one, that the Mrs. Balfour before the Court is not the person who was married. What reason is there to apprehend that she was a fictitious person? She has admitted herself to be the wife—has confessed the marriage—and given her proctor a proxy to appear for her.

This marriage is null and void to all intents and purposes in law whatsoever; if it is not declared so now, persons may appear-hereafter and contest it.

These cases are unfortunate and unfavourable to the man, who, having himself procured the licence, now moves the Court to pronounce for a nullity. [223] The marriage, however, was had while the man was a minor, without the consent of his parents; and I have no hesitation in pronouncing the libel to be proved. In so doing, I do not differ from the case of *Osborne v. Goldham*,^(a) or from that of *Selby*.^(b) In those cases there was no direct proof of the want of consent.

On the other point in the case, it is not necessary to decide; and I give no opinion as to the validity of a marriage under such a licence.

The marriage was annulled.

[224] *COPE v. BURT*, FALSELY CALLING HERSELF COPE. High Court of Delegates, Easter Term, May 8th, 1811.—A marriage under a licence, in which one of the parties was described by a false christian and surname, held to be valid.

An appeal from the Arches Court of Canterbury.

The Judges' Delegates who sate under this commission were Mr. Justice Lawrence, Mr. Baron Graham, Mr. Justice Bayley, Doctor Adams, Doctor Lushington and Doctor Dodson.

The question in this case arose upon the admissibility of an allegation which had been successively rejected by the Consistory Court of London, and the Arches Court of Canterbury.

The allegation was offered on the part of John Cope, Esq.; and the purport of it was to set forth such a statement of facts as might induce the Court to annul a marriage which he had contracted on the 2d of February, 1793.

The marriage had been solemnized under the sanction of a licence which authorized the marriage of John Cope with Elizabeth Melville, widow. This licence had been obtained on the affidavit^(a) of Mr. Cope; the case now set up by him was that

(a)¹ *Osbourne v. Goldham*, Consistory Court of London, Aug. 2, 1808, Arches Court of Canterbury, Dec. 12, 1808.

(b) *Selby v. Selby*, Consistory Court of London, 1771.

(a)² The following is a copy of the affidavit:—

“Vicar-General's Office, January 31, 1793.

“Which day appeared personally John Cope, and made oath, that he is of the parish of St. James, Westminster, in the county of Middlesex, a bachelor, of the age of twenty-one years and upwards, and intendeth to intermarry with Elizabeth Melville,

the person he had married was not, in point of fact, Elizabeth Melville, a widow, but Sarah Burt, a spinster.

The third, fourth, and fifth articles of the allegation pleaded to the following effect:—

3. "That Sarah Burt, falsely calling herself Cope, from the time of her birth lived with Edward Burt and Hannah Burt, her father and mother, in the parish of Whitechapel, until the death of her mother, which happened when she, the said Sarah Burt, was about three or four years of age; that, after that event, the said Edward Burt, her father, removed from thence, and went to reside in Queen Ann-street, Middlesex Hospital, in the parish of St. Mary-le-bone, in the county of Middlesex, and took with him the said Sarah Burt; and she, the said Sarah Burt, continued to reside with her said [226] father there until about the year 1781, when she quitted his house; and that during all the time she, the said Sarah Burt, so lived and resided with her said father, in the parish of Whitechapel, and in Queen Ann-street, she constantly and invariably passed and was known by the names of Sarah Burt, and by no other."

4. "That the said Sarah Burt, soon after she so quitted her father's house, went to live and reside with her sister, Mary Moneypenny, wife of James Moneypenny, Esq., in Southampton-buildings, Chancery-lane, in Pump-court, in the Temple, and afterwards in Henrietta-street, Covent Garden; and continued principally to live with her sister there, and at other places until about the year 1788, when she quitted her sister's house; and the said Sarah Burt did, upon her going to reside with her sister, assume without any legal authority whatever, the surname of Melville, and drop her true surname of Burt; and during the time she so resided with her said sister used and passed by the surname of Melville, but continued to use and pass by her true christian name of Sarah until about the year 1787, when she dropped her said christian name, and assumed the christian name of Elizabeth; and from that time used and passed by the assumed names of Elizabeth Melville until her pretended marriage with the said John Cope, Esq."

5. "That after the said Sarah Burt had quitted her sister's house in the year 1788, she resided in lodgings in King's-street, Covent Garden, in lodgings, at the house of ——— Battersley in the Strand, in lodgings, at the house of ——— in Charing [227] Cross, in lodgings, at the house of ——— in Warwick-street, and afterwards in a house in St. Alban's-street, in the parish of St. James, Westminster; and at those places respectively she pretended to be a widow, and used and passed by the assumed names of Elizabeth Melville; and the party proponent doth further allege and propound that during such her residence at the house of the said ——— Battersley, to wit, in the year 1791, the said John Cope, Esq., party in this cause, was introduced to her under the assumed names and character of Elizabeth Melville, widow, and as such paid his addresses or courtship to her, in the way of marriage, and that she, the said Sarah Burt, fraudulently concealing from the said John Cope her real names and character, and representing herself to be Elizabeth Melville, a widow, did receive his addresses and courtship and consent to be married to him, and that accordingly, on or about the 2d day of February, in the year of our Lord, 1793, a pretended marriage was in fact had and solemnized in the parish church of St. James, Westminster, by the Rev. John Waring, clerk, officiating minister of the said parish, between the said John Cope and Sarah Burt, then a spinster, and by the names of John Cope and Elizabeth Melville, by virtue of a pretended licence obtained, under seal of the Vicar-General of the Archbishopial See of Canterbury, in the said names of John Cope, bachelor, and Elizabeth Melville, widow, whereby the said pretended marriage was, and is absolutely null and void to all intents and purposes in law whatever."

[228] Dr. Jenner, Dr. Edwards, and Mr. Martin for Mrs. Cope. The parties were both of age at the time of the marriage; they were both capable of contracting and willing so to do; under the general law, such a marriage would be good; the necessity, therefore, is thrown upon the adverse party of setting up some special law by which it can be set aside.

of the same parish, a widow, and that he knoweth of no lawful impediment, by reason of any pre-contract, consanguinity, affinity, or any other lawful cause whatsoever, to hinder the said intended marriage, and prayed a licence to solemnize the same in the parish church of St. James, Westminster: and further made oath, that the usual place of abode of him the appearer hath been in the said parish of St. James, Westminster, for upwards of four weeks last past.

"JOHN COPE."

It cannot be said to fall under any of (26 Geo. II. c. 33) the provisions of the marriage act, because by that act no formality is required in obtaining the licence; the grounds set up for annulling this marriage are that the woman, for fraudulent purposes, assumed other names than those which properly belonged to her: on this ground, only one cause has been brought forward since the passing of the marriage act, that of *Cockburn v. Garnault*, which was a suit first brought in the Commissary Court of Surry. The licence had been obtained by the man, and there was a variation both in his christian and surname. The decision was in favour of the marriage; the cause was appealed to the Court of Arches,^(b) where the sentence of the Commissary Court of Surry was affirmed; there has been no cause prior or subsequent to this on this point, whereas many suits have been brought for nullity of marriage where the banns have been published under false names. In *White v. Paul* an attempt was made [229] to set aside a marriage on the ground that the person, who had made the affidavit on which the licence was granted, was not the person married under it; but this attempt failed.

Marriage is a contract; and to make it valid and binding it is enough, according to the doctrine of the civil law, if the parties are sufficiently designated, nihil valet error nominis si de corpore constet. No fraud was intended against the ordinary; the woman had passed many years by this name prior to her marriage; and it cannot be competent to the party himself, who obtained the licence for her under that name, to come forward now after the lapse of so many years, and take objection to his own act.

Mr. Serjeant Lens contrâ. This is an important cause as connected with great public interests and the general interests of the community; it appears to us that there is a radical defect in the licence by which these parties were married, which no length of time can cure; it is a question of public policy and general reasoning, inasmuch as the institution of marriage is for the sake of the public as much as for the sake of individuals. No uniform current of authorities has been cited against us from the Ecclesiastical Courts: one solitary case has been produced which never reached the Superior Court.

The question then is, whether the true name of the parties is not of the very essence of such a contract as that of marriage? Whether the christian name is not the essential name of the parties? [230] This is the doctrine held by Coke Littelson: a man may change his surname for valid purposes; but his christian name can only be changed at confirmation.

The marriage act is framed in the same spirit, and undoubtedly implies that parties are to be married by their true names: besides, search is peculiarly eluded by this double change of names; it is calculated to avoid a law framed for the very purpose of preventing such a fraud; it is the worst kind of fraud, in fraudem legis, *Evans v. King*, Wills Reports, p. 554. It is not the case here as in a common contract, the public is a third party which is interested in seeing and knowing who the parties are, who are really married; the public is imposed upon; the name is of the very essence of the transaction; the defect is radical; anterior to the marriage act, it must have been always the general policy of the law that the parties should be properly designated; it is not the mere identity, but the true description of the persons which is necessary.

Dr. Arnold and Dr. Swabey on the same side. All marriages must be by banns or by licence; banns are the more ancient mode; they are a public notice to all persons interested to come forward and state their objections, if they have any, to the ceremony which is about to take place; it is the intendment of the act that banns should be published under the true names; and it has been held that a publication, otherwise than by the true name, renders a marriage null and void. No question [231] respecting false names under banns arose before the case of *Early v. Stephens* (Consistory Court of London, 1785).

The publication of banns, however, may be dispensed with by persons having ecclesiastical jurisdiction; but it is required that this should only be done on good caution and security being taken. This care in the grant of a licence is devolved on the ordinary; it is as necessary, therefore, that the true names should be given in a licence as in a public proclamation, otherwise the ordinary has no means of knowing,

(b) *Cockburn v. Garnault*, Commissary Court of Surry, May 4, 1792; Arches Court of Canterbury, Dec. 11, 1793.

either by personal knowledge or by inquiry, that the oath of the party procuring the licence is in unison with the fact; the true name is necessary for this; the registration then follows to give facility and possibility of search into the condition of the parties to those whose interests may be involved in the marriage.

It never can be said that a grant to empower A. to marry will empower B. to do so; the very form of the instrument is for the purpose of preventing that fraud which is both suppressed and suggested in this licence.

The case of *Cockburn v. Garnault* is a single case, and the first of its kind, and it never was carried to the court of last resort.

The sentence of the Consistory Court of London was affirmed.

[232] TATTERSALL v. KNIGHT. Arches Court, Easter Term, May 13th, 1811.—A faculty for the erection of a gallery in a church granted, notwithstanding the opposition of the vicar.

An appeal from the Consistory Court of Gloucester.

Judgment—*Sir John Nicholl*. This is an appeal from the Consistory Court of Gloucester; where it was originally a suit to obtain a faculty for erecting a gallery in the church of Wotton-under-Edge, and for appropriating the seats in that gallery.

The application was made by several of the parishioners; the opposition was from the Rev. W. Tattersall, the vicar. The cause was heard on the 18th of June, 1810, when sentence was pronounced decreeing the faculty.

From that sentence the present appeal was made; and I have now to decide whether the Chancellor of Gloucester did right in decreeing this faculty.

The history of the case is this: At the visitation in Michaelmas, 1806, the vicar of Wotton-under-Edge made a presentment to the Chancellor of Gloucester, stating that new pews were wanting in the church, and that he and the churchwardens had formed a plan for regulating the seats; but [233] that the vestry had negatived this plan: he also presented "that a gallery which had been erected for the use of the Sunday school had been pulled down, which he desired might be re-erected:" and he concluded by stating "that if the leading parishioners who wanted seats would bring forward any plan equally commodious, and which would not be likely to disfigure the church, he would readily concur with them."

This presentment is not formally before the Court; but in the proceedings in the country Courts (which are frequently very irregular), it is necessary to look to the substance of the proceedings rather than to the form of them, otherwise it would in most instances be impossible to administer justice between the parties.

By the admission made in this presentment of Mr. Tattersall's, an additional accommodation in the church was necessary; the plan, however, which he proposed was disapproved of by the vestry: now it is to be observed that the incumbent has no authority in the seating and arranging the parishioners, beyond that of an individual member of the vestry, and that which his station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient; which diminishes the accommodation in the church; which disfigures the building; which renders it dark and incommodious. In any case of this description it is very proper that he should make a representation to the ordinary: but as to the mere arrangement of seats, if the parishioners can settle that [234] amongst themselves, and to their own satisfaction, and can agree about the expence, there seems but little necessity for the interference of the incumbent: the expence is that of the parishioners; the churchwardens are bound to repair with the consent of the vestry: it is not the vicar, but the vestry, which appropriates the seats; the general superintendence and authority in allotting them rests with the ordinary.

In 1807 the parishioners, having held several vestry meetings and agreed upon a plan for erecting a new gallery, applied to the ordinary for his faculty: upon the citation issuing the only person who appeared to oppose it was the Rev. Mr. Tattersall. The statement made by those who applied for the faculty was as follows:—"That a very useful gallery, to consist of five handsome seats in front, with two ranges of sitting places behind, might without detriment to the church, or inconvenience to the other seats, be erected at the west end of the north aisle, in the room of the gallery originally built without authority for the accommodation of the Sunday school children, but no longer used for that purpose (the Sunday school being discontinued), and not fit for the reception of families wanting pews; that this new gallery

would be ornamental to the church, being upon a plan corresponding with the present gallery in the middle aisle, which was set up under the inspection of the vicar, to whom the plan of the new intended gallery had been submitted before the removal of the old one; and he expressed no dissent thereto.

[235] "That Sarah Knight, and four others of the principal inhabitants, were willing, at their joint expence, to erect the seats, and desirous of having them appropriated to themselves and their families, and that the parishioners in vestry had given their unanimous consent to this. That the other inhabitants are desirous that the two ranges of sitting places behind the enclosed pews should be erected at the parish expence, and for the general accommodation of the inhabitants; to which the vestry also gave their unanimous consent."

This seems a fair representation of the matter; and, unless strong ground of opposition can be laid, will be sufficient to authorize the grant of the faculty.

The vicar objects—

First. That no vestry was called to agree to this appropriation.

This is not correctly true, for notice was given that persons should apply who wished to have pews appropriated to them. These persons were named, the plan was produced and approved; if no parishioner appeared, the presumption is that no one disapproved.

Secondly. That the former gallery was pulled down without authority, and ordered by the ordinary to be replaced.

It was ordered to be replaced upon an ex parte representation, which omitted to state that it had been erected without authority, and that the use of it was at an end.

[236] Thirdly. That no plan was annexed to the process.

It is not necessary that the plan should be annexed to the process; it was produced to the Court, and at the vestry; and no objection has been taken to the plan itself.

Fourthly. That the gallery is to be erected upon a larger plan than the former gallery, and the gallery was ordered to be restored on the same plan.

This does not go to the question; the question is, whether it is not proper that it should be so erected?

Fifthly. That the occupiers of the other seats will be incommoded.

None of them appear, or object to the measure either in the vestry or in answer to the process; and there is no proof whatever of this assertion.

Sixthly. That there are owners of other estates of greater value who have no pews, and that some of these parties are not owners of the messuages which they occupy.

This objection is open to the same answer as the last; the parishioners are acquainted with this proceeding, and do not oppose it.

Not one of these objections apply to the expediency of the measure; and I must express my regret that, upon such grounds as these, the vicar should so long have opposed this accommodation in his church; that accommodation was called for, is admitted, and the plan of it has been very generally approved of, and is satisfactory to the parties [237] principally interested; it is proved also that it will not disfigure, but rather be ornamental to the church.

It appears, therefore, that the faculty was very properly decreed by the Court below, and that the surrogate very properly took a view of the church himself; it is also very proper that the faculty has not appropriated, as the terms of the citation called upon it to do, the seats to the messuages, but to families resident in the parish: great inconvenience has been found to arise from annexing pews to houses; the houses become dilapidated; the inhabitants of them fail in their circumstances; new houses are erected, and the occupiers of them want pews. It is very desirable that after due time has been given as encouragement to those who build them, that seats should return to the disposition of the ordinary: the form of the grant should be "as long as they continue inhabitants of the parish; or, as long as they continue inhabitants of the parish, and occupiers of the messuages stated;" the former of these is the more usual, as it gives no notion of annexing to houses. I affirm the sentence of the Court below.

With respect to costs, none were given in the Court below; but I hardly think that the original opposition to this measure, and the contest which was carried on, justified so lenient a sentence; at least the vicar should have been satisfied with that decision: the appeal has some appearance of being vexatious. Looking, however, to

the relation in which the parties stand to each other, and con-[238]-sidering how desirable it is that they should return to a good understanding together, perhaps it would be advisable that the parishioners should wave pressing the costs. I shall allow the question to stand over for their consideration.

May 24.—Costs were given against the vicar.

[239] PHILLIPS v. BIGNELL AND OTHERS. Prerogative Court, Easter Term, May 15th, 1811.—An executor bound to exhibit an inventory and account at the suit of a party interested in the property for which he is executor.

Daniel Lampett, a yeoman of Horknorton, in the county of Oxford, died in the year 1796, having made a will, by which he constituted Richard Benjamin Bignell, Williams Meads, and David Salmon his executors; and bequeathed property of various descriptions to be equally divided amongst his three daughters; their several shares to be paid them on their marriage, or their attaining the age of twenty-one years; but in the event of one of them dying before either of these contingencies, then her share was to be equally divided amongst the survivors.

The executors took probate of the will in the Prerogative Court of Canterbury in October, 1796. The two eldest daughters married, one in 1805, the other in 1806, and their husbands received their respective shares of the property; the youngest was still a minor (about seventeen years of age) and unmarried.

In November, 1810, a citation issued at the promotion of the husbands of the two married sisters against the executors to exhibit a full and particular inventory of all and singular the goods, chattels, and credits of the deceased, which at any time since his death had come to their hands, posses-[240]-sion and knowledge. The executors objected to comply with this citation on the ground that they had paid the two eldest daughters their shares of the property on their respective marriages, and had received their husbands' receipts in discharge of them; and, further, that the sums paid them exceeded in amount their distributive proportion.

Swabey for the executors.

Burnaby contra.

Judgment—*Sir John Nicholl*. This is a proceeding against the executors of Daniel Lampett, for the purpose of compelling them to exhibit an inventory and account: the executors object to doing this, but the law does not readily admit objections.

The canons require an inventory to be exhibited even before probate is granted; and this was the old practice of this Court, and indeed is still the practice in some country jurisdictions. The statute (21 H. VIII. c. 5, s. 4) requires executors and administrators to exhibit inventories as part of their duty, without any proceedings to call upon them to do so.

The modern practice, however, is certainly not to render an account unless it shall be called for; but the executor must remember that he has bound himself by his oath to render a just account when he is by law required. The Court may, and in some instances does, for the protection and security of the parties interested, require ex officio that an inventory shall be exhibited; and though the Court [241] does not exact this in all cases, still it always will, where a party having an interest in the property applies for it.

It has been laid down in a variety of cases that a probable or contingent interest will justify a party in calling for an inventory and account. This was so held in *Salter v. Sladen* (Prerogative, Michaelmas Term, 1792), *Snow v. Strutt* (Prerogative, Hilary Term, 1793), and *Myddleton v. Rushout* (see the next case, p. 244). It is not necessary to particularize the circumstances of these cases; but in all of them it was laid down that a probable or contingent interest was sufficient, because the production of an inventory was so much a matter of duty that the executor was bound to exhibit it, even where there was an appearance of interest in the party calling for it. My predecessor so much discouraged all hanging back in cases of this description, that he has generally condemned the parties who have been guilty of it, in costs.

In the present case the executors proved the will in October, 1796; they are now cited by two of the daughters of the testator, who are also two of the substituted legatees to exhibit an inventory: it is argued that they are barred from making this demand, because their respective husbands have received releases for their several shares from the executors. On the other hand, it is stated that the accounts are loose and incorrect; this again is denied, and it is asserted in reply (which certainly

appears very extraordinary) that the sums paid exceeded the amount of their respective shares.

[242] Here then is a considerable estate, consisting of various descriptions of property to be sold and divided, monies to be advanced for the maintenance and education of children, interest to be calculated on the respective shares, and, in short, no estate so circumstanced that one can scarcely figure to oneself a case in which a more exact inventory and account ought to have been kept and stated.

Two out of the three daughters are married, and accounts of their property have been rendered to their husbands ; but it is not averred that they were full and perfect accounts, all the executors state is that the husbands received the shares and gave releases for them ; and the husbands might, on their respective marriages, have accepted them in unsuspecting confidence ; but they are mere receipts, not releases, and certainly not releases given on a due investigation of all the accounts. I am not prepared to say that they would be a bar, even if the parties had no contingent interest ; but here they are residuary legatees, to them they can be no bar ; if the unmarried sister were to die before marriage, or under age, they would be entitled to her share : but, independently of this consideration, the share of the unmarried sister cannot be ascertained without a precise inventory and account ; and the Court would almost ex officio, for the protection of her interest during her minority, direct an inventory and account to be exhibited.

Lapse of time may sometimes weigh with the Court ; the Court would be unwilling to open old accounts where documents have been lost and [243] vouchers destroyed ; but the argument founded on lapse of time does not apply in the present instance, since, as one of the parties is a minor, all the documents and vouchers must have been preserved, and it is difficult to surmise why the executors should refuse to produce them ; when the minor attains the age of maturity, or marries, she will have an undoubted right to call for them. No inconvenience, therefore, can arise to the parties from exhibiting them.

Upon the whole, I think there is no ground or colour for this refusal ; when parties are acting fairly they are rather desirous of making a full disclosure than of attempting to raise objections to it. The Court is bound to discourage and discountenance any backwardness in cases of this description ; and I think I am only following the example of my predecessor when I condemn the executor in costs.

[244] MYDDLETON v. RUSHOUT. Prerogative Court, Easter Term, May 12th, 1797.—An executor bound to exhibit an inventory and account, at the suit of a party having an interest in the property for which he is executor.

A citation was taken out by the widow of Richard Myddleton, Esq., of Chirk Castle, against the executors of her husband to produce an inventory ; the executors objected to comply with the citation, on the ground that the widow was not so interested as to entitle her to call for an inventory, as by her marriage settlement she had 500*l.* per annum settled on trustees for her. To this it was replied that there was a covenant that there should be paid at several instalments money to make up 5000*l.* stock, or, in the event of her surviving her husband, so much as would make up the 5000*l.* stock ; that nothing as yet had been paid towards making up his sum, consequently the 5000*l.* stock was due to her, and she was entitled to an inventory.

Sir William Scott for the executors. This application rests on two grounds ; first, that an executor is under a general obligation to deliver an inventory without the application of any person. Secondly, that the party in this suit is a creditrix and, therefore, has a specific interest.

As to the first point, it is true the executor engages to furnish an inventory when required by law ; but he is not considered as imperiously ob-[245]-liged to deliver it, unless at the instance of a person interested ; at least it is not the practice of the Court ex officio to call for one ; therefore there has been no failure of duty. Secondly, the parties usually applicants are the next of kin, or creditors who are immediately and directly interested ; but here the party states herself to be interested under a marriage settlement by which money was to be paid, partly in the lifetime of the husband, and partly after his death to trustees for her use ; thus she is a creditrix only in equity ; the legal creditors are the trustees ; the widow's interest is merely equitable, and not to be attended to in a mere court of law.

When legacies are in trust it is always held that the trustee, and not the cestui qui trust, must sue.

Dr. Nicholl contra. The Court will call for an inventory on the shewing of any kind of interest. In *Sladen v. Sulter*, Prerog. Mich. Term, 1792, a suit was pending before the Lords of Appeal on a question of joint capture; it was not determined whether Sladen would be entitled to claim any thing from Salter; and, therefore, it was argued that he had no interest to entitle him to call upon Salter's executor for an inventory; but the Court held that where even the party can shew any kind of interest, it will enforce the call for an inventory. That this could be no hardship, for the executor was bound, both by the stat. of H. VIII. and his oath, to do it, though this was not ordinarily and in all cases enforced; the Court held that a probable interest was sufficient, and said that it knew [246] of no case where such an interest had been shewn, and the application had been refused.

The wife has an interest here; a certain sum should be raised for her use; none of that money has been paid; she has an interest to discover the effects; suppose she wanted to institute a suit to compel the trustees to recover, it would be necessary to see all the assets; but she is the person really interested, for the trustees are to pay over to her.

Judgment—*Sir W. Wynne*. This is a suit brought by the widow against the surviving executor of her husband for an inventory; the executor has appeared under protest, stating a settlement, and that on 2500l. being granted to Mr. Myddleton, 500l. was assigned to trustees to be set apart annually, paying interest to her; and if by this payment at the death of Mr. Myddleton it did not amount to 5000l. stock, his executors were, three months after his death, to pay that sum to trustees for her use. It is stated that no such sum has been paid, so that 5000l. is now due to her from the estate; this is not denied, but it is contended that she is not a legal, but an equitable, creditor, and that therefore she is not entitled to an inventory.

I never heard of this distinction, nor can I see any reason for it; the legal interest cannot be enforced in the Ecclesiastical Court more than the equitable one.

The statute of H. VIII. requires all executors to give an inventory; this is not required of all exe-[247]-cutors in practice, and the Court always enquires into the interest of any party requiring one; but when it sees any kind of interest it enforces that which is by law generally required.

I know of only one case in which it could be refused; i.e. if a creditor had brought a suit in Chancery for a discovery of assets in such a case, the Court has said that the party shall not proceed in both Courts; this is not suggested here. I see no ground for the objection, and I pronounce against the protest, with costs.

[248] ACKERLEY v. OLDHAM AND WILBRAHAM. High Court of Delegates,
Easter Term, June 17th, 1811.

An appeal from the Consistory Court of York.

The Judges' Delegates who sat under this commission were Mr. Baron Thomson, Mr. Justice Chambre, Mr. Justice Bayley, Doctor Arnold, Doctor Adams, Doctor Phillimore, and Doctor Edwards.

A citation issued in the Consistorial Court of Chester, at the suit of Lievesley Oldham and John Wilbraham, devisees and executors of Mary Done, deceased, against John Hawksey Ackerley, of the city of Bath; calling upon him to take upon himself letters of administration, and to exhibit an inventory of the goods, chattels, and credits of his father, David Ackerley, deceased; and also to [249] render a true and just account of his administration of them; he, the said John Hawksey Ackerley, having, as was reported, intermeddled in and possessed himself of the goods, chattels, and credits of his deceased father.

Edward Pate then exhibited his proxy for Lievesley Oldham and John Wilbraham, devisees and executors named in the last will and testament of Mary Done, widow, deceased, and alleged that David Ackerley, late of the city and diocese of Chester, gent., deceased, departed this life some time since intestate, leaving behind him Frances Ackerley, widow, his relict, and John Hawksey Ackerley his only natural and lawful child; that the said Frances Ackerley departed this life without taking upon her the administration of the goods, chattels, and credits of the said deceased; and that the said John Hawksey Ackerley had intermeddled in and possessed himself of the said goods, chattels, and credits of the said David Ackerley, deceased, and now resided in the city of Bath, within the diocese of Bath and Wells; and prayed a requisition to be directed to the Bishop of Bath and Wells, his vicar-general or

surrogate, to cite the said John Hawskey Ackerley to appear in the Consistory Court of Chester, on Thursday, the 15th day of October, 1807, then and there to take upon him the letters of administration of the goods, chattels, and credits of the said David Ackerley deceased, and to exhibit a true and perfect inventory of the same which had come to his hands, possession, or knowledge, [250] and also to render a true and just account of his administration of them.

The citation was served by letters of request from the Chancellor of the diocese of Chester to the Bishop of Bath and Wells, on Mr. Ackerley at Bath.

Oct. 15, 1807. Pate (proctor for the executors of Mary Done) returned the citation in the Court at Chester.

Oct. 22. Baker exhibited a proxy for Mr. Ackerley, and prayed time to shew cause till the next Court.

Nov. 5. Baker prayed further time, and time was allowed till the next Court.

Nov. 12. Baker prayed, and the surrogate decreed, a requisition to take a declaration or affidavit of the defendant, returnable on the second Court day.

Nov. 26. Baker alleged the requisition to have been duly executed, but not yet returned to him; and he prayed time to prove the execution thereof to the next Court, which was granted.

Dec. 3. The defendant having been twice publicly called, Pate accused his contumacy in not taking upon him the administration of the goods, chattels, and credits, of David Ackerley, the deceased in the cause, nor shewing any lawful cause to the contrary, and prayed that he might be reported contumacious; and, in pain of his contempt, to be excommunicated, which the surrogate decreed accordingly. Baker dissenting, and it being alleged that the defendant still resided in the diocese of Bath and Wells, the surrogate also de-[251]-creed a requisition to the bishop of that diocese, his vicar-general or surrogate, to cause the defendant to be denounced, and declared excommunicated.

From which decree, and the sentence of excommunication issued in that behalf, in the name of the Rev. Thomas Mawdesley, surrogate of the Rev. Thomas Parkinson, D.D. vicar-general, and official of the Lord Bishop of Chester. (Consistory Court of Chester, Dec. 3, 1807.)

From this sentence an appeal was interposed to the Consistorial Court of York, where the decree of the Court of Chester was confirmed. (Consistory Court of York, July 6, 1809.)

Dr. Swabey and Mr. Heald, for the appellant. The citation issued without any affidavit to lead it, on the mere allegation of the parties, that they are the executors of a Mary Done, widow; but what interest, if any, they or their testatrix have in the effects of the intestate is not set forth; it will be said Mr. Ackerley has appeared by his proctor absolutely, and prayed time to shew cause when he might have protested against the proceeding, as a nullity; is, however, the want of any apparent interest in Messrs. Oldham and Wilbraham, to call upon Mr. Ackerley to the effect of the citation, the only ground of exception to the decree by which he has been declared excommunicated? Certainly not; for supposing him to have intermeddled in the effects of his deceased father, and that Mary Done was in her lifetime a creditrix of his estate; the Court had no jurisdiction to compel him to take out letters of administration.

He may possibly have acted as an executor de son tort, and if so, have subjected himself to the legal inconvenience consequent on such conduct in [252] a court of law. But that would neither give to a person intermeddling a right to letters of administration, nor compel him to take the same upon him, if otherwise entitled to ask the grant from the ordinary.

A next of kin does not stand on the same footing as an executor, who, by having intermeddled in the effects of his testator, is held to have accepted the office; and is thereby bound to proceed in his functions, and may be compelled to take probate; and the creditors cannot release him from this obligation. An executor may do many things before probate; but a next of kin in the case of intestacy by an improper intermeddling, becomes only an executor in his own wrong, and is not even called an administrator, as no man can become one by his own act, nor unless by the appointment of the ordinary.

In the present case Mr. Ackerley left a widow who, in her life, was entitled to be preferred, and the acts of the son could not supersede that title.

Take any other case, where there may be several next of kin in an equal degree;

and what would be the mischief if one of them by his own misfeasance could acquire a preference over the claims of the others, and controul the choice and discretion of the ordinary.

These, and other considerations, ought to have occurred to the Judge of the Court below, by whose decree Mr. Ackerley, with great reason, complains that he is aggrieved, before he proceeded to excommunicate the appellant for not taking upon himself the administration of the goods of the de-[253]-ceased intestate, he not having, as alleged, intermeddled with and possessed himself of them. Besides that, he had not before assigned him so to do, and therefore has visited him with punishment for a contempt which he has not incurred.

The act is utterly unsustainable; and the respondent, having attempted to support it in two instances, must be liable to be condemned in all the costs of these proceedings.

Dr. Jenner contra. The parties pretend an interest, and this is sufficient ground for the citation; by having appeared they admit the jurisdiction; and it is too late now to stir the question of right; besides, in reason and equity, it does not appear why the next of kin should not be liable as well as the executor.

The Judges pronounced for the appeal, and dismissed Mr. John Hawksey Ackerley from the original citation returned in the Consistory Court of Chester, and from all further observance of justice in this cause; but without costs.

[254] MOSS v. BRANDER. Prerogative Court, Trinity Term, June 19th, 1811.—A will set aside for want of adequate proof and one of an earlier date established.

Judgment—Sir John Nicholl. This case arises upon two wills of Hannah Brander, and it has required the full attention of the Court. The deceased was a femme coverte. I have already (Trinity Term, 1809) decided that, under a power given to her in the form of a bond, he could make a will; and that I am bound to enquire into the factum of the instruments propounded.

One of them is propounded by Moss, who is not an executor, but the residuary legatee; it is dated the 25th of August, 1801. The other is propounded by the husband, and is dated the 25th of May, 1806.

The former is regularly prepared, formally executed, and attested by two witnesses. The drawer of it (Mr. Bevan) has been examined; and he proves that the instructions were given by the deceased, that he prepared the will from those instructions, and delivered it to her. One of the subscribing witnesses proves the execution; and the death, and character, and handwriting of the other, are also proved. So that the factum of this will being established, it would be entitled to probate, unless revoked by the subsequent will; and the true question in this case is the factum of the second will.

[255] This will is not formally drawn up; it is on a scrap of paper written on both sides; it is attested by only one witness, Mr. Wilson, who is also the drawer of it; he describes himself as a calico glazer, and says, "He was slightly acquainted with the deceased for about two years, by occasionally calling at her husband's house; that on a Sunday afternoon, about the 25th of May, 1806, he called; and after having been there some short time the deceased asked him if he would write her will; the deponent told her he had no objection, but it was a thing he had never done for a person in his life. Her husband offered to go for some paper; the deceased said no, there is a piece on the table that will do; I have not a great deal to say, for I am very ill, and shall not be able to sit up long." That he then wrote according to her order; and the paper being shewn him, he says "That he drew and wrote the same by the dictation and desire of the deceased, and in her presence, and in the presence of her husband; that he then read it all over to her, and she said she was very well satisfied with it, and asked her husband if he was so, and he said yes. That the deponent then asked the deceased if she would sign it, and she said yes, and set her name thereto. That he thought there should be a seal; she said, there is one on the table, I will put it on myself, which she did, and said she declared it as her will, and asked the deponent if it would be proper for him to sign it, and the deponent accordingly signed his name as witnessing the execution thereof."

[256] Now the evidence of this single witness, being the only proof offered in support of the will; a will exclusively in the favour of the husband; made in the presence of the husband, when the deceased is stated to have been very ill; and

notwithstanding her marriage (being then a widow), she had reserved a power of disposing of certain property, and had actually exercised that power in 1801, in favour of her relations. The evidence of this single witness requires to be carefully considered, for it is only on the full belief of his testimony that the will can be established.

His account then is, that he was only slightly acquainted with the deceased by calling on her husband; he was, therefore, the friend of the husband; that he never drew a will before in his life; that this will was written off at once upon this sheet of paper, without any draft, or previous note or memorandum; that it was immediately read over, and immediately signed.

Then let us observe how this calico-glazer, writing at the dictation of this sick woman, who herself from another paper which has been exhibited appears to have been but an illiterate person, has expressed this will, and how the paper is written; it is in these words:—

“This is the last will and testament of me, Hannah Brander, of Susannah Row, Shoreditch, in the county of Middlesex, which I now make and publish by virtue and in pursuance of the settlement made on my marriage with my present husband, Andrew [257] Brander, in manner following:—I give and bequeath the sum of five hundred pounds of lawful money of Great Britain to my present husband, Andrew Brander, which was settled on me at my marriage with him, hereby revoking all former wills by me at any time heretofore made, and do declare this only to be my last will and testament. In witness whereof I have hereunto set my hand and seal, this twenty-fifth day of May, one thousand eight hundred and six; HANNAH BRANDER, (L.S.) in the presence of witness,
[“William Wilson.”]

Here then is as perfect and as technical a form of words as could possibly be used, not only in the formal, introductory, and concluding parts, but in the disposition itself; it is written quite fair, there is not a single omission, erasure, or amending, except in the spelling of the word following. He confirms, and more strongly ties himself down upon interrogatories, that it was no copy. He was asked whether he did not make such will from a copy, and his answer is, “No,” and on another interrogatory he says, “I did not hear of the will in favour of her relations till after her death.” “That he will take upon himself to swear, having perused the will of 1801, that he did not take the form of the will from a copy thereof.” So that he even excludes the deceased from having any copy before her; for if she had he would have mentioned it either in his examination in chief or on this interrogatory.

[258] This would be difficult to believe in itself, that persons of this description should be able *uno contextu* to draw up such an instrument in such formal and technical terms; it is equally formal in the introductory, in the dispositive, and in the concluding part. But what renders it still more difficult of belief is, that the introductory and concluding parts are verbatim the same as in the will of 1801; and yet the witness does not pretend that that will was then produced; nor is it likely, when the other evidence comes to be examined, that it could have been produced. Indeed, it is pretty strongly proved in the case that the instrument was not in the possession of the deceased; but it is also fully proved that a copy of it was delivered to the husband by his own desire, after the deceased's death; and the husband admits in his answers that he was not informed of the contents of this will till after the deceased's death, so that it could not have been produced on the 26th of May; that so precise a coincidence of wording should have taken place without being copied, and in a paper not drawn by a professional person, is almost beyond belief.

There is another circumstance of suspicion, namely, that the ink of the signature is quite of a different colour from the body of the will; the whole name is written in a much deeper ink, and all is equally black; and yet the witness says it was signed by the deceased immediately after the body of the instrument was written by him. It is also observable that his own name, which he says was written after the deceased's signature, is in the same coloured ink as the body of the instrument.

When this name was written, or how the signature-[259]-ture was obtained, or whether it is in the deceased's handwriting (for it is a hand easily imitated), or how it was signed, it is not necessary for the Court to conjecture; but if the case rested here, I should find great difficulty in giving credit to this evidence.

Though Mr. Brander gave in a second plea, yet he has not attempted to aver any

circumstance to support the act ; there is not the testimony of a single witness declaring that the testatrix intended to benefit her husband by this property ; there is nothing in the shape of a recognition, though she lived near a fortnight afterwards.

In answer to a charge that he treated her cruelly in order to obtain a will from her, he has produced two witnesses, who say that they appeared to live comfortably together, and that is all. There is nothing stated of particular affection and regard towards her husband, or of alteration of regard towards her relations.

He has pleaded the finding of this paper after the deceased's death ; but no evidence of that fact, or even that it was in existence till long after her death, has been produced ; there is nothing, therefore, to uphold the witness Wilson.

How then stands the evidence on the other side ?

Ann Bull was intimate with the deceased and her opposite neighbour for ten years ; she says, " That the deceased told her about a twelvemonth before her death that her husband had given her a bond on her marriage that she should have 500*l.* at her own disposal ; she often told her she had made her will, and within two or three days of [260] death told her she would not alter it ; that about a twelvemonth before her death, she brought some papers to the deponent, and desired she would take care of them, and not let Brander or any other person know that she had them, and said they were the bond, and the leases of her houses, and her will ; that soon after the deceased being very indifferent, the deponent wished her papers to be removed, that the deceased brought a tin box, put her papers into it, took them away, and left them as she believes with Sarah Leighton. That the deceased many times told her that her husband wanted to get possession of her will ; but that he never should."

Sarah Leighton says, " That the deceased brought a tin box to her, said her will was in it, and requested that she would take care of it for fear her husband should get it ; that the deceased sent for the deponent several times during her last illness, but she was at Walthamstow ; that when she returned, she understood that the deceased had sent her niece for the tin box, and that the deponent's daughter had delivered it to her."

Ann Pascal (the deceased's sister) deposes, " That on the morning after the deceased's death, she told Andrew Brander that she had the deceased's will, and all her writings ; and Brander said, ' that's right, take care of them, I only want a copy.' That a copy of the deceased's will was made and sent to Brander."

Here is a strong adherence to the will of 1801 ; an anxiety that the instrument should not come [261] within reach of her husband ; it satisfies me also that the will of 1801 was not produced to the husband and Wilson on the 25th of May, when it is pretended this last will was made : Brander, desiring to have a copy, is a strong disavowal of the will of May 25 being then made, and may account for that instrument, when it was afterwards produced, being in the same technical form as the will of 1801.

Ann Bull (the witness first mentioned) also says, " That the deceased frequently told her Mr. Brander used her ill because she would not alter her will, and make a will in his favour, but that she never would ; that he used her ill one night on the account she would not put her hand to a paper because he would not let her see what it was."

This would impose upon Brander the burthen of proving very satisfactorily, that a will made in his presence, and when his wife was described as very sick, was the free and voluntary act of the deceased.

The witness goes on, " And that on the next day after she had so refused she found the paper in a box, that it was a will Brander had made in his own favour, and she had copied it off and given it to some friend, and put over the top of it that it was a forged will in case it should be brought forward after her death."

This account in its different parts is confirmed by three other witnesses ; the paper so copied by the deceased is before the Court, and Elizabeth [262] Pascal (a niece) says it was deposited with her father.

The instrument purports to be a will of the deceased's, giving her leasehold house and all her property to her husband, and is dated in 1803, but not signed ; at the top there are written these words, " This is the copy of a forged will in my name."

This evidence, on the one hand, renders it most highly improbable that the deceased should voluntarily have departed from the will of 1801, and disposed of her property in favour of her husband ; and on the other, must excite the greatest jealousy of an

instrument produced by the husband, and supported by one single witness in the manner already stated.

Elizabeth Pascal says, "That on the Sunday previous to the deceased's death, she was sent for to attend her; that on the Wednesday following, Mr. and Mrs. Cheswick drank tea with Brander; that Brander came down and told the deponent that her aunt was going to alter her will, but that there was a witness not come; that a person came soon after, but Brander took care she should not see him; that Brander came down into the kitchen, and fetched the pen, and said, he is come, we shall soon settle the business. That Mrs. Cheswick soon after came down, and the deponent asked her if her aunt had been settling her will; she said she had not. That the deponent not feeling fully satisfied, asked her aunt herself; the de-[263]-ceased said, 'No, she had had a paper brought to her to sign, but she said, let those that make wills sign them, she would sign no more than what she had already signed, and that should stand good.'" She made similar declarations on the following night.

That there was some attempt to obtain a will on this Wednesday, and that the deceased declined it, is confirmed by Brander's own interrogatory. (a)

Whether this was a proper or an improper attempt, the Court has it not in its power to judge, for Mr. Brander has not thought proper to explain this transaction; he has not pleaded it, though he has given in a second allegation; nor has he examined Mr. Selby or Mr. and Mrs. Cheswick; therefore the appearances and presumptions are against him. But the transaction bears upon the case in another way; it renders it highly improbable that this will of the 25th of May (only ten days preceding) should have been made at all; for if it had been made, it must have been in some manner referred to and recognized by Mr. Selby; and if it had [264] been so recognized, that circumstance would certainly have been pleaded and proved.

Within two days afterwards the deceased dies: what is Brander's conduct? The will of the 25th of May is not produced; Mrs. Pascal tells him she has the deceased's will; the will of 1801 and other papers. He replies, "That's right, take care of them, I only want a copy." He receives a copy; he enters a caveat against it, but does not produce his own will, or assert its existence; the objection he took to the will of 1801 being that it was not a legal execution of the power. In August, 1806, he files a bill in Chancery against Ann Pascal, to recover possession of the leases and other papers relating to the deceased's houses; in that bill he asserts that the deceased had died intestate, not suggesting then that he had in his possession a will which revoked all former wills. Ann Pascal, in answer to Brander's bill, claims her right under the will of 1801, and Brander has not ventured to proceed with his suit. And it is not till May, 1807, that this latter will first makes its appearance.

A caveat being entered against the will of 1801, Moss, the surviving executor, being in indigent circumstances, and having no direct interest himself, and being in some doubt whether the will of 1801 was a good execution of the power, does not institute a suit; and the matter having rested quiet for near a year, Brander produces the will of May, 1806, and takes administration with that paper annexed in May, 1807.

In explanation of the bill in Chancery, in which he stated the deceased to have died intestate, Mr. [265] Brander in his plea alleges, "That he did acquaint his solicitor, Mr. Samuel Parkinson, of the will propounded by Moss, and also informed him that the deceased had made another will, bequeathing to him the property she had power to dispose of; but what was become thereof he did not know."

This is an important fact; for at least it would have shewn that he averred the existence of this will shortly after his wife's death, and it would have taken off the effect of his having alleged in his bill that she died intestate. Mr. Parkinson is produced and examined on this article of the plea, and on this article only. Mr. Parkinson, in his deposition in chief, speaks to the filing of the bill, and says, "That

(a) The interrogatory was addressed to Ann Pascal, and to this effect: "Were you present in the room with the deceased about two days preceding her death, when Mr. Brander brought a will to her as articulate, and requested her to sign it, which she refused? Will you take upon yourself to swear that it was Mr. Brander himself who brought the said will to the deceased? Upon your oath was not that will brought by Mr. Selby, the attorney who prepared it? Will you swear that the ministrant requested the deceased to sign it, and that any thing was said upon the subject of signing the same, either by Mr. Selby or the ministrant?"

in the bill it was stated that Hannah Brander was dead intestate, and that Andrew Brander was then taking steps for obtaining letters of administration of her effects; that Pascal kept possession of some writings under pretence of there being a will, but that his wife had no power to dispose of those leases by will."

Not suggesting, therefore, that such will was revoked by a subsisting will; but on this part of the plea, "that the deceased had made another will bequeathing to him the property she had the power to dispose of; but what was become thereof he did not know." In this very important part of the article the very gist of it Mr. Parkinson knows not to depose. This is rather a strange way of getting over it: the examiner ought to have required a specific answer to that part of [266] the article; but coupling this with the answer of the witness to the interrogatories, the Court is at no loss what inference to draw from it. He is cross-examined directly to this fact on the third interrogatory. He had answered this interrogatory, but he afterwards has that part of his answer expunged, and then instead of further knows not to answer, says, and further declining to answer: and in like manner he declines answering several other interrogatories.

Now, whether he was or was not bound to answer the other interrogatories may depend upon their contents, and it is unnecessary to examine into that point; but in his deposition in chief to that fact so pleaded, and to this interrogatory directly applying to the fact pleaded, I think he was bound to answer.

The privilege of not answering to facts communicated to him confidentially by his client is not the privilege of the attorney himself, but of the client; and if the client waves the privilege, the attorney cannot refuse to answer. Here Brander had pleaded the fact; had vouched Parkinson, and had produced him on this very article; he has sworn to speak the truth, and the whole truth. This was a waiver of privilege as to this fact; and he being produced to prove the fact, the adverse party had a right to cross-examine to it. Mr. Parkinson, however, having declined to answer when he was bound to answer, the Court must infer that he negatives the fact; it is pretty much the same as if he had expressly said that [267] Brander did not communicate to him in August, 1806, the existence or making of this will of May, 1806.

If so, if consulting with his attorney at this very time in August, 1806, upon this very subject, viz. his right to the deceased's property—that property claimed under a will of 1801; relying only that such will was not executed in conformity with the power of attorney, and, therefore, alleging that the deceased died intestate; it is next to incredible that the deceased could have made this will with an express clause of revocation, and in the presence of Brander himself, and that Brander should never have mentioned such a circumstance or transaction to Mr. Parkinson.

At all events, supposing Parkinson was bound to decline answering, there is then no proof that Brander did mention it; and the case must be considered as one in which there is an absence of proof.

That Brander made any search for the will on the death of the deceased, or ever intimated when Mrs. Pascal gave him a copy of the will of 1801 and claimed under it, that the deceased had made a subsequent will, there is no proof.

When the will was made; whether the body of it was written before or after the death of Mrs. Brander; whether it is or is not of the handwriting of the deceased; it is not necessary for this Court to decide: the party setting up the instrument must furnish proof that it was made by a free and capable testatrix.

Putting then in one scale the evidence of this single subscribing witness, supported only by two [268] witnesses to similitude of handwriting; in the total absence of any testamentary declarations or recognitions of such an act; and without any circumstances shewing a probability that she should so execute the power given to her by her marriage settlement. And putting into the other scale the inconsistency between the instrument itself and the account given by the subscribed witness—the acts, the conduct, and the declarations of the deceased herself, contradicting the whole transaction, and the acts, conduct, and declarations of Brander himself, so inconsistent with the making of this instrument—I feel no difficulty in pronouncing that he has failed in proof of this will; and as the transaction he has undertaken to prove, whatever it was, passed within his own knowledge, he having failed to prove it, has, I think, rendered himself liable to costs.

I therefore pronounce for the will of 1801, and condemn Mr. Brander in the costs of this suit.

[269] WATSON v. THORP. High Court of Delegates, Trinity Term, June 21st, 1811.—A clergyman suspended for three years for immoral conduct.

An appeal from the Consistory Court of York.

The Judges who sate under this Commission were Mr. Justice le Blanc, Mr. Justice Chambre, Mr. Baron Graham, Doctor Arnold, Doctor Phillimore, and Doctor Edwards.

This was a cause of office, originally brought by citation, and articles in the Consistorial Court of Durham, at the promotion of the Rev. Robert Thorp, D.D., Archdeacon of Northumberland, against the Rev. George Watson, D.D., rector of Rotherham, in that county, for the lawful correction and reformation of his manners and excesses, and more especially for his profligate life and [270] conversation; and the crime of adultery, fornication, and incontinency by him committed.

The articles, after stating that the party proceeded against had been for thirty years a priest or minister in holy orders of the Church of England, and for ten years rector of Rothbury; exhibited a copy of the mandate addressed by the Bishop of Durham to the Rev. Dr. Thorp, Archdeacon of Northumberland, for the induction of Dr. Watson into the possession of the rectory and parish church of Rothbury; and then proceeded to state in detail the several charges of which he was accused.

Several witnesses were examined upon these articles, who fully proved them.

Whereupon the Consistory Court of Durham pronounced the following sentence:—

Consistory Court of Durham, Oct. 7, 1808.—“That the said Rev. George Watson, clerk, doctor in divinity, shall be suspended for the space of three years (to commence from the time of publication of such suspension for that purpose in the parish church of Rothbury aforesaid) from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the Word of God, administering the sacrament, and celebrating all other duties and offices in the said parish and parish church of Rothbury, and elsewhere, in the diocese of Durham, and from all advantages and benefits of the said rectory and benefice, and from taking and receiving the tithes, rents, profits, and emoluments of the said rectory. And the said judge did thereby suspend the said George Watson accordingly, and did condemn [271] him in the costs of suit; which costs he did also pronounce, decree, and declare, after taxation thereof by him, or by some other competent judge in that behalf, the said George Watson, clerk, doctor in divinity, shall be compelled by ecclesiastical authority really and effectually to pay, or cause to be paid, to the said Rev. Robert Thorp, or to his proctor; and did order and decree that at the expiration of the said three years, the said George Watson, clerk, doctor in divinity, do and shall exhibit and bring into the registry of this Court a certificate, under the hands of three clergymen in his vicinity, of his good behaviour and morals during the said time of his suspension; and that the said certificate shall be exhibited and approved of by the Court before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the aforesaid time of three years, until the aforesaid satisfactory certificate shall be exhibited and approved of; and did decree a sequestration of all and singular the tithes, rents, lands, tenements, profits, and emoluments of the said rectory; and did order that the balance which shall be remaining in the hands of the said sequestrator, during the time of the said suspension, shall be applied and disposed of from time to time, as the Lord Bishop of Durham, the diocesan of him, the said George Watson, clerk, doctor in divinity, by writing, under his hand and seal, shall direct.”

Consistory Court of York, July 13, 1809.—From this sentence an appeal was interposed to the Consistory Court of York; which Court affirmed [272] the sentence of the Court at Durham, and condemned the appellant in costs.

Dr. Jenner and Mr. Owen for the appellant, took the following grounds of objection to the sentence of the Courts below:—

First. That there was no proof that the party proceeded against was the incumbent of Rotherham.

Secondly. That the sentence was irregular, and such a one as it was not in the power of the Ecclesiastical Court to pronounce.

With respect to the first point, the very form of the articles called for more full proof than had been produced. The suit was brought against Dr. Watson, in his capacity of rector of the parish of Rotherham; the first article pleaded this fact, and without that article the sentence of deprivation could not have been founded. No

evidence, however, was produced upon it; not a single witness was examined from the parish to prove it. In a case of this description, which was as much a criminal prosecution as if the defendant had been indicted for bigamy, the mere reputation of his being the incumbent was not sufficient. If an attempt should be made to infer his incumbency from the mandate of induction, the answer would be that the mandate was no evidence; it was the mere letter of the bishop to the archdeacon authorising the induction; but there was no proof that he ever was inducted into the living, that he ever read the Thirty-Nine Articles, or ever officiated as incumbent, or received any emolument as such. In suits for tithes it was necessary to prove the in-[273]-stitution as well as the induction of the incumbent. It was so laid down in Buller's *Nisi Prius*, and Gilbert's *Law of Evidence*.

If resort should be had to the proxy (a) given [274] to the proctor in this suit to

(a) The proxy was as follows:—

"Whereas there is now depending undetermined in judgment, before the worshipful Thomas Bernard, doctor of laws, vicar-general and official principal of the honourable and right reverend father in God Shute, by divine providence, lord bishop of Durham, lawfully constituted a certain pretended cause of the office of the judge, voluntarily promoted by the Rev. Robert Thorp, clerk, doctor in divinity, archdeacon of the archdeaconry of Northumberland, against the Rev. George Watson, clerk, doctor in divinity, rector of the rectory and parish church of Rothbury, in the county of Northumberland and diocese of Durham, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for his lewd and profligate life and conversation, and the crime of adultery, fornication, and incontinency. And whereas a citation having issued under seal of the Consistorial and Episcopal Court of Durham against the said Rev. George Watson, and having been returned into Court, an appearance was given thereto on his behalf. And whereas certain articles or interrogatories have been brought in and now stand for admission in the said Court:

"Know all men by these presents, that I, the said Rev. George Watson, clerk, doctor in divinity, rector of the rectory and parish church of Rothbury, in the county of Northumberland, and diocese of Durham, party against whom the said pretended cause is promoted as aforesaid, for divers good causes and considerations me thereunto specially moving, do hereby nominate, constitute, and appoint George Bacon, notary public, one of the procurators-general of the Consistorial and Episcopal Court of Durham, to be my true and lawful proctor, for me and in my name to appear before the worshipful Thomas Bernard, doctor of laws, vicar-general and official principal of the honourable and right reverend father in God Shute, by divine providence, lord bishop of Durham, lawfully constituted, his surrogate, or any other competent judge in this behalf, and exhibit this my proxy, and pray and procure the same to be admitted; and by virtue thereof, for me and in my name, if counsel shall advise, to oppose the admission of the said articles or interrogatories; and if the same shall be admitted, to give a negative issue thereto; to see witnesses produced, received, and sworn thereon; publication decreed; and to give an allegation or allegations in writing, produce witnesses, and procure them to be received, sworn, and examined thereon; pray publication, and generally to act and do all and singular other acts, matters, and things, needful and necessary to be done; to conclude the said cause, and have the same assigned for a final sentence or hearing; and to attend, see, and hear a definitive sentence, or other final decree, read, promulged, and given in the said cause, with full power to my said proctor to substitute or appoint any one or more proctor or proctors in his stead and place, as need shall be, or occasion shall require; and whatsoever my said proctor hath already done, or shall or may hereafter lawfully do or cause to be done, in and about the premises, I do hereby promise to ratify, confirm, and allow, for valid. In witness whereof I have hereunto set my hand and seal, this 7th day of March, in the year of our Lord 1807.

L.S.

"GEORGE WATSON.

"Signed, sealed, and delivered (being first duly stamped), in the presence of us—
Matthew Thompson, Thomas Foggon."

establish the fact of incumbency, the answer is obvious: in a criminal suit the recital in the proxy merely follows the description of the party in the citation; and moreover a negative issue has been given to all the articles of the charge. The appointment of a proctor [275] must be considered as analogous to the appointment of an attorney at common law, which is frequently made antecedent to a charge.

Secondly. The sentence goes to exclude the appellant from all ecclesiastical rents and tithes, from the office of minister, and from holding any benefice within the diocese of Durham; it suspends him in fact *ab officio et beneficio*, and can be considered in no other light than as a temporary deprivation. Moreover, from the form of the sentence, it puts it in the power of three clergymen to deprive him of his benefice for life. We apprehend this to be beyond the power of the Court; for though suspension *ab ingressu ecclesiæ* may be pronounced by the ecclesiastical judge, yet any sentence of deprivation must be pronounced by the bishop in person; it was so held in the case of *Owen v. Fleming* (Arches, Hilary Term, 1733-4). Where a suit was brought by the churchwardens in the Commissary's Court of Hampshire against the incumbent of a living for non-residence; the inferior Court held that he had not shewn sufficient ground for non-residence, and consequently suspended him and condemned him in costs. But this sentence was reversed when carried by appeal to the Court of Arches.

In *Powlett v. Head* (Consistory of London, 1728) the clergyman was suspended *ab officio et beneficio*; but then the sentence was pronounced by the bishop in person.

The present case goes beyond these; the suspension is not to terminate unless he shall produce [276] a certificate of good behaviour from three clergymen; this is a suspension *sine die*, and as such illegal and a nullity; a person is only to be punished *eo modo quo offendit*, and besides it amounts to a suspension which can be pronounced by the bishop alone.

Dr. Swabey and Mr. Wetherall contra. There are various ways of proving facts: they may be admitted, or they may appear on the face of the proceedings, and yet they may be equally legal proofs; this is a mild sentence. In the cases in the time of Queen Elizabeth, which are sound law, deprivation is the usual punishment for incontinency; this law also may be seen in Lynwood and other writers.

A proxy does not resemble the warrant of an attorney; the proctor by the proxy is constituted *dominus litis*; he is to join issue on the whole suit. *Quo nomine* does he give his proxy to the proctor, but by his own description?

The mandate of induction is not merely the letter of the bishop; it is an instrument known to the law; it is usually returned (it must be admitted erroneously) without a certificate of execution, *loquitur sigillum episcopi*; the mandate proves the institution. In *Adams v. Tubbs* (Admiralty Reports, vol. vii.) in the Instance Court, which was a penal proceeding under the revenue laws, the objection taken was that there was no proof that the seizing officer was qualified; but the Court over-ruled this on the ground that his proctor had so described the prosecution.

[277] But a more serious objection is stated to arise on the sentence itself. In *Owen v. Fleming*, the bishop had appointed a special commissary in Hampshire, and that by a patent during pleasure; the objections taken to the sentence of the inferior Court were, that there was no citation to lead the monition, that no articles were exhibited, and that the suspension was *sine die*. The Court of Appeal held that the judge had done wrong, on the following grounds:—

1st. That the appointment of the judge was wrong.

2dly. That, consequently, there was no judge.

3dly. That the answer was not good.

4thly. That the sentence ought not to have been *sine die*.

5thly. That the clergyman, from the nature of the offence, ought only to have been monished.

In short, there were in that case as many nullities as could well be crowded into a sentence.

Powlett v. Head was decided by Bishop Gibson, who, having high notions of personal authority, always sate in Court with his chancellor. No inference, therefore, arises from this circumstance occurring in the case.

The difference between suspension and deprivation exists in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone. All chancellors can suspend; the dean of the Arches can even deprive, but he alone of all ecclesiastical judges is vested with this power.

The suspension in triennium is definite, and so [278] far good. In *Dickes v. Huddesford*,^{(a)1} the sentence was merely in the same words as this.

[279] The Court affirmed (a)² the sentence of the Courts of Durham and York on every point; and condemned the party appellatant in costs.

(a)¹ *Dickes v. Huddesford*, Arches, June 16, 1794: it was a suit brought by the secretary of the Archbishop of Canterbury against the Rev. John Huddesford, vicar of Lydd, in Kent.

The sentence was as follows:—

The judge, by his interlocutory decree, pronounced that the Rev. John Huddesford, clerk, the party accused and complained of, had given an affirmative issue to the libel or articles given in and admitted against him, and that the proctor of George William Dickes, the promoter, had thereby fully proved his intention deduced therein, and he, therefore, pronounced that the said John Huddesford, vicar of the vicarage and parish church of Lydd, in the county of Kent, be suspended for the space of two years, to commence from the time of the publication of the said suspension in the parish church of Lydd aforesaid, from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the Word of God, administering the sacrament, and celebrating all others, duties and offices in the said parish church and parish of Lydd and elsewhere, within the province of Canterbury, and from all profits and benefit of the said vicarage and benefice, and from taking and receiving the fruits, tythes, rents, profits, salaries, and other ecclesiastical dues, rights, and emoluments whatsoever, belonging and appertaining to the said vicarage, and did suspend the said John Huddesford accordingly; and did condemn him in the costs of this suit; and did order and decree that, at the expiration of the said two years, the said John Huddesford should exhibit and leave in the registry of this Court a certificate under the hands of three clergymen in his vicinity, of his good behaviour and morals during the time of his said suspension, and that the said certificate be exhibited and approved of by the Court, before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the term of two years, until the said satisfactory certificate be exhibited and approved of; and did decree a sequestration of all and singular the fruits, tythes, profits, and other ecclesiastical emoluments of the said vicarage and parish church of Lydd; to issue under seal of this Court, to be directed to Robert Cobb, Esq., a parishioner and inhabitant of the said parish of Lydd; and did nominate and appoint the Rev. John Goodwin, clerk, also a parishioner and inhabitant of the said parish, to be curate of the said parish, to perform the divine offices of the said vicarage and parish church during the suspension of the said John Huddesford; and did direct the said Robert Cobb, the sequestrator, to pay to the said Rev. John Goodwin the annual sum of 80l. out of the fruits, tythes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments whatsoever, belonging and appertaining to the said vicarage and parish church of Lydd, and to bring into and leave in the registry of this Court yearly, and at the end of every year, a true and faithful account of the fruits, tythes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments of and belonging to the said parish, together with the balance which shall be remaining in his hands at the end of such year, to be then and there subject to such order of his grace the Archbishop of Canterbury, the diocesan, of the said Rev. John Huddesford, until the said suspension shall be relaxed; and ordered bond to be given by the said Robert Cobb, Esq., in the penal sum of 1000l. for the due performance of the conditions on which the said sequestration is to be granted, before the said sequestration shall pass the seal. Bogg undertook to have the suspension published on Sunday the 22d instant, or on Sunday the 29th instant; and to certify the same by the third session of this present term, and on taxation of costs, the same time. Bogg.

(a)² In this case (i.e. *Watson v. Thorp*) the Court was of opinion that the admission of the party was sufficient proof that he was rector; and that the judge was competent to pronounce the sentence. But the Court doubted as to the requiring the certificate; and also as to its being required that the certificate should be approved of by the judge; considering, however, that if the certificate when offered should be rejected, it would be an appealable act, it affirmed the sentence of the Courts below on these, as well as on the other points.

[280] HILL v. BULKELEY. Prerogative Court, Trinity Term, June 19th, 1811.—The deposition of a witness, who died before he had been repeated, and before he had been examined on the interrogatories of the adverse party, admitted.

An allegation was offered for the purpose of inducing the Court to receive the depositions of W. R. Dowling, a witness who had been examined in chief, and had signed his deposition, but had died before he had been repeated, or examined on the interrogatories of the adverse party.

Adams and Stoddart against the admission of the allegation, argued that it was no deposition till it was sworn to; that the witness had not been repeated, consequently, that there was no verification of its contents upon oath; that the rule of practice was strict which excluded any deposition which had not been (a) recognized by the witness from being received by the Court.

Jenner and Edwards contra, denied that there was an oath after the examination; the witness was only repeated to his deposition, and acknowledged it. Whatever security, therefore, was to be derived from the oath, the Court had it, because the oath was administered previous to the examination. They cited a case from Viner's Abridgment, and another from the Chancery Reports, viz. *Lord Arundel v. Arundel*, [281] Viner's Abr. vol. xii. p. 108, tit. Evidence. Ch. Rep. 90. 10 Car. 1, *Lord Arundel v. Arundel*.

Judgment—Sir John Nicholl. The examination certainly is not complete, but, under the circumstances, the Court may receive something short of the regular examination. The examination in chief comes as near to a regular examination as it well can, for the deposition was read over, and actually signed. The single defect on this point is, that it was not repeated to him; and on the other hand, he has not been cross-examined, but this has been prevented by the act of God.

The case from Viner's Abridgment, though it relates to the practice of another court, is directly in point. There is likewise a case in Peere Williams, *Copeland v. Stanton* (1 Peere Williams, 414), in which Lord Chancellor Parker admitted the depositions of a witness under similar circumstances. In Chancery it should seem the deposition is considered as complete when it is read over and signed.

Upon the reason of the thing, and the authorities cited, this evidence is admissible, if the facts pleaded in the allegation shall prove true; the deposition, however, must be read at the hearing of the cause, with some deductions, because it is possible that the cross-examination might have discredited the witness. Subject to these observations, I shall admit the allegation.

[282] THE OFFICE OF THE JUDGE PROMOTED BY NEWBERY v. GOODWIN. Arches Court, Trinity Term, July 4th, 1811.—A clergyman in the performance of divine worship not at liberty to alter or omit any part of the service.

[Referred to, *Martin v. Mackonochie*, 1879, 4 Q. B. D. 774; *Girt v. Fillingham*, [1901] P. 183.]

(Brought by letters of request from the Consistory Court of Chichester.)

This suit was promoted by Francis Newbery, Esq., an inhabitant and parishioner of Heathfield, in the county of Sussex, against the Rev. Dr. Goodwin, vicar of that parish.

The facts and circumstances of the case are fully set forth in the judgment.

Judgment—Sir John Nicholl. This is a suit against a clergyman for "irregularities in reading the Holy Scriptures, and for quarrelling, chiding, and brawling in the church."

The usual proceedings have been had, and the articles containing the circumstances of the charge stand for admission.

The two first articles plead the law upon the subject—the canons and the statute.

The law directs that a clergyman is not to diminish in any respect, or to add to the prescribed form of worship; uniformity in this respect is one of the leading and distinguishing principles of the [283] Church of England—nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed, and though the alteration might begin with little things, yet it would soon extend itself to more

(a) Si depositio non fuerit coram iudice recognita et repetita, non valet. Oughton, *Ordo Judiciorum*, tit. 85, s. 8, et supra.

important changes in the public worship of the Established Church, and even in the Scriptures themselves; the most important passages might be materially altered, under the notion of giving a more correct version, or omitted altogether, as unauthorized interpolations.

The law also, not merely the statute of Edward VI. but the general ecclesiastical law, protects the sanctity of public worship, and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion; it prohibits all quarrelling, chiding, and brawling in the church, or church-yard, and requires decent and orderly behaviour.

The third article pleads, generally, that the defendant frequently leaves out portions of the Holy Scriptures appointed to be read, and often acknowledges that he has so done, and declares that he will do so again.

The fourth article pleads a specific instance, viz. "that on the preceding Sunday he omitted part of a verse in the first lesson," and if the fact had happened simply (though, strictly speaking, not legally justifiable to omit any part), yet, probably this suit would not have been brought; but the article proceeds to state that, after he had omitted [284] the verse, he looked round to the pew of Francis Newbery, and said, "I have been accused by some ill-natured neighbour of making alterations in the service; I have done so now, and shall do so again, whenever I think it necessary; therefore mark."

This gives a very different colour and complexion to the act, the omission seems to have been made, not from mere feelings of delicacy, which, though not a legal justification, would greatly extenuate the omission; but the omission seems to have been selected, as affording a favourable opportunity of asserting the general right, and even of reflecting, in the midst of the service, upon those who questioned the general right.

The violation, therefore, of the law was aggravated by circumstances which render the correction of the offence necessary and proper.

If this article should be proved, it will not only subject the party to admonition, but further, to the payment of costs.

The fifth article pleads that, in publishing in the church a citation for a faculty for appropriating a vault to Francis Newbery, Esq., he declared as follows:—"It appears by this paper that Mr. Newbery is endeavouring to obtain a right to this vault, which he has hitherto used only by sufferance, and thus provide a permanent place of interment for his family and himself. You see, therefore, that he wishes to be buried amongst you, though he never attends the sacrament, and seldom comes to church; if you have any objections to this grant, you will state them to [285] the Bishop's Court, which will be held at Lewes on Friday, the 16th inst."

This was not the proper time, nor the proper place, to explain to the parishioners what their rights were, and how they were to proceed if they thought fit to oppose this grant; much less was it a lawful or justifiable occasion of reflecting upon, chiding, and reproaching the individual applying for the faculty, for never attending the sacrament and seldom coming to church. It would be difficult to put any other construction upon this conduct than that the opportunity was taken as a mere pretext to give vent to his malevolence, and for the purpose of exciting opposition to the grant; it amounts to illegal chiding, to reprehension leading to quarrelling, and to an attempt to render the church a place of public dispute and confusion. The effect which such conduct, if not corrected, must have upon the minds of the congregation assembled for very different purposes, need not be described.

The sixth article pleads that a poor man near eighty years of age, on approaching the altar to receive the sacrament, was addressed by the minister in the following words:—"Does not your conscience prick you? how can you think of coming to receive the sacrament when you are rich, and have suffered your son to go to the parish for relief."

These articles are certainly proper to be admitted; whether they can, or cannot be proved, I am not to anticipate; but if they can, I am of opinion that the conduct of the minister is illegal, [286] and will subject him to censure, and to the costs of the proceeding. He therefore will consider well whether he will act discreetly and adviseably in defending the suit.

(a) The articles were admitted to proof.

(a) Nov. 11, 1811.—An affirmative issue was given by Dr. Goodwin to these charges, whereupon the Court suspended him from the ministration of his office for a fortnight,

[287] SMITH v. HUSON, FALSELY CALLED SMITH. Peculiars Court, Trinity Term, July 11th, 1811.—The marriage of a minor by licence with the implied consent of the father, established.

A marriage took place between Henry Smith and Afra Huson, on the 8th of December, 1805.

On the 17th of April, 1809, Henry Smith instituted proceedings to annul the marriage, on the ground that his wife was a minor at the time it was contracted, and had not the consent of her father.

Mary Messenger (the sister of Afra Smith) deposed, "That her sister came to London on the 7th of December, 1805, and, on her return to Croydon, on the following day, she informed the deponent that she was, on that day, married to Mr. Smith. That they were married by licence, in the parish of Saint George, Hanover-square, and Mr. Pearson and Miss Howse were present, and she signed her name in the book at the church; and that, at the time of the solemnization of the said marriage, the said Afra Huson was a spinster, and a minor of the age of seventeen years and upwards, and under the age of twenty-one years; and she believes such marriage was had and solemnized without the consent of Ralph Huson, the natural and lawful father of the said Afra Huson, the minor aforesaid, or of any other person having, by law, a right to consent [288] thereto." And in another part of her deposition, "That during the time the said Henry Smith was in the frequent habit of coming to the house of Ralph Huson, and paying his addresses, in the way of marriage, to the said Afra, Ralph Huson used to speak of him as an industrious good young man; that the deponent has frequently heard her said father say that he would not oppose any of his daughters' inclinations in point of a husband."

Sarah Howse deposed, "That she was on a visit at the house of Ralph Huson, the father of the ministrant, in Oct., 1804; and continued there she thinks about a week or a fortnight; that she does not recollect that Henry Smith came regularly every day to the house of the said Ralph Huson, but he came of an evening sometimes; that she verily believes it was understood by Mr. and Mrs. Huson, and the family, that the said Henry Smith came for the express purpose of courting the aforesaid Afra Huson; that Ralph Huson always received the said Henry Smith, when he came to his house, as one of the family; and as the respondent believes, received him as his intended son-in-law; that the said Henry Smith always shewed very great attention towards the aforesaid Ralph Huson; that she was on a visit at the house of the said Ralph Huson in 1805, and stayed there about a fortnight; that Ralph Huson was then much indisposed by a stroke of the palsy; that he had, in consequence of the said paralytic stroke, lost the use of his right side, but he, occasionally, came down stairs to his meals, and walked about the house with a stick; that the producent was frequently at the [289] house of the said Ralph Huson during the time that the respondent was there, and sometimes drank tea with the family; and the said Ralph Huson, at that time, spoke and behaved to the producent in a very kind and friendly manner; and the respondent verily believes that the said Ralph Huson well knew and understood that the producent came to his house for the sole purpose of paying his addresses, in the way of marriage, to his daughter, and approved thereof."

Deborah Huson (the mother of the party, proceeded against). "That Ralph Huson died on the 24th of June, 1806—that he was very kind and good to his children—and did not sanction any persons coming to the house but those he approved of—that he would not have permitted any young men to visit his daughter, except they came on honorable terms—that he permitted Henry Smith to visit his daughter Afra, as he considered that he intended to marry her—that during the time Henry Smith paid his addresses to their daughter, Ralph Huson used to tell the deponent to treat him with respect, and to look upon him as one of the family, and to make him welcome, come to the house when he would, as he was a very industrious young man, and a very good young man, and he considered him as one of his sons; and often told his son Henry that he should be glad to see Afra and Smith comfortably settled; that it would make him very happy; that Mr. Martin, a master bricklayer at Croydon, frequently came to spend the evening with him, and the deponent recollects her husband asking him if he knew [290] Smith, to which Martin said, 'Yes, he did know him very well,

decreed a monition against him to refrain in future from offending in the manner charged in the articles, and condemned him in costs.

and if he sent in a load of bricks at night, he came the next morning for the money ; that he gave no longer credit, for he stood in need of the money ;' that her husband replied, 'Mr. Martin, my daughter Afra and his son have taken a great liking to each other ;' Mr. Martin said, 'Remember, Mr. Huson, there is no money there ;' and Huson said, 'If she likes a chimney-sweeper, my daughter, I won't deprive her of her happiness ; he is a very sober, industrious young man, attentive to business, and might get forward in life as well as those who have more money ;' that she thinks, on the 12th of February, 1805, Ralph Huson was seized with a stroke of the palsy, which deprived him of the use of his right side, and prevented him ever after attending to his business, as he could not even dress himself or cut his victuals ; that his mental capacity continued sound and good, except that, at some times, he would be a little lost for a few minutes ; that, in the month of April following, he came down stairs, and continued to come down every day, and took his meals with the family till about the month of October ; that the said Henry Smith sometimes dined, and very frequently drank tea and supped with the family, and frequently stayed there all night ; that, on such occasions, when the said Ralph Huson saw him with his family, he always shook hands with him, treated him with great respect, was always glad to see him, and told him to make it his home whenever he liked ; and, let who would be there, the said Henry Smith always came into the parlour, as one of the family, [291] and always behaved very kind to the said Ralph Huson ; that, some time about the latter end of September, or beginning of October, 1805, the said Ralph Huson's health began to decay, and he grew weaker ; and, from that time to the time of his death, which happened June 24, 1806, the deponent thinks he was never down stairs more than three times, but was confined to his bed-room, and the apothecary ordered him to be kept very still ; that Henry Smith was always considered as one of the family ; and the deponent thinks he saw Ralph Huson two or three times when he was confined to his bed-room ; that, one day, in a conversation with his daughter Mary, he said, 'Mary, I am not unhappy about you, but Afra's rather giddy, I am rather uneasy about her ;' to which the said Mary Huson replied, 'Father, don't make yourself uneasy, for Henry Smith and Afra either is married, or soon will be ;' and the said Ralph Huson put his two hands together, and said, 'Thank God ! Mary, you have made me quite happy ;' that she first became informed in July, 1806, that Afra was married to Mr. Smith, and was informed thereof by her said daughter ; that she did not know of the intended marriage before it took place, further than that the said Henry Smith paid his addresses to the said Afra Huson, and that she expected that it would take place when he got into business ; that she was not informed by any one that it would take place when it did ; that she does not know that her husband was acquainted by any person that such marriage was proposed or intended at the time it took place, and she does not know whether he did or did [292] not at any time prior to the said marriage, declare his consent thereto, but he always expressed a very great wish for them to be married, for he wished to see them settled and happy ; that he did not make, or direct to be made, any preparations for the said marriage ; that when the said Afra came to town, she told the respondent that she was going up to spend the day with Miss Howse—it was Miss Howse's birth-day ; that neither the respondent, nor her said husband, then knew or believed that such visit was a mere colourable pretence, and that, in reality, their said daughter was going to London to be married ; that neither she nor her husband attended the wedding, because they did not know of it, neither was her husband able to attend it ; that neither her husband, nor herself, did, during her husband's lifetime, ever mention to any one that their daughter Afra was married ; that neither her husband, nor herself, or any one else, ever called her said daughter Afra by the name of Smith during her father's life, to the respondent's knowledge ; that, when she was informed Mr. Smith had married her daughter Afra, she expressed her pleasure thereat, and wished her all the happiness the world could afford her ; that she approved thereof."

William Gentry deposed, "That Ralph Huson frequently spoke to him on the subject of his family, and the disposal of his effects, and appointed him one of his executors ; that the deponent was in the same habits of friendship with the said Ralph Huson during his last illness, which continued for some months, as he had been for a great many years ; that he does not re-[293]-collect that the said Ralph Huson ever said or hinted to him that he either knew or suspected that his daughter Afra was courted by the said Henry Smith, or that she received his visits, or that she was likely

to be married to him; that the deponent has often seen the said Henry Smith at the house of Ralph Huson, and knew that he visited him; but the deponent does not know, and has no reason to believe, whether he was received by the said Ralph Huson as or upon the footing of a man likely to become his son-in-law, by marrying his daughter."

The same witness answered to an interrogatory, "That he does not know whether Henry Smith came very often to the house of the said Ralph Huson, but he has seen him of a Sunday afternoon and evening, when he has been there; that it is impossible that he can tell the ideas of the father and mother of the visits of Mr. Smith to the family; that when he has seen Henry Smith there, he has seen the same attention paid to him as to the visitors who were there at the same time; that the respondent believed that he was paying his addresses in the way of marriage, to his present wife; but he does not know what other people understood of it."

Stoddart and Jenner for Mr. Smith.

Swabey and Burnaby, contra.

Judgment—*Sir John Nicholl.* This suit is instituted by Henry Smith, to have his marriage with Afra Huson declared null.

The marriage was solemnized by licence on the 8th of December, 1805—and the fact of the marriage is admitted and proved—the birth and baptism of Afra Smith are sufficiently established to [294] have taken place in the course of November, 1788—so that she was little more than seventeen years of age at the time of her marriage, her father was living, and the only question is, whether the marriage was had with or without the consent of her father? for the marriage act (26 Geo. II. c. 33) expressly declares, "That all marriages solemnized by licence, where either of the parties (not being a widow or a widower) shall be under the age of twenty-one years, which shall be had without the consent of the father of the party so under age, if then living, first had and obtained, shall be absolutely null and void."

The party who prays the sentence of nullity must prove the fact of the marriage having been had without the consent of the father—the presumption of law is in favour of the marriage—*semper præsumitur pro matrimonio*. Where a marriage has been solemnized, the law strongly presumes that all the legal requisites have been complied with. This presumption is not less favourable where there is no particular disparity in the age or situation of the parties—where the marriage has not been hastily entered into—where there is no appearance of either of the parties having been surprised or inveigled into the contract, and consequently where the object and policy of the statute cannot have been violated.

In the present case the man was about twenty-two or twenty-three years of age, and was shopman to a grocer at Croydon. The woman was the daughter of a plumber and glazier in the same town. A courtship of near a twelvemonth is [295] proved—she went to London by appointment with him to be married, the licence was obtained by the man four days before the marriage: so that there was no disparity of age or condition between the contracting parties, nor any haste in the act.

The favourable presumption is still further fortified by this suit not having been brought by the woman, who was a minor, and incompetent to contract a marriage, but by the husband, who was of full age, who was fully competent to bind himself, and who prevailed on this young girl, almost a child, to come to town to be married privately, certainly without the presence of her father, probably without his immediate knowledge of the marriage, under the pretext of keeping the act secret from his own friends, till he had sufficiently established himself in business to be independent, not only so, but he obtains the licence on his oath, as it should seem (for he could not be ignorant that this young girl was a minor), by wilful perjury, for instead of obtaining the consent of her father, he swears that she was of age.

The circumstance of his wishing to conceal the marriage from his own friends, coupled with the infirm state of health of the father who was then become paralytic, sufficiently accounts for the mode in which the licence was obtained without raising the ordinary inference in any forcible degree, that the consent of the father could not be obtained.

The husband then comes into court, laying the foundation of the case in his own corrupt act, the licence being obtained by perjury, not to conceal the fact from the father of the minor, but from his [296] own friends. The presumption, therefore, in favour of the marriage, and the burthen of proof thrown on the party instituting the

suit are unusually strong. Indeed, I have rather understood that the Superior Court did on one occasion express something of surprise that suits of this description should be allowed to be instituted at the prayer of the party who had obtained the licence, but however revolting this may be at first sight, yet upon consideration that the Act of Parliament makes the marriage void, notwithstanding these unfavourable circumstances—as third parties may be interested in the declaratory sentence—and as the public also may be concerned that the state and condition of the parties should be judicially ascertained, these suits have been suffered to proceed. Such circumstances, however, are not wholly immaterial in considering the force of legal presumptions, and the weight of the burthen of proof.

Under these considerations, the Court is to enquire whether the party has established that this marriage was solemnized without the consent of the father first had and obtained, for that must be established by the party setting up the nullity, the other party is not bound to prove consent—consent is presumed till the contrary is shewn.

In construing this statute, it has not been held that an express and direct consent is necessary to the very fact of marriage at that particular time and place. The case of *Selby v. Selby* (Consistory Court of London, 1771) sufficiently established that point, for all that the mother said [297] was, that her daughter asked her consent to marry Selby, and she gave her consent and wished them happy; but it was not pretended that she knew when or where they were to be married—they were not married for a month afterwards; and the licence was obtained by the oath of the man, swearing that the woman was of age.

I also understand that the present Judge of the Consistory (and whatever falls from him is of great weight) confirmed this doctrine, stating that consent to the marriage itself at a particular time and place was not necessary; but that a general consent to the marriage was sufficient.

The next consideration is, how that general consent must be given—must it be expressly in words, or is it sufficient to be given impliedly by conduct, or, lastly, where it is strongly given by implied conduct, whether it must not be presumed to have been also expressly given by words, unless that presumption be most decidedly and clearly negatived. All that the act says is that the marriage will not be valid without the consent first had and obtained; but the sort of consent necessary, whether express or implied—whether by direct words—or whether by implied conduct, is left perfectly open so far as the terms of the act go, and the Courts have gone almost the length of requiring proof of dissent where the person whose consent was necessary had any knowledge of the courtship.

In *Stoney v. Terry* (Consistory Court of London, 1771) the father had encouraged [298] the man to come to the house, there was no proof of consent, the licence was obtained on an oath that the party was of age, which raised an inference of want of consent to the marriage itself; but the father was dead, and could not negative consent; and there being no proof of dissent, the marriage was held not to be invalid.

In *Osborn v. Goldham* (a) the mother acquiesced, [299] after the marriage there was

(a) *Osborn v. Goldham*, Consistory Court of London, Aug. 2, 1808. Arches Court of Canterbury, Dec. 12, 1808. The suit was instituted by the wife against the husband in 1807. She was stated to have been born in Brydges-street, on the 25th of February, 1774, and to have been baptized on the 17th of March following: the marriage took place in 1795. The following is an extract from Sir William Wynne's judgment in the Court of Arches:—"The proof of her birth rests on the evidence of Anne Owen. An entry in the books of one of the lying-in hospitals describes her mother to have been delivered in Brydges-street of a male child; the midwife who had been employed seven years in the hospital, recollects that she did deliver a woman in Brydges-street about this time, of a girl; it is stated that the registers of the hospital are very irregularly kept: this is the only evidence of the birth; with respect to the baptism, little can be depended on.

"The marriage was in 1795; the mother is said to be the wife of a second husband, and, consequently, that she had no right to give her consent. It appears, however, that the mother's second marriage could not have been a lawful marriage, as the banns were published under a wrong name; she was, therefore, unmarried at the time.

"These parties have been living together thirteen years, from the time their

no proof of dissent, the woman was a minor, but the licence was obtained on oath of the husband stating that she was of full age, consent was presumed, and the marriage held not to be invalid.

Where the courtship has been known and not prohibited, and *a fortiori*, where it has been countenanced and encouraged, the law must and ought to presume that the party was consentient, and had given that sort of consent which the law requires. Such conduct is equivalent to saying, "Get your marriage solemnized whenever you please, I have no objection, I consent."

If more direct consent to the fact were required, and no evidence could be obtained of the negative from the person whose consent was necessary, he being dead, as in this case, the Court would be justified in presuming that such a consent had been [300] obtained as the law required, notwithstanding that the matter had been kept secret.

Let me not be misunderstood on this part of the question. I do not mean to lay down that implied or even express consent to a matrimonial connexion may not be retracted, or may not be limited; a parent may countenance and encourage a courtship—may give an express consent to marriage—or he may limit his permission to courtship, by stating that before he gives his consent to the marriage itself, he must further deliberate: that settlements must be made, that other circumstances must take place before he gives his final consent; but if courtship allowed and encouraged without retraction, and without limitation and restriction, implies a consent to the matrimonial connection, in such circumstances it will not be a marriage without consent first had and obtained, and this is the point which must be kept steadily in sight, as necessary to be proved.

If these principles are correct, the evidence in this case leaves me little difficulty in deciding it.

The father died in June, 1806, six months after the marriage, his direct evidence, therefore, cannot be obtained; but there is no direct proof of want of consent. The mother, brother, sister, and the sister's husband, and several others, have been examined, they all prove that the man visited openly in the family, and was received by them as the acknowledged and accepted lover of the woman, that he spent the evenings with them, particularly on the Sundays. He has pleaded that his [301] meetings with her were secret, that he was not received at the house as her lover, but that he only went there clandestinely—these facts are totally unsustained by proof—that his visits were countenanced and encouraged is proved by his own witnesses, by Sarah Howse, to the fullest extent, and even Mr. Gentry says that he often saw Smith there on the Sunday.

It has been said that another person, Mr. Shove, was received as a favoured lover at the house after the summer of 1804; but this is sufficiently negatived. There is some doubt upon the evidence whether he ever paid his addresses to her at all, but if he did, he had been rejected, and was not received by her in the light of a lover. With respect to Mrs. Huson's declarations on Shove's marriage, the account of it is so blind, and it is given by two persons who say they accidentally overheard the conversation, and not by the persons with whom the conversation was held, that it is

marriage was first communicated to the mother; at first hearing of the event, she expressed surprise, but not dissatisfaction; she died in her daughter's house; this must be esteemed a complete acquiescence on the part of the mother.

"The statement then that this marriage was had without the consent of the mother is not proved; it is not necessary that the mother should have appeared when the affidavit was made, and have given her consent.

"The case of *Selby v. Selby* in the Consistory, 1771, was on the same ground. A suit was brought for a nullity, the mother was proved to have signified pleasure after the marriage; and the marriage was confirmed.

"In the present case, the acquiescence was immediately after the marriage, it continued thirteen years, nothing was done during that time. It certainly was not the intent and meaning of the act to annul a marriage of this kind, the object of it was to prevent minors from being drawn in without the consent of their parents; the suit here was not brought till after the death of the mother; the evidence does not bring it within the act of parliament; the proof is defective; and I shall pronounce against the appeal."

impossible to rely upon it, or safely to draw any inference from it; the mother herself positively denies it. Even admitting that the declarations were made by her, it is impossible that they could have been serious or sincere, as at the time she is stated to have made them she very well knew that her daughter was married to Smith. Her evidence on the other hand is strong to shew that Smith paid his addresses to her daughter, and that he was received by her husband and herself as one of the family; her words are, "That her husband and herself approved of Henry Smith paying his addresses to their daughter, and expected that he would marry her." In other [302] parts of her deposition she says, "That her husband used to treat him with respect, to look upon him as one of the family, to make him welcome to the house, come when he would, as he was a very industrious young man, and that he often told his son Henry, that he should be glad to see Afra and Smith comfortably settled, and that it would make him very happy, that she recollects his saying to a person of the name of Martin, Mr. Martin, my daughter Afra and Henry Smith have taken a great fancy to each other. Martin replied, remember, Mr. Huson, there is no money there. He answered, if she likes a chimney-sweeper, I won't deprive her of her happiness; he is a very sober industrious young man, attentive to business, and would get forward in life as well as those who have more money."

The father had a paralytic stroke in 1805, but he continued to treat Smith with the same kindness; her mother mentions a conversation between the father and his eldest daughter; not long before his death he said, "Mary, I am not unhappy about you, but Afra is rather giddy, I am rather uneasy about her; to which she replied, father, don't make yourself uneasy, for Henry Smith and Afra either are married, or soon will be; and her father put his hands together and said, thank God, Mary, you have made me quite happy."

The daughter, Mrs. Messenger, confirms this declaration.

Now, though it may be inferred from hence that the father did not know that the marriage had taken place, yet it strongly implies his approbation [303] of it, and that his approbation had never been withdrawn. And where there was previous knowledge and approbation of the courtship, and no appearance of retraction, consent to the marriage is to be presumed. The father had become paralytic, which usually affects the memory; it is not impossible that he may have signified his assent to the marriage, and may even have known of its having taken place, and yet have forgotten these circumstances, this is not impossible; but I go no further: perhaps the probability is the other way; but the legal presumption is that Smith did obtain the father's consent, as far as the law requires, and there is no proof of dissent, nor any clear proof of the want of consent, as if it had been shewn that the parent was wholly ignorant of the courtship, as in the cases of *Balfour v. Carpenter* (a) and *Jeffries v. Foster*. (b)

Mrs. Messenger, the sister of the wife, has been examined, and fully confirms her mother's account.

Mr. Huson also, the brother, deposes that "in the frequent conversations he had with his father and mother, they fully expected such marriage to take place; that while Henry Smith was paying his addresses to his sister, he has often heard his father say that he thought Mr. Smith was a good and industrious young man, and that by his care and industry he had no doubt but that he would be as well off in the world as others, and would make Afra a [304] good husband, and that he had rather she should have Mr. Smith than a man who was richer, on account of his care and attention."

Surely this is consent, if it is not afterwards retracted?

The visiting and reception of Mr. Smith in the family is further confirmed by several other witnesses; and although the particular declarations to which I have alluded come from witnesses who may be biassed from their connection with Mr. Smith, yet I see no sufficient grounds to disbelieve their testimony; that, however, which confirms them most strongly is the *evidentia rei*. Smith admits that he courted her—he admits that he prevailed upon her to marry him—why should he keep his attachment secret from the family? or why should they withhold their consent, since

(a) *Balfour v. Carpenter*, Arches Court of Canterbury, Michaelmas Term, 1810. See p. 204.

(b) *Jeffries v. Foster*, Consistory Court of London, T. T. 1811.

from his age, character, and situation, the match was not an improper one? and if the conduct and character of the young woman are to be judged of from the letters which are before the Court, she was well worthy of his choice, and has deserved better treatment at his hands than she has experienced.

The conduct of the father, and his declarations respecting this marriage are sufficiently established, the presumption of law is so far from being repelled that it is most strongly confirmed by them. So far from its being proved to have been a marriage without the father's consent, there is every reason to conclude that he was fully consenting to it, either expressly on an application made by Mr. Smith, or impliedly by his conduct in [305] such a manner that the law will construe and presume (and this is all the Court has to decide) that the marriage was not had without consent.

Upon the whole, I must pronounce that Mr. Smith has failed to prove his libel, and that the wife is entitled to be dismissed from all further observance of justice.

[306] SMITH v. HUSON. High Court of Delegates, Trinity Term, June 24th, 25th, and July 6th, 1811.—The marriage of a minor by licence, with the implied consent of the father, established.

An appeal from the Peculiars Court of Canterbury.

The Judges' Delegates who sate under this Commission of Appeal were Mr. Baron Wood, Mr. Justice Bayley, Doctor Arnold, Doctor Adams, Doctor Daubeney, Doctor Edwards, and Doctor Dodson.

Mr. Leach, Dr. Swabey, Dr. Burnaby, and Mr. Yorke, in support of the marriage. The presumptions are always in favour of marriage; in the present case, every circumstance is unfavourable to the party endeavouring to set aside the marriage—there is no disparity in the age or situation of the parties, the licence was obtained upon the oath of the husband, which was wilfully false in two points, of this perjury he [307] comes to take advantage, the suit moreover is not brought by the party whose consent is required, and it is not brought till after the death of that party. All the act enjoins is that the marriage should not be clandestine, and therefore that it should be with the approbation of the parents—a general approbation therefore is held to be sufficient, even though the father should be ignorant of the time and place of the marriage; the Court then is to see whether it has proof that consent was not given—circumstances are the constant interpreters of this act, it decidedly is not necessary that consent should be given at the particular time and place of the marriage; but a general consent is necessary; we admit also that it must be previous consent, but we contend that, if given long before, it is sufficient, provided it has not been retracted. Consent may be expressed directly, or, like any other fact, it may be proved by indirect evidence, such as that of the father's knowing of the addresses paid to his daughter, and approving of them.

In the earlier cases, the courts have gone almost so far as to require proof of the dissent, where the father has been dead; and where he has been living, they have held all evidence of dissent insufficient in cases where the father has not been produced and examined as a witness.

In *Heslop v. Haddon* (1788) the Court, after publication, allowed an allegation to be given in and affidavits to be exhibited shewing the consent of the mother.

[308] In *Stoney v. Terry* (Consistory Court of London, 1771) the father was dead, but it was shewn that he had encouraged the suitor, and the Court held that there was no evidence to shew that consent was wanting.

In *Selby v. Selby* (Consistory Court of London, 1771) the mother was examined.

In *Hodgkinson v. Wilkie* (Consistory Court of London, 1796) it was held that consent once given will continue.

From the strong circumstances of this case, the Court will presume consent—the suit was not brought till the death of the father. The mother, brother, sisters, and sister's husband, all prove the footing on which Mr. Smith was received in the family anterior to the marriage, and there is nothing to shew that the father would not have approved of the marriage at any time.

The appellant calls upon the Court to release him from a most important contract—he must shew a clear title—this he has failed in doing—he has disproved his own case, and the Court must pronounce in favour of the marriage.

Mr. Fonblanque, Dr. Stoddart, Dr. Jenner, Mr. Holroyd, and Mr. Brougham

contrâ. The Court is called upon to consider the construction of a statute, and not the character of the appellant. Consent to addresses cannot be held to be consent to marriage—addresses are frequently broken off upon pecuniary considerations, to which it may be the duty of a parent to attend. Besides, what is the sort of marriage to which the Court is called upon to presume that the father had con-[309]-sented in the present instance? that his daughter was to retain her maiden name, and, being placed in a situation in which she might have a child, she was nevertheless to pass as a spinster.

This is the first case of this description which has been brought before this Court; the man might have denied the marriage in an action for goods sold and delivered; and the child might be put to prove his legitimacy; with respect to the facts—it is clear there was no consent or knowledge on the part of the father.

Per Curiam. Mr. Justice Bayley. I take the fact at issue between you to be that they admit that there was no knowledge of the marriage or consent at the time; but they contend that there was that conduct which amounted to a previous consent.

ARGUMENT RESUMED.

We apprehend that the facts proved completely negative any antecedent consent—reliance has been placed on the addresses being known to the father; but by law a child is rendered incapable of contracting a marriage, except with the consent prescribed in the statute. The father would act contrary to his duty if he consented to marriage when he consented to addresses; in the latter instance, it was his duty to interpose all vigilance that his confidence should not be abused—to see that the visits, though permitted, were not abused; it is not till his daughter's affections are engaged that he can stipulate for a provision for her, it is then that firmness is required from the father, if a man can say to him, because I have had your con-[310]-sent to my addresses, therefore I have your consent to my marriage, and accordingly I have married your daughter, I have anticipated any stipulations you might have to make for a provision for her; if it were lawful to consider addresses in this light, it would be at once to repeal the marriage act, and to throw open again the Fleet and Marshalsea. How could a father, under such doctrine, admit any man to pay his addresses to his daughter?

No case has been cited in point; if there have been any, they have not been appealed; it is of great importance to the public, on account of the principle on which the decision must rest—because it will be to guide future cases, and if it shall be established to the extent contended for, it must introduce great uncertainty and confusion into the law; the object of the act is to obviate the mischiefs resulting from clandestine marriages, it is not to be construed strictly as a penal, but from its fair import as a remedial act.

In *Horner v. Liddiard*,^(a) though the words of [311] the act extended to the father and mother generally, yet the meaning was confined to those who were so considered in law.

(a) Consistory Court of London, Easter Term, 1799. "First. The marriage of minors is to be had with the consent of the father. Of what father? I take it clearly to mean of the legitimate father, and him only; for it follows, secondly, the consent of a guardian lawfully appointed. But how appointed? I pronounce by the father under the act of parliament which gives him the power; for there are only two modes of appointment known to the laws of this country; by the father under the statute, and by the Lord Chancellor. Now the guardian appointed by the Court of Chancery is not introduced till a later stage, where he is particularly described; consequently the guardian here spoken of must be the guardian appointed by the father; and the father who is mentioned must be he who can appoint a guardian: but it is admitted that that power belongs only to the lawful father. The father, therefore, spoken of must be that father, and that father only. In the third place, the consent of the mother. If the natural mother is to be understood, she would have more authority than a legal mother, because the right of giving consent does not devolve upon the legal mother till in the third instance, viz. in case of a defect of appointment of a guardian by the father. But the natural mother would be entitled to give a valid consent in the second instance, as the natural father can appoint no guardian." See the judgment of Sir W. Scott, in Dr. Croke's report of the case of *Horner v. Liddiard*, p. 180.

Priestley v. Hughes (11 East, 1) was on the same principle; that Courts should leave as little uncertainty in the law as possible, there are cases which shew how courts of common law have held the marriage act to be construed.

In *The King v. Preston* (Burrows, 486. 1 Blackstone, 192) Lord Mansfield took the distinction between acts made against one party and acts made against both, he understood it as an act not giving the rights of marriage to either party, unless all should be done which the act requires; as an act to preserve the right of parents, consent is rendered indispensable, which shall be previous.

It is not stated by witnesses in this case that consent was prior to marriage, and the circumstances in proof shew that it must have been subsequent; it is not contended that it is not necessary to [312] prove consent by a party present and hearing that consent given, for all the persons present might die; but if circumstantial evidence is relied upon to prove that consent, it must be such as it will satisfy a reasonable mind that it was given. The father might permit the addresses in the hope that the young man would get forward in the world; but if consent to addresses is sufficient, the man would immediately obtain a marriage which would be irrevocable.

The cases cited on the other side are very distinguishable from this. In *Stoney v. Terry* there was evidence to shew that the father encouraged the man to come to the house, but there were no circumstances to shew no consent to the marriage as there are here.

In *Selby v. Selby* positive consent was given, though the marriage was not solemnized immediately afterwards.

If the father's consent had been given in this case, what would have been the natural conduct of the parties? No reason is given for concealment, except as against the friends of Smith; it is not to be presumed that Smith would commit perjury without necessity; the question does not differ here, because the suit has been instituted by the husband; it must rest on the same ground as if brought on by the woman's father.

In *Walker v. Walker* (Consistory, Easter Term, 1812) there was strong presumptive evidence against consent, viz. perjury and a false description; the transaction also kept secret from the father and mother.

[313] *The King v. Thomas Martin*, (a) a case on an indictment for bigamy—the first marriage was by licence, the husband was under age—it was contended that it must be shewn that the marriage was had with the consent of his father. The Judges doubted; they thought that the prisoner must prove the irregularity of the marriage, and that consent was to be presumed, unless the contrary was shewn: but the fifteenth section (26 Geo. 2, c. 33, s. 15) requiring it to be mentioned in the register, which it was not: Wilson, Justice, said the register shewed the marriage to be irregular, and directed the jury to acquit.

Per Curiam. Mr. Justice Bayley. There has been a case since in which the point was saved; and the Judges held that a prosecutor must prove the first marriage valid (K. B. Michaelmas Term, 1803).

ARGUMENT RESUMED.

The marriage act is to be construed upon its fair import, and it should be the endeavour of courts to carry into effect its object, which is to establish the rights of parents by ascertaining their consent, and great mischief will arise, if consent is easily presumed—here the presumption is against consent, and the defendant is bound to satisfy the Court that it was given to the actual marriage—the declaration of the father can be of no avail, unless it is shewn to have been prior to marriage; [314] if the marriage was invalid when it was contracted, the Court cannot now pronounce for it.

Mr. Leach and Dr. Swabey in reply. It has been argued that the marriage is void, because it has been had without consent; but want of consent is what the adverse party has taken upon himself to prove—the onus probandi lies upon him; the presumption being in favour of the marriage, we do not ask the Court to pronounce the marriage to be good, but to declare that the husband has not proved that it was had without the father's consent; he has not brought proof on which the Court is obliged to pronounce that the marriage is void.

(a) *The King v. Thomas Morton*, at Newcastle on the Northern Circuit, April, 1789.

The cases of bigamy which have been cited are upon a different issue, and the proof of marriage in them must be strictissimi juris.

Dec. 11.—The Judges having maturely deliberated, affirmed the sentence of the Court of Arches.

[315] NEWHAM v. RAITHEY. Prerogative Court, Trinity Term, July 26th, 1811.—Copies of the register of a dissenting chapel not to be pleaded as evidence.

Objection was taken to an article in an allegation which pleaded the copy of a register of a dissenting chapel.

Judgment—*Sir John Nicholl*. This is not evidence that can be admitted. The Court can only admit copies of public documents which are in official custody.

Extracts from a register of this description must be considered as mere private memoranda: the books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent: by this means the party will have the benefit of them, though in a different manner from that in which they have now been attempted to be introduced.

[316] PETTMAN BY HIS GUARDIAN v. BRIDGER. Arches Court, Michaelmas Term, Nov. 8th, 1811.—A possessory right in a pew is sufficient to maintain a suit against a mere disturber.

[Referred to, *Crisp v. Martin*, 1876, 2 P. D. 25; *Taylor v. Timson*, 1888, 20 Q. B. D. 677; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.]

This was a question concerning the right to a pew in the parish church of Eastry, in the county of Kent.

A libel was given in on the behalf of Thomas Pettman, a minor, stating that his grandfather, Thomas Pettman, was for many years before, and down to the time of his death, possessed of lands in the parish of Eastry, occupied a house, and was a parishioner there, and as such was entitled to a pew in the church; that in the year 1789 alterations were made in the church, by erecting new pews, and dividing others, in order that the parishioners, who had not any fixed seat, might be accommodated according to the size of their families; and that livery servants might have a seat apart to themselves; that Thomas Pettman, being one of the churchwardens for that year, and having no fixed seat for himself and his family, was by and with the advice and concurrence of his colleague in office, and with the consent of the parishioners assembled in vestry, put in possession of the pew in question, next to the pew occupied by Mr. Bridger; and that he continued in the occupa-[317]-tion of that pew till his death, which happened in August, 1808.

That upon the death of Thomas Pettman, William his son became possessed of his property, who put his son, the party proceeding in this cause, into possession of the dwelling-house and lands occupied by his grandfather, in the parish of Eastry; that from that time he also possessed the pew, and continued to occupy it till the 9th of October last (1808), when he was disturbed in his sitting therein, and totally excluded from the pew by William Bridger, who took possession of it, and placed his livery servants in it.

That on account of the disturbance thus created by William Bridger, a vestry was held on the 28th of October, when the parishioners then assembled, having given Mr. Bridger a fair hearing, resolved, by a majority of ten votes to two, that William Bridger was not entitled to the seat; and that Thomas Pettman should keep possession of it: and they directed the churchwardens to place a lock upon the door of the pew, and to give the key to Thomas Pettman; but that William Bridger, on the Sunday following, caused the lock to be taken off, and again placed his servants in the pew.

Under this statement of facts, the libel prayed the Court to monish William Bridger to refrain for the future from molesting Thomas Pettman in the quiet and peaceable possession of the pew.

In reply to this libel, an allegation was given in by Mr. Bridger, pleading—

[318] That in the year 1805 he intermarried with the daughter of Robert Tournay Bargrave, Esq., the lessee under the dean and chapter of Canterbury, of the estate and mansion-house called Eastry Court, and from that time has occupied and possessed the said estate and mansion-house.

That the ancestors of Robert Tournay Bargrave held the estate and mansion-house of Eastry Court upwards of 150 years, and during that period constantly occupied

two pews as appertaining to the mansion-house, for the use of themselves, their servants, and tenants, to wit, the pew which is the subject of the present suit, and the one next adjoining to it; that during the said time, the family used one of the pews, and their servants and tenants the other; that the said two pews have from time immemorial appertained to the mansion, and have been reputed and considered to belong to it by the parishioners of Eastry.

That in the year 1784 Isaac Bargrave, the then possessor of the estate, granted a lease to Thomas Pettman (the grandfather of the party in the suit) for twenty-one years, and that, in consequence of this, Thomas Pettman did, as tenant to Mr. Bargrave, apply to him, and obtained permission to sit with his family in the pew in question.

That in the year 1790 the said Isaac Bargrave caused both the pews to be repaired at his own expence, and fitted up with new linings and cushions differently from the other pews in the church; and that Thomas Pettman, being by trade a carpenter, was employed to refit and new line them, and was paid by Mr. Bargrave for so doing.

[319] That in the latter end of the year 1791 Isaac Bargrave caused the two pews to be further repaired and refitted, by new carpetting the same.

That the alterations made in the church in 1789 did not apply to, or include the pew in question, which had not become vacant, but was possessed and occupied by the said Isaac Bargrave, in the same manner that it had been for more than a century before by his ancestors and family; that Thomas Pettman only sate in the pew as tenant of the Eastry estate, and though he continued to sit there after the expiration of his lease (in 1805), it was only by the sufferance successively of Robert Tournay Bargrave and William Bridger, who, in consideration of his being an infirm old man, afflicted with a paralytic stroke, were unwilling to remove him.

That on the death of Thomas Pettman in August, 1808, Mr. Bridger intimated to his family that none of them would be permitted to use the pew; notwithstanding which the party in this cause and his father intruded themselves into the pew: whereupon William Bridger, on the 19th of October, 1808, sent his servants to keep possession of the pew; but, in the assertion of his right, he carefully avoided to give any interruption to divine service.

Many witnesses were examined, who proved most of the principal facts put in plea on the one side and the other; there was no evidence, however, to shew that any repairs had been done to the pew by any of the Bargrave family, except that in the years 1790 and 1791 the pew had been lined and fitted up with new cushions.

[320] Swabey and Edwards for Mr. Pettman. We stand upon a possessory title, which *primâ facie* is sufficient; i.e. if it has a reasonable commencement, as in the present instance it has, being derived from the churchwardens; we have peaceable possession for twenty years; to oust this either a faculty must be shewn on the other side, or such an immemorial use as will presume the grant of a faculty.

It has been laid down by every writer, from the first institute to the present day, that no one can found a prescriptive right to a seat from lands; it must be from a house; nor can any one prescribe generally for a seat in the body of a church, unless he can shew that his ancestors have time out of mind occupied and repaired the same; prescription too must be strictly pleaded, which it is not in this plea; it does not state that he and all those who have preceded him in the occupation in the house have used, or sat in, the pew; he pleads, indeed, that from time immemorial the seat has appertained to the house, and that he and his family have sat in it for 150 years and upwards; but he does not plead the antecedent use of it, nor who used it before.

Court. Is not the immemorial use of it implied in that part of the plea which states that it immemorially belonged to the house in question? Is not that enough in this Court, though perhaps it might not be at common law? Besides, should not you have noticed this objection when the allegation was admitted?

[321] ARGUMENT RESUMED.

We apprehend not; we are not bound to notice a defect in pleading till the final hearing of the cause; besides the party who claims the prescriptive right is bound to shew that the repairs have been made at his expence; we shew by the belief of the persons examined, which, in the case of a prescriptive title, is sufficient evidence that the repairs were not made at his expence; it will be argued that the lining and refitting the seat in 1791 was at the expence of Mr. Bridger, and that we cannot deny

our agency on this occasion, our party having been employed as a workman, and sent in a bill for the work done; but this we submit does not constitute repairs in the true meaning of the word; there is evidence in the depositions of one of the churchwardens, of the seating Mr. Pettman in the pew by the order or consent of the parishioners.

If we prove a possessory right lawfully acquired in which we have been disturbed by a party setting up a prescriptive title, in the proof of which he has failed; we are entitled to our costs, and the party must be monished to create no further disturbance.

Arnold and Adams for Mr. Bridger *contra*. We do not deny the fact of disturbance, but justify it on the ground of the pew having been always appurtenant to the house of which our party is the occupier; our title, therefore, is in itself an exclusive title, and paramount to all others, and a right which he is bound to maintain.

Nor is there any failure in the plea; it is sufficient [322] that the plea should substantially set forth the facts on which the party relies; the strictness of pleading which obtains in the courts of common law is not called for; it is the constant doctrine of these courts, that we are not tied down to such a strictness in form as is necessary in other courts; the party pleads the occupation of himself and his family, and of those from whom he holds the estate for 150 years, and then proceeds to state that from time immemorial the pew has appertained to the house he occupied—he states a right, and that which was necessary to the right, that without which a right could not exist—and then pleads the general reputation that the possession was in him.

We are founded from the evidence in saying that there was a general reputation in the parish that the pew belonged to this house; the oldest witnesses speak to the history of the pew a considerable time back. It was then in a different form from that in which it is at present; an alteration was made in 1756, and the pews were then put into their present form; an alteration in the form of the pew could not affect the right. A donation was given to be laid out generally in beautifying the church, it was taken out of an extra fund, and as such was applied more to the purposes of ornament than of use or convenience, if the fact of the alteration of the pew had been proved it could not affect the right to the occupation of it.

The vestry has no right in the disposal of a pew in the church, nor was the churchwarden (if the right for which we contend was existing) entitled [323] to interpose in respect to it; as little could the Court attend to the general wish and convenience of the parish, if the right of another is involved in the question.

The pew was always occupied by those who lived in the mansion-house in which Mr. Bridger now resides; his right, therefore, to the pew must have been perfectly known by those who have attempted to dispossess him of the seat, and he is entitled to be seated in it by a decree of this Court, which shall carry the costs against the adverse party.

Nov. 15.—*Judgment*—*Sir John Nicholl*. This is a suit technically termed for “perturbation of seat,” it is promoted by Mr. Pettman, who sets up only a possessory right, that his grandfather had the estate and pew for twenty years, that he succeeded to it, and has been disturbed in the possession of it by Mr. Bridger. Bridger admits the fact of dispossession, but sets up a prescriptive right to the pew.

By the general law, and of common right, all pews belong to the parishioners at large for their use and accommodation; but the distribution of seats among them rests with the ordinary; the churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank and station; but they are subject to the controul of the ordinary if any complaint should be made against them.

The vestry, as such, has no authority whatever on the subject; the churchwardens are not bound [324] to follow their directions; at the same time the sense and opinion of the vestry ought to have weight with them.

The general right then being in the parish and the ordinary; any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances.

A possessory right is not good against the churchwardens and the ordinary, they may displace and make new arrangements; but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them; the

possession therefore will have its weight, the ordinary would give a person in possession *cæteris paribus* the preference over a mere stranger.

A possessory right is sufficient to maintain a suit against a mere disturber; the fact of possession implies either the actual or virtual authority of those having power to place. The disturber must shew that he has been placed there by this authority, or must justify his disturbance by shewing a paramount right, a right paramount to the ordinary itself; namely, a faculty by which the ordinary has parted with the right: or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty.

[325] A prescriptive right must be clearly proved, the facts must not be left equivocal, and they must be such as are not inconsistent with the general right.

In the first place, it is necessary to shew that use and occupation of the seat has been from time immemorial appurtenant to a certain messuage—not to lands—the ordinary itself cannot grant a seat appurtenant to lands.

Secondly. It must be shewn that if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expence of the party setting up the prescriptive right. The onus and beneficium are supposed to go together, mere occupancy does not prove the right. What might be the effect of very long occupancy; where no repairs have been necessary, I am not called upon now to say; it is a common error to suppose that, by mere occupancy, pews become annexed to particular houses; in country parishes the same families occupy the same pews for a long time; but I apprehend they still belong to the parish at large; if, however, it is shewn that the inhabitants of a particular house have repaired, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew; thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the [326] seat, is evidence sufficient to establish a prescriptive title.

To apply these principles to the present case, Mr. Pettman sets up no prescriptive right—his grandfather first sate there in 1789, and continued in the occupation of it till his grandson succeeded him—this would be no good title against the churchwardens and the ordinary if they thought proper to remove him. It appears that a vestry was held soon after the dispute between the parties in this suit, at which it was decided, by a majority of ten to two votes, that Mr. Pettman was to have possession of the pew, and the churchwardens were directed to put a lock upon it. This is strong against the statement that general reputation was in favour of the right of Mr. Bridger. Mr. Bridger did not bring an action to support his prescriptive right, but on his own authority took off the lock and resumed possession.

The vote of the vestry is of itself of no authority as to the question of right; but it marks the opinion of the parish, that Mr. Pettman was entitled in opposition to any common intruder.

Mr. Bridger does not set up that Mr. Pettman is an improper person to occupy the seat, or that the pew is necessary for his own accommodation (for he has another pew in the church sufficiently large for the occupation of himself and his family), the parish is increasing, and pews are wanted for the use of the parishioners. Mr. Pettman very properly offered to give up this pew to the disposal of the parish; this proposal was rejected by Mr. Bridger, who stands on his paramount right, [327] and the question now is at issue on this right between Mr. Bridger and the parish at large, as to their accommodation.

Now, though these considerations cannot weigh at all, supposing Mr. Bridger can make out his right, yet still they have some weight in ascertaining the burthen of proof which is imposed upon the parties.

Mr. Bridger pleads that two pews, the one he sits in and the one adjoining to it, which is the pew in question, have been, time immemorial, annexed to his house, Eastry Court. I think, according to the practice of these Courts, the averment is sufficient; it must be considered as including the averment that the pew had been used, occupied, and repaired, from time immemorial.

The right is put in this shape: "The two pews appertain to the mansion for the use of the family, their tenants, and servants; the family always sate in one, the tenants and servants in the other, being the pew in question."

But for the last twenty years the servants have not sat in the pew ; nor, indeed, have they ever sat in it ; from the time of building this pew, they have occupied a pew in another part of the church.

How stands the case as to tenants ? No tenant of the house has sat in it for the last twenty years. Mr. Pettman was tenant of part of the land, but not of the house—a prescription for a seat as annexed to a messuage, for the use of the tenants of lands belonging to the proprietors of that mes-[328]-suage, would be a bad prescription ; it can only be good for the inhabitants of a messuage : if it could be extended to tenants of the lands, mere land might be held by the inhabitants of another parish, and the pew would then be for the use of persons not dwelling in the parish, which would be contrary to law.

The pew, therefore, has been occupied for the last twenty years by persons who were not inhabitants of this messuage, and who, as mere tenants of lands belonging to the owner of the messuage, could support no personal right ; and this fact alone would be nearly, if not quite, conclusive against the right claimed ; it is, however, unnecessary for the Court to decide on this point simply, for the history disclosed in the evidence must be examined, and in examining it, the Court must keep in mind that the burthen of proof rests with Mr. Bridger, and that proof of mere occupancy, without maintaining and repairing, is insufficient.

It appears from the evidence of the oldest persons that this pew was built near sixty years ago ; previous to that time, there stood on the site of the two pews, one large pew and a small slip ; the mansion was then divided into two tenements, with a hall common to both ; the mansion and estate were held under lease by the Bargrave family, from the see of Canterbury. Mr. Bargrave occupied one tenement of the mansion, Mr. Sayer the other ; the two families occupied the large pew together, the servants sate in the open slip.

Now what is there to shew that this large pew [329] was annexed to the mansion ? there is mere occupancy, but no attempt to prove any maintaining or repairing at that time.

Some time between 1750 and 1756 an alteration was made, the large seat and slip were converted into their present form, i.e. two seats of nearly equal size ; Mr. Bargrave had one seat—Mr. Sayer the other—and the maid servants were placed in a different part of the church. This was a material alteration, a considerable expence was incurred, and this, in truth, must be considered as the building of the present seat ; has it been attempted to be proved that this was done at the expence of Mr. Bargrave ? not only the presumption of law, but the strong probability of fact is that it was done by the parish. Just before the alteration was made, a Mrs. Lawson left a sum of money to the parish to repair and beautify the church. Many alterations were made, Mr. Bargrave's pew and slip were altered at the same time, and four new pews were made ; they were uniform in appearance and painted alike.

Now, though it is possible that Mr. Bargrave, notwithstanding these circumstances, may have done this at his own expence, yet, being done at the same time, and in the same manner, and like the opposite pews, the probability is that it was all done by the parish.

If this building was done by the parish, there must be a complete end of the question—it would be a cession of the pew to the parish, unless some express agreement to the contrary could be shewn—there is no proof that it was done by Mr. Bar-[330]-grave—on the contrary, there are several witnesses who say that they believe it was done by the parish, or with Mrs. Lawson's money—there are none who venture on a contrary belief, so that the weight of evidence is against Mr. Bargrave, though the burthen of proof lies on him.

The pews have been since repaired ; and the belief of the witnesses is that the repairing was also done by the parish ; and it is the more probable, because one or two pews to which the occupiers had an exclusive right were not painted.

Mr. Sayer was succeeded by Mr. Reynolds, who married his daughter, and who of course continued to occupy the seat ; in 1782, Mr. Reynolds gave up the house and farm, and quitted the parish ; another very material circumstance then occurred—a part of the mansion was pulled down, and the two tenements were united, perhaps restored into one.

In 1784 portions of the lands were let to different tenants, and, among the rest, to Pettman ; but so far from this notion that the pew was for the use of the tenants

of the lands; not one of these tenants at that time sate in it, and Pettman's sitting in the pew neither commenced nor ended with his being such tenant.

It was in 1788 or 1789 that Pettman first sate in the pew; there was then a general alteration and new arrangement of the church—the parish was increasing in inhabitants, and many pews were altered and divided so as to accommodate a greater number of persons. Several of the witnesses state that it was left to the churchwardens (as properly [331] it should be) to seat the inhabitants. Mr. Hadden and Mr. Pettman were the churchwardens, and now it was that for the first time Mr. Pettman was put into possession of this pew. Mr. Hadden deposes, and so do others, that he was placed there by the authority of the churchwardens as a matter of right. Mr. Bargrave suggests that it was as matter of sufferance, or as his tenant; this suggestion is not very consistent with itself, for, if he was entitled as tenant, permission would not have been necessary. I have already said that, as tenant of the land, he could have no right; but if Mr. Bargrave had intended to have retained his right, supposing him to have had any, surely he would have taken care to have recorded in some way that this was mere sufferance; that Pettman was only to sit there so long as he continued his tenant or during his pleasure; some written acknowledgment from the churchwardens, some entry in the parish books, some resolution of vestry, would have been required.

Mr. Bargrave, however, soon after lined and put cushions into both pews, and this is the great fact relied upon to prove repairs, and the only appearance of any; I do not consider this as repairs, but as mere ornament; it proves nothing, for this reason, that it is in no degree inconsistent with the fact of the pews belonging to the parish. Lining and cushioning are not usually done by the parish—these are things which each individual does for his own convenience and comfort. The use Mr. Bargrave made of Pettman's pew is accounted for—he had occasionally many visitors at his house, [332] and when his own pew overflowed, some of them went into his neighbour's pew—this is an usual accommodation in all churches. Mr. Pettman, being his tenant, would of course admit his visitors, and Mr. Bargrave choosing, as he said, “that his friends should be as well seated as himself,” lined and put cushions into Pettman's pew, who, being his tenant, would have no objection to this measure.

But this circumstance, thus accounted for, the only one, and in opposition to all the other facts in the case, does not appear to amount to repairs, to be any act of ownership, or any proof that the burthen of this pew lay on the owner of Eastry Court, and not on the parish.

Pettman continued in the occupation of the pew till his death, though he ceased to be Bargrave's tenant three years before that event.

It has been said that this was sufferance. Mr. Bargrave might so consider it, he might suppose that he had the right to the pew. But did Mr. Pettman acknowledge it as sufferance so as in any manner to bind himself, or to deprive the parish of this pew? Quite the reverse. Pettman's family considered that he had the possessory right, and therefore attempted to continue the possession after his death, and the parish, upon hearing the statements, and the whole question, decided by a majority of ten to two that Pettman's notion was right, and that Mr. Bridger was not entitled to the pew.

Upon the whole, I am of opinion that Mr. Bridger has not proved this seat to be legally annexed to his mansion.

[333] Considering, also, that this right is claimed after a dispossession of twenty years, that it is a special right set up in derogation of the general principle and policy of the law, that the pew was not wanted for the accommodation of Mr. Bridger's family, that it was wanted by the parish, that this right was set up in opposition to the opinion of his fellow parishioners, that it was enforced by taking off the lock and placing his livery servants in the pew, that he refused to accede to any proposals of accommodation that were made to him, but stood and insisted upon his extreme rights—while Mr. Pettman, being thus ejected, has contested the right, not so much for his own benefit, or for the sake of triumph, as for the accommodation of the parish I think the Court is bound to condemn Mr. Bridger in the costs.

In doing this, however, the Court means to throw no imputation on Mr. Bridger's conduct; it is probable that he was strongly impressed with an opinion that he had the exclusive right to the pew; but, having asserted that right and failed to establish

it, the expence must fall upon him, and not upon the party who was disturbed in his possession and compelled to resort to the protection of the law.

The Court monishes Mr. Bridger to refrain in future from disturbing Mr. Pettman and his family in the possession of the pew in question, and condemns Mr. Bridger in the costs of the suit.

[334] STRIDE v. COOPER. Prerogative Court, Trinity Term, 1811.—The latest in point of date of two wills established, the republication of the first not being proved.

The deceased was William Dredge, originally a shoemaker, but who, in his latter days, kept a garden and sold the produce of it; he resided in the New Forest, and died there on the 10th of April, 1810, leaving two relations, the one Rebecca Cooper, spinster, a second cousin, the other Mary Stride, a widow, his first cousin. The former lived with him several years immediately preceding his death, as his housekeeper. The latter was a cripple, and resided at some distance; and on that account, as it appeared from the evidence, was not in the habits of any great intimacy with him; but there was proof sufficient that he entertained a very affectionate regard towards her.

Two wills were before the Court. The one dated Feb. 7, 1801, entirely in the handwriting of the deceased, and attested by three witnesses, in which, after leaving a legacy of 10l. to Mary Stride, and his wearing apparel to Robert Cooper, he bequeathed all the rest and residue of his property to Rebecca Cooper. This will was found in an envelope with the following endorsement—[335] “Wm. Dredge’s will, dated Feb. 7, 1801.” The paper of this envelope appeared from the water mark to have been made in 1806. The factum of this instrument was not disputed.

The other will bore date on the 8th of July, 1803; by this he gave a legacy of 10l. to Rebecca Cooper, 50l. to another more distant relation, and the whole of the rest and residue of his property to Mrs. Stride, who was also joint executor with her husband. The factum of this paper was also most fully proved; it was not, indeed, in the deceased’s own handwriting, for on this occasion he had had recourse to Mr. Strickland, a solicitor, of Fordingbridge, who deposed most fully to the instructions of the deceased, to his execution of them, and his complete capacity; and he was confirmed in his deposition by the other two attesting witnesses.

In the allegation offered in opposition to this latter instrument, neither fraud nor incapacity were suggested; but the case set up was the revival of the first will in such a manner as to revoke the second, and this by no formal act of republication, but by circumstances taken together, and amounting, as it was contended, to a republication.

Swabey and Adams for Mrs. Cooper, contended that the facts proved in the case amounted to a legal republication of the will of Feb., 1801.

Jenner and Phillimore for Mrs. Stride contra.

Judgment—*Sir John Nicholl*. No formal act of republication is proved; but a collection of circumstances is taken together, [336] which have been argued to amount in substance to a republication.

I will not venture to lay down decidedly that no act short of a direct and formal republication would be sufficient to revive a former, and revoke a latter will, both instruments remaining perfect; but it certainly would require either a second republication, or very unequivocal circumstances. The animus revocandi must be very clearly established, otherwise the last dated will uncanceled must remain in force; the presumption of law is decidedly in its favour; it has been pressed upon the Court that slight circumstances will amount to a republication, but the authority relied upon for this assertion by no means bears it out. (a) Wentworth says that “if the testator is speechless, his act shall supply the words of republication;” but still a clear act

(a) If a man having made a former will, do make a later, which is more than a bare revocation; yet, if afterwards, lying upon his death-bed and speechless, both these wills be delivered into his hand, and he required to deliver to one of his friends about him that will which he would have to stand, and to keep in his hand the other, and he thereupon delivereth to the minister, or other his neighbours, the first made will, retaining in his hand the later, as was done in the time of Edward the Third; here the former will, though made void many years before the later, is revived, and shall stand as the party’s will. Wentworth’s Office and Duty of Executors, ch. 1, p. 25.

of republication is required, and this is put in an extreme case, and in my mind it goes a great way to shew that there must be some direct and unequivocal act.

In the present case, the circumstances are these: first, an endorsement on the envelope of the will [337] of 1801, in these words, "Wm. Dredge's will, dated Feb. 7, 1801." The paper of this envelope is proved from the water mark to have been made in 1806.

This is only pleaded as a recognition; they do not venture to assert this, of itself, to be a republication. Now this endorsement is perfectly equivocal; he had made two wills, one in Feb., 1801, the other in July, 1803; this only describes which of the two wills is contained in this envelope, and might be only to distinguish it from other papers. It would not have been inconsistent if he should have made a similar endorsement on the will of 1803.

It is asked why he should preserve this will, and put it in an envelope in 1806? It is not necessary that the Court should be able to answer this question; wills are ambulatory till the death of the testator—he had two by him—he might preserve both, that in case Mrs. Stride should die, or in some other contingency, he might choose to revive this, and destroy or revoke the other, but he has not done it; or it might be to deceive Mrs. Cooper, who was living in the house with him, if she should happen to get access to it, and induce a belief in her mind that she was to be the person benefited at his death.

The same observation applies to the next circumstance, viz. that he consulted with an attorney, Mr. Woodyear, whether this instrument would be valid; but there is no act of republication stated, and he merely took advice as to a particular point; and the evidence is open to the observation, either that the deceased deceived the witness intentionally, [338] or that the witness must have deposed inaccurately; for the deceased must have known, at least the Court must presume that he knew, that it was not his last will; he might have had some hesitation in his mind as to which will he should adhere to or he might have it in contemplation to set up the first will again, by some future act—by destroying that of 1803, or upon some event or contingency—he might also have his reasons for holding out false colours to Mr. Woodyear; at most he was only consulting Mr. Woodyear, and not intending a republication.

This is not sufficient to revoke a later will regularly executed and attested.

The only remaining circumstance to be considered is the affection of the deceased for Mrs. Cooper, and his declarations that she would be benefited by his death.

Now circumstances of this kind, though of some weight in an enquiry into the factum of a will, yet weigh nothing as amounting to the revocation of an uncancelled will, the factum of which cannot be impeached.

If, therefore, this evidence had been unopposed, it would have been insufficient to have revoked a latter, and set up a former will; but there is, on the other side, evidence of a recognition of the will of 1803—of affection for Mrs. Stride, of declarations in her favour—and, on the other hand, of disaffection towards Rebecca Cooper, and also of a wish that she should not know how he intended to dispose of his property, which does away with the whole effect of the circumstances (in the absence of any formal act of republication) by which it has been [339] attempted to set up the former and revoke the latter will.

On the whole, the will of 1803 is fully proved; its effect is to revoke the preceding will: and accordingly I pronounce for the will of 1803.

The costs being prayed against the party setting up the will of 1801—

Per Curiam. The parties have been misled by the conduct of the deceased; I shall give no costs.

HOLLWAY v. CLARKE. Prerogative Court, Michaelmas Term, Nov. 20th, 1811.—

Marriage and the birth of a child, presumptive revocation of a will made by a widower, and in favour of children of a former marriage.

Judgment—Sir John Nicholl. Henry Clarke died on the 24th of November, 1810; he made his will on the 15th of April, 1807, by which he gave his real and personal estates to his executors in trust to sell the whole, and after the payment of his debts and funeral expences, to apply the remainder to the maintenance and education of his son and two daughters; the whole then to be divided between them with survivorship; but if they all died before twenty-one, or without issue, he then bequeathed over his property to be divided between three cousins.

[340] The deceased was a widower at the time this will was made. He afterwards married, viz. in June, 1808, and had issue one child, who is now living. He received a marriage portion with his wife; but there was no settlement, or other provision, for her and her issue.

These facts are not controverted; there can be no doubt, therefore, that *prima facie* this will is revoked; the law is so clear on this point that it is unnecessary to discuss the history and progress of it; it is sufficient to state that it has been held in a series of cases for upwards of a century that marriage, and the birth of a child, operate as the presumptive revocation of a will; and upon this principle, that there has been such a complete alteration in the deceased's circumstances, such new obligations and duties have been contracted, that a departure of intention must be presumed. The particular circumstance of the deceased's having been a widower, does not seem to break in upon the principle; the change of circumstances is the new obligation he has contracted by having a new wife and new issue. Indeed, several cases have occurred in this Court, in which this circumstance has been held to make no difference. In *Emerson v. Boville* (a) the testator was a widower, though the particular point made was whether the subsequent death of the child born in the second marriage did not set up the will again. The Court held that it did not, though it was admitted that the presumption against the will would have been rebutted by [341] circumstances, or declarations indicating an intention that the will should operate, as was the case in *Thompson formerly Myall v. Sheppard and Duffield* (Prerog. Trinity Term, 1782); but there is no case in which the Court has held a revival from the circumstance of the death of either of the parties in whose favour the law had presumed a revocation.

A presumptive revocation may be repelled by circumstances; but then the circumstances to repel must be clear and unequivocal, and shewing that the deceased adhered to or revived the will; there must be some act, or at least some declaration clearly referring (after the change of circumstances) to the will as an existing will, intended to operate.

In this case it is stated that the deceased left real property to the value of 13,000*l.*, and personal property to the amount of 12,000*l.*; that he left specialty debts to the amount of 8300*l.* and simple contract debts to the amount of nearly 14,000*l.*, making together upwards of 22,000*l.*; so that unless the real estates are charged with the debts, there will be a deficiency of nearly 10,000*l.* in the payment of the debts; and, finally, that the wife will be provided for, by being entitled to her dower.

Now that circumstances of this description are to repel the presumption, I can find no precedent.

It must be shewn by some act or declaration that he considered the will as an operative will.

The insolvency of his personal estate would, at the utmost, leave the matter to mere conjecture; he might not be aware of the state of his circum-[342]-stances—he might not have admitted all these demands—he might not have considered them as urgent, or he might choose that his real estate should not be charged with them; there would be no end of such conjectures in respect to his intention.

The presumptive revocation arising from marriage and issue must be repelled by clear and unequivocal evidence of an intention that the will should operate. The Court, therefore, is of opinion that, so far as respects the personalty (over which alone this Court has jurisdiction), the will is revoked, and that the deceased died intestate.

EMERSON v. BOVILLE. Prerogative Court, Hilary Term, Jan. 22nd, 1802.—

Marriage and the birth of a child presumptive of revocation of the will of a widower made prior to a second marriage: and the death of the child does not alter that presumption.

Judgment—*Sir William Wynne*. I take it to be established by an uniform course of decisions for above a century, that marriage, and the birth of a child by that marriage, creates a presumptive or implied revocation of a will; but it is only a presumption grounded on the supposition that, so complete a change having happened in the family of the deceased, raises the implication that he did not intend that his will should take effect. [343] It may be rebutted, as was the case of *Thompson formerly Myall v. Sheppard and Duffield* (Prerog. Trinity Term, 1782); there a seaman made

(a) See the next case.

his will in favour of his children by a former wife; he married again, and had one child and a posthumous child. Many declarations proved that he did not believe the child, which was born in his lifetime, to have been begotten by him; and there were letters and declarations by which it was completely established that it was his intention that the will should not be revoked; and Dr. Calvert pronounced for the will.

But is there any instance in which there being nothing of this kind, without declarations or circumstances, importing a permanence of intention, that the presumption has been held to be taken away merely by the death of the child? I think there is no such case, and the effect would be severe, were it to be so held.

For it being established law, that marriage and the birth of a child revokes; here the wife has no provision.

Finding no case in which it has been held that the death of the child revives the will, I should have been unwilling to hold a doctrine so severe on the second wife, if this had been a new case; but I find a case in point, that of *Sullivan v. Sullivan, the Attorney of Brooke*. Joseph Derwell made his will, March, 1771, giving an annuity of 100l. to his brother; several legacies, and the residue to three children, two by his first wife, and one by his second; he was then a widower; the [344] will was all in his own handwriting; on the 8th of August, 1771, he married; on the 1st of May, 1772, a child was born; on the 11th of the same month the child died; on the 20th of September, 1772, the testator died, leaving property to the value of 10,000l.; probate of the will was prayed, which was opposed, and an administration was prayed to his effects as having died intestate; two points were made—

1st. That the will was for the benefit of the former children; and it was argued that in none of the cases decided was the will in favour of children.

2dly. That the death of the child during the life of the testator, revived the will.

On these points, Sir George Hay said—

1st. That it was as much his duty to provide for a child by his subsequent marriage as for his other children.

2dly. That he considered that the will would not revive, unless it were republished or revived by some act. And administration was decreed.

On the authority of that case, and on principle, as I take it, the death of the child does not revive the will; but it requires some act, some recognition, or something to shew the deceased's intention that it should take effect.

I think the will was revoked, and that it remains revoked.

[345] BONE AND NEWSAM v. RICHARD SPEAR. Prerogative Court, Michaelmas Term, November 29th, 1811.—An informal will established.

[Applied, *Torre v. Castle*, 1836, 1 Curt. 338: affirmed 2 Moore, P. C. 133. Distinguished, *Whyte v. Pollock*, 1882, 7 A. C. 410.]

William Spear, of Gray's Inn, an attorney at law, died on the 21st of July, 1811. John Bone and Christopher Newsam alleged themselves to be the executors named in the will of the deceased, as contained in the following testamentary writings marked A and B.

(A.) Heads of the Will of William
Spear, of Gray's Inn, Gent.

"All my just debts, funeral & testamentary expences to be paid immediately after my death: to my uncle John Spear five hundred pounds, to be paid within 3 months after my death—by my executor;

"To my brother Charles Spear five hundred pounds; to my BROTHER RICHARD SPEAR (a) one thousand 3 p. cents. to be set apart in my name in trust (b)

consol^d. bank ann^d. A IN TRUST for my nephew John Spear, & my neice Spear, the interest & dividends to be sum

laid out in the funds. Same A to accumulate till the eldest one moiety of (c)

attains 21; then A to divide the principal & the accumulations

(a) The words "to my BROTHER RICHARD SPEAR" were struck through with a pen.

(b) The words "IN TRUST" were struck through with a pen.

(c) The words "to divide" were struck through with a pen.

to be paid him, & the other moiety to remain till my
 niece attains 21; then to be transferred to him; if either
 die before 21, the surv^r. to have the whole at 21;
 if both die under 21, to go to my executor;

two (a)

[346] "To my brother-in-law John Bone one thousand 4 p. cents.

to be set apart in my name in the bank, IN TRUST for the
 of my brother-in-law John Bone,
 son & daughter ^Δ the same way as I have given the 1000
 consols to my BROTHER RICHARD'S CHILDREN.
 To my sister-in-law Sophia Newsam the interest & dividends
 of all my India stock, IN TRUST apply the same
 towards the education of her children, which I hope she will
 faithfully do; & her receipt for such interest to be a
 sufficient discharger notwithstanding her coverture.

any one (c)

"When either child attains 21, his other share of the stock

to be transferred to him or her, according to the number
 of children my s^d. sister-in-law shall then have;
 & so as often as it shall happen that any one
 child shall attain 21, a like transfer to be made.

the

"As to all ^Δ rest & residue of my money, stocks,
 funds, securities, & also my chambers at No. 2,
 Gray's Inn Square & all my other property

Mr.

in-law John Bone & ^Δ Christopher Newsom,
 I give the same to my BROTHER ^Δ CHARLES SPEAR, (d)
 exors. (e)

his ^Δ admors. & assigns, for his own use; (f) & I appoint
 them (g) sole (h) to be executors.

"WM. SPEAR.

"Gray's Inn, 31 July, 1809, (i) 1810."

The paper was endorsed "Intended Will."

[347] B.

19th August, 1810.

Whole Property.			
2000 4 per cents.	at 85	.	£1,700
1300 consols	— 68	.	884
60 per cents. long. ann.	— 18	.	1,080
1000 India stock	— 182	.	1,820
Chambers	.	.	800
Furniture about	.	.	600
Sir Jno. Q. Johnston's bond	.	.	750
			£7,634
Partnership about	.	.	1,000
Carry forward			£8,634

(a) The word "one" was struck through with a pen.

(c) The word "either" was struck out with a pen.

(d) The words "CHARLES SPEAR" were struck through with a pen.

(e) The word "his" was struck through with a pen.

(f) The words "for his own use" were struck through with a pen.

(g) The word "them" had been "him."

(h) The word "sole" was struck through with a pen.

(i) "1809" was struck through with a pen.

Brought forward	£8,634
Disposed of by Will.	
2000 4 per cents.	£1,700
1000 consols	680
1000 India stock	1,820
Legacy to my uncle	500
Ditto to my brother Charles	500
	5,200
	<hr/>
	£3,434

Richard Spear, one of the brothers of the deceased, entered a caveat, and opposed the validity of these testamentary schedules; and the executors gave in an allegation pleading—

1st. That the deceased, being of sound mind, and desirous of settling his worldly affairs, wrote the paper A; and, having approved thereof, on or about the 31st of July, 1809, or on the 31st of July, 1810, being the several dates appearing thereon, subscribed his name thereto.

2d. That the deceased, being minded to make alterations in his will, as well in the dispositions thereof as also in the appointment of executors, with his own hand made the alterations afterwards pleaded; and having so done, on or about the 19th of August, 1810, he wrote the paper B, and therein described the particulars and amount of the property he possessed, and specified the legacies given by paper A to ascertain the total amount thereof, and thereby recognized and confirmed the several alterations made in paper A; and that the deceased, by the alterations made in paper A, appointed John Bone and Christopher Newsam executors and residuary legatees.

3d. That the whole of the papers A and B, and the several interlineations and alterations therein, are of the handwriting of the deceased.

4th. That on Friday, the 19th, and Saturday, the 20th, of July, 1811, William Cardale, the partner and confidential friend of the deceased, visited him at his house at Holloway, by his, the deceased's request, he being in an infirm state of bodily health, but of sound mind; and the said William Cardale, on both said occasions, then spoke to him on the subject of his will; that the said deceased on such occasions said he had written over the heads of his will and signed it, and it would do very well; and upon the said William Cardale urging him to make his said will in a more formal manner, and offering his assistance therein, the deceased said he would do it, but repeated that what he had already written would do very well, or to that effect; that about nine o'clock on the following morning, being Sunday, the 21st of June, Mr. Cardale again attended [349] at the deceased's said house, in consequence of a message from John Bone, party in this cause, requesting him to come immediately, as the deceased had been taken suddenly ill; but on his arrival found that the deceased had died suddenly a short time before his, the said Mr. Cardale's, arrival; that John Bone and his wife, Ann Bone, being then present, the said William Cardale thought it proper to seal up and secure the deceased's property till his relations could be assembled; and, with the approbation of the said John and Ann Bone, he proceeded to seal up and secure the deceased's effects in his house; and on inquiry for the key of the chest in which the deceased deposited his plate, the deceased's woman servant said that the same was usually kept in the drawer of a wardrobe which stood in his bed-chamber; that the said William Cardale unlocked the said wardrobe and, upon unlocking also an internal drawer, the paper A appeared lying at the top of other papers of moment and concern which were contained in the said drawer, the said paper A being folded together, but not inclosed in any envelope or cover, or sealed, and the paper B being folded therein; that the said William Cardale then proceeded to read over the said papers aloud to the said John and Ann Bone, and then observed the several obliterations, interlineations and additions, now appearing therein; and the article concluded with pleading the plight and condition of the papers in the usual form.

Judgment—*Sir John Nicholl.* William Spear, a solicitor, is the party deceased: [350] two papers are propounded as his will by the executors, which are opposed by the next of kin.

The papers themselves are important ; A is superscribed as the "heads of the will of Wm. Spear, of Gray's Inn ;" the inference would be from this, that it was a paper from which it was intended that a more formal will should be drawn out ; it is dated and subscribed, and it contains a complete disposition ; still, however, if it rested here, the Court must have considered it as imperfect, because it described "heads of a will." But alterations were made afterward in a formal manner, which look like an alteration in his intention as to this point ; and there is a high probability that he intended this paper to have effect ; but the Court is not left to this conjecture.

Paper B, was written within a fortnight afterwards ; this contains a calculation of the amount of his property, and then enumerates the several legacies, exactly in conformity with the will. And it is pleaded that, when the deceased was taken ill, he told his friend Mr. Cardale "that he had written the heads of his will and signed it, and that it would do very well ;" that Mr. Cardale urged him to make it in a more formal manner. He said he would, but repeated that which he had already written would do very well, and he died unexpectedly the next morning before Mr. Cardale's arrival.

If these facts shall be proved as they are laid in this allegation they will be decisive of the validity of this paper ; they will establish continuance of intention, and non-execution caused by the in-[351]-terposition of death ; the paper was found not as a cast off memorandum, but carefully preserved.

The Court can have no doubt in admitting this allegation.(a)

[352] TAPPENDEN v. WALSH. Prerogative Court, Michaelmas Term, Nov. 29th, 1811.—A married woman can make a will of property left during coverture to her sole and separate use.

An allegation was submitted to the Court, propounding a will dated Dec. 15, 1797, and a codicil dated Oct. 2, 1801, of Anne Thompson, widow ; both made during her coverture.

The property had devolved to her partly under the will of Anne Wilson, and partly under the will of Thomas Martin : by the former instrument, the property had been left to trustees for her use, with a power to her of disposing of it "by any writing purporting to be, and in the nature of, her last will and testament." By the will of Thomas Martin a legacy had been bequeathed "to her and her heirs, executors and administrators and assigns, absolutely and for ever, to and for her and their own sole and separate use and benefit."

Adams and Stoddart opposed the admission of the allegation.

(a) The cause came on for hearing on the 26th of February, 1862, when the allegation being proved by the evidence of Mr. Cardale and two other witnesses, the Court pronounced for the validity of paper A, but rejected paper B.

From this sentence an appeal was interposed by Richard Spear, to the High Court of Delegates ; and in the course of proceedings in that Court, Charles Spear, another brother of the deceased's, intervened ; and alleging himself to be the sole executor named in paper A, propounded that paper as it stood prior to the alterations made in the three last lines ; he also gave in an allegation pleading that the alterations and interlineations in the three last lines were not made by the deceased, nor under his directions ; and that he always entertained a great aversion and contempt for Christopher Newsam. On this allegation, fourteen witnesses were examined. The executors gave in a responsive plea contradicting these facts, on which they produced eighteen witnesses.

Delegates, 1816.—On February 15 and 17, 1816, the cause was argued at Serjeant's Inn, before Mr. Justice Graham, Mr. Justice Bailey, Mr. Justice Dallas, Doctor Arnold, Doctor Adams, and Doctor Dodson.

Dr. Swabey, Dr. Jenner, and Mr. Heald were counsel for the executors ; Dr. Stoddart and Mr. Warren for Richard Spear ; and Dr. Phillimore, Dr. Lushington and Mr. Phillimore for Charles Spear.

The Delegates established paper A, and condemned "Richard Spear in the costs occasioned to the respondents by his appeal, excluding therefrom any part of the costs which arose from the intervention of Charles Spear." They gave no costs against Charles Spear.

Swabey and Jenner contra, cited *Ryley and Asberry v. Lawton*, Arches, 1731. *Bennet v. Davis*, 2d Peere Williams. *Rolfe v. Budder*, Bunbury.(a)¹

[353] *Judgment*—*Sir John Nicholl*. Two objections are taken to this allegation.

First. That Anne Thompson had no right to dispose of her property by will, for want of a power from her husband authorizing her to do so.

Secondly. That the codicil disposes of property not her own, as by the will of Thomas Martin, who bequeathed it to her, it was not left to trustees for her separate use.

By the law, as it stands at present, a married woman who possesses separate property may dispose of it without the consent of her husband.

The probate of this Court does not decide upon the right of disposal, it decides merely on the factum of the instrument; perhaps, if no probate were granted by this Court, the person to whom the property is left might be unable to recover it.

The general right of the wife in this respect has been established in a great variety of cases. In *Rees v. Rhodes* (*Rees v. Rhodes*, Prerog. Trinity Term, 1799) a wife, without any authority from the husband, disposed of separate property, over which she had controul.

In *Bowes v. Bowes* (*Bowes v. Bowes*, Prerog. Hilary Term, 1801) this Court laid down that it would not look nicely into the power of the wife, as that right belonged to another Court; [354] in that case the Court granted a limited probate. *Richards v. Lea* is to the same effect.(a)²

In other Courts the same doctrine has been held. In *Fettyplace v. Gorges* (b) Lord Thurlow said, "That where personal property was enjoyed separately by the wife, it must be enjoyed with all its incidents."

The Court will, therefore, grant probate without the consent of the husband, limited to the separate property of the wife.

The second objection is, that the codicil disposes of property not her own because it was not given to trustees for her separate use. It appears to me, however, that the will of Thomas Martin does convey the property to the separate use of Mrs. Thompson, independent of her husband. If I am at all required to give an opinion as to this point, I apprehend that, under the words of this will, a Court of Equity, or any Court would decide that she had a right to enjoy the property independently of her husband: at all events it is not necessary to decide this point; it is enough for this Court to grant its probate.

I have no difficulty in admitting the allegation; nor shall I have any difficulty, if the facts are proved, in granting a limited probate.

[355] *FAREMOUTH AND OTHERS v. WATSON*. Arches Court, Michaelmas Term, Dec. 4th, 1811.—A civil suit to annul an incestuous marriage brought by the sisters of the husband.

An appeal from the Consistory Court of Exeter.

Judgment—*Sir John Nicholl*. This suit originated at Exeter, but was brought into this Court by appeal on an incidental question; the cause has been retained here, and now comes upon the merits as an original cause.

It is a proceeding to declare void the marriage of Samuel Watson with Catherine Kingwell on account of affinity, she being the sister of Ann his former wife.

The suit is brought as a civil suit: the parties bringing it are the sisters of Samuel Watson, who have an interest under the will of their mother, contingent upon the

(a)¹ It stood singly on the point whether from the circumstances she had such a separate property in the bond that she could dispose of it: and per Curiam, clearly she is not only executrix, but the bond is devised to her sole and separate use, which vests the interest in her in a Court of Equity, as much as if the son had vested it in trustees for her separate use, and there are many instances where a Court of Equity has decreed an husband to stand as a trustee for the separate use of his wife. *Lady Suffolk's case*, who married Serjeant Maynard; Sir Joseph Hearn's wife; *Seymour v. Dilkes*, Nov. 17, 1718. See *Rolfe v. Budder*, Bunbury's Reports, p. 187.

(a)² *Richards v. Lea*, Michaelmas Term, 1805.

(b) All the cases shew that the personal property, where it can be enjoyed separately, must be so with all its incidents; and the *ius disponendi* is one of them." *Fettyplace v. Gorges*, Brown's Chancery Reports, vol. iii. p. 10.

death of their brother without lawful issue; these sisters are also his next of kin; the Court has already on the admission of the allegation (a) given an opinion that a slight interest is sufficient to enable a party to bring a suit of this [356] description, and there is full proof of a sufficient interest here.

The marriage of John Kingwell, the father of the two sisters, with Ann Wedger in 1748 is proved by the entry of that marriage, and by their subsequent cohabitation, reputation, and acknowledgment.

The birth and baptism of their children, Ann and Catherine, is also proved by the entries of their baptism, and reputation, and acknowledgment as the children of John and Ann Kingwell; and by their reputation and acknowledgment of each other as sisters.

The marriage of Samuel Watson in 1780 with Ann, and her subsequent death, are proved by the registers; Ann died in 1788; it has been objected that these facts were not proved by any one who was present either at the marriage or the funeral. This is not necessary; their identity is sufficient, proof by exhibits is more stringent, besides, there is no attempt to prove diversity, it would have been important to the adverse party, himself and his children to have proved it; his silence, therefore, tends to confirm the fact, and there is no suspicion of collusion.

The subsequent marriage of Samuel Watson with Catherine, the sister of his first wife, is not proved by direct evidence of the fact, or by the entry in any register; the place of that marriage having been kept secret; but the cohabitation of these parties, their acknowledgment of each other as husband and wife, their having had four children as their issue, and their always claiming to be husband and wife, is most fully proved.

[357] Eighteen years of cohabitation, reputation, and acknowledgment, the concealment of the place where the marriage was celebrated, the absence of all attempt in the party himself to deny or disprove the fact, leave no doubt in my mind that for the purposes of this suit the fact is sufficiently established.

If no marriage took place, no injustice will be done; here is an incestuous connection which ought to be stopped, and the issue are illegitimate.

The Court, therefore, cannot do wrong in pronouncing the marriage void, and in signing the sentence prayed.

WOOD v. WOOD. Prerogative Court, Michaelmas Term, Dec. 6th, 1811.—Part of a will established, and part held not to be entitled to probate.

Judgment—*Sir John Nicholl.* James Wood is the party deceased; he died on the 29th of March, 1809, leaving Jane Wood his widow, and also a mother and brother, several sisters, and some nephews and nieces: he had real property to the value of about 20,000*l.* and personalty amounting to about 13,000*l.*

An unexecuted paper, being a paper of instructions marked A, and which refers to a will of the [358] deceased's brother Jacob, has been propounded by the widow, as containing with that will so referred to the will of the deceased.

Another paper B, which was the draft of a will prepared from A, has been propounded at the hearing of the cause; and I am now prayed in the alternative to pronounce for A and B, or for A and the brother's will.

All these papers are opposed by the mother and three other next of kin, who pray an intestacy.

The history of the papers, as given in the evidence, is to this effect: the deceased was taken ill on Sunday, the 26th of March, 1809; he was rather better on the Monday; but on the Tuesday morning he grew worse. On that morning, Amy White, a maid servant, who is examined on behalf of the opposer, states, "That about eight o'clock the deceased expressed a wish that his solicitor, Mr. Edis, should be sent for, and asked the respondent to go for him; but she was prevented so doing by Mrs. Wood, the deceased's wife; and soon afterwards the deceased asked her if she had been to Mr. Edis; and on her telling him she had not, he seemed quite angry, and desired her to tell Mr. Thomas to come up to him for that purpose, which she accordingly did."

Mr. Thomas (who was clerk to the deceased) states, "That about eleven o'clock

(a) Arches, May 12, 1810; the admission of the allegation was opposed, and the Judge took time to deliberate whether the parties promoting the suit had not set forth sufficient interest to authorize the Court to entertain the question.

he was desired by the deceased to go to Mr. Edis, his solicitor, and desire him to come and take instructions for his will. He accordingly went, but Mr. Edis was not [359] at home; he left a message for him; Edis came shortly afterwards, in the forenoon, and he accompanied him up stairs into the deceased's room."

So that the whole originates with the deceased himself; the animus testandi is strongly marked, he is angry with the maid for not going to Edis. Mrs. Wood had no desire for a will, she prevents the maid from going—the deceased then sends his clerk; so that the intention of making a will, and dying testate, is quite spontaneous, and is decided.

Mr. Edis then takes up the account, "That on entering the room the deceased shook hands with him, and, addressing him, said, 'I want you to make my will.' The deponent asked the deceased to give him instructions; pen, ink, and paper, were brought; the deceased gave instructions verbally, which he wrote down in the deceased's presence; that the deponent prepared the will of the deceased's brother Jacob, who died about a year ago; the deceased was one of the acting executors, and well acquainted with the contents thereof; and being desirous of making his own will, in great measure, similar to the will of his late brother, he referred thereto by telling the deponent that he meant his wife to be left exactly as Mr. Jacob Wood's wife was; and the deponent then wrote the same down in nearly the same words as dictated by the testator; the deceased then proceeded to dictate the rest of the instructions, and the deponent wrote the same in manner aforesaid, being the whole of the testamentary schedule A, except (besides something quite immaterial) that he wrote the words 'if children; if none, to have estate and effects sub-[360]-ject as hereunder;' subsequently to taking such instructions as will be hereafter deposed; that as he wrote each clause, he, as he recollects, read the same; that the deceased was very ill, and the deponent was as concise as possible in taking the instructions; yet he is certain they were exactly conformable to the deceased's wishes, and met his approbation; that having completed them, he of his own accord said he would immediately go home and prepare the will, and then left the deceased, taking the instructions with him."

Mr. Thomas "well recollects the deceased mentioned his intention to make his will in great measure similar to that of his late brother Jacob, by saying that he meant his wife should be left exactly as his brother Jacob's wife was, and that his mother should be left the same as in his brother's will; that, as Mr. Edis wrote down the instructions, he read the same clause by clause to the deceased, who well understood and approved thereof, to the best of the deponent's recollection; Mr. Edis, when he had completed the instructions, read them all over to the deceased, who expressed his approbation thereof and desired the will to be prepared as soon as possible."

Mr. Dawes, who was an intimate friend of the deceased's and joint-executor with him under his brother Jacob's will, states, "That being informed the deceased wanted to see him he went into his room and found Mr. Thomas and Mr. Edis with him; Edis was writing; he was informed they were instructions for the deceased's will. Edis said the deceased had expressed himself very anxious [361] that the deponent should be one of his executors; he asked the deceased if he wished him so to be; to which he replied, 'Yes, he did very much.' The deponent answered he would not hesitate, if he would let him know with whom he was to act. The deceased said he meant his wife to be one of the executors; after which some conversation ensued about the propriety of appointing a third, the deponent suggesting such propriety, and asked the deceased if he would have either of his relations appointed or not. The deceased decidedly answered, 'No.' Mr. Turner and his son were proposed—the deceased stated his reasons for not adopting them, and at length Mr. Ayton, Mr. Dawes's then partner, was fixt upon." Mr. Dawes adds, "That the deceased being at such time setting up in bed, threw himself rather back on his pillow, and said, 'Now I am satisfied.' That the whole instructions were read over to the deponent in the deceased's presence and hearing; and he well remembers that it was intended by the deceased that the will of his late brother Jacob should form the basis of his will, for the deponent well remembers that in such instructions, which were read over to the deceased as well as to the deponent, and were also looked over and read by the deponent, as Mr. Edis was writing, the latter part began with expressing that Mrs. Wood was to be left exactly as Mr. Jacob Wood's wife was, and that the deceased's mother was to be left similarly, as under Mr. Jacob Wood's will; that he is quite certain the deceased perfectly well knew and understood the whole contents of the

instructions; and that he, [362] the deceased, did, in the deponent's presence, declare the same to be quite as he intended his will to be."

No evidence can more strongly, clearly, and uniformly mark a fixed and decided testamentary intention, and more particularly the intention of leaving his wife exactly the same as his brother Jacob had left his wife.

The next of kin have given an allegation pleading incapacity arising from delirium the whole of this day.

They have examined four witnesses; the two apothecaries, neither of whom saw him till that evening.

The maid servant, who says, "That he was free from delirium till the afternoon about three o'clock." And

Dr. Meyer, who says, "That when he visited him in the morning between eight and nine, or between nine and ten, he was in a state of strong delirium (which renders it probable that his conversation with the maid servant, when he desired her to go for Mr. Edis, was at a later hour than she mentions), but that between twelve and one, when he again visited the deceased, he found him free from delirium, quiet, and perfectly rational, and so far from being incapable of giving instructions for his will that he considered him fully capable, and he would not have hesitated becoming witness to a will at that time had he been requested; that when he visited him on the same day in the evening he found him in a high delirium, and he died next morning; that when [363] he visited him the second time about noon he saw some persons with him, but does not recollect who they were."

The evidence then, upon, the opposer's own allegation, though it proves prior and subsequent delirium; yet, at the time of the transaction, it proves an entire absence of disorder and perfect capacity.

The Court, indeed, has more satisfactory evidence than the opinion of any witnesses, viz. the conduct of the deceased himself, which leaves no doubt of his capacity.

The paper of instructions which was written was to this effect—

"Mrs. Wood to be left exactly as Mr. Jacob Wood's wife was.

"Rings the same, except as below."

"My mother to be left similarly as she was under Jacob's will.

"My three sisters 50l. each."

Then some other little legacies and rings, and Ayton, Dawes, and Mrs. Wood, executors.

This paper then precisely corresponds with the parole account given by all the witnesses. The disposition in favour of the wife and mother is only intelligible by a reference to Mr. Jacob Wood's will, which, in substance, is to this effect:—

"Mr. Jacob Wood gives his wife 400l. per annum, and the residue to his children, if the child which he has (having then one son), or any other child, should live to the age of twenty-one; but if this son, and all other children, die before twenty-one, then the interest of the whole to the [364] wife for life; and after her death, the reversion to his mother, brother, and other relations. The mother has a legacy of 120l. besides her reversionary interest in the residue."

The intention of the brother seems to have been to give the wife 400l. per annum, if they had any child or children; and if none (and at the time of making the will he had none), the interest of the whole to her for her life; and after her death, the reversionary interest to his own family, to his mother, brother, and sisters.

The deceased was perfectly capable; it is strongly pleaded that he well knew the contents of his brother's will; he was the acting executor under it. Mr. Edis had drawn the will—he must have perfectly understood his intention. Mr. Dawes also was executor under that will. The only possible doubt could be whether, as his brother's wife was de facto only receiving 400l., he having left a son, the deceased intended to give his wife only 400l. a year; or whether he intended to give the whole for life (he having no child), as his brother's wife would have in the event of her child dying. I should have thought clearly that he meant her to have an annuity of 400l. at all events, and a life interest in the whole if there were no children; and then the whole to go to his mother and other relations; and such I think is the construction of the paper itself. The Court would have no room to entertain any judicial doubt as to the intention.

Suppose then the deceased had been struck with sudden death the moment these

persons left his room ; here was the deceased himself, of his own accord sending for his solicitor to make his will [365]—in possession of full capacity—dictating instructions—these instructions reduced into writing—read over—approved by him—containing a full disposition of his property—no doubt or hesitation of his intention—his friends round him—no supposition of any improper influence, and the solicitor carrying away the instructions to prepare a will as expeditiously as possible from them ; but before he could prepare the will the deceased became incapable by the act of God, and died the next morning. If the case had rested here, the Court could not, proceeding according to its ordinary rules, have hesitated in pronouncing for this paper.

The question then is, whether anything happened afterwards, either to add to or to take from this paper ; and the more clear, distinct, and deliberate the intention was at this time, the more clear should be the proof of any subsequent alteration.

There is introduced into this paper of instructions a most important additional clause, in these words, "If children ; if none, to have all the estate and effects, subject as hereunder:" these words were written by Mr. Edis, the solicitor ; and it is admitted that they were not written till he was informed of the deceased's death. Now no case has been furnished where an additional clause or bequest, written after the testator's death, has been established. The Court would be very sorry to make the precedent, more especially under the circumstances of this case ; perhaps this alone would be sufficient for me to direct the whole clause to be struck out ; but as it may be necessary to examine the whole case, in order to see whether the former [366] part of A is in any degree affected, or whether B, which was written in the deceased's lifetime, can be supported, the further evidence must be considered. The effect of this clause, the substance of which is introduced into B, is to produce a very important change in the disposition ; the clause runs thus—

"Mrs. Wood to be left exactly as Mr. Jacob's wife was, if children ; if none, to have all the estate and effects, subject as hereunder."

What is the effect of this ? Here is no child—why that Mrs. Wood, instead of taking a life interest in the whole, takes the whole absolutely ; instead of being left exactly as Mr. Jacob Wood's wife was, or would have been if her child had died, she has an absolute interest instead of a life interest ; the relations, and among others the mother, instead of having a reversionary interest in the residue, are wholly excluded, notwithstanding the mother is by this very paper expressly "left similarly as she was under Jacob's will ;" and all the witnesses saying the deceased perfectly understood and approved the paper, and declared it was exactly what he wished.

This most important alteration, made after the deceased had so deliberately given full instructions for his will, after he had marked a decided intention to make his brother Jacob's will the basis of his own ; had directed his wife in part to be provided for as his brother Jacob's wife ; had sent away the solicitor to prepare the will as expeditiously as possible ; the whole transacted in the presence of two confidential friends : I say this important alteration, if it had been reduced into writing in the deceased's presence, and read to him, and standing upon the single testimony of one person, would have staggered and alarmed the Court ; if not as to the correctness of the witness, at least as to the capacity of the deceased. Such a change of intention, not a slight difference in the amount of the legacy, but in the very basis and leading principle of his will, would have called upon the Court to have examined very narrowly whether his full capacity continued ; carefully, to have ascertained whether he was fully understood by the witness, whether his capacity and intention had been fully proved, or whether there might not be some misapprehension between the witness and the deceased. What then is the account given ?

Mr. Thomas says, "That the deceased, previously to sending for Mr. Edis to make his will, told the deponent that he meant to leave all his property to Mrs. Wood, subject to such legacies as he should bequeath."

When this declaration was made does not exactly appear, though I should understand the witness as meaning that the deceased said so at the time he sent for Edis ; but on a single loose declaration of this sort, the Court can never rely ; such a declaration is so liable to be misapprehended, so liable to be not exactly remembered, so liable to be loosely made without restriction, where only meant *sub modo*.

The deceased might so express himself, though meaning to leave the whole but "for life only ;" or the witness might not hear the limitation or restriction for life ;

it is not corroborated by other declarations; there is no suggestion that it was the [368] generally declared intention of the deceased to leave every thing to his wife in exclusion of his other relations. This conversation, then, spoken to by Thomas, affords very little proof of such an intention; but if it was his idea then, he had, when he set about the act, come to a complete determination to make the same division between his wife and his family that his brother Jacob had done, to her the whole for life, as there were no children; but then the property to revert to his own family.'

Mr. Thomas goes on: "That on going down stairs with Edis, he told him that if Mrs. Wood was to be left exactly as Mr. Jacob Wood's wife, it would not correspond with what the deceased had, as aforesaid, previously told the deponent, and he states that Edis then went to Mr. Dawes in his counting-house."

Dawes says, "That after he had been a short time in his office, on coming down from the deceased, Edis came to him there; and the deponent having recollected that the circumstances of Jacob Wood's will could not entirely form the basis of the deceased's will, as the deceased had no child, and Jacob left a son; he mentioned the same to Edis, and as there might be a child, that a similar trust must be created for such child, as Jacob had created for his son; and he advised Edis accordingly to go up stairs to consult the deceased, which he did."

Edis says, "That as he was going to prepare the will, seeing Mr. Dawes in his counting-house, he went in, and shewed him the instructions; and some conversation was then started by Mr. Dawes, on the subject of the deceased's having [369] left this will the same as his brother Jacob's wife, and the dissimilarity there was in their situations, Jacob having left a son; and suggested the propriety of providing for the deceased's leaving issue, although he had none at that time; and thereupon the deponent, at the suggestion of Mr. Dawes, returned to the deceased, and asked whether, in the event of his leaving no child, he meant the residue of his property to go to his own relations, as his brother Jacob had directed by his will; to which the deceased replied as if he recoiled at the idea of leaving his property from his wife, if he should leave no child, 'No, all to my wife;' that having obtained no further instruction from the deceased, he again left him without having written down such further instructions." He then says that he went home and prepared the draft of a will B, which he carried to the deceased about five o'clock in the evening; but he was then delirious, that he died the next morning, and being informed he was dead, he then wrote the additional clause, "if children," &c. in the paper of instructions A.

This is the account of the addition to A and the writing of B; and it is contended, and prayed, that if that clause in A (not being written till after the death) cannot be pronounced for; yet that B, having been written in his lifetime, though not in his presence, nor even read to him, may be pronounced for, being conformable to such further instructions.

Upon the point of law, there certainly have been cases where a paper written in the lifetime of the testator, but neither reduced into [370] writing in his presence, nor read over to him, has yet been established; but then they have been so established upon cases perfectly clear, both as to the intention of the deceased, conveyed by his instructions, and that the paper was exactly conformable to such clear and decided intentions. The Court has always acted with extreme caution in such cases; but such is the principle laid down in several within my own recollection. In *Bury v. Bury* (Prerog. Hilary Term, 1791). *Campbell v. Campbell* (Prerog. Michaelmas Term, 1797). *Wingrove v. Bye* (Prerog. Michaelmas Term, 1799). *Simpson and Davison v. Temple* (Prerog. Trinity Term, 1801). *Hoare and Hayes v. Hayes* (Prerog. Hilary Term, 1807).

Is there, then, in this case, such clear evidence of the intentions of the deceased and of the accuracy of paper B as the Court has always required? There is much confusion between the witnesses. According to Thomas, you would suppose that the suggestion originated with him, in consequence of what had previously passed between him and the deceased respecting the wife, and that Edis upon that went to Dawes to consult him what was to be done.

According to Edis, he went to Dawes to shew him the instructions; which was strange, as Dawes was present when they had been given in part, and had just heard them read.

According to Dawes, it was an idea started by himself that there would be

children; and he and Edis agreed that if children should be born, it would be [371] proper that a trust should be raised for them, and that the deceased should be consulted upon that point; and in that Edis agrees. It seems rather extraordinary that they should have thought it necessary to have consulted the deceased upon that point; for surely the instructions already given implied it. The deceased had already declared that his brother's will was to be the basis of his own; that his wife was to be provided for exactly as his brother's. How would Mr. Edis have drawn the will? After the legacies he would have given 400l. a year to the wife; he would have given the residue to the children, if any should be born; but in case of no issue, or the issue dying, then the residue to the wife for life; and then to the relations. To leave the wife exactly as the brother's, to provide for the contingency of children being born, it wanted no further instructions for that purpose; and yet, both Edis and Dawes say that it was to consult the deceased on that point, and on that point only, that Edis again went to speak to deceased. But how does Mr. Edis state that he put the question? Not one word of providing for the children, if he should have any, and raising a trust for their benefit; but "whether, in the event of his having no child, he meant the residue of his property to go to his relations? Not whether in the event of having a child he would have a trust raised to provide for that child? How, going for the purpose of consulting the deceased upon the event of his having children, could he possibly have put this single question upon the event of his having no children, is not easily un-[372]-derstood; but if the question was thus put, how must the deceased have understood it? Why the residue after the annuity of 400l. to the wife. How was the case of the brother's wife? She left a son, she had an annuity of 400l., the residue was to provide for the son. The deceased, who was acting executor, well knew this; he then most naturally understood the question, whether, if there was no child, the residue should go to the relations." His answer is, "No, all to my wife." That is, not only the 400l. a year, as my brother's wife has; but the interest for life of the residue, in case we have no children, as my brother's wife would have had in the same event.

Supposing the deceased's faculties had been ever so alert and alive, this was a very natural and probable misunderstanding, considering how explicit he had been, that he meant to do exactly the same for his wife that his brother had done; and also for his mother: in any other understanding of the question, how could the deceased possibly have recoiled at the idea of leaving his property from his wife, leaving the whole for life, he must have understood it, the residue beyond 400l. a year.

But that upon this single question, and single answer, the Court is to take it that the deceased had totally changed the whole plan and principle of his testamentary disposition, and that he meant now to exclude his own family altogether from any reversionary interest in his property, is quite impossible. The Court would require that his change of intention should be most distinctly ascertained [373] by conversation and explanation, so that there could be no possibility of doubt of the deceased's meaning. The Court would also require that his capacity should have been fully proved, even if the question and answer were not liable to any misconception. The deceased had been strongly delirious a short time before; he was again strongly delirious in a short time (within about two hours) after; he had been fatigued by this transaction, by giving instructions for the will, and the discussion respecting the executors; he had thrown himself on his pillow, rather rejoicing that he was relieved when the business of the third executor to be appointed was arranged. He had been left some little time, since his friends had quitted the room, he would naturally be in a dull torpid state, not readily apprehending a single question, nor accurately ascertaining his own meaning by a single answer to that question. Under such circumstances, to pronounce for a paper not written in his presence, and never read over to him, would be going infinitely further than the Court has ever done, or than it can ever safely do.

In addition to this, what is paper B? Why, it contains a direction beneficial to the widow; that she shall at all events, even if there were children, have all the dividends for the first year; a bequest not warranted by the brother's will, nor by any directions suggested to have been given by the deceased himself. It is said this bequest is inoperative; so it may be by events; but how can the Court rely in any degree on the accuracy of such a paper? This bequest, and the disposition of the residue abso-[374]-lutely to the wife, would both be introduced with less

caution, as Mr. Edis expected that the whole would undergo the revision of the deceased, and that would make him less careful on this second interview to explain the matter more fully, and exactly, or to write down this important alteration, and read it over to the deceased, and take care that he fully understood the nature of this change.

The Court, therefore, has not the least doubt or hesitation in rejecting paper B; but in respect to A I shall strike out the clause written since the deceased's death. With the exception of that clause the paper is fully proved to have been dictated by the deceased, read over and approved by him, and by referring to the will of the brother to contain the testamentary intentions of the deceased. Nothing which passed afterwards has satisfied me that the deceased in any degree departed from or altered those intentions.

I pronounce for A, together with the will of Jacob Wood therein referred to, as together containing the will of the deceased, the words of the clause in A being first struck out.

The Judge accordingly struck out with his own hand the following words in paper A :—"If children : if none, to leave all estate and effects subject as hereunder."

[375] MOORE AND METCALF v. DE LA TORRE v. MOORE, (a) Prerogative Court, Hilary Term, Jan. 23rd, 1816.—A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

[Affirmed, p. 406, post. See *Cutto v. Gilbert*, 1854, 9 Moore, P. C. 145. Applied, *O'Leary v. Douglass*, 1878, 3 L. R. Ir. 331.]

Catherine Moore died August 16, 1813, possessed of a personal estate amounting to about 30,000l.; she left three sons, Thomas, George, and Peter; Peter was a lunatic.

The following testamentary papers were found at her death :—

(A) "In the name of the Father, and of the Son, and of the Holy Ghost. Amen.

"I, CATHERINE DE KILLIKELLY AND MOORE, widow to the late George Moore, of Ashbrook, and Moore Hall, Esq., declare, before my God and man, my last will and testament, under my hand and [376] seal, in my perfect senses and good health, that if the Almighty pleases to call me to himself, on the road going to Ireland, or any where else, or by some other unforeseen accident, as we are all mortal, leave every thing I possess in Spain, England, Ireland, or any other part of the world, as property, lands, houses, money, jewels, plate, linen, and every kind of houseal furniture of every description, between my son Thomas Moore, and my son Peter Moore, if the latter gets back his senses again; in case it is not God's will this should happen to him, pray his B^r. Thomas Moore, to do by him as it would be most comfortable to be done to himself, if himself was the person inflicted by the divine hand. I name my son Thomas Moore sole executer of all I have, or will have, or possess. In my husband's will, made in Alicant the year 94, is expressed, that if any of my sons disobed me in any respect, I might give his share to any other of his sons, as I pleased or thought proper. I now exclude and disinheirite my eldest son, George Moore, (possessing all his father's lands in Ireland,) him and all his heirs for ever and ever, to have the least claim or title to any thing belonging to me; as likewise, any thing that his father left to my disposal upon no pretext whatever, for his ungratefulness, undutifulness, and disrespect to me, the best and fondest of mothers to him more than any of her other sons, [377] that brought John and Tom to be jealous of me on his account, when he got the last sum out of my power, as only executrice, gives himself away for life, into a family that he knows in his heart were the means of his father's and brother's most miserable and untimely death; who the meanest

(a) The author has been induced, in compliance with the suggestions of several of his professional friends, to give this case, both in the Court of Prerogative and the Court of Appeal, and also the case of *Johnson v. Johnson*, decided in the Prerogative Court in the course of the last year, a priority over many cases which have preceded them. It is thought that the important points of testamentary law, which have been agitated in both instances, will justify this preference.

and most ill-natured of sons, his recompence to me for all my sincere affection and tenderness I had ever for him in particular is to conclude his ruin, without even letting me know one word, neither ask my advice, or wait for my answer, which he ought to have done, after so often protesting to me he would rather *die* than once offend me, and that he was coming over to Spain, who can believe such a person. I declare before God, who is the Searcher of hearts, that he has deceived me more than I can have words to express, therefore in my turn must renounce him to be my son, and errace him as much as possible out of my memory, till my latest breath; I leave my B^r. Mr. Bryan Paul de Killikelly, one 100 pounds; my S^r. Fanny at Rouen in France, one 100 pounds, a year while she lives to pray for me; to my niece O'Neill de Arlox, fifty pounds a year while she lives, or for life; to Micaela Perez, for her good services, a piset a day for life; to my two nieces in Lisbon, fifty pounds each; to the nun Miss Morony in Paris, twenty pounds to pray for me; to Do-[378]-loxes my grand niece, daughter to O'Neill de Arlox, fifty pounds to pray for me; to my nephew, Mr. Arthur, twenty pounds to pray for me; if please God I die in Ireland, I desire my son Thomas to have me carried to Galway, to be buried in the Convent of Fryar's, of St. Dominick, near the place where my uncle, bishop Killikelly lays, as I should never consent to leave my bones on any spot belonging to my once dearly beloved son. I desire my son Thomas to have my funeral as simple as possible, no ostentation, but corresponding to me. I leave two thousand masses to be said for me from the day of my death, as fast as they clergy can say them, looking out for the best and poorest livers, at 6 reals each mass; three high mass's, and the whole office, to be said before I am laid under ground; 20 pounds to be given to the poor the day of my burial; to Micaela Antonio, and Visenta, mourning, and an ounce each; to Marg^a. the French maid, her wages to be paid, her mourning, and an ounce besides, to Tomasas S^r. and nephew an ounce each: my nurse's son in Bilboa; two ounces my son Tom's nurse, and ounce Augⁿ. mourning, and an ounce of the 14 in Mr. Moore will to be portioned I only paid three of them, they must be paid by my son Tom, if I don't live to do it; of the two thousand mass's I leave to be said for the repose of my soul, 200 [379] of them must be offered in the Capuch in convent, in Alicant, where my dear aunt is buried, and fifty in each church, and convent in Alicant likewise for me; all my best silk cloaths to be cut up and made into vestments, for the altar; all my other cloaths and linen to be divided between my S^r. Fanny and my niece Helen O'Neill; what they don't like of them I leave to Micaela, and the other good servants that shall attend me in my last sickness, paying them well besides; to my confessor 10 guineas to pray for me; let him and the other clergyman who says mass for me and assits at my funeral, be payed as they ought to be. I leave a guinea to the woman who will dress my corps; if I die in London, I order my body to be buried at St. Pancras; the 9th and 30th day after my decease, to be said each day 33 masses if possible, they can do it; in case the Court of Spain dos not continue to pay the Spanish chapel here, I will take it for my Acc^t to pay the clergy, the four now in it, 4 women, and the porter, besides the boy's school, and must get one for thirty-three girls at my expence. I have money here in the funds, besides six thousand dollars for this purpos, in my trunks in Spain. I have a small annuity here of twenty guineas a year, in peaceable time, this sum I leave for ever and ever to have masses said for the repose [380] of my soul particularly, must be offered by clergy without reprove from heaven. I leave Micaela and Marg^a, the bed and bedstead they lay on in my house in Alicant, with two pair of sheets each, and to Micaela 3 table-cloths, and 11 napkins with blue strips, I had three French ones; to my niece Helen O'Neill, 4 pair of my own sheets 4 middleing table-cloths, 2 dozen napkins, 1 dozen fringed towels, 1 dozen coarse new cloths, that she should pray for me; Mrs. Athy one hundred pounds. I thank God I have no debts to pay, but forgive my B^r what he owes me. I better my son Thomas in every thing which the laws of Spain permits, provided he don't marry like his B^r Geo. into a family he knows I dislike, my niece de Arlox, will tell him one of them. George married without ever letting me know one word of his match, neither asked my advice, nor waited for my consent; for this reason exclude him for ever and ever, to claim any inheritance

from me, nor do I wish ever to see him while I live, nor any body belonging to him, for carring my gray hairs to the grave with sorrow. I leave Pedro Perez, mourning; and an once to Maria, the old woman, that come to diner for charity, half an onze to pray for me; to her son, the Capuchin Fryar, half an onze to say forty masses in my intention at a pisset. I leave all my [381] power to my son Thomas, in regard to any property belonging to his B^r Peter to manage it for him, till please God he gets back his five senses, excluding his B^r. George to have any thing to say to him, except to give up by my commands the fortune his father left him in the Irish will, being a better B^r. and dutiful son; and do declare, that George did not follow my advice about geting him back his senses, and for so doing I shall never forgive myself to have sent him from Spain, to be tutered by such an unworthy son as George has proved to me by his undutiful actions. My blessing to my two sons Thomas and Peter, may heaven shower upon them both every blessing, to be good and dutiful to the fondest and best of mothers.

"I sign with my own hand and seal

"CATHERINE DE KILLIKELLY AND MOORE. (L.S.)

"London, 29th May, 1808."

B.

(The black lines are to shew in what manner the original paper was found cut.)

"In the name of God, Amen.—I, Catherine Moore, late of Alicant, in the kingdom of Spain, but now of Wimpole-street, in the parish of St. Mary-le-bone, in the county of Middlesex, in the kingdom of England, widow, do make and publish this my last [382] will and testament, in manner following, (that is to say) I will and desire that my dear son, Thomas Moore, shall and do, as soon as conveniently may be after my decease, procure my remains to be decently and carefully deposited in some appropriate place in England, until a convenient opportunity shall by him be obtained for safely conveying my remains by sea to Spain; and when such opportunity and conveyance shall have been so found and obtained by him, then I will and direct that my said son, Thomas Moore, do and shall cause and procure my remains to be decently and carefully conveyed to the city of Alicant, in the kingdom of Spain aforesaid, and afterwards that he shall procure them to be interred in my own vault in the Capuchin church, outside the said city. I also will and direct that all my just debts, funeral expences, and the charge of the probate of this my will, be paid out of my personal estate by my said son, Thomas Moore, my executor, and charged and chargeable with the payment thereof. I devise, give, and bequeath all my lands, tenements, and hereditaments, whether in freehold or copyhold, and also all and singular my personal estate, goods, chattels, household furniture, plate, books, wearing apparel, stock in the public funds, ready money, bonds, mortgages, notes of hand, and all other securities for money, [383] rent, arrears of rent, interest of monies, debts due and owing to me, and all other my estate and effects, of what nature and kind soever, and wheresoever situate, whether it be in Spain aforesaid, or in England, Ireland, or elsewhere, that I shall be seized or possessed of, interested in, or entitled to at the time of my decease, unto my said dear son, Thomas Moore, to have and to hold the same, and every part thereof, unto him the said Thomas Moore, his heirs, executors, administrators, and assigns, for ever, or according to the nature and quality thereof, and to be by him, my said son, Thomas Moore, peaceably and quietly held, occupied, and enjoyed for ever, free from the claim or demand of any other person or persons whomsoever, and only subject to the payment of my debts, funeral and testamentary expences as aforesaid: and further, to be subject to such legacies (if any) which I may hereafter bequeath by any codicil or codicils to be added to this my will. And, lastly, I do hereby nominate, constitute, and appoint my son, Thomas Moore, sole executor of this my last will and testament; and I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament. In witness whereof I, the said Catherine Moore, the testatrix, have, at the bottom of the first [384] sheet of this my will, (the whole whereof is contained in two

sheets of paper) subscribed my name, and to this second sheet, my hand and seal, this thirteenth day of December, in the year of our Lord one thousand eight hundred and ten.

"Signed, sealed, published, and declared by the above named Catherine Moore, the testatrix, as and for her last will and testament, in the presence of us, who, at her request, and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto,

C. MOORE. (Seal.)

"Eleanora Archdeacon, } East Street,
"Edw^d Archdeacon, } Manchester
"P. Archdeacon, } Square."

C.(a)

"London, the 6th August, 1812.

"In the name of God, Amen.—I, Catherine Moore, widow of the late George Moore, of Ashbrook, and Moore Hall, Esq. in the county of Mayo, in Ireland, make my last will and testament, in my perfect senses and good health, not knowing how soon, neither the hour or instant, that the Almighty God [385] should call me to himself out of this world. I wish and desire my will should be made in the following manner by a lawer approved of; I bequeath my son Peter Moore while he lives unsain, three hund^d pounds a year, that he should be well taken care of, and have what may be comfortable to him in his present state, but if God pleases to give him back his five senses whatever I bequeath must be divided in three equal parts, and give him one of the 3 parts, but then as to the three hundred pounds a year, I bequeath that to him besides for ever and ever, to him and his exors heirs lawfully begoten, as he was, to me the only obedient and more dutiful to me than my two mentioned sons; I bequeath to my sister Fanny de Killilly, now at Rouen, fifty pounds a year while she lives, and at her death to fifty pounds more to pay her funeral expences. I beques my B. B.: P.: Lynch de Killikelly now at Bilboa, one *two* hundred pounds, and forgive him the 9000 R^r. he owes me. I all my juels, plate, linen of all kinds, with *all* my silk cloaths: furniture of this *house*, must be sold for as much as can be got for it, not to sell it in a hurry. I leave it in charitable *uses*, but hope to live to sell it myself be I desire, and give away my carpit, which my aunt gave me with the sofa, and 12 armed chairs to a friend which I don't name, as *it is* my will and pleasure so to do; this house, without the furni-[386]-ture, I leave to my niece Helen O'Neill for ever, and after her to her daughter Doloxes, if she proves dutiful to her mother, otherwise she may disinherit her, they must never sell it, but must go to one of her sons who shall be most dutiful to her. I leave my two nieces in Lisbon, Mrs. Cusin and Mrs. Cloughan x one hundred pounds each for once, and my niece in Paris, the nun, Helen Moroney 50 pounds once; to Micaela Perez, I leave her 3 reals plate every day while she lives, with mourning for her, and if I have any *other woman* in Clara Ramiro, to pay their wages till the day of my death, and give them *mourning*; to blind Pira 2 reals a day while he lives. I pray that my corps should be buried with my dear aunt, at the Capuchins in Alicant, in the vault I got made there myself. If they won't permit I should be buried there, I desire, at my own expens, to be sent in a decent manner to Galway, in Ireland, and be buried near the place my uncle Peter, the bishop, lies, in the chapel of the Dominican friars. In case I shall be buried *there*, bequeath them two hundred pounds for my funeral expenses, and charitable uses. To my faithful serv^t Tomasa Cloreas Sⁿ 20 dollars *once*. To her son twenty more *once*. To Tom's nurse 30 dollars once current dollars, and desire my son Thomas to sell every thing that belongs to me in Spain, or any where else, with all *my acc^t*, and give [387] them up clearly and justly to my executors, that they should dispose of every thing that belongs to me as I shall

(a) There were many erasures and interlineations in this paper

desire or put in writing. As to the lease of this house, I shall dispose of it myself; that my will should be valid in Spain; leave one guinea to the holy house of 'Jerusalem.' I annul every other will I have wrote myself, or got it wrote by any other person, except this one of this date, which I now write with my own hand,

"I name as my two executors,
Dⁿ Manuel de la Torre,
Father, & Mr. Frans
Archdekin.

"CATHERINE MOORE.

"I bequeath my son Peter all I have to leave in this world, for his being to me an obedient and dutiful son, till he became unsain; and as it is God's he should be so, leave him all I my property, that he should be taken better taken care of, and live more comfortably; but if he dies without coming to his five senses, and even if he only gets them at his death, I desire my executors to appropriate all my property I left my son Peter, to be laid out in charitable uses, as

This paper was endorsed

"Mrs. Moore,
"of Alicant.
"Last Will."

[388] Besides these there was the draft of a will dated Dec., 1810, by which the deceased bequeathed all her property to Thomas Moore, and the following form of a codicil:—

E.

The lines round this paper are to shew in what manner the original was found cut.

Form of a codicil to the will (if such be intended).

"Whereas by my will hereunto annexed, bearing date the day of December, 1810, I thereby give, devised, and bequeathed unto my dear son Thomas Moore, all my real and personal estate, of which I should die seized, possessed of, interested in, or entitled to, subject only to the payment of my debts, funeral, and testamentary expences, and such legacies as I might bequeath by any codicil to be added to my said will. Now I do hereby further bequeath unto [here name the nature and amount of the further bequests, and the exact descriptions of the persons to whom such legacies are bequeathed]. And I do hereby declare and direct that all the said legacies bequeathed in and by this codicil to my said will, are and shall be accounted and are charged upon all my estate and effects so devised and bequeathed to my said son Thomas Moore as aforesaid; and that the same are to be paid by him out of my estate and effects, within after my decease. And I do ordain and declare this [389] present writing to be a codicil to my said will annexed hereto; and that it shall be taken and accepted as part thereof; and I do hereby confirm my said will in every particular thereof, that is not hereby altered. In witness whereof, I have to this codicil set my hand and seal, the day of 18 of "

Signed, sealed, declared, and published by the said Catherine Moore, as and for a codicil to be annexed to her last will, and to be taken as part thereof, in the presence of "

(Endorsed)

Copy for a codicil.

Paper C was propounded by Mr. Metcalf, the committee of Peter Moore. Paper B by Thomas Moore, who also, in the event of B being pronounced to be cancelled, propounded paper A. George Moore prayed an intestacy.

Mr. Edward Darell deposed, "That he was at school with Thomas Moore, with whom a correspondence and intimacy were kept up, which led to his becoming, in the year 1809, acquainted with his mother; and that she often sent to him to talk with

her; and he continued to be acquainted with her till two or three months [390] next before her death, by which means, as well as by declarations of deceased, as long as he was acquainted with her, he knows that she entertained a very particular regard and affection for Thomas Moore, and she spoke to deponent as having made him her heir entirely of every thing; but with a qualification, as it appeared to him, from what she said, that she expected her said son would be submissive to her; and she repeatedly spoke of his elder brother being possessed of an ample fortune, by succeeding to his family estates in Ireland, on his father's death, and of her being offended with him very highly; and likewise speaking of her other son, Peter Moore, becoming deranged, she said all her hopes were in her son Thomas; and she entrusted him with the management of her pecuniary concerns.

"That from his earliest acquaintance with Mrs. Moore, and as long as he was acquainted with her, she constantly expressed herself as highly displeased with and offended at her eldest son, George Moore; and assigned as reasons for such displeasure, his not paying her her jointure, and his marriage; and the deponent engaged himself in or about the month of April or May of the year in which she died in endeavouring to effect a reconciliation between her and her said eldest son; but he was unable to prevail with her on such occasion, and she was not reconciled to him as long as he knew her; and till deponent so last knew her she, the said deceased, in his hearing, made use always of the most [391] forcible expressions, purporting to and expressing her displeasure against him, and accusing him of ingratitude and various acts of baseness, and declaring that she did not, and never could again look upon or consider him as her son, and that he should never be benefited by any property she might leave behind her."

The same witness answered in reply to an interrogatory, "That the deceased did, about the period of her said son Thomas going to Spain, in the summer of 1812, as well as afterwards, mention to the respondent her disapprobation of his intermarrying with his present wife, as not being a proper match for him: but the respondent did not see or hear from her after the said marriage took place; and he knows not, nor has heard, nor has ground whereon to believe, that the deceased was, and uniformly declared herself to be, greatly exasperated and offended with him on that account, and that she never forgave him, or would ever permit his wife or her children, by her two former marriages, to see or visit her; save that, previous to the said marriage, she, the deceased, made declarations to the respondent that such would be the case, when she talked to him to induce him to discourage her son from the said marriage."

Mr. Thomas Lowten, an attorney at law, deposed, "That he was several times in company with the deceased, and her son, the articulate Thomas Moore, and until some months before her death, [392] and on such occasions, as well as when absent from her, she appeared to have, and by her expressions of him, as he verily believes, had, a very particular regard and affection for him, and until about a month before her death, she appeared to him to look upon, and did, as he verily believes, look upon him as the special and peculiar object of her testamentary bounty; and she several times, in his hearing, spoke of her having made, and told him she had made, her said son her sole heir; and left him every thing; and she dwelt much upon her elder son George having got all the family estates in Ireland, as well as the personal property, which she said she had given him power to collect, but he had not paid her her dower, or the legacies given to his brothers by his father's will, and she said he became possessed of considerable property by the death of his eldest brother, John; and mentioned her other son, Peter, as becoming deranged in mind, and very often spoke of her being greatly offended with the said George Moore. That, by his acquaintance and intercourse with the said deceased, who used constantly to send her said son, Thomas Moore, to him, he knows that she entrusted her son Thomas Moore with the care and management of her pecuniary concerns, and he believes that he had the management of every thing, as she appeared not to do any thing without him; and she did, until about a month before her death, on various occasions, in his hearing, declare and express her regard and affection for the said Thomas Moore, and her full confidence [393] in him, and she said to him, as late as in July next preceding the month of August, in which she died, that she had made him her heir; that she did, within the last month of her life, when he was in company with her, say, when speaking of the said Thomas Moore, who was in Spain, that she was surprised she could not hear from him respecting her affairs, after which, within the same month,

in a letter in her handwriting, addressed to deponent (the said Thomas Moore having arrived from Spain, and being in London, where he had seen him) she desired him, after what had passed in Spain, not to consult her said son about her affairs; and in conversation she afterwards told him she had heard her said son had been deranged in his mind in Spain (which he apprehends was what she alluded to, in saying, after what had passed in Spain) and the deponent remonstrated with her on the impropriety of such her determination, and said how much she would be assisted by him in giving her answer to a bill in Chancery, filed against her by his brother George; and she at last consented that the deponent should advise with Thomas Moore about preparing such answer; but requested he would not let him know that she had desired him so to do; that he remembers (but whether within the last month of her life, or not, he cannot say) when she appeared dissatisfied with the said Thomas Moore (and being the last occasion of her speaking of him) in an odd sort of way shrugged up her [394] shoulders, and said, 'I had' or 'I have' (he cannot say which) given him every thing."

Mr. Anthony Gower deposed, "That he had known the deceased nearly forty years. That shortly before, and thinks it may have been as late as a month next before the death of the said deceased, who was in the habit of frequently calling upon him, that he last saw and was in company with her; and she, the said deceased, constantly appeared to have, and as he verily believes had, and entertained a great regard and affection for her son, the articulate Thomas Moore, to which he is enabled to depose from the expressions she always, in his hearing, used towards him; that she did many times say that she doated on the said Thomas Moore, and that she had made him her heir; but she did sometime before her death tell him that she suspected Thomas was going to marry; and within the last six weeks of her life, but more particularly as to time he cannot depose, she told him he was married, which appeared to displease her; that in speaking of this she said her said son, whom she doated upon, and whom she had made her heir was married, with which she appeared to be, and was dissatisfied."

Mr. Daniel French, barrister at law, deposed, "That he was, on several occasions, in company with Mrs. Moore, until the day next before the day on which she died; that, on the first occasion of sending for him, she signified to him that her said son was going to take some step displeasing [395] to her; but whether it was his departure for Spain, or what it was, he, to whom she particularly mentioned such, cannot now from recollection set forth; and she did, as he well remembers, then say, speaking of her said son Thomas, that he was the only person for whom she had any love; and that she had made a will in his favour, regularly signed and attested, and left the whole to him, and desired deponent to mention to him what it was that so displeased her, which he was going to do, and which deponent did mention to him, though he now forgets what it was; and this deponent says, that at all times that he was in company with her, and down to the time of his last seeing her, she appeared to have, and as he verily believes had, and entertained a very particular regard and affection for her son, Thomas Moore; and she constantly to the deponent expressed and spoke of him as the peculiar object of her testamentary bounty; and during the latter part of his acquaintance with her, when she became displeased with him, said and declared to the deponent that her son, Thomas, was still the object of her bounty, though he had so much displeased her; and she did latterly frequently, when he was in company with her, request him to call on Mr. Butler, the conveyancer, and desire him to call upon her to make a new will, and which she so did about a month before her death; and on the last day next before her death, when he was coming from her house, the Reverend Mr. Garey, a priest, who attended her at the street door, told him [396] Mrs. Moore wished him to go to Mr. Butler, and desire him to call upon her. That, until her said son Thomas went to Spain, the deceased entrusted him with the care and management of her pecuniary concerns, and all other business of importance; and that when he went to Spain, which he did about a year before her death, she entrusted him with her affairs there; that about a month before her death she wrote a letter, in which she desired deponent to meet her son Thomas, at Yarmouth, on his return from Spain (where he had been, as he understood, in conversation with her, deranged in his mind) and accompany him to London; and soon afterwards, but before he so went to meet him at Yarmouth, she told the deponent she should always be afraid of his losing his mind again, and that he should only live in her house, provided the deponent would live with him; that the deceased, on various occasions, and at different

times, declared and expressed her regard and affection for, and full confidence in, the said Thomas Moore, to whom she had, as by him predeposed, said she had left every thing; and so declared and expressed herself until she spoke as she did to deponent, some weeks before her death, about her son Thomas having become deranged in his mind in Spain, on which her affections appeared alienated from her said son Thomas; and when she spoke of his being deranged, he was in Spain; after which time, within two or three weeks next before her death, she several times said and declared to the deponent that she would make a [397] will in such a way as if she had no sons; and spoke occasionally against both her sons, Thomas Moore and George Moore, with great acrimony. That he has frequently heard her express her displeasure against George Moore in the most pointed terms, and declare that she did not nor ever could again look upon him as her son, and that neither he nor his sons should be benefited by any property she might leave behind her.

"That several times in the course of the year in which she died she told him she had made Thomas her heir, and left him every thing; that one day, shortly before her death, she called on the deponent, and he went into the carriage to her, when she said, 'Now I consider that I have no sons or relations, and shall make other friends;' and a few days afterwards she repeated what she had said on the preceding day, and requested deponent to call on Mr. Butler, the conveyancer, in order to have a new will, saying, she felt herself very ill, and might probably die; on which he, from what she said, expressed his horror at the idea of her bequeathing her property away from her family; and saying that no good man would suffer himself to be benefited by her bounty at their expence, she replied she was determined to act as she thought proper; and finding her inflexible, he said to her, at all events, in case Mr. Butler should not come, I hope you will do nothing that will in the mean time disinherit your family, and leave your property in a state of eternal litigation; to which the said deceased answered, No, no, I have taken great care [398] of that matter, though, God forgive me, this morning I very near did something that would have made Tom remember (or suffer, he cannot say which), but if I die before I see Mr. Butler, which I think from my pain in my side I may very probably do, there is a will, by which the property will not go out of the family; but really poor Tom is quite mad, and you must live here with him, and we must have at dinner knives that will not cut; and deponent from thence was perfectly convinced that, until the hour of her death, she considered her said son Thomas Moore as the object of her bounty by will; but otherwise he cannot depose to her recognizing any will by her made; that on all occasions, when she inveighed most bitterly against her son Thomas, she uniformly relented towards the end, and gave him to understand that he was still the fondest object of her affections; that when she heard of Thomas's marriage, she did once or twice declare that her son George's was highly advantageous over Thomas's."

Mrs. Rooke deposed, "That the deceased had the greatest aversion to her son Thomas's marriage; and he has heard her say that neither George nor Thomas should be benefited by any property she might leave behind her."

Mr. Thomas Moore, in his answers to the allegation given in by the committee of Peter Moore, deposed, "That the deceased had a small flat deal box, and a small trunk in her bed-room, in both of [399] which she kept her money, keys, papers, memoranda, letters, and other things; and that, after her death, the papers marked C and B were found by Mr. Lowten in the presence of Edward Darrell, Daniel French, and the respondent, together in the said deal box; and the paper marked A was found in the said small trunk."

Swabey and Stoddart for paper C.

Jenner and Lushington for paper B or paper A.

Phillimore and Dodson for an intestacy.

Judgment (a)—*Sir John Nicholl.* In December, 1808, the deceased wrote a sort of temporary will; for it was clearly made with a view to a more formal instrument. It is merely signed—not attested—and from expressions which occur in it, must have been written with the intention of its being the preparation for a more formal will: strong terms are used in it; and it is written under feelings of great resentment, and for a temporary purpose.

(a) This judgment has been given rather in a compressed form as so much of the evidence has been detailed. For the arguments of counsel, see the next case.

Mrs. Moore's testamentary intentions were carried into more formal effect by the will of 1810; in that will every thing is given to her son Thomas; but she forbears to record the reproachful terms against her eldest son, which she had inserted in the other instrument. By the will of 1810 there were [400] no legacies; a form of codicil, however, was furnished to her by her solicitor. The will of 1810 not only superseded that of 1808; but was in great degree in execution of it, and represented it, for it was nearly to the same effect. It approaches the case of a draft which a person signs, and afterwards executes a will made from it; the draft is superseded, being entirely dependent on the will: if the will is revoked, the draft is revoked also.

If the Court is of opinion that this will was for a temporary purpose, and that a subsequent will was executed from it; the question which has been made as to the revival would hardly arise. Therefore, I may relieve myself in a considerable degree from going into the cases cited; though with respect to those cases, I cannot but observe that there is not, when the arguments come to be examined, much difference between the counsel with respect to the law. Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side or the other. For whether there is a presumed revival or a presumed revocation, still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances; and the case would then revolve itself into a question of intention.

If it were necessary to decide the point, I should hold that it was not the presumption, when B was cancelled, that A should revive; and supposing the general presumption to be in favour of a revival, I should be most clearly of opinion that the presumption was repelled, and that it was not the intention of the deceased that A should revive.

The question then comes to the cancellation of [401] B; the Court must examine the appearance of the instrument itself; the three sheets were connected by tape, sealed by her own seal, the same seal annexed to the will itself; the fact is, that some one has carefully cut out, apparently with scissors, the whole of the instrument or margin, so as to detach it from its frame; the attestation clause also is cut through. It is the duty of the Court to put a rational construction on this act. In my judgment, it must have been done for the purpose of cancelling, revoking, and destroying the validity of this instrument. I can put no other rational construction on the act; it must have been done not equivocally, but decidedly, for the purpose of revoking the instrument; the form of the codicil also is cut in the same manner, so that it is not improbable, considering the character of the deceased, that she thought it in some way necessary.

The instrument being presumptively revoked, the next question is, by whom? Here there can be no difficulty, it was found in her own possession, and it is not suggested that any other person had access to it.

The presumption that the act was done to cancel the instrument may be repelled by shewing that it was done for some other purpose, or by some other person. Purposes are suggested by the ingenuity of counsel; but it is not enough to suggest; they must be proved. It is pleaded in the eighth article of the allegation that the act was not done by the deceased, or by any person under her authority; but the evidence adduced in support of the plea falls short of the averments. Indeed, it [402] strongly disproves them, and confirms the presumption of law.

In the first place, paper C was written in 1812. The deceased then intended a very different disposition—her son George, who had been excluded by A and B under strong circumstances of resentment, when she wrote C had been restored to her favour and bounty. It is by no means impossible that when she wrote C she might have cancelled B.

Before her death, something of a reconciliation had taken place with her son George, so as to admit him to an intercourse, though it was not a very cordial one, as the Chancery suit continued.

It is more important to observe that the confidence which in 1808 she entertained in her son Thomas, had been a good deal broken in upon; her letters have been introduced, passages have been cited from them which mark her maternal affection; but there are passages also in these letters which mark her displeasure against this son.

The character of the lady is distinguished by intemperance of mind and capriciousness; at any time in her life this might have produced a cancellation; she was not satisfied with her son Thomas's conduct while in Spain; charged him with neglect of

her affairs, and considered him as insane; after his return he committed what was in her opinion an act of great atrocity: he married without taking her advice; this was the same sort of circumstance which had induced her resentment against her son George; and she declared that she was more dissatisfied with Thomas's conduct than with that of George.

[403] These circumstances would naturally produce an alteration in the disposition of her property; the result of the evidence is that there was great resentment towards her son Thomas, and it is proved that till the last moment of her life she wished Mr. Butler to prepare a new will.

All these circumstances, so far from repelling, confirm the probability that the act was done with intention of revoking.

Mr. French's evidence does not alter the view now taken by the Court; she several times told him she had left her son Thomas everything; but on other occasions she said, "I have no sons or relations," and desired him to call on her every day; shortly afterwards she repeated this—Mr. French expressed his horror at her bequeathing her property from her family; but she said she was determined to act as she thought proper; finding her inflexible, he said, "he hoped she would do nothing to disinherit her family, and to leave her property in eternal litigation." To which she answered, "No, no, I have taken great care of that matter, though, God forgive me, I very near did something which would have made Tom remember or suffer (he cannot say which), but if I die before I see Mr. Butler, which, from the pain in my side I think very probable, there is a will by which the property will not go out of the family; but really poor Tom is quite mad, and you must live here with him, and have knives that will not cut."

In the conclusion which this gentleman (who was not acquainted with other declarations of the deceased) drew from this conversation, it is extremely difficult to concur. By what will, by [404] what instrument, and to what extent, was this provided? One day, just before her death, she said Tom was not fit to be his own master; nothing, therefore, could be further from her intention than to place the whole of her property under his care and direction, and to make him her executor.

The Court, however, can place little reliance on the sincerity of declarations—they are very easily misapprehended, and a trifling word may alter the whole import of them—and with a person of such a character, and under such circumstances, the declaration mentioned is too loose to be relied upon; and, above all, it would be extremely dangerous to depend upon them in opposition to the acts of the deceased; she alludes to something she had done that morning—it may have been cutting B or writing C, or something else.

The declarations—that she had no son, that she must make other friends—Mr. French says that she was inflexible—Mr. French's horror at her intentions—I doubt a great deal, not what the witness, but what the deceased herself meant; the Court must scrutinize declarations coming from the deceased as well as from the witness; there is nothing to shew that B was not cancelled after these conversations; from the expression "very near," though she might not then have done it, she might have done it the next morning; it has been admitted that it was impossible to depend one hour upon her conduct; her passion and caprice were so irregular that the only conclusion we can come to is that she had no fixt and determined mind upon the subject.

Here is an act of cancellation—it must be pre-[405]-sumed to have been done by the deceased—there is no evidence to shew that it was not done *animo revocandi*; every thing leads to the contrary conclusion. I pronounce against B.

Paper C has been propounded; the question is whether it is a deliberative or a complete paper; if it is of the former description, there must be evidence to shew that the deceased was prevented by the act of God from the due execution of it—it was written on the envelope of a former will—various interlineations and alterations occurred in it; it states that she wishes it to be made in the following manner by a "lawyer approved," George and Thomas Moore are struck through—it leaves off in the middle of a sentence. The counsel have hardly ventured to argue this as a finished paper, there is a complete departure from all other wills, and its several parts are quite inconsistent with each other; it could only be sustained by evidence shewing that she had come to a final resolution that this paper should operate as far as it goes—there is not one tittle of evidence to supply the demands of law in this respect. Mr. Butler was sent for; but what to draw up the Court can form no opinion—it must be at a

loss to conjecture her settled intention. The only conclusion I can come to is that she died intestate. She might have intended to die testate; but the Court cannot make a will for her—it is enough that she did not intend either of these papers to operate. I must pronounce against them all: and for an intestacy.

[406] *MOORE v. MOORE AND METCALF.*(a) High Court of Delegates, Hilary Term, Jan. 31st, Feb. 3rd and 5th, 1817.—A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

(An appeal from the Prerogative Court of Canterbury.)

The Judges who sate under this commission were Mr. Baron Richards, Mr. Justice Park, Mr. Justice Abbott, Doctor Arnold, Doctor Adams, Dr. Burnaby, and Doctor Gostling.

Dr. Phillimore, Dr. Dodson, and Mr. Heald for Mr. George Moore, and in support of the sentence of the Prerogative Court.

[407] The argument necessarily divides itself into two branches—

First. Whether B is a cancelled instrument.

Secondly. If B should be held to be cancelled, whether A does not, by necessary implication, and by construction of law, follow the fate of B.

As to the first point, we submit that if the testatrix cut B advisedly, the presumption must be that she cut it *animo cancellandi*. That from the circumstance of its having been found in her custody, and no other person having access to the box in which it was kept, the presumption must be that she cut it herself. And, lastly, these presumptions are confirmed and corroborated by the character of the deceased, and the state of her affections at the time of her death.

The manner in which B has been cut raises the inference that it has been advisedly cut; the attestation clause was entirely cut through, one of the seals which fastened the different sheets together was broken, and the several papers in their detached state were found scattered about the box. The rule of the civil law was that if the testator had mutilated a will himself, the heir could not claim under it; but if it could be shewn that another person had mutilated it, the will was good (Dig. lib. 28, tit. 4, c. 3). *Consultò quidem deletà exceptione petentes, repelluntur; inconsultò verò, non repelluntur, sive legi possunt, sive non possunt, quoniam si totum testamentum non extet, constat valere omnia quæ in eo scripta sunt. Et si quidem illud concidit* [408] *testator denegabuntur actiones: si verò alius, invito testatore, non denegabuntur.* The expressions in this passage seem to characterize the very species of mutilation this instrument had undergone.

Such being the appearance the instrument presents on the face of it, a Court of law is bound to put some construction upon the act; it will not be sufficient to say that the testatrix (if such she is to be called) has done it in sport or to while away a vacant half hour—if she did it advisedly, the law will fasten on her the conclusion that she did it *animo cancellandi*.

Again, from the care with which the will was preserved, and from the place of its deposit being accessible to herself alone, the presumption must be that she cut it herself. *Sin de facto testatoris haud quidem liqueat, sed testamentum tamen scriptum domi testatoris, et in arcâ reperiatur deletum, aut incisum; etiam tunc ex voluntate testatoris id factum præsumatur* (Voet, Ad Pand. lib. 28, tit. 4). Moreover, it was found together with paper C, which paper, if completed, must have utterly annihilated it. In the eighth article of the adverse plea it is stated “that when paper B was found after the deceased’s death, it was in the same plight and condition as it now appears, and that the cutting off the border or margin of the said paper was not done by the deceased, or any person under her authority or direction, with a view to destroy, cancel, or revoke the said will; but that down to the time of her death she recognized and considered the said paper writing B [409] as her last will and testament.” It was extremely essential to have established this fact, and yet no evidence

(a) Paper C was not propounded in the Court of Delegates; but the committee of Mr. Peter Moore, who had prayed probate of that paper in the Prerogative Court, joined with Mr. George Moore in praying an intestacy, and appeared by his counsel: after some preliminary discussion, however, the Court refused to hear them, on the ground that there had been some informality in the mode of adhering to the appeal.

whatever has been adduced in support of this article of the allegation; by the witnesses examined, and the letters produced, the affections of the deceased at the latter period of her life appear to have been alienated from her son Thomas. Letters of the 28th of July and the 10th of Aug. are important in this view, as they embrace the period about which C was written.

C, too, but for the postscript, would be a finished paper; and in it we read recorded by her own hand that Thomas was undutiful and disobedient; he is placed on a level with George, for whom she entertained so deep-rooted an aversion, and every will she had ever made is annulled.

On this part of the case the character of the deceased is important; it is impossible not to be struck with the extraordinary features by which it is delineated in the evidence before the Court—her irritable and anxious mind, the vehemence of her passions, her tendency to act strongly and permanently on the impulse of the moment, all paved the way for the misery, vexation, and disappointment which she was destined to experience in her latter days. In return for the passionate affection she lavished on her children, she exacted from them implicit obedience and submission to her will; and, above all things, she held that they were bound to consult her wishes alone in disposing of themselves in marriage; to a mind constituted like this, influenced by the fervour of such warm affections, and liable to the agitations of such stormy [410] passions, the transition from ardent love to violent hatred was natural and easy; her eldest son, whom she had doated on to such an excess as to excite the jealousy of his younger brothers, had for many years been to her an object of aversion. Is it, therefore, surprising, or inconsistent with the ordinary course of human passions, that her youngest son, when he conducted himself in a manner similar to his eldest brother, should have excited in her mind similar feelings of indignation and resentment?

If we have established that B was mutilated *animo cancellandi*, it will be very difficult to maintain that when she did this act she did not also intend to cancel A—the wills are so essentially identified that one appears to be little else than the rough draft from which the other was transcribed, the same person was executor in both and both contained substantially the same disposition of her property.

But we may carry the argument higher, and assert that, by construction of law, A was destroyed when B was completed; and that A being destroyed, in order to have given effect to it again, there must have been some act of republication, or some revival by necessary implication, or something in short to shew that it was the wish and intention of the deceased that her first will should take effect after she had cancelled her second. This is the clear language of the Roman law. (a) *Posteriore quoque testamento quod jure perfectum sit posterius rumpitur, nec interest, extiterit aliquis hæres, an non, hoc enim [411] solum spectatur, an aliquo casu existere potuerit. Ideoque si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus, antequam hereditatem adiret, decesserit, aut conditione, sub quâ hæres institutus est, defectus sit, in his casibus paterfamilias intestatus moritur. Nam et prius testamentum non valet, ruptum à posteriore; et posterius æque nullas vires habet, cum ex eo nemo hæres extiterit.* In the same book of the Institutes, under the head of *Quibus modis conualecit testamentum*, there is a further illustration of this doctrine (Instit. lib. tit. 17, s. 7). All the commentators have concurred in the sense and stringency of these passages; the expressions of Vinnius are nec prioris testamenti sublatio pendet ab eventu aliquo, aut casu contingente post mortem testatoris, sed illud statim vivo adhuc testatore ipso jure per posterius rumpitur.

This doctrine will be found also in the Digest, lib. 28, tit. 3, s. 2, and in several passages of the code; (b) and it was carried so far that if a man, having made his will, was adopted into another family, and afterwards became emancipated, it was necessary that there should be some act to revive the will (Dig. 37, tit. 11, c. 11).

We are not, however, driven to stand on the extreme of this principle: in looking to cases, we may anticipate that that of *Goodright v. Glazier* (d) will [412] probably be pressed against us: it may be observed, however, that the dicta of the Judges in that very case admit that, under circumstances, the first will, though found entire, might have been held in law to be cancelled; both Lord Mansfield and Mr. Justice Yates

(a) Instit. lib. 2, tit. 17, s. 2, de posteriore testamento.

(b) Tunc autem prius testamentum rumpitur, cum posterius jure perfectum sit.

(d) *Goodright on the demise of Glazier v. Glazier*, Burrows, vol. iv. p. 2512.

admit that such a case might exist; but whatever may be the weight and authority of *Glazier's case* in Courts which are bound up by the decisions of the Courts of King's Bench, here we can only look to it as expressing the opinion of wise and enlightened judges as to the law which rules in the disposition of real property; here it cannot be considered as having any binding authority; for here we have in the records of this very Court an uninterrupted series of decisions for upwards of a century, flowing in a contrary course.

In *Whitehead v. Jennings* (Prerog. 1712. Deleg. 1714) Anthony Keck made his will in Aug., 1701; in 1712 he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee; in an access of passion against his nephew he burnt the latter will, he afterwards became reconciled to him, and sent for Mr. Tolson, his attorney, to make a new will; before the attorney arrived he was taken suddenly ill, and died in the course of the night, calling anxiously for him. The will of 1701 was propounded; but the Court pronounced for an intestacy.

In *Burt v. Burt* (Prerog. 1718) a will made in 1669 was found in the closet of the deceased; it was pleaded and proved that he had made another will in 1713; [413] the only account given of that will was that the wife said she had destroyed it, having found it in a cancelled state; she was materially benefited under the existing will, and the Court pronounced for an intestacy.

In *Helyar v. Helyar* (Prerog. 1754; 1 Lee, 281) Robert Helyar died in June, 1751, a bachelor, leaving Joanna Helyar a sister, William Helyar his nephew, and two nieces; by a will of Feb., 12, 1742, he bequeathed to his sister the moiety of a small estate they possessed together in joint-tenancy in Cornwall, and 2000l. in money. All his other estates and property he left to his nephew, whom he constituted also his executor and residuary legatee; he declared to his solicitor that his object was to keep the real estates in the male line of the family. The nephew made his will on the same day, by which he left his property to the uncle, and they exchanged copies of their wills; afterwards the nephew married and had a son; his uncle's affections became alienated from him, and in process of time he completely quarrelled with him, and declared he should never be benefited by him; and, accordingly, on the 19th of Dec., 1745, he made another will, in which his sister was executrix and residuary legatee in the stead of the nephew; that will was not found at the death of the deceased; and it was established to the satisfaction of the Court that the deceased had destroyed it himself. The case was argued at great length before Sir George Lee (from the manuscript notes of Sir Geo. Lee, see p. 166); five points were [414] made in favour of the will of 1742. First. That it was contrary to the statute of frauds to receive parole evidence of a will which did not exist. Secondly. That there was not sufficient proof of the factum of the second will. Thirdly. That the executing a second will was not of itself a revocation of the first. Fourthly. That there was proof that the second will was destroyed by the testator himself. Fifthly. That if the second will was destroyed, no act of revival was necessary to set up the first. Sir George Lee, however, decided against the will propounded, and pronounced Mr. Helyar to have died intestate, expressly on the grounds that the execution of the second will was a revocation of the first; and that where a second will had been destroyed, some act of revival was necessary to set up the first.

In *Arnold v. Hoddie* (Prerog. 1765) the deceased made a will in 1753, in favour of a Miss Arnold, whom at that time he was about to marry—he afterwards quarrelled with her; in 1760 he made another will, by which he bequeathed his property to a sister; the latter will was not found at his death, nor was there complete proof of the execution of it; but his aversion to Miss Arnold was proved, and Sir George Hay pronounced against the existing will.

As to the effect of these cases we do not mean to contend that under all circumstances, when a second will is destroyed, one anterior in date cannot revive; what we maintain is that we have so far adopted the civil law into our decisions as to consider [415] the factum of a second will as a presumptive revocation of a first, and that the burthen of proof is by such a circumstance thrown on the adverse party to repel that presumption. On the other hand, where circumstances have been such as to shew clearly that the deceased intended the first will to revive, these Courts have pronounced for them, as in *Stacey v. Dickens* (Prerog. Easter Term, 1724). *Vanier v. Hue* (Prerog. 1724), and in the latter case of *Passey v. Hemming* (Prerog. Michaelmas

Term, 1809. Deleg. 1812); but it has been only in cases where the intention has been satisfactorily made out that the presumption of law has been held to be repelled. The present case is stronger in its circumstances than either of those which were successively decided by Sir Charles Hodges, the Delegates, Sir George Lee, and Sir George Hay.

For the purposes of this argument, the cancellation of B is a strong circumstance against A. The writing of C is a powerful argument against A—the declarations of Mrs. Moore that “she would make her will as if she had no sons,” that “Thomas and George should never inherit her property,” her refusal to see Thomas Moore’s wife, her indignation at his marriage, her sending for Mr. Butler to make a new will when she was dying, are all strong circumstances to shew *quo animo* B was cancelled, and that, by cancelling that paper, it never could be her intention that A should revive.

[416] Mr. Warren, counsel for Mr. Thomas Moore, *contra*. The first question undoubtedly will be whether B is cancelled; the second will be whether, if B is cancelled, A is in force, i.e. whether B, which is originally upon the face of it a perfect will, has been, by any thing which has happened to it since, cancelled; and if so, whether, by cancelling B, paper A is revived, and is to all intents and purposes the same as if B had never been made.

To say that B is cancelled on the face of it, is very much to overstate the case; no case, no decision, has been adduced in support of this assertion: if this is to be decided by bare inspection, let us look to the rules which Swinburne (part vii. s. 16, p. 515) lays down on this head. “The third case is when the whole testament is not cancelled or defaced, but some part thereof only rased, blotted, or put out; for the other parts of the testament do remain firm and safe, as they were before, although the deletion were in the chief part of the testament, namely, the assignation of the executor.”

If, therefore, a testament were drawn over with lines, there can be no doubt but that it must be considered as cancelled; so if it were drawn over with cross lines diagonally, in either case to repel the presumption, there must be evidence to shew that the party did not mean to deface it. Here there is nothing crossed or blotted out; if, instead of this will being cut, a line had been drawn along the top, passed down the side, and through the attestation clause; could it be contended that the [417] will was cancelled on the face of it, for there is no difference between the act of a knife and the act of a pen; it is material whether it be a cancellation *primâ facie* or not; if it is not, unless there is sufficient evidence to shew that the party intended to cancel it, it remains a good will. Suppose, again, this margin not to have been found; and that the will had been found without it in the drawers of the testatrix where she usually kept her papers of consequence; could it be said she did not keep it as her will? if she did not, why was it there?

Our opponents are not entitled to ask the reason why she cut the paper, for the paper is in itself perfect as a will; they, therefore, are to shew that this was done *animo cancellandi*; cutting through the attestation clause cannot be of more importance than cutting through the name of the executor; and we have seen in what light Swinburne regards that when he states that, though you cut out the assignation of the executor, still the will is good.

Per Curiam. Mr. Justice Abbott. “Blot out,” not cut out.

Mr. Warren. “Erase, blot, or put out.”

Per Curiam. Mr. Justice Abbott. Erase does not apply to cutting out.

Mr. Warren. In whatever way it was done, it would not alter the argument; evidence may be given to shew for what cause it was done; but whether cut, or drawn round with a black line, it can make no difference. We can only say there are many things done for which we can give no account.

[418] If, however, it should be held that there is something on the face of this paper which we are called upon to explain, then we have abundant evidence to shew that she did not intend to cancel it.

Bibb v. Thomas (Blackstone’s Rep. vol. ii. p. 1043) was a case in which circumstances were equally strong as here; there evidence was brought by the heir at law, who claimed against the will, to shew the intent with which the act was done. If the Court is of opinion that explanation is necessary, the letters and the evidence supply it: in the former we see the language of a mind in a great degree subsiding from the anger she had once felt towards her son; and there are a variety of instances in them, as well as in the depositions, where she speaks of him with great affection.

The next question is, supposing B to be cancelled, what is the effect of that cancellation upon A? And this is a question of great importance, of great extent, and of considerable nicety, in consequence of the cases which have been cited. In *Goodright v. Glazier*,^(b) the same argument was used, which has been used by my learned friend on the other side; but it was over-ruled by the Court.

There is no doubt but that the repeal of a subsequent statute sets up a preceding statute. This is a law as old as any in the country, and why? because the act which shewed the change of intention is removed by a subsequent act. It is difficult to conceive how these two cases are to be dis-[419]-tinguished. What is supposed to repeal the first? Undoubtedly the second. But then it is argued, the second will shews a change of mind; to be sure it does, it shews there was a change of mind at that moment. But does not the destruction of the second instrument shew a change of mind again? As altered, it is to take effect if the party does not change that will, and that is the distinction. His mind is shewn by the expression in the second will, if he does not cancel that. The will is ambulatory, and so it is no evidence of a change of intention so as to affect the former will; and this appears to have been the opinion of Lord Mansfield, and, as Mr. Justice Yates says, "A will has no operation till the death of the testator, it is the expression of a man's mind to take place after his death; as long as he lives he may alter his opinion. I tear the paper which expresses my sentiments, then, has not my mind reverted? he has revoked the revocation, and his mind comes back to its first intention."

In *Harwood v. Goodright* (Cooper's Reports, p. 1791) Lord Mansfield says, "It is settled that if a man by a second will revoked a former, yet, if he keep the first will undestroyed and afterwards destroy the second, the first will is revived." Lord Mansfield, speaking the sense of the Court, considers this as a clear established rule at common law. It stands upon the authority of these two cases.

Per Curiam. Mr. Justice Abbott. That would go a vast length; if you put it as an absolute proposition at law without any de-[420]-duction, that the cancellation of the second will revives the first. Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family—that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for. If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

Mr. Warren. Your lordships will do me the justice to recollect that I have only cited authorities.

Per Curiam. Mr. Justice Abbott. Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

Mr. Warren. I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

Per Curiam. Mr. Baron Richards. But I think I may venture to say it has not been universally so considered. It is a great misfortune that dicta are taken down from Judges, perhaps incorrectly, and then cited as absolute propositions.

Mr. Warren. I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case; but he considers it as a point perfectly established.

Per Curiam. Mr. Justice Abbott. [421] It certainly in the report is put as the settled law, excluding all question of intention.

Mr. Warren. If it is the law, therefore, whatever inconvenience may arise from it, it must remain the law till it is altered by the legislature, and nothing short of an act of parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the Court to depart from the rule on account of any peculiar hardship.

In *Wright v. Netherwood* (a) Sir William Wynne observed, "The point seems a good deal like that which has been a vexata quæstio in these Courts, and brought before the Courts of Common Law, whether a will, which is revoked by another, is set up by the

(b) *Goodright on the Demise of Glazier v. Glazier*, Burrow, vol. iv. p. 2512.

(a) *Wright v. Netherwood*, Prerog. May 6, 1793, reported in the Notes of Mr. Evans's edition of Salkeld, vol. ii. p. 593.

destruction of the second." So that Sir William Wynne, coming many years after Sir George Lee, considered it as a vexata quæstio; the decision, therefore, in *Helyar v. Helyar* could not have set the question at rest. "There was a case to that effect," he says, "before Sir George Lee, *Helyar v. Helyar*, in which it was held that the will, being once revoked, remained so: but there was an appeal from that judgment to the Delegates, and it was never determined by them; the case of *Glazier* was directly contrary to that, and it was held that the first will was good." If, therefore, there was any meaning in words, he thought the latter decision the correct one. Supposing this case sent before a jury to decide, there can be no doubt but that, on the authority of the [422] cases cited, they would find for the will; but then, says my learned friend, the ecclesiastical law is different; you cannot have the personalty; it may be a very good law for the realty, but it is a very bad one for the personalty. This appears a strange proposition: there is no difference in the facts nor in the conclusion. It cannot be said that a different conclusion is to be laid down as matter of law, there being nothing but the simple fact that one relates to a landed, the other to personal estate. What is the ground of Sir W. Wynne's opinion in *Wright v. Netherwood*, that *Helyar's case* was wrong? Why? because the Court of King's Bench had decided the contrary; indeed, if this is the law, as I apprehend from these cases it clearly is, in the Court of King's Bench, it must be the law in the Ecclesiastical Court: it is impossible there can be one law applying to real estate,^(a) and another to personalty. Moreover in this Court *Passey v. Hemming* is directly in point in our favour.

Lastly, parole evidence cannot be admitted to affect paper A. There may be parole evidence to affect B. I admit it, because there is something on the face of B requiring explanation: but suppose B cancelled, what is there on the face of A requiring explanation? A is a perfect will; and if it had been the only paper in existence, there could have been no question about it; and, under the statute of frauds, no parole testimony can be given under to affect A. Stat. 29 Car. 2, c. 3, s. 22.^(b) If parole testimony is admitted, it must [423] be in direct violation of this clause. Upon the face of the will all has been regular. Then no evidence can be given; if it were otherwise, verbal evidence might set aside a written will, and do all the mischief the statute of frauds was enacted to prevent.

Dr. Jenner, Dr. Lushington, and Mr. Taddy on the same side with Mr. Warren. With respect to the cancellation reliance has been placed on a passage from the Digest; and it has been argued that the word *concido* expresses exactly the species of mutilation which this paper has undergone: but when we come to look for the meaning of this word in dictionaries, we find it is that which least expresses the appearance of this paper; for it means to cut in small pieces, to tear to pieces. In the Dictionary of Ainsworth there are five meanings, one metaphorical, the others go to the complete destruction of the thing, to chop, to mince, to hurt, to ruin, or utterly destroy, i.e. if you find that the deceased has done an act which shall destroy the effect of the instrument, or the material upon which that instrument is written, then you may presume it to be a revocation, or act otherwise. Four modes of cancellation are pointed out by the statute of frauds, by tearing, burning, [424] cancelling, or obliterating: (a)² the act, therefore, which is to cancel an instrument, must be such a

(a)¹ *Passey v. Hemming*, Prerog. 1808. Deleg. 1812.

(b) "And be it further enacted that no will in writing concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same, in the life of the testator, be committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at least." 29 Car. 2, c. 3, s. 22.

(a)² "No devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall, at any time after 24th of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same." Stat. 29 Car. 2, c. 3, s. 6.

one as shews an intention on the part of the deceased that that instrument shall not have effect; it must be an act that, at the time of doing it, shews that it was the intention of the deceased that the instrument should be destroyed by the act then performed upon it; this is the meaning of the methods found out by the statute of frauds for destroying a will of landed property. Those cited from the civil law are to the same effect; they imply that there shall be an act done not equivocal in itself, but which shall necessarily import an intention to destroy the instrument to which the fact is applied.

The substance of the paper remains complete; the greatest care has been taken that not a syllable of it should suffer from the act: it is true that in cutting it the attestation clause is cut through; but this is clearly not advisedly done; it was upon the second sheet of the will; it is the effect, therefore, of accident, and not of any intention to cut through [425] the essential part of the instrument itself. This is further confirmed by her not having cut through the attestation clause of the codicil; if the act is at all equivocal, the burthen of proof is on those who impeach the validity of the instrument to shew that it was done *animo revocandi*, and that proof must apply most strictly to the act itself.

The other point of the case of extreme importance, and one upon which a decision on the point would be highly desirable, not only in this, but in all courts where questions concerning wills are agitated. We maintain that, according to the principles of this, as well as of the Temporal Courts, a paper revoked by the execution of a subsequent paper is, by the cancellation of that subsequent paper, revived. The case of *Glazier v. Glazier* has established the law on this point; during the discussion of *Passey v. Hemming*, Mr. Justice Heath produced a note he had himself taken in Court of the judgment in *Glazier's case*, which carried the doctrine further than the case, as reported in Burrows, does. A statute which has been repealed, by the repeal of the repealing statute becomes operative again; and upon general principles it must be so held that the suspension of a second act revives a former act.

Per Curiam. Mr. Justice Abbott put this case—A will giving an estate to trustees for the benefit of A., with some few legacies. Let the testator make a second will giving that estate to A. and B. in joint-tenancy; suppose B. to die and several of the legatees, the effect of the instrument will be the same upon an estate of some thousand pounds, with the exception of some few hundreds; [426] would you say that the destruction of the second will is to set up the first; the generality of the principle would rule that. *Glazier's case* comes near that; and if you compare it to the repeal of a statute you must go to that extent.

ARGUMENT RESUMED.

The doctrine of the Ecclesiastical Courts does not go to that extent undoubtedly.

With respect to the authorities from the Digest, they have nothing to do with the subject; they have no bearing upon it; ours is not the civil law of Rome, our proceedings are grounded upon the *jus gentium*; rules proper for the Roman people would be improper for a country like this; we all know the solemnity with which wills were executed at Rome. The civil law said that when once a will is perfected there it must remain; in many instances it could not be revoked, it was not ambulatory, the principle was the opposite of ours. With us no testament can be of effect till after the death of the testator; we are, therefore, to appeal to common law, and not to civil law, for authority.

In *Jennings v. Whitehead* it appears that the deceased had told Mr. Tolsen, his solicitor, that he had a will in his possession which was not to his mind; that he was reconciled to his nephew Richard, and meant to give him 2500*l.* in Hampshire. It is a case, too, in which the whole tenor of his life, subsequent to 1713, shewed that the person he had once made executor and residuary legatee was never meant to be so again; it was pronounced an intestacy, because there was evidence to shew it could not be his intention by the [427] revocation of the second will to revive the first; the intention was clearly shewn to be contrary.

In *Burt v. Burt* the only evidence as to the destruction of the second will was that of the wife, by whom the destruction had been made; it is impossible, therefore, that there could be any evidence to shew that it was his intention that the first will should revive.

In *Arnold v. Hoddie*, when the instructions were given for a second will, the first

will and a codicil were in the hands of an attorney, and the testator had no opportunity of cancelling them; circumstances shewed that it was impossible he could have meant the will to revive.

In *Helyar v. Helyar* (a) Sir George Lee's judgment cannot be taken as a decision upon the law that an act is necessary to revive. Whatever may be his opinion he does not decide that; he con-[428]-siders all the circumstances as material. The case of *Helyar*, therefore, only goes to this, that circumstances are material to shew intention; and Sir George Lee would probably have decided differently had the case of *Glazier* been then decided.

Wright v. Netherwood shews Sir W. Wynne's opinion.

Passey v. Hemming has, however, as it has been generally understood, entirely disposed of this question: it unfortunately happens that we are in the dark as to the grounds of the decisions in this Court; but it is reasonable to conclude from that judgment that some act or declaration is necessary, in the case of a subsisting will, to shew it was the intention that it should not revive. The will established was in 1780; the testator died in 1807; it consisted of two separate papers, written within a short period of each other; they were attested only by two witnesses, and consequently were not good to pass real estates; he had made subsequent wills, and to a late period of his life was occupied upon another will which contained a different disposition of his property; but it was unfinished. The will of 1780 was found in a drawer in a garret, and there was nothing to shew that they had ever been recognized by the deceased. Sir W. Wynne said he should have felt extremely unwilling to have been bound to have pronounced against them; but he was not; he considered *Helyar's* as a case of circumstances from which it was impossible to believe that the first will contained his last intention, a departure of intention had been shewn by the variation in the second will, and that variation was proved [429] not by mere circumstances, but by the execution of the second will.

In another point this case essentially differs from all those in which the subsisting wills have been held to be void; namely, that in all of them there have been different executors in the second will from the first; a circumstance strong to shew a complete change of intention; here the executor is the same under both instruments. It is remarkable that all the finished wills in this case shew continued affection towards the same person, and this is not contradicted by any act of the testatrix, shewing any intention to dispose of her property in a manner injurious to him. There has not been any act established under her own hand, as an operative will, indicating a change of intention.

The law of the Ecclesiastical Court is that there may be evidence given that it was not the intention of the testator that the first will should be revived by the cancellation of the second; but that, if such evidence is not produced, the presumption must be that he meant to revive the first. The operation was only suspended by the factum of the second will; and the moment the second will is cancelled that suspension is taken off.

Dr. Phillimore in reply. Important as the case is on account of the principle of law it involves, the importance of it has been augmented by the course of argument adopted on the other side; it has been contended—

First. That if B is a cancelled paper, we are precluded by the statute of frauds from entertaining any question whatever with respect to the [430] validity of A. Secondly. That if the Court of King's Bench would pronounce for A, the Court of

(a) In the mention which is made of this case in the report of the case of *Goodright v. Glazier*, Burr. 4, 2512, Sir George Lee's judgment in *Helyar v. Helyar* is erroneously stated to have been affirmed by the Delegates, the fact being that the case was compromised in the Court of Delegates, and consequently did not come to an hearing there. In the manuscript notes of Sir George Lee, after the recapitulation of the grounds of his judgment, I find the following memorandum:—N.B.—“Mr. William Helyar has appealed to the Delegates, and prayed a commission of Lords Spiritual and Temporal; but, on hearing counsel, Lord Chancellor granted it only to judges and civilians, because the questions in the cause turned upon points of law. The cause was afterwards agreed, and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court, and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 19th of January, 1757.”

Delegates is bound to do the same. Thirdly. That the Digest has nothing whatever to do with the question. If either of these objections are founded, we must be content to admit that there is an end of the question at issue. It is essential, therefore, that they should be set at rest.

Parole evidence is not introduced here to revoke a written will; but to prove a fact, viz. whether A is a will or not. The evidence is introduced not to revoke A, but to shew that B had ceased to be a will; cases of this description have been held not to fall within the statute of frauds; and the practice of the Prerogative Court has, ever since the passing of that statute, been to establish unfinished and unexecuted papers, whenever it can be shewn that it was the intention of the deceased, continued to the latest moment of his existence, that they should operate, even in cases where the most regular and formal wills have been found entire and uncanceled.

The objection is not new; we find from a note of the judgment in *Helyar v. Helyar*, in the handwriting of the eminent judge who decided it, that a similar objection was pressed in that case to any inquiry being made into the factum of an existing will; "but," to use his language, "the case (a) of *Sellars v. Garnet* in the Prerogative, October, 1748, was full to this point; for there an executed will was held to be revoked by a will wrote while [431] the testator was alive; but he died before it was brought to him, and the contents thereof were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parole evidence could not be received; that it was to revoke a written will by parole only, contrary to the statute; but both Dr. Bettesworth in the Prerogative, and the Delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing, that the parole proof of the instructions ought to be received, and that it was not a case within the statute of frauds." This was the doctrine held in 1751; and subsequent practice has established and confirmed it.

The second point made against us is that if it could be shewn that the Court of King's Bench would hold paper A to be a will, this Court would be bound to establish it, inasmuch as it never can be said that there is one law for personal and another for real property. To this we reply that the Court of King's Bench has no authority whatsoever over the decisions of the Court. The argument, if good for anything, would go to constitute it as a Court of Appeal from the Ecclesiastical Courts. If so, for what purpose is the Court of Delegates convened, by commission under the great seal, to hear all appeals made to the king by virtue of the statute of Henry VIII.? and why is a still ulterior tribunal by a commission of review sometimes opened to suitors in this Court? The Ecclesiastical Courts exercise an independent jurisdiction in all cases over wills of personal property: the law they administer, from whatever [432] sources derived, is incorporated into, and has for centuries formed part of the established law of the land; the Court of Delegates is to them a Court of dernier ressort; the rules of law, and the decisions which have been handed down to your lordships by your predecessors here, are to be the sole guides of your sentence. The evil and inconvenience arising from the diversity of testamentary law in the Temporal and Ecclesiastical Courts is imaginary; the diversity exists to a great extent already; the will which can pass personal property to the greatest amount which the talent and industry of a British subject can accumulate it, may have no effect, and in practice frequently has none, over landed property; while it is valid with respect to one, it is a perfect nullity as to the other. Indeed, if it were permitted to us to look to the policy of a diversity of this kind in the administration of the testamentary law of England, we should confidently maintain that it was wise, politic, and well adapted to the mixed interests of the opulent and commercial country in which we live, that there should be a greater facility in disposing by will of personal than of real property. But this difference exists on great points of every day's occurrence; what evil, then, can result from it on a point which can only arise for decision now and then in the course of a century? It is sufficient, therefore, only to state on this part of the case, that if it can be made out satisfactorily that, according to the course of decisions in the Ecclesiastical Court, this lady would have been held to have died intestate, the Court of Delegates is [433] bound to affirm this sentence; and that even though cases might be cited from Courts of Common Law leading to a directly contrary conclusion.

(a) Cited from Sir George Lee's manuscript notes. In the case of *Helyar v. Helyar*, Prerog., Jan. 8, 1754.

Thirdly. The assertion that the Digest has no bearing on the subject could only have been resorted to under the conviction that it was impossible to open the Roman code without being overwhelmed by the force of the authorities which pressed against the argument of our opponents. The position is novel to the extent, at least, to which it has now been laid down; the civil law is not the text law of the Court in all instances; but it is positively so where our own law is silent: and beyond this, the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions. To illustrate this, by an example familiar to every one: the birth of children by the Roman law amounted to the revocation of a will; we have not adopted it to this extent; with us marriage and the birth of a child amount to presumptive revocation of a will; can any one be heard to maintain that we have not adopted our rule from the civil law? What was the conduct of Lord Camden,^(a) when a question of this sort came before him? He directed an issue to Sir George Hay to try the question, because the Civil Law Courts were best competent to expound the [434] law on this subject; so it is in this case, by the Roman law the cancellation of a second will ipso facto revoked a first; with us a second will cancelled is a presumptive revocation of a first; we do not push the argument further than this, we admit that the presumption may be repelled by circumstances. That the civil law has always been considered as the basis of the law of the Ecclesiastical Courts, we have only to refer to the dicta of Sir George Hay,^(a) Lord Camden, Lord Mansfield,^(b) and Sir George Lee, which occur in the several cases which have been cited in different stages of the present argument. But it has been argued that the civil law is diametrically opposed to the testamentary law of England in principle; because, by the civil law, a will took effect in the lifetime of the testator, and was not ambulatory; once made, it could not be revoked, the testator himself had not the power of cancelling it; it happens, however, unfortunately for this observation, that the maxim, which is described as so peculiarly characteristic of the English testamentary law, is a fundamental maxim [435] of the Justinian code,^(a) and was transplanted from the Digest into the law of this country.

With respect to the points more immediately under discussion; it has been laid down broadly that, under all circumstances where the second will is cancelled, the first will must, as it were, ipso facto revive. Would this be a rule consistent with reason? Would it be desirable, on grounds of public policy and justice, that a rule of this description should be stern and unbending, that there should be no limitation to this doctrine, no qualification of it, whatsoever? Cases of extreme hardship will suggest themselves readily; cases in which the intention of the testator (the only sure guide for all Courts of testamentary law) might be obviously defeated by such a rule. Let us suppose, for instance, that the cases of *Whitehead v. Jennings* and *Arnold v. Hoddie*, had come before the Court of King's Bench, with a full development of all the circumstances which were laid open to the Ecclesiastical Courts; and can it be contended that in either of those cases the Court of King's Bench would have felt itself bound to have decided in favour of the subsisting wills? And yet it has been pressed, on the

(a)¹ *Shepherd v. Shepherd*, T. R. p. 51.

(a)² It was further objected that, by the Roman law, by which we proceed in this Court, the birth of children operated as the revocation of a preceding will. I agree that this is rightly stated from the Roman law, and that the Roman law, in general, guides our decrees; but it guides our decrees no further than where it is uncontradicted by the English law. Sir George Hay's judgment in *Shepherd v. Shepherd*, T. R. p. 51.

(b) Though, as to personal estate, the law of England has adopted the rules of the Roman testament; yet, a devise of lands in England is considered in a different light from a Roman will. Lord Mansfield, judgment in *Harwood v. Goodwright*, Cowper's Report, p. 1791.

(a)³ *Quemadmodum circa fideicommissa solemus vel in legatis, cum de doli exceptione opposita tractamus, ut sit ambulatoria voluntas ejus usque ad vitæ supremum exitum. Dig. lib. 24, tit. 4, c. 4.*

Quod si iterum amicitiam redierunt et pœnituit testatorem prioris offensæ; legatum vel fideicommissum relictum redintegratur: ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum. Dig. lib. 34, tit. 4, c. 4.

authority of *Goodwright v. Glazier*, that the law is ab-[436]-solute and unalterable, and cannot be changed but by an act of parliament.

In *Glazier's case* the will destroyed, and the will subsisting, benefited the same person; and there does not appear to have been before the Court one single circumstance to shew that the deceased had in the slightest degree varied from the affection he entertained for the person to whom he had bequeathed his estate.

In *Harwood v. Goodright* the doctrine goes no further than this, that a subsequent will, though it be found to contain a different disposition from a former will, yet, if the particulars of that difference are unknown, cannot operate as a revocation of it.

If we have been successful in shewing the civil law is to guide our decisions, our argument remains untouched; since it is clear, both from the text law and the writings of the best commentators, that there can be no doubt as to the language of the civil law on this part of the case; the passage before alluded to from the commentary of Vinnius (Vinnius in *Instit. lib. 2, tit. 17, s. 6, c. 2*) embraces the whole argument: "Fingamus rursus testatorem, testamentum quod secundo loco fecerat, ac perinde quo prius ruptum erat, incidisse. Quæritur an restituatur prius, cujus tabulæ integræ manserant? Papinianus respondit, si id hoc animo à testatore factum sit, ut priores tabulas supream relinqueret: voluntatem quæ defecerat recenti iudicio reddisse et posse secundum tabulas priores bonorum possessionem pati. At inquires an non sic testamentum citrà [437] ullam solennitatem nudâ voluntate constituitur? Negat hoc jurisconsultus atque hanc objectionem sic removet, ut dicat, non quæri hic de jure testamenti, sed de viribus exceptionis, quo significat, recenti isto iudicio, et simplici voluntate testatoris non constitui novum testamentum; sed si scriptus priore testamento hæres agat, et hæreditatem vindicet, eique objiciatur exceptio mutatæ voluntatis, posse eum hanc exceptionem elidere replicatione voluntatis reversæ, si constet, testatorem hoc animo, posterius testamentum, incidisse, ut prius iterum valere vellet." Throwing the burthen of proof therefore completely on the party setting up the instrument, and exacting from him some act to shew that it was the intention of the deceased that the first will should revive.

Per Curiam. Mr. Justice Abbott. The concluding sentences of the passage you have referred to, seem to me to make very strongly for your argument, stronger even than those which you have cited: "utique enim hic animus, ab hærede scripto, omnino probandus est, per codicillos putà, aut alias literas, quibus testator palam declaraverit, se velle priores tabulas valere, alioqui eum, tanquam quem utriusque voluntatis pœnituerit intestatum potius decedere voluisse interpretabimur."

ARGUMENT RESUMED.

Other passages might be cited to the same effect. From them the law of this Court is deducible. The practical operation of it has been established by a series of cases occurring at intervals from [438] 1714 to 1765. It has been admitted that no decision has occurred on this point from the case of *Arnold v. Hoddie* in 1765 to that of *Passey v. Hemming* in 1812. But it has been contended that, in the intermediate time, Sir William Wynne expressed an opinion decidedly hostile to the principle on which these cases had been adjudged. When the subject was indirectly brought to his notice in the case of *Netherwood v. Wright*; as if the obiter dictum of a judge could be taken as affording any fair criterion of what his opinion might be when a subject of this nature should be brought before him, or as if it were probable that any judge would, on an incidental point, step out of his way to give a decision on a question of this magnitude and importance.

Fortunately, however, we have the advantage of knowing what Sir William Wynne's (a) opinion really [439] was on this subject when his mind was immediately

(a) Now, under these circumstances, it appears clearly that the deceased, after having written the two papers which remain entire, executed two further wills, one in the year 1781, the other in the year 1798; but that these regularly executed instruments are each to the same purport, each to the same intent, as far as the two papers F and G go to make provision for the wife, and for the other relations who are there mentioned, it appearing clearly that the deceased's intention was in the first place to die testate; and, secondly, that substantially the intention of the deceased was to do that which he has done by the two papers F and G. I should be extremely loth to find myself bound by the practice of the Court to establish as to those two papers, containing, as I think they clearly do, and are proved to do, what was the intention

addressed to it in the case of *Passey v. Hemming*, he there states as the ground of the decision that [440] it appeared clearly both that the intention of the deceased was to die testate; and, secondly, that he always meant to do in substance that which the papers propounded would carry into effect; expressions which surely do not convey the idea that his opinion was in opposition to that series of cases which had been determined by his predecessors; indeed, from the perusal of his judgment in that case, it is manifest that, entertaining the opinion he did as to the particular case immediately under his consideration, he nevertheless felt the greatest anxiety not to depart from the tenor of those decisions, or to decide any thing which might even in appearance indicate an opinion adverse to the great authorities which had preceded him. This point was much laboured by him throughout the judgment. *Passey v. Hemming* has been pressed against us as conclusive; but that was a case decided upon its own special circumstances; several wills were before the Court in a cancelled state; in all of them the testator had constituted his wife executrix, and given her the residue; his affection to her was not shewn to have been changed, and the benefit to her was the characteristic feature of the will which was established. It may be observed also, that [441] *Hemming's case* was decided by a very thin commission of Delegates; and that the judgment of the Court below appears to have been much influenced by an erroneous statement of *Lord Alington's case*.

The counsel for Mr. Thomas Moore objected that it was not regular to allude, in reply, to a case which had not been before introduced into the argument.

Per Curiam. Mr. Justice Park. I think in this instance the allusion is justifiable; we have all been furnished, and very properly, with a copy of the judgment in *Passey v. Hemming*, in which *Lord Alington's case* is peculiarly referred to.

Per Curiam. Dr. Arnold. It is very material that the circumstances of *Lord Alington's case* should be correctly stated; certainly, in *Hemming's case*, there was a complete misapprehension of them.

ARGUMENT RESUMED.

Lord Alington died in 1722; (a) the will propounded was dated in 1685. It was stated in the argument on *Hemming's case* that there was clear proof before the Court that Lord Alington had made another will within a few years of his death, in which Sir John Jacob was executor, containing a wholly different disposition of his property, but that this latter will could not be found; and that it was on this point that the case turned. On in-[442]-vestigation, however, of the proceedings, it appears that there was no proof whatever before the Court of any second will ever having been completed; nor could the case have turned on this point; several inceptions of wills with revocatory clauses were produced; and the question was whether these inceptions of wills, coupled with length of time and great change of circumstances, would amount to the revocation of a will; and the Court decided in the negative.

The result of the consideration and comparison of all the decided cases appears to be that the presumption at common law is in favour of a revival, and the presumption in the Ecclesiastical Court is against a revival; but that either presumption may be rebutted by circumstances.

It has been said, however, that in all the cases where the making of a second will has been held to revoke a former will, there has been in the second a different executor, and a different disposition of the property; from which circumstances the of the deceased down to the last of his testamentary life, owing to its appearing that there were testamentary papers afterwards cancelled; that they must be considered as revocations of these two testamentary papers, I should be extremely unhappy if I felt myself bound so to pronounce; but I think I am not; it appears to me that all the cases in which that decision has taken place have gone upon the ground that there were differences, that there were departures, and that what was the intention in the first paper was cancelled in the latter. I take it, by the civil law and the practice of this Court, a paper of a later date, containing a different disposition, would be a revocation of the former; and that, though the latter did not appear, and the former did, and was left; it should require some account, or some declaration of the circumstances, in order to give it effect.

Now I think in all the cases in which it has been held that the former will was

(a) The cause was entitled *The Duke of Somerset v. Sir John Jacob*, Deleg., Jan. 22, 1725.

change of intention, it has been argued, must necessarily have been inferred. To us it appears that the present is a stronger case than any one of those yet decided, from the very circumstance of the same executor being appointed in both the instruments; because, if it is once admitted that the deceased cancelled her second will from the aversion she had conceived towards her executor, and from her determination that he should not be entrusted with the management of her affairs, is it likely that she should intend to leave in force another will of nearly similar import, in which she constituted the same [443] person her executor, and bequeathed to him the bulk of her property? A, in fact, is the preparation for B; it is the substratum of it. A is informal and unsolemn; B is regular and solemn, and contains a direct revocatory clause.

With respect to the cancellation, this must be considered as the rock on which the counsel on the other side have split; to explain it away, they have been driven to resort to irrational and contradictory theories; it has been argued by one as the result of accident, by another as the effect of design; one has maintained that the deceased took great care not to cut through the attestation clause, while another has laboured to shew that not having the attestation clause before her eyes, she accidentally and inadvertently cut through it.

The passage from Swinburne has no application whatever to the present case; it merely goes to this, that if a will is not advisedly cancelled, even though it be cancelled and blotted in its most essential parts, it is not to be considered in law as cancelled; our argument is that, being found in the possession of the testatrix, if erased, it must be presumed to have been erased by her; *prima facie*, it is mutilated; and it is for the party claiming benefit under the instrument to shew that the mutilation was accidental.

Again, we have been told, on the authority of Ainsworth's Dictionary, that "concido" means to cut in small pieces; and, consequently, cannot apply to the species of cancellation which this instrument has undergone; we do not deny this meaning of the word, but we deny that it is the [444] only meaning of it; and we assert that in the passage cited from the Digest, the construction of it is not limited to this signification. It is not so that the commentators have interpreted it. The glossary of Cujacius on this passage is, "irritum fit etiam testamentum si deleatur vel incidatur." And Voet (Voet, *Ad Pandectas*, lib. 28, tit. 4) understands *concidit* in the same sense. *An autem consultò, an inconsultò ac præter testatoris voluntatem deletio, incisio, similiaque contigerint non juris, sed facti quæstio est.* And again, *consultò tabularum incisio, vel inductio aut cancellatio facta credatur, donec contrarium probatum fuerit.* But if we are not to refer to commentators, but to dictionaries, Facciolati, who is of the highest authority among compilers of this class, states *concidere* in one sense to be synonymous with *abrogare*; and refers to this identical passage in the Digest as an example of such an use of the word.

No explanation then having been given of the cancellation, it must be presumed to be revoked by the cancellation of the latter. In all the cases I have looked into, at least, it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper.

In the case of *Helyar v. Helyar* the first will was in the year 1742. William Helyar, the deceased's nephew, was the executor; the deceased after that made another will, by which another person was appointed executor, and the latter will did not appear; but there was proof that the deceased declared his dislike to the marriage of William Helyar, who was the person appointed executor in the first will; that he declared that he had left him 40,000*l.*, but that he would not leave him a farthing; from thence the Court concluded that the second will was inconsistent with the former, and on that ground revoked it.

In the case of *Jennings v. Whitehead* the first will was in May, 1711; by that he appointed his nephew, Henry Whitehead, executor and residuary legatee; in 1713 he made another will, appointing his wife executor; in that same year, in a passion, he burnt his second will. The will with the residue to Richard Whitehead still continuing in existence, he afterwards sent for an attorney to take his instructions for a new will, who asked him whether he had again received his nephew into favour. To which he replied, no, very far otherwise. Here was the clearest proof that could be, of a departure from the first will; and, therefore, the Court pronounced against the first will. Cited from manuscript notes of Sir William Wynne's judgment in the case of *Pussey v. Hemming*.

have been done *animo cancellandi* ; on the face of it it is most carefully done, and has all the appearance of design ; the law cannot resort to fanciful suppositions in opposition to such an act ; we admit the act to be equivocal, and that the presumption might have been rebutted, but we contend that all attempts to rebut it have failed.

Thus stands the argument on the documentary evidence ; but when reference is had to oral testimony to shew that Mrs. Moore did not consider B as cancelled, and that her affection to her son [445] Thomas continued unabated till her death, the facts established by evidence utterly refute any such notion.

Mr. French shews his impression of what the deceased's intentions were, by the reasons he gives for not having, according to her request, sent Mr. Butler to her : all the witnesses speak to her displeasure, her dissatisfaction, and her acrimony (these are their expressions) at her son Thomas's marriage ; to the bitter reproaches and opprobrious epithets she lavished upon him—to her declarations that she now considered herself as having no relations ; and above all, there is clear testimony of the anxiety she expressed to the latest moment of her life, to see Mr. Butler for the avowed purpose of making a new will. It is in vain, in opposition to such stubborn facts, to argue that her letters begin and end with those expressions of affection and endearment, which a mother usually employs when writing to a son ; that her anger was only occasional, and that she never seriously came to the resolution of making a new will.

The sum of the argument is that there is clear proof of the cancellation of B—that from the facts and documents before the Court, it is equally clear that if she intended to revoke A she must be presumed to have intended at the same time to revoke B ; and though she might not, and probably did not, intend to die intestate, yet it is obvious that neither of the wills before the Court contain the disposition she intended to make of her property ; [446] whatever that disposition might have been, it would probably have been inofficious. It may be some satisfaction, therefore, to the Court (if it is permitted to courts of justice to feel satisfaction on such subjects), that the only conclusion of law at which it can arrive is to pronounce for an intestacy, since there can be no doubt but that such a sentence will make a more just disposition of the property of this unhappy lady, than she, if she had lived a short time longer, would herself have made of it by will.

Feb. 5.—The Judges Delegates affirmed the sentence of the Prerogative Court of Canterbury ; but gave no costs.

[447] **JOHNSTON v. JOHNSTON.** Prerogative Court, Hilary Term, Feb. 19th, March 1st, 1817.—The birth of children, combined with other circumstances, will revoke the will of a married man.

[Applied, *Castle v. Torre*, 1837, 2 Moore P. C. 133.]

James Johnston made a will on the 21st of July, 1793 ; he was then resident in the island of Jamaica, and had two children, a girl and a boy, and his wife was pregnant. By this will he bequeathed “10,000l. to his daughter, 10,000l. to the child of which his wife was ensient, and if more than one, then 10,000l. to each, and the residue of his property to his son.” He quitted Jamaica shortly after the making of this will, and returned to England, where he continued to reside till his death, which happened suddenly, on the 3d of July, 1815, at his house in Wimpole-street ; he had four children born subsequent to the date of his will ; and his personal property at the time of his decease amounted to nearly 300,000l. His widow was possessed of a considerable landed estate in fee.

The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it. The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the deceased's death, the will of the 21st of July, 1793, was in the custody of his agent in Jamaica ; but in the pigeon-hole of an [448] *eserutoire* in the library in Wimpole-street was found a will bearing date June 21, 1793, originally prepared for execution, but afterwards altered in several places by the deceased, and obviously used as a draft for the will of July 21, 1793. There was also found within the blotting paper leaves of a writing book in the same *eserutoire* (a) the sketch of a

(a) This paper was propounded in the Prerogative Court on the 26th of June, 1816. as the last will of the deceased ; but the Court held that it could not be entitled to

will in the deceased's own handwriting, without date or signature, written on the back of a printed letter from the West India Dock-house, which letter was dated July 6, 1814. And, lastly, there was in the same escrutoire a will made prior to his marriage, and dated Charleston, November 30, 1782.

Swabey and Jenner in support of the will. The question turns upon the birth of three children born subsequent to the date of the will, for whom no provision is prospectively made in that instrument, and upon the legal effect of this circumstance, on a will duly made and executed after marriage. It is important, if the law is already settled on this point, that it should remain unshaken. The will was made just previous to the voyage of the deceased to England; and it is said that it was only intended to operate in the event of his dying on the passage; but his intent is not to [449] be collected from circumstances, or other collateral matter, but from the words and tenor of the will, which is absolute and unconditional, neither temporary nor contingent, in the terms in which it is expressed; and if that construction from circumstances cannot be allowed where words are to be explained, much less ought they to be admitted to supersede a will regularly and deliberately made. In order to substantiate the opposite case, it must be shewn to form an exception to the general law, which is very accurately laid down by Swinburne (*a*) under the head of revoking the testament, and will be found to include most, if not all, the circumstances to be found in this case.

Such as the law stood in Swinburne's time, it still continues; but not entirely without exception as from about the year 1682, which we take to be the æra of its introduction in *Overbury v. Overbury* (Shower's Reports, vol. ii. p. 253); which was followed by *Lugg v. Lugg* (Salkeld, 592, and Lord Raymond), 1698; and afterwards by *Meredith v. Meredith* (1710) in 1710, there have been many decided cases in which wills made before marriage have been set aside both in this Court and in the Delegates, by reason of marriage and issue, as well from the alteration of the state of the testator as his presumed intention, subject, nevertheless, like any other presumption of law, to be rebutted by evidence of a contrary intent.

All such exceptions are *stricti juris*, and we shall [450] contend that there has as yet been no instance, where either marriage alone, or birth of children alone, though attended with hard circumstances, has been thought sufficient, by the law of England, to revoke a will made after marriage. No doubt but that by the civil law the birth of a child only was the revocation of a will, for by that law a will was void when a father passed by a child without notice: and a will was equally destroyed by the birth of a posthumous child. This depended on the strictness of the Roman law, by which a child had a right to a portion of the father's estate, of which he could not be deprived without just cause; but this law was never received here—there is no instance of it. By our law, the father of a family may dispose of his estate as he pleases; it is wholly in his own discretion; if that discretion is exercised imprudently or improvidently, Courts of justice can afford no relief, except in cases of ideotcy or madness. Every will, and revocation of it, must be the act of the testator himself; and it cannot be set aside on any other foundation than a legal revocation by the laws of this country. Alteration of circumstances may reasonably require the alteration of a will; it would be matter of prudence to make a disposition suitable to the change, yet men do not always act with prudence.

The testator also may think of doing it, but die without having made up his mind as to the specific disposition he would substitute, or death may have suddenly intervened before he has taken any final resolution about it: if that should be the impediment, wherever it may occur, it is unfortunate—[451]—nate; but the law has no remedy for such evils; if the deceased is in the progress of a testamentary act, the law will relieve if possible; but a different disposition, if meditated, may from various circumstances be deferred where a person has a will by him; but why persevere in keeping a will if it was his intention to die intestate? Mr. Johnston, by his conversations with his wife, was aware of the existence of this will, and of its operation; to get rid of her importunity on the subject of making another will, he told her it was

probate. It was marked with the letter C, in the registry of the Court, and is the paper referred to under this denomination, in the arguments of the counsel, and the sentence of the Judge.

(a) Part vii. s. 15, title "Of revoking the testament."

time enough to think of that; and on being asked what the consequence would be to his family if he died without a will, he would reply in general terms, "that the law would make the best will for a man," but not that it would make the best will for him. His not having made up his mind to what specific alterations he would wish, if he proceeded to make a new will, may, in great measure, likewise account for his not having done it; he was aware also of the power his wife would have, if she should survive him, over a large real estate which she might charge with provision as she might think fit for any of her children; but it never was his intention by any act or declaration to leave her in addition to her real property one-third of his personal estate. There may be grounds on which to expect that the deceased, if he had lived, might have revoked this will by a new instrument. But it is sufficient for us to say that there is no case in which circumstances, aided by the birth of children alone, has been held to revoke the will of a married man; nor is such a question *res in-[452]-tenga*, the point was fully and clearly decided by the Delegates in *Ward v. Philips* (Prerog. 1732. Deleg. 1734), which is mentioned by Sir George Hay, in his judgment in *Shepherd v. Shepherd*, and as appears also from the manuscript notes of Dr. Andrews who was counsel in that case. The case of *Combe v. York* (Deleg. 1738) seems decided on the same ground.

The reasoning of Baron Carter in the case of *Noel v. Noel* (c) is to the same effect. The case of *Shepherd* (d) itself was expressly referred by Lord Camden from the Court of Chancery to the Ecclesiastical Court, upon a question arising on the birth of a posthumous child, and whether such a circumstance could operate as a revocation of the will and codicil of the father; the case was ably argued, and solemnly decided by an eminent Judge, than whom none could have more feeling for the distress of such an incident, or would more gladly have found ground to set that will aside, as well as all others of a similar kind, as he declared; but he could not break in upon a known rule of law. He readily admitted that marriage, with the birth of children, would vitiate the will of a batchelor made in a state of celibacy; but said that marriage alone would not. Children also born after the making of the will by a married man will not. For a married man must have children in view at the time of [453] marriage; and children only add to his family, they do not alter his state or condition.

It appears also from the case of *Doe on the demise of White v. Barford*,(a) that it is the opinion of the present Chief Justice of the King's Bench, that it would be dangerous to extend the doctrine of presumptive revocations any further than it has been already carried.

The only remaining circumstance is the inception of paper C; and if such a rude and unfinished sketch as this, or any other paper, about which no testator can be said to have taken any final resolution, could be permitted to revoke a will which must be presumed to have been made with deliberation, infinite mischief must frequently ensue; but the rule of law *posterius imperfectum non tollit prius perfectum* has been recognized in numerous decisions, and is not now to be called in question.

Adams and Lushington contra, for an intestacy. We admit that marriage, or the birth of children alone, will not revoke a will; but the question is, whether the birth of children, with other circumstances, will not: Lord Mansfield and Lord Kenyon have put the principles of presumptive revocations on different grounds; the former presumed alteration of intention, the latter held that there was a tacit condition annexed to the will that it should not operate under such circumstances; it is admitted by them, however, and all other Judges, [454] that this principle of revocation is derived from the civil law. The civil law is so far admitted into our law that the birth of children may revoke a will, if accompanied by other strong circumstances; what these strong circumstances are the law does not define; the nature of them may be discovered from decided cases; they are circumstances under which no rational man would expect a will to stand. *Overbury v. Overbury* admits the general principle. In *Parsons v. Lanoe*, Lord Hardwicke takes the distinction between real and personal property and admits the principle of these revocations, though the case rendered it unnecessary to decide the point.

(c) Referred to in the case of *Parsons v. Lanoe*, Ambler, p. 557.

(d) *Shepherd v. Shepherd*, reported in a note to *Doe on the demise of Lancashire v. Lancashire*, T. R. vol. v. p. 49.

(a) *Doe on the demise of White v. Barford*, Maule and Selwyn, vol. iv. p. 10.

In *Wells v. Wilson*,^(a) the Judges at the Cockpit, after much deliberation and repeated hearings, pronounced for the principle we contend for, and decided that the will was revoked; it is impossible to find a case in which a stronger coincidence exists than between this and that; in both, the wills provided for children in ventre de sa mere; in both, the children born subsequently were totally unprovided for; in both the testator had disposed of all his property; in both, the death was sudden. In *Shepherd v. Shepherd* Sir George Hay admits the principle of the decision in *Wells v. Wilson*.

The alteration of circumstances in the present case is as great as can be imagined; the time since the making of the will is twenty-two years; the fortune is augmented from 20,000*l.* to 300,000*l.*; his family from two children to six; nor is it any [455] thing to say that Mrs. Johnston had property of her own, for the estate was hers in fee, and how she might dispose of that can be no argument in law; and so Lord Hardwicke held in the case of *Parsons v. Lanoe*.

Swabey and Jenner in reply. The case of *Wells v. Wilson* was decided on different grounds from those stated; the decision was that a man cannot die with two wills which are substantive and independent of each other, and that where two inconsistent wills are produced of the same date, neither of which can be proved to have been last executed, they are both necessarily void, by construction of law.

Judgment—*Sir John Nicholl*. This is a case certainly of much importance, both to the parties, and as involving a question of law of great extent and consequence. I have considered it with all the attention and circumspection in my power; and I now proceed to the decision of it with much anxiety, and a painful sense of the responsibility that belongs to it. My chief consolation, however, is that, if the judgment I am about to give should be erroneous, it may be corrected by a superior tribunal.

The question of law involved in this case, and to which I have referred, is whether a will made by a married man having certain children is revoked by the subsequent birth of other children [456] left unprovided for, aided by other circumstances concurring clearly to shew (if such should be the result of the facts) that it was not the intention of the deceased that the will should operate.

I will first advert to the facts of the case, observing upon their effect as I proceed, in order to arrive at their true result; and I shall then consider the question of law.

The facts themselves admit of no controversy; they are not involved in contradictory and conflicting evidence. They are stated in the plea, and are admitted in the answers. The testator, Mr. James Johnston, died upon the 3rd of July, 1815, at his house in Wimpole-street, leaving behind him a wife, three sons, and three daughters; one daughter being married, one son and two of the daughters being minors, which son has come of age since the commencement of the suit, and now appears in his own person. The deceased left personal property amounting to upwards of 200,000*l.* There was also a real estate in the West Indies settled upon him and his wife in survivorship in fee. The deceased several years ago resided with his family in the island of Jamaica. In the month of June, 1793, being about to return to England, he made, and duly executed, the will in question, a very few days before he sailed. The prospect of the voyage was probably the incitement to make the will; but there is nothing in the instrument itself, nor is any sufficient evidence laid before me, to render the validity of the will in any degree conditional and contingent upon the event of the testator's safe arrival in Eng-[457]-land. I am of opinion, therefore, on this part of the case, that the will remained valid after the arrival in England of the testator; and that, unless it has been revoked by subsequent circumstances, it now remains valid.

At the time of making this will the testator had two children, a son and a daughter; and his wife was then supposed to be ensient. It is admitted in the answers that his personal property at that time amounted to no more than from ten to fifteen thousand pounds, and his wife was provided for by the settlement of the real estate already mentioned.

Now, by the will in question, he gives 10,000*l.* to the child of which his wife was then ensient; if more than one child, 10,000*l.* to each of them: the residue of his real and personal property he gives to his son; and in the event of his dying without issue, he gives certain legacies.

(a) *Wells v. Wilson*, mentioned in Sir George Hay's judgment of the case of *Shepherd v. Shepherd*, T. R. vol. v. p. 49.

Let me here pause, in order to look at the principle of this will, and at the effect which it now would have if valid. The principle or character of the deceased's testamentary disposition of his personal property (if I may so express it) is to provide amply for his younger children; he is so anxious to discharge that duty that he provides for the child or children of which his wife might then be pregnant. Even if there should be only one child born (which was the case) the whole personality would be exhausted, and the eldest son would have nothing but the real estate.

Such would have been the effect of the will, and such was the intended disposition if the deceased had died soon after his arrival in England. He, [458] however, lived above twenty years afterwards, and had three other children born besides the one of which his wife was pregnant when he made his will; and his personal property had increased to upwards of 200,000*l*. The effect then of the will at his death under the residuary clause is to carry 180,000*l*. of the personality to the eldest son, in total exclusion of the three youngest children, who will be left entirely unprovided for, and even in great disproportion to the other two children, of one of whom his wife was ensient at the time of making his will. This effect is totally inconsistent with the principle and character of the testator's intentions at the time of making his will.

It is also admitted that this will was left in the hands of one of his executors, or his agent in Jamaica; it was handed over from one agent to another, as they severally succeeded to the situation, but it was never in the possession of the deceased himself; it is admitted that he brought over with him no duplicate of this will, he did not execute it in duplicate. He did, indeed, bring over a draft or corrected copy of the will; and in the year 1798 he received an inventory of the papers which he had left at Jamaica, one item of which inventory is in these words: "Under an open cover addressed to Alexander Wright, Esq., is a sealed paper in form of a letter, which was received by Mr. Landale from a Mr. Forsyth; on the sealed paper is written, in Mr. Johnston's handwriting, 'Not to be opened till certain accounts are received of the death of James Johnston.'" The draft of the will and this inventory were found together in the de-[459]-ceased's *escritoir*, where he generally wrote. Now, from these circumstances, and from the conversations with his wife to which I shall presently refer, though there is no reason to conclude that the deceased had neither forgotten that he had made such a will, nor supposed it was no longer in existence; yet still the will was not in his possession, so that he could at any time cancel or burn, or otherwise destroy it. He could only do that by sending for it to Jamaica, or by sending directions there to destroy it, to which he might not choose to trust.

It is farther admitted that for these after-born children the deceased shewed an equal degree of affection, as for those provided for by the will. The youngest son was placed with a merchant, with a view to his establishment with the deceased's assistance in a mercantile house; so that there is every reason to suppose, both from the presumed sense of duty, as well as from his actual conduct and affection towards these children, that he did not intend to exclude them from a provision after his death.

It is also admitted that the deceased at all times, and especially during the latter parts of his life, was very reserved respecting his property and testamentary intentions; and was very reluctant to enter upon the subject, even with his wife: when she commenced the conversation he seemed rather displeased; yet, notwithstanding this disinclination, she did at different times, and as fit opportunities occurred, suggest to him the propriety of his making a will, representing to him that, according to the will made at Jamaica, the [460] younger children would be left unprovided for; that the deceased on some such occasions answered generally, "That there was time enough for making a will, he would take care of that;" now here is not the least appearance of approbation of, or adherence to, the will in question, in these conversations; where the wife represents that the younger children will be utterly unprovided for. He does not in the most distant manner intimate, what has been thrown out in argument, that as his wife in case of surviving him would have the real estate, she might have an opportunity of providing out of the real estate for younger children. Such a thought seems wholly inconsistent, indeed, with the will itself, and with the whole of his conduct, and seems never to have entered his imagination. So far from his having the slightest intention that the Jamaica will should operate, he accedes to the representations of his wife as to the propriety of making a new will; he merely procrastinates, and says, "That it is time enough to make a will, but I will take care of that."

It is further admitted that Mrs. Johnston on one occasion mentioned to the deceased what the consequences to his family would be if he died without having made a new will ; when he replied in general terms "that the law made the best will for a man."

Certainly, parole declarations are always to be received with very great caution ; in general, they are the lowest species of evidence ; though in this Court upon questions of factum, and also upon questions of revocation, the declarations of the de-[461]-ceased are always received as corroborative evidence of intention—both of the animus testandi, and the animus revocandi. The loose declarations which a man often makes in conversation with his friends and acquaintance are of very little weight indeed. They may, on the part of the testator, be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended and misrepresented. But these confidential communications with his wife, upon her serious representations to him respecting so important a subject, are deserving of rather more weight as evidence of the deceased's mind and intentions ; and, judging from those declarations, he does not seem to have had any strong objection, even to an intestacy ; for upon her enquiring whether he intended to make a will he answered "that the law made the best will for a man." Yet, even upon these declarations the Court would be cautious in placing much reliance if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections.

There is before the Court a paper marked C written by the deceased, certainly within the last year, possibly at a later period, of his life. A paper which, if it could have been shewn that it was written at a very short period indeed before his sudden death (as might possibly be the fact), might have prevented the whole of the present question ; for in that case it might have been established as a will, and in its effect it would be completely revoca-[462]-tory of the present will. Paper C is in these words, "Whitehall estate, in the parish of St. Mary's, with the negroes, stock, &c. is settled on J. Johnston and Mary Ballard Beekford, his wife, for their joint lives, and to the survivor of them. If, therefore, I should survive my said wife, I give, &c. the said estate, &c. to my eldest son James Johnston ;" there are then some words struck through ; then follows :—"In the event of his dying without issue, to Robert Ballard Johnston, my second son ; and in the like event as to him, to my third son William Clarke Johnston, their heirs, &c. subject to the payment of legacies ; to my other children, in equal shares, to the following amount, that is to say, to each of my said children, Robert Ballard, William Clarke, Mary Beekford Bevan, wife of Charles Bevan, Esq., Eliza Johnston, and Helen Johnston, and their respective executors and assigns, the sum of out of my said estate, besides the respective shares of my money in the funds, as hereafter mentioned. I give to my brother David Johnston, if he should survive me, and if not, to such children of his as shall be living at my decease, the sum of .

"And to my sisters Jane Johnston and Eliza Johnston, the sum of , and to my sister Helen Carruthers, if she survived me, and if not, to her children equally, as in the case of my brother David's children, the sum of ;" there is a mark with a caret, which refers to a clause at the end, intended to come in here ; "And I give to my said wife, if she survive me, and if not, to my son James, &c. the house in Up-[463]-per Wimpole-street, in which I now live, with the furniture, plate, horses, carriages, &c. which I shall die possessed of ; and to my friends, Patrick Lynch and J. H. Deffell, and to each, the sum of , and all the residue of my property to be equally divided between such of my said children as shall survive me, share and share alike ; and I appoint executrix and executors of this my will, my dear wife, Mary B. Beekford, if she shall survive me ; my son, James Johnston, or the eldest of my sons that survive me ; my brother David Johnston, and my friends Patrick Lynch, of the island of Jamaica, Esq., and John Henry Deffell, of the city of London, merchant."

These are the exact words of paper C ; and this paper is written upon the back of an old letter, which was dated the 6th of July, 1814, so that it must have been written after the date of that letter. The deceased died in less than a year afterwards, namely, the 3d of July, 1815. This paper, for the reasons assigned by the Court, when it was propounded, could not operate as a new will : not being valid as a dispositive paper, it is not per se valid as a revocatory paper : but it is a circumstance

of evidence tending to shew that the deceased did not mean the will made at Jamaica to operate; and it is extremely strong. In its principle of disposition it is the same as the Jamaica will; but in their effect the two wills, from the change of circumstances that had intervened, would be very different indeed. By paper C the whole of his personal property is to be divided equally among his children. The eldest son, so far from [464] taking the residue 180,000*l.* of personalty to the utter exclusion of the three younger children, and in great disproportion even to the other two, would take only the real estate in tail, and subject to the payment of legacies to the other children; the amount of which legacies is left in blank. This approaches, therefore, very nearly to an intestacy: for though the widow was not intended to have her distributive share, as she was provided for by settlement; yet she was to take some benefit under the will; the house and certain effects in Wimpole-street are left to her; and she had in no degree lost the affection of the deceased, for she is appointed to be his executrix.

Now this paper proves, in some degree, the sincerity of the deceased's declarations "that the law makes the best will for a man;" not meaning, however, himself literally to die intestate, for it is clear he meant to make a will: his declarations are, "There is time enough to make a will, but I will take care of that;" but still it shews that it was not the intention of the deceased to depart very far from that disposition which the law would make of his property.

Lastly, it is admitted that the deceased died suddenly of apoplexy, having this intention of making a will; but from indolence, from procrastination, or possibly from not having made up his mind as to the amount of the legacies with which he should charge his real estate, while he is thinking there is time enough, he is suddenly overtaken by death in the manner stated.

Such are the facts of the case. The result of [465] them, so far as respects the intentions of the deceased to revoke, can hardly, I think, admit of question: there is not the slightest circumstance of a contrary bearing. If the deceased had had this will in his own possession, and had not cancelled it, as he did the other old will in his possession, that might raise an inference that he intended it should operate till he had made a new will. If, when his wife conversed with him, he had expressed any adherence to this will, or any substitution for it; such as a desire that she should provide for those younger children; if he had left the residue to her, and thereby devolved upon her the duty of providing for those younger children, by giving the bulk of his property to her, that circumstance might have raised a similar inference: but his answer negatives all these suppositions. It is, "There is time enough to make a will, but I will take care of that;" if, notwithstanding those declarations, he had done nothing, he had taken no steps, some doubt might have been raised; but he does write this paper. If this paper had been the mere inception of a will, or if it had shewn an intention to give a very large portion of the personal estate to the eldest son, it might in some degree appear confirmatory of the will at Jamaica; and, adhering rather to the effect than the principle of that will, it might have raised some doubts whether he had made up his mind to revoke the Jamaica will. But the paper C is the very reverse of all this in its disposition. Again, if, notwithstanding the writing of this paper containing such a disposition, the deceased had had a long [466] illness; had been aware of his approaching death, and yet had taken no steps, nor expressed any desire to make another will; such a circumstance might have carried some inference adverse to revocation; but he died suddenly of an apoplexy.

Looking then at the different papers, attending to the bearing of all the circumstances, seeing that they are all set in one direction, endeavouring also to divest myself as much as possible of any impression arising from the hardship of the case upon the younger children, and looking solely to the just result of the circumstances upon the mere question of fact as to the intentions of the testator, it is the clear moral conviction of my mind that the deceased had not any intention whatever, at the time of his death, that the will made at Jamaica, which is propounded in this cause, should operate.

But the question still remains whether, in point of law, these circumstances, and this result, amount to a revocation of the will.

The general rule certainly is, that a will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*; such as burning, cancelling, making a new will, and the like. Swinburne lays it down in the passage which was

quoted, and read by the counsel, that length of time, increase of wealth, prejudices to relations, or, as he expresses it, to those in administration, all concurring, will not revoke. If a will be made on account of sickness, yet it is not revoked on recovery; though it be made on account of a journey, it is not revoked by a return. He adds, "If a testator, after making [467] a testament, should have a child born, I suppose the testament is not thereby presumed to be revoked, especially if the testator live a long time after the birth of the child, and might have altered the testament, and did not." He then puts several cases where revocation shall be presumed, such as the executor becoming the enemy of the testator, and two or three other cases, which are certainly not law at the present day: Swinburne wrote in the latter part of Queen Elizabeth's reign; the statute of frauds (29 Charles 2) enacted some new positive rules, not only in respect to the factum of wills, but in respect to the revocation of wills: but since that statute there have been several cases decided of implied revocations, many of which have been cited in argument. Under those various cases several points are now settled which may be stated without reference to the particular cases themselves in which they were so decided; first, that implied revocations are not within the statute of frauds; secondly, that a marriage and birth of children do together amount to an implied revocation; thirdly, that marriage, without birth of children, does not amount to an implied revocation; fourthly, that the subsequent birth of children is not alone and without other circumstances an implied revocation. But the point remaining for consideration is whether the subsequent birth of children, accompanied by other circumstances such as those in the present case, and leaving no doubt of intention, will or will not raise the implication of law: or, in other words, whether the circumstance of subsequent marriage concurring with the subsequent birth of issue is an essential ingredient; [468] a sine quâ non, in order to produce an implied revocation.

Now, to solve this question it is necessary to trace this rule (if it may be so called) with respect to implied revocations up to its origin, to see upon what authority the rule stands, and upon what principles it is founded. The importance of the present question requires that this should be done, and in detail.

A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence; nor, as far as I am informed, was it a part of the ancient jurisprudence of any other country. It is not mentioned as a rule existing in Swinburne's time; nor is it enacted by the statute of frauds, or any other statute.

The first reported case in which this rule was applied is, I believe, that of *Overbury v. Overbury*. That was a case of personal property; and after that the case of *Lugg v. Lugg* in 1696, *Meredith v. Meredith*, 1711, and many other cases of personal property, occurred. It was, however, not finally admitted as a revocation of a will of real property until the year 1771, in the case of *Christopher v. Christopher* (cited in 4 Burrows, 2132), in the Exchequer; in that case one of the judges was dissentient, thinking the words of the statute too strong to be got over. Certainly, the words of the statute are very strong that "no devise of lands shall be revocable, except" by certain modes prescribed by the statute, "any former usage to the [469] contrary notwithstanding." No words can be well more clear than these words; but, strong as they are, the judges ventured to get over them—so far as to consider the case out of their operation; and the decision in that case has been adopted in other cases, and has been approved by other judges. The rule then of revocation by marriage and issue stands, in point of authority, not upon any ancient rule of law; not upon positive enactment; but as the result of decisions of courts of justice, even against strong words of positive law; yet founded certainly, in my apprehension, on sound principles, and in order to arrive at substantial justice.

Having thus considered the authority upon which the rule stands, I will next examine the nature and extent of the rule. It is not an absolute, it is only a presumptive, revocation; and this presumption, or presumed intention to revoke, may be rebutted by other evidence. Some questions have arisen as to the species of evidence to be let in. The evidence of circumstances has been admitted in all Courts, and in all cases. In this Court parole declarations have always been admitted in concurrence with other evidence. Doubts upon the admissibility of parole declarations have been raised in courts of common law; Lord Mansfield, in the case of *Cubit and Brady*

(*Brady v. Cubit*, Douglas, p. 38), was decidedly of opinion for their admissibility; but in all cases circumstances tending to rebut the presumption have been received.

It may be proper to refer very briefly to some of the cases in which the presumption has been considered as rebutted. The case of *Brown v. [470] Thompson* (1 Equity Cases Abridged, p. 413) was the case of a will before marriage, made in favour of a woman whom the testator afterwards married, and by whom he had afterwards a posthumous son; and it was held not to be revoked by such marriage and issue, and upon the ground that the will made a provision for the wife, and through her for the son.

In *Cubit v. Brady*, Lord Mansfield lays it down "that a subsequent marriage and the birth of a child affords a mere presumption; there may be many circumstances where a revocation may be presumed. The case in *Cicero (b)* is an old and well known instance of such presumption;" and Lord Mansfield there is made to say further, "I do not recollect any instance in which marriage and the birth of a child have been held to raise an implied revocation where there has not been a disposition of the whole estate. The testator disposed of a small part of his estate in charity; then, in contemplation of his marriage, he settles 600l. a-year on his intended wife, with remainder to himself in fee; it is clear, therefore, that he contemplated the change in his situation, and provided for it as to his wife; and with regard to the children he will be supposed to say, I will keep them in my own power;" he goes on and says, "I am clear on the other ground;" the admissibility of a parole declaration, [471] "that this presumption like all others may be rebutted by every sort of evidence." In this decision the other judges concur; and Mr. Justice Buller, in the conclusion of his judgment, says, "Implied revocations must depend on the circumstances at the time of the testator's death."

The case of *Kenebel v. Scrafton* (2 East, 530) was that of a will made in contemplation of marriage; and by the birth of children after marriage the Court held it was not revoked. Lord Ellenborough says in that case, "Upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This cannot be said to be the case where the same persons who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character."

In the case *Ex parte Lord Ilchester* (7 Vesey, jun. 348) a disposition was made in favour of the children of the first marriage: the testator afterwards married, and had children of that marriage; but that was held not to revoke the will, upon the ground that the children of the second marriage were provided for by the settlement.

In the case of *Sheaf v. York* before the Rolls the question arose on a devise of the real estate to the children of a first marriage; and it was held not to be revoked by the subsequent marriage and [472] issue, because the children of the second marriage would derive no provision, since the whole real estate would descend in case of intestacy to the son of the first marriage; consequently, the revocation of the will, as to the real estate, would not furnish any provision for the children.

I will only mention one or two cases out of these Courts. In the case of *Thompson formerly Myall v. Sheppard and Duffield* (Prerog. Trinity Term, 1782) before Dr. Calvert, it was held that though there was marriage and the birth of children after making the will, yet that the presumption was rebutted; he concludes his judgment in these words, "The facts thus operating against the presumption, I must pronounce it to be the will of the deceased." So again in *Wright v. Samuda* in 1793, before Sir William Wynne. The testator gave some legacies, and then gave the residue of his fortune to his wife; she died, and he married again, and had other children; Sir William Wynne after stating "that there was no difference between the will of a bachelor and the will of a married man, or widower with children, as to revocation;" yet held

(b) Quæ potuit esse causa major quam illius militis? de cujus morte, cum domum falsus, ab exercitu nuntius venisset, et pater ejus re creditâ testamentum mutâset, et quem ei visum esset, fecisset hæredem, essetque ipse mortuus: res delata est ad centumviros, cum miles domum revenisset, egissetque lege in hæreditatem paternam testamenti exheres filius. Cicero, De Oratore, lib. 1, c. 38.

that under the circumstances the presumption was rebutted, and the will was still a valid will. In the case of *Calder v. Calder* Sir William Wynne laid it down "that marriage and birth of children is a presumptive revocation, but the contrary may be shewn, and the presumption be rebutted; declarations of the deceased are admissible, not to revoke a will, but to explain the intention."

In all these cases, and in several others, the will is [473] not absolutely revoked, though followed both by marriage and issue. On such questions, whether it be to examine if the presumption be raised, or whether it be to examine if the presumption be rebutted, the Courts do always inquire into all the circumstances of the case.

What then is the true sense and sound reason and foundation of the rule itself? In looking through the several cases, the foundation upon which the presumption stands, as pretty constantly stated, is the alteration in the testator's circumstances between the time of making his will and the time of his death. If it stood so general, as the mere alteration of circumstances, it would be very loose indeed. If it be added, "total alteration of circumstances," it is not much more definite. But if the case be further examined, we shall find that Courts have required such an alteration of circumstances arising from new moral duties accruing subsequent to the date of the will, as by necessary implication creates an intention to revoke. Here then, I think, we touch upon safer ground, and upon more solid principles. Intention is the very foundation and corner-stone, the very essence, of all wills. The term "Will" necessarily means that it is the testatio mentis. Intention is the principle of factum and of revocation; it is the principle of revocation whether it be direct by act, or implied by circumstances; the animus testandi or revocandi is the governing principle. By Courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation; by their inquiring, in the manner I have al-[474]-ready stated, into all the circumstances, it is quite obvious that they examined into and endeavoured to get at the real intention: but it might be opening too wide a door, if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time are no longer admitted. Courts have, therefore, required that the rule shall have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made; marriage and issue are supposed to produce those new moral duties; every man is presumed to intend the making of a provision for his family.

Having thus arrived at the true foundation of the rule, the question remains to be considered whether both circumstances are required to concur; whether the rule has been so limited, as that subsequent marriage is an essential requisite. Now I cannot help thinking that upon plain reason, and upon substantial justice, it should seem that the concurrence of marriage is not an essential part. The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground work of presumed intention, and may be accompanied by circumstances furnishing as indisputable proof of real intention, as if the will had been made previous to the marriage. Marriage alone may possibly stand upon a different foundation and footing from after born issue. Marriage is a civil contract: the wife may make her own conditions before marriage in order to provide against the negligence or injustice of the husband: marriage settlements are [475] usual: the law, out of the real property, makes a provision for the wife by dower. If she enters into the contract, and takes no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself. But after-born issue are parties to no contract; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father while living to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death. It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them, the law did not allow him to dispose of his whole property; at present he may if he pleases, and the law can afford no relief; but by moral obligation there is a strong foundation laid for presuming that he did not intend to exclude them. In point then of true reason and sound sense the concurrence of subsequent marriage is not essential in all cases. The circumstances of this very case in the most forcible manner do, I think, illustrate the truth of this position.

It must, however, be enquired in the next place whether the authorities and the adjudged cases have held marriage to be an essential requisite.

It appears from the first reported case, as well as from what has been stated in subsequent cases, that the rule was originally borrowed from the civil law. The civil law is certainly no binding authority in this country; it is received where the law of England is silent, and where it is not at variance with the spirit and principles of the law of England; [476] and when it furnishes a sound rule of equity and substantial justice: at all times, however, it has been adopted with great caution and jealousy. Yet, so far as the rule in question has been borrowed from the civil law, it is quite clear that marriage, far from being an essential to that rule, had nothing to do with the subject. By the civil law the matter stands upon a different footing; it is the birth (a) of issue alone that revokes. But even by the civil law the birth of children revokes upon the principle of presumed intention; for it supposes that the exclusion of children was not intended by the testator. The same notion seems to have prevailed in this country, and has given rise to a common error, existing to this day, that it is necessary to cut off a child with a shilling, or some small sum.

In the next place, if we look at our earliest testamentary writer, Swinburne, the result is the same: treating of an implied revocation, he speaks of cases wherein it is raised, and what circumstances will not raise it; but he does not mention subsequent marriage as an essential ingredient, or as in any degree applying to the subject. In the passage already quoted he seems to doubt whether by the law as it was then understood the birth of children would or would not revoke; "he supposes"—that is the way in [477] which he qualifies his expression—"he supposes it would not," especially if there were circumstances tending to shew an adherence to the will. His words are, "If the testator live a long time, and might have revoked the testament, and did not, the rule of the civil law that the birth of issue revokes would not avail." And so is the rule at present; the mere circumstance of subsequent birth of issue, without any other circumstances, is admitted not to revoke; it has been so adjudged: but as to subsequent marriage, Swinburne does not in any manner advert to it.

I come now to the adjudged cases. The first to which the attention of the Court has been called is that of *Wingfield v. Comb* (Cases in Chancery, 16), in 1669; which, not being a question of revocation, is not mentioned as having much bearing upon the point. The case reported is to this effect—A., having a son and other children, married again; five years before he died he made a will, taking notice therein that his wife was ensient, and giving to the child en ventre sa mere 1000l. if a daughter, and 100l. a year if a son, to be settled upon him and his heirs male; and if the son died without issue, then to the plaintiff. The wife was brought to bed of a son, and this son died in the life time of the father; the testator died leaving the wife ensient with a daughter, to whom no portion was left or other provision: the Lord Chancellor Nottingham said, "In case of a devise I cannot help where the law fixeth the estate; but if you come for relief in equity, and there falleth out an unforeseen accident which if the testator had foreseen he would have altered his [478] will, I shall consider of it:" "here he meant, in case he left a daughter born after his decease, to have provided for her; and though it happened the wife had no such daughter when he made his will, yet she was ensient at the time of his death;" the Lord Chancellor then directed a bill to be brought, and that the posthumous daughter should be made a party. This does not seem to be a question of revocation, and therefore does not strictly apply: but it shews the anxiety of the Court to get at the object, and at the intentions of testators; and the circumstance of subsequent marriage did not occur in that case. The Lord Chancellor refers to another case in the course of his judgment: he says, "A. having only a daughter, devised to trustees to convey to the daughter in fee; the testator recovered and had a son; the daughter shall not carry land from the son." Here then, if I rightly understand the matter, the after born son revoked the devise to the daughter, which could only be upon the ground of presumed intention. But here again, as in the former branch of the case, subsequent marriage is not an ingredient.

The first case directly upon the question of revocation was that of *Overbury v. Overbury* (2 Shower, 253) in 1684; and the report is in these words, "Upon an appeal to the Delegates it was adjudged that if a man makes his will, and disposes of his

(a) This was the law of Rome from a very early period: In Cicero's time we know that the point was considered so settled as not to be arguable. Num quis eo testamento quod paterfamilias ante fecit quam ei filius natus est, hæreditatem petit? Nemo: quia constat agnascendo rumpi testamentum. Cicero, De Oratore, lib. 1.

personal estate among his relations, and afterwards has children and dies, that this is a revocation of this will according to the notions of the civilians, this being an *inofficiosum testamentum*." In this report it is to be observed there is no mention whatever of subsequent [479] marriage being an ingredient: upon looking into the original proceedings I find that the marriage was also subsequent to the will; but the report shews that it was not understood by the lawyers of that day that marriage was a material circumstance; for so far from its being considered essential, it is not even adverted to in the report. He states the revocation to be founded upon the idea of the civilians that it was *testamentum inofficiosum*; if it was so, it could only be upon the birth of children, for the civil law looks to that circumstance only; marriage has nothing to do with the subject according to that law. Here then is the civil law from which the rule is supposed to be borrowed; here is the opinion of Swinburne; and here is the report of the first adjudged case upon the question of revocation, all concurring in considering the birth of children as the essential ingredient, and in which marriage is in no degree adverted to as a material circumstance.

The next case is that of *Lugg v. Lugg* (2 Salkeld, 592. 1 Lord Raymond, 441), which happened in the 8th William III.; the report in Salkeld is in these words—"Before a commission of Delegates—one being single made his will, and devised all his personal estate to I. S.; afterwards he married and had several children, and died without other will or dispositions: and now coram delegatis of which Treby, C. J. was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the [480] same mind." Here both of the circumstances are mentioned—the subsequent marriage and the birth of children; but it is put upon the evidence of presumed change of intention arising from change of circumstances, not adverted specifically to marriage as one of the circumstances, but that all the circumstances taken together did amount to presumptive evidence to shew that the testator did not continue of the same mind.

The next case which has been adverted to is *Meredith v. Meredith* (Prerog. 1811) in 1711; of that case I happen to have two manuscript notes, both in the handwriting of Dr. Andrews. I am not able to ascertain which was first made; but they both state the circumstances of the case to the same effect, and I will read them both at length. "*Meredith v. Meredith*, 1711. Henry Meredith in 1708 made his will, and therein makes his brother Roger Meredith his executor; he afterwards marries and settles the leasehold estate in trust for him and his wife, during both their lives; and after their decease for his executors if he makes a will, or administrators if he dies intestate: he leaves issue one daughter, and dies. Among his writings is found the draft of a will, which begins in these words: 'In the name of God, Amen. I give all my estate in the manner and form following, that is to say, I give to my wife all my plate and jewels,' and there leaves off. The brother prays probate of the will of 1708; the widow desires administration with the testamentary schedule annexed. Per Curiam. Sir Charles Hedges decrees administration to the widow with the testamentary [481] schedule annexed. In *Overbury's case* it was determined that the subsequent marriage and the birth of issue destroys a will made before marriage. The beginning another will shews that he intended the first should not be in force, but was supposed to be revoked by the marriage settlement." Dr. Andrews, in this report, does not state the question or the grounds of decision very pointedly. The other report is in these words: "*Meredith v. Meredith*. The testator left a daughter, and died possessed of a lease of tithes about 100l. a year, held under the Archbishop of York; by marriage articles this was settled on his wife for life, then to his executors and administrators; he died at Christmas, 1710. Among his papers was found a will dated 1694, and another 1708, in which Roger Meredith, the plaintiff, was executor, and this lease given him; there was likewise an imperfect will, in which the testator gave his wife some jewels and plate, but went no farther. Question if the marriage articles, a child born after this will, and another will began, was not a revocation of that of 1708. Judge of opinion it was, and founded himself principally upon the birth of the child; and *Overbury's case*, which has been adjudged in the Delegates, was quoted as an authority, and decreed administration to the widow with the paper annexed." Here then Dr. Andrews does state the question: he mentions the circumstances upon which the case was to be decided, and states the ground of decision.

Now there are some observations which present themselves upon these notes. In the first place, the putting this lease in settlement could [482] only have revoked the will pro tanto; namely, so far as respected the bequest of that lease. The testamentary schedule could not be a very material circumstance, except as a circumstance of evidence, because it certainly of itself could not have revoked the whole will, inasmuch as it was merely the inception of a new will, and according to every rule the inception of a new will will not revoke; but as far as it goes, it is to be taken in conjunction with the former will. The marriage itself could not be a very material circumstance, because there was a settlement made providing for the wife; but the report says the judge founded himself principally upon the birth of the child: that is expressly stated by the reporter as the principal foundation of the decision. The marriage is not even adverted to; where he is stating authorities he considers *Overbury v. Overbury* as a parallel case, and seems to have been aware that subsequent marriage had occurred in that case, though the report in enumerating the grounds of the sentence does not mention that circumstance; so that it seems to have been, upon all the circumstances considered together, the birth of a child being the principal circumstance, and marriage not even mentioned (at least by the learned reporter it was so understood), that Sir Charles Hedges held the will to be revoked in the case of *Meredith v. Meredith*.

The next case adverted to is that of *Ward v. Phillips* in 1734; it is very shortly stated in *Shepherd v. Shepherd*, in the 5th Term Reports. The circumstances were these: Captain Rowland Phillips died in September, 1731; leaving a widow and three children at the time of his death; no will [483] was found; the widow had renounced the administration; which was granted to the grandmother of the children; the widow afterwards married Ward, the plaintiff; a will was subsequently found in a portmanteau among a parcel of papers; it was made twelve days after the marriage, and gave every thing to the wife; evidence was gone into to shew that the testator had afterwards a bad opinion of his wife, that they lived upon very bad terms, that she had been confined in a madhouse for a very considerable time, and that in the latter part of his life he lived separate. The Prerogative Court appears to have pronounced against this will, not upon any question of revocation, but upon failure of the proof of the factum. I have looked into the pleadings and evidence; and, as far as can be collected, it appears that the opposition was directed against the factum; it was offered to prove that it was a forgery, that the testator was abroad at the time the will was made, that he lived on ill terms with his wife, &c. Thus the original grounds intended to shew that he had made no will, and not to raise the question of presumed revocation. The Delegates reversed that decision, and were of opinion that the factum was fully proved; they were also of opinion it was not revoked—for from the notes of counsel it appears that this point was raised and discussed, namely, whether the will was revoked or not—and I find in some subsequent cases it has been quoted, both in argument and decision, as an authority that the birth of children alone will not revoke. But suppose the direct point to have been raised, solemnly raised, instead of occurring accidentally in argument, I think that there were [484] grounds upon which the Delegates could not decide otherwise than for the validity of that will. The will is made twelve days after the marriage; why, certainly, at that time the testator must be presumed to have contemplated the birth of children; he must have made his will in contemplation of that event; he thought it proper at the time to give the whole to his wife; it is by no means an uncommon thing both for a husband expecting children, and a husband having children, to give every thing to the wife, under the idea that his death will devolve upon her the duty of providing for those children; and that he enables her to discharge that duty, and provide for them by leaving her the bulk of his property. In the case of a will made in that way twelve days after the marriage, when the event of children must be presumed to be contemplated, it would have been exceedingly dangerous to have held such a will to be void; besides, it was proved that the will remained in the deceased's own possession, in a trunk with his own letters; there was no inception of any new will, so that the revocation must have arisen, if at all, upon the state in which the deceased afterwards lived with his wife; but the two great circumstances of difference between that case and the present are those already referred to, first, that the property being given to the wife, the duty of providing for the children devolved upon her, and, therefore, they could not be considered as unprovided for; and, secondly, that the will was made at

a time when he contemplated the fact of his having children. That case then, though of very considerable weight, yet does not appear to me to go the whole [485] length of establishing that the birth of subsequent children accompanied by a different combination of circumstances may not, without subsequent marriage, raise a presumption of revocation.

The case of *Parsons v. Lanoe* (Ambler's Reports, 557) in 1748, was this: Colonel Lanoe, a married man, but without children, made his will on going to Ireland; he afterwards returned, and children were born; the question was, whether the will was revoked by his return, or by the subsequent birth of children. The Lord Chancellor decided that, upon the words of the will, it was to be considered as contingent upon his return from Ireland, and consequently was void, and he thought it therefore unnecessary to decide the second point; but the very circumstance of the second point being argued, and the reserve which is maintained upon it by the Lord Chancellor, shews that, at that time at least, there was no such rule understood in the Court of Chancery, as that the concurrence of subsequent marriage was essential to the revocation of a will.

The case of *Altham v. Gray* is, I think, admitted on all hands to have very little bearing on the question, and therefore it is useless to quote it.

The next case is that of *Wells v. Wilson*, decided at the Cockpit in 1756. It is cited in the case of *Shepherd v. Shepherd*, as reported in a note of the 5th Term Reports, and given in the judgment of Sir George Hay. I have seen the printed cases; and several inaccuracies in the case as reported in *Shepherd v. Shepherd* certainly exist. I have never seen the appendix of the case, so that I am not ex-[486]-actly aware how the evidence stood upon the contrary statements which are made in the printed cases; but, from them I think the facts may be collected to have been as follows:—Mr. Nicholas Taylor was the deceased; he died at St. Christopher's in 1751; he left a widow, and five children, and a very considerable real and personal estate; the will in question was dated November 5, 1748; he gave to the wife one-third of certain plantations for life—and the furniture absolutely; he gave to his daughter Elizabeth, and his son William, and the child or children of which his wife was then pregnant, 31,000l. between them; the instrument concluded with the words, "I hereby revoke all former wills by me made, and acknowledge this my last will and testament;" the will was written on one side of a sheet of paper; on the other side of which was written another testamentary paper, expressed nearly in the same words, and almost to the same effect, but which was neither dated nor signed; the deceased left two children born after the will was made; one of them I collect to have been the child of which the wife was then ensient—the other was wholly unprovided for; in 1749 the deceased had a fall from his horse, but recovered and lived two years afterwards; it was alleged on one side that he frequently declared that he had made no will; and after his fall he said "it was lucky that he had recovered, for his affairs would have been left in great confusion;" but on the other side it was asserted that he had often declared he had made his will, and only thought of altering it: six months before his death, he had asked Mr. Wilson to be his executor; [487] it appeared that he was equally fond of those two younger children, as of the others, and his fortune had considerably increased since the making of his will; in his last moments a person had been sent for, to make a will for him, but when he arrived, the deceased had become delirious, and consequently could not make another will: the will in question was found in the bottom drawer of his bureau; on one side it was asserted that it was found among loose papers; on the other, it was asserted that it was folded up among papers of consequence. At St. Kitts the will was pronounced for; but this sentence was reversed before the Committee of the Privy Council for hearing plantation appeals. It has been contended that doubts must have arisen which of the two papers was first or last written, and also whether the will was meant to act upon real estate. As to which of the two papers was first or last written it could not be material, because the one paper was executed, and the other was not; the papers were nearly transcripts of each other, there was no very material difference in the disposition; taking them either way (though certainly, the probability is that the unexecuted was first written because the executed one was more formal than the other—the one was dated, the other without date—the concluding words of the one are, "I do hereby revoke all former wills by me made;" the other was the same, with the addition of, "and I acknowledge this to be my last will and testament"), but take it either way, suppose

that he wrote the unexecuted paper first as a rough draft of his will, and the other afterwards, making some alterations as he proceeded, and then dated and [488] signed it; there can be no doubt whatever but that the executed instrument would supersede the other: taking it the other way, that he having executed the one paper began this other paper, but did not go on to complete and sign it, what would be the construction in that case? Why, that he afterwards gave it up, and abandoned it, remaining content and satisfied with the will as it was executed and before signed by him. There can be no doubt, therefore, but that the executed paper was the only valid instrument. The Court might well wish to see the paper itself; they might well suspend their judgment till it was produced, for there might have been something important arising upon the face of it; but it is evident from the report of the case that Sir George Hay, who had been counsel in the cause, did not consider the cause to have turned upon any point as to which of the two instruments was the last. Again, it has been said that the will was intended to operate upon real estate; and therefore not being sufficiently executed for that purpose, that it could not be a valid will, as to the rest of the property; but it is surely unnecessary to state that this circumstance would not affect its validity as to the personalty. The factum then of the paper having been established, as it must have been in that case, the Court could only hold that it was revoked by circumstances. Now among the circumstances, subsequent marriage did not occur; the birth of children, accompanied by other circumstances, must have been the ground of holding the instrument revoked. Sir George Hay, in speaking of this case in *Shepherd v. Shepherd*, evidently so considers it. This then is an affirm-[489]-ative case; and upon the point whether marriage is essential to revoke, one affirmative case holding a will revoked without that ingredient is infinitely more decisive than many cases without that circumstance in which the will is not held to be revoked; because it might be held not to be revoked on account of the absence of other circumstances tending to prove the intention of the testator to revoke it.

The case of *Shepherd v. Shepherd* goes no further than to shew that the naked fact of after-born children does not revoke. That was a case sent out of the Court of Chancery for the opinion of the Prerogative Court. In the Term Reports (vol. 5, p. 51) it is thus stated, "Shepherd, the testator, having made his will, after some small legacies to his collateral relations, made his wife residuary legatee; after the will in 1763 his wife was brought to bed of a daughter; upon the birth of this child the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300l. should be secured on the residuum, and paid to his daughter; the codicil and will were found together," I presume found together in possession of the deceased. "In 1765 another daughter was born; in 1768 a son, who was a posthumous child, the testator having died about six months before his birth; these two last children being unprovided for, this suit is commenced to set aside the will, and decree an intestacy: whence it appears that the question is [490] whether the testator's will is revoked by the subsequent birth of two children who now remain unprovided for." That very able judge decided that under the circumstances of the case the will was not revoked, that the mere fact of after-born children did not revoke. Certainly, that case, as far as it goes, is binding upon me; and if it be not presumptuous, I should add, that it is a decision in which I am disposed to concur. Upon the question of intention, which in the judgment given by Sir G. Hay is admitted to be the governing principle, he says, "It has been urged that the intention of the testator would govern, if the intention be consistent with law: this is certainly true, but that intention must be plain and without doubt; but that is not the case at present, for here is no guide to be found." Upon the intention to revoke very considerable doubts might well be entertained under the circumstances—the will was not of very old date; it was in the testator's own custody; and upon the birth of the first child, so far from revoking it, he makes a codicil providing for that child out of the residue, and confirms the will: and upon the birth of other children he might also intend to make a provision for them out of the residue by further codicils, or he might not ever intend to do so; for having given the residue to the wife, having lived with her a longer time, he might be presumed to have confided to her the duty of providing for those children. Here was no inception of a new will: still less was there an entire new disposition, inconsistent with and therefore tending to revoke [491] the former. So far, therefore, from the intention being "plain and without doubt"—which Sir G. Hay

states as being necessary—the probability of fact is rather an adherence to the will, or at most that he meant to provide by codicil for after-born children.

The utmost length, therefore, that the decision in that case goes is, that the mere subsequent birth of children, unaccompanied by other circumstances proving intention, does not amount to a presumed revocation.

To the same extent but no further, hardly indeed so far, goes this last case which has been decided, viz. that of *Doe on the demise of White v. Barford* (4 M. & S. 10) and another. The plaintiff claimed under the will of one J. Borteel, who, being seized in fee in 1791, married, and in 1792 made his will and devised the premises in question to his niece, from whom the plaintiff derived her title. Borteel died leaving his wife ensient, which was unknown to either of them at the time of his death; and afterwards the wife was delivered of a daughter, from whom as heir at law the defendant derived his title; and the question was, whether the alteration of circumstances was a revocation of the will. The learned Judge at nisi prius ruled that it was not a revocation; and the Court of King's Bench was of the same opinion. Lord Ellenborough says, "The argument seems to be that the testator, had he known his situation, ought to have revoked his will; therefore, the law will impliedly revoke it:" then he goes on to say, "Where are we to stop?" [492] so that it was the mere naked fact of the after-born child—no corroboratory fact to shew an intention to revoke; indeed, if actual intention be necessary, in this case of *White v. Barford* it could not have existed, because the wife was not herself aware of being ensient; and, therefore, the husband could not, in fact, have intended to revoke; and the will could only be held to be revoked by fiction of law. The Court of King's Bench did not, I apprehend, mean to lay it down that no possible combination of circumstances, accompanying subsequent birth of children, can amount to an implied revocation, unless marriage be one of the concurrent circumstances.

The very circumstance of trying this case so recently, and even applying to the Court for a new trial, shews by some degree of inference that no such rule is considered, even at the present moment, as being settled in Westminster Hall.

The same inference is to be drawn from the Court of Chancery's having sent the case of *Shepherd v. Shepherd* to this Court: nay, Sir George Hay himself seems to me to have laid down the reverse; and seems to have held that the case of *Wells v. Wilson* was a case establishing that, with special corroborating circumstances, the birth of children might revoke without after-marriage; for he states, "as marriage alone will not revoke, so the birth of children will not revoke unless upon very special circumstances. It has been done sometimes under a combination of circumstances, but never on the mere ground of the birth of a child: the first case I remember of that kind is the case of [493] *Wells v. Wilson*, at the Cockpit." Laying it down, therefore, that the birth of children, with special circumstances, may revoke; and referring to the case, of *Wells v. Wilson*, as a case in which it had been so held; and speaking of that case, not as a singular case, but only as the first case. It is very possible that the report may be incorrect in that respect; or it may be that though no other case has been found, one or more may have existed; though, from the decisions of this Court not being reported, it is possible it may have escaped notice. Sir George Hay, in stating the case, specified the combination of circumstances under which the revocation was held: he had been of counsel (as already noticed) in the case, and is now stating the facts judicially, so that it must be inferred that he stated them correctly. The way in which he states them is this, "The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that, and the frequent declarations of the testator, the state of his mind, and his repeatedly declared intention in the interval between the fall and his death." Now it so happens that all those circumstances do occur here: and even others still more decidedly furnishing evidence of intention to revoke. In this case, as in that, there is a strong anxiety to provide for after-born children shewn in the will itself; for in each case the testator provides for the child with which his wife is ensient: in this case as in that the residue is given to the eldest son; but here it is clear that he did not mean to give to his eldest son more of his personal estate than to the rest of his family: as far as we can rely on [494] the papers produced in that case, the declarations were loose and general; but here the declarations to his wife are confidential and precise, that "there is time enough to make a new will, but he will take care of that." In that case, though he intended to make a new will, and the person was sent for, but arrived too late, yet there were no

instructions given—nothing begun—nor was it known what the import of such new will might be: though he had had a violent fall from his horse two or three years before, endangering his life, yet, even under that sort of incitement, he only talks of, but does not set about, making a new will: but in the case before the Court, here is not only the inception but the entire outline of a new will: this new will shews a complete departure from the effect of the former will, as I have already mentioned: this new will shews that, so far from intending that the immense residue of his personal property should go to his eldest son, he even meant to charge the real estate, before the son was to enjoy it, with legacies to younger children.

The deceased, when talking of intestacy, seems to have had but little objection to it; he says, "The law makes the best will for a man." He might not mean to die intestate, and yet have no very great objection to it.

Finally, here is sudden and unexpected death. Now in some of the earlier cases the inception of a will was considered a very important circumstance, as shewing an intention to revoke; at one period, before the law of this Court and its principles were correctly settled, an unfinished paper, coupled [495] with sudden death, would have been established, even though a considerable interval had elapsed between the writing of the paper and the death of the testator. I doubt whether at the period to which I allude, paper C might not have been established: but it is now clearly settled that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for; and it must be shewn that the testator adhered to the intention, but was prevented from finishing it. But still the writing such a paper and sudden death are extremely strong circumstances, in addition to the birth of subsequent children, to establish the intention to revoke. The present case, therefore, has a combination of circumstances, which appear to me to be stronger than those of *Wells v. Wilson*; and as strong as can well be imagined, tending to shew that it was the intention of the deceased not to adhere to the old will which he had made under very different circumstances twenty years before.

The Court has been reminded, and not improperly, that it cannot make or alter the law; that it cannot make or revoke wills; and undoubtedly it cannot: it is bound conscientiously to administer the law as it finds it; to ascertain its true principles; and to be governed by established rules. It is for this reason that the Court has endeavoured, as far as was in its power, to trace this matter up to its true principles; and to ascertain the rules growing out of those principles; and to be governed by them. The first principle of all [496] wills is the intention of the testator. Positive law and the decisions of Courts have prescribed certain rules for ascertaining that intention. They have prescribed that a will of land shall not be good unless executed in the presence of three witnesses; that a will of personalty shall not be good (with certain exceptions), unless it be in writing. So again, the law has established rules for ascertaining the intention of revoking; in some cases it requires certain acts to be done by the testator. It has also, from certain circumstances, implied an intention to revoke. The change of circumstances may imply a change of intention; but the great circumstance which has been regarded as laying the foundation of this implied change of intention is the subsequent acquirement of new moral duties. It is the duty of a father to provide for his children. The law upon that duty as the principal circumstance may safely found the intention to discharge it. The Roman law acted upon that circumstance alone, and presumed an intention not to exclude the children. The law of England has not gone so far. It has adopted it as a leading circumstance, but not as alone sufficient to shew an intention to revoke; marriage, however strong it may be as a concurrent circumstance, is not, as far as I have been able to trace the matter, absolutely essential: it was not the doctrine of the civil law; it was not held to be essential by any thing laid down by earlier writers. It is not considered as essential in the earliest cases. And in tracing the doctrine downwards, I have been unable to find it settled, [497] that a revocation cannot take place without the concurrence of subsequent marriage. On the contrary, as far as I can understand the case of *Wells v. Wilson*, there is one case at least in which a will has been held to be revoked by the birth of children, without the concurrence of subsequent marriage, but accompanied by other circumstances.

The Court has been also warned in respect to the danger of rendering the law vague and uncertain: undoubtedly it is the duty of every Court to be cautious of opening a door to uncertainty; but Courts must also be cautious lest, whilst they are

attempting to establish rules to guide to certainty, they do not undermine principles, defeat intention, and thereby lead to injustice. Courts have not gone that length. Even where marriage and issue do concur, they have not held such a concurrence to be a positive revocation; but all the circumstances are let in for the purpose of ascertaining whether it was, or was not, really the intention of the testator to revoke. The danger of uncertainty appears to me to be little, if at all, greater in that case than in the present.

Unquestionably where a will has been once regularly made, the presumption of law is strong in its favour; and, as Sir George Hay states, "The intention to revoke must be plain, and without doubt." But, under all the facts of this case, taking the subsequent birth of issue as the essential basis of the proof, and accompanied as it is by the other concurrent circumstances, I am of opinion that the intention of the testator is "plain, and without doubt," [498] and, therefore, that I am warranted in law and justice to pronounce against this will, upon the ground that it has been revoked.

Application was made that the Court would direct the expences of the suit to be paid out of the estate.

Per Curiam. Certainly.

[499] CONSISTORY COURT OF LONDON.

POUGET v. TOMKINS, FALSELY CALLING HERSELF POUGET. Hilary Term, Jan. 24th, 1812.—The marriage of a minor annulled on account of a fraudulent publication of banns.

[S. C. 2 Hag. Con. 142. Referred to, *Holmes v. Simmons*, 1868, L. R. 1 P. & D. 530.]

William Peter Pouget was born at Surat, in the East Indies, on the 5th of May, 1794. In the month of May, 1810, his father, who at that time resided in Blandford-street, Portman Square, was informed by one of the servants in his family that his son had been married, in the preceding January, to Lucretia Tomkins, his grandmother's maid. Upon investigation, it was ascertained that the marriage ceremony had taken place in the church of St. Andrew's, Holborn, after a publication of banns, under the names of William Pouget and Lucretia Tomkins, in which they were both described as residing in that parish. It was in evidence also that an attempt had been first made to have the banns published in Highgate Church: but, upon the names being delivered to the clerk, he asked if the parties resided in Highgate parish; to which the bearer of the paper on which the banns were written (a servant girl in Mr. Pouget's family) replied, "That she believed they did, but she did not know where." This answer not satisfying the clerk, no further steps were taken for their publication in that parish.

[500] *Judgment*—*Sir William Scott*. This is a suit brought by the father of William Peter Pouget to annul a marriage contracted by his son, on the grounds of minority, want of consent, and undue publication of banns.

William Peter Pouget was a minor at the time of the marriage, having been born in May, 1794, and married in January, 1810, at St. Andrew's, Holborn; his father's residence, and consequently his, he being resident with his father, was in the parish of Marybone; his alleged wife was a servant in the family; her age does not appear; the letters exhibited from her shew her to have been an uneducated person.

The minor's name of baptism is William Peter; it is proved that the name of William was merged in that of Peter, which was the only appellation in common use. Maria Perkins says that he was scarcely known to have any other name, except by his very near relations; she is supported in this by other witnesses; his letters were generally subscribed Peter, and rarely William Peter Pouget; in the letters of the party against whom the suit is brought she styles him Peter, and it appears that she always, in mentioning him, termed him Master Peter; so that it is clear, however William might compose a part of his baptismal name, the other had obliterated it in common use. The name of William Pouget would not describe him to most persons so as to notify him to be the person so described.

[501] By what preliminary measures the marriage was brought about does not appear; nothing transpires before an attempt to publish the banns at Highgate, which miscarried. One of the witnesses carried the banns to the clerk at Highgate, who asked if the parties resided in the parish; her answer implied that she believed they did not, and in consequence thereof the publication was declined.

It appears in this case that the banns upon which the marriage afterwards took place at St. Andrew's, Holborn, were delivered by the minor; a circumstance which would not take away the fraud, for that is charged to have been committed not on the boy himself, but on the parental rights of the father; and though the case might have been grosser if it had been proved that the party herself, who is proceeded against, had been active in giving the banns for publication, yet it makes no such a material difference that they were given by the boy himself, as to the fraud upon the parent.

The account which Mary Hemming gives of the marriage is that the parties in her presence were married by the names of William Pouget and Lucretia Tomkins. The clergyman asked the name and residence; he answered that his name was William Pouget, but he was confused in his answer as to his residence. The brother of the woman answered concerning the residence; he probably, therefore, was the principal mover in the business, although this does not distinctly appear; but it is clearly established that the banns were published in the name of William Pouget, [502] omitting the Peter, that the father was totally ignorant of the marriage, and that he was not informed of it till some months afterwards, when he was both surprised and grieved.

The act recites the general inconvenience which had arisen from clandestine marriages, and professes to prevent it in future. For this purpose it directs a notice in writing of the true christian and surnames, and residence of the parties, to be given in writing to the minister seven days before, otherwise he is not obliged to publish them; but he is not forbidden to publish them, though not so delivered; and I suppose that this regulation respecting the time of giving the names is not very generally observed in practice.

It is the clear intention of the act that the true names should be published; it was not necessary to insert this in the act. It had already directed that true names should be given in for publication; and if it had not, still if the true names are not published, it is no publication; no notice is given, and there is no opportunity afforded to persons interested in preventing the marriage of knowing what is about to take place; no one can allege any impediments to a marriage between persons not known by the description. It has been held, therefore, from the case of *Early v. Stephens* (Consistory Court of London, 1785) downwards that a publication in false names is no publication; to hold otherwise would be contrary to common reason, and to the whole intention of the act.

[503] There being then a variation in the name here, the question comes whether the variation is sufficient to nullify the marriage. The true christian name is William Peter; in strictness, all baptismal names should be set forth, for in strictness all compose but one christian name. I understand it is so held at common law in a plea of abatement on account of misnomer. In proclamation of banns, therefore, all names should be published; for all make but one name, and the party may be known by one to some, by another to others; at the same time I should be afraid of going the length of saying the proclamation would be vitiated in all cases by want of this full enumeration; where there is no fraud intended on either side, the mere omission of a dormant name by accident or negligence—all parties interested knowing the fact, and the identity of each of the individuals—and all circumstances being clear of all purpose of imposition, I think it would be an unreasonable rigour to hold a marriage void for such an omission alone.

But where the omission is known to both, where it is intended by both as a fraud on a third party, it is not to be deemed a mere omission; but a suppression to avoid the rights of another, and to defraud them. In such a case I think the Court would be called upon to enforce the strict letter of the law, and by so doing to maintain the spirit of it.

It has been argued that it is provided in the act that, after the marriage has taken place, the residence shall not be inquired into for the purpose of annulling the marriage. This, however, shews that other points may be inquired into for that purpose, and, amongst such points, is the publication of banns on which the marriage has taken place.

Thinking, therefore, that the Court is called upon to act on these principles, I have to consider the evidence, in order to see whether it is a casual omission, and not intended to mislead, or if it is a fraudulent suppression in order to effect a marriage

which would not otherwise take place. If one name is dormant, and that is omitted, it seems that it would be no more than a fair presumption that it was accidental, for where could be the use of omitting an unknown name? But here the name is omitted by which he was usually known and called in the family; even by this person in her letters. This can leave little doubt but that the concealment was intentional, and for the purpose of deceiving the father or the friends of the family who might convey the information to him; and this appears to be a very deciding criterion between the accidental case and the fraudulent, unless other circumstances of greater weight countervail its effect, and give the transaction, as they possibly may do, a different character: in the present case, it rather appears to the Court that other attending circumstances confirm the impression of fraud which the suppression of the name had already affixed to it.

The banns were actually published, and the marriage celebrated in St. Andrew's, Holborn, the real residence of the father being in Marybone. [505] An objection was taken on the admission of the libel which stated these facts that it was against the provisions of the statute to inquire into the residence in order to annul the marriage on that ground. The answer given that the pleading of this circumstance was not used to invalidate the marriage directly, but only as a support to the charge of fraud, did not entirely satisfy the Court; which, however, admitted the libel with some hesitation, reserving to itself the power of further considering the admissibility of any evidence that might be adduced upon that very point. But it rather appears to me that another circumstance, though of the same kind, which this case presents, is in a less degree liable to the objection. I mean the fact upon which this marriage was not obtained, the attempt to procure a fraudulent publication of banns at Highgate, which proved ineffectual: for the publication was refused, because the parties could not vouch for their residence in that parish; and nothing followed. This, I think, stands more clear of the objection upon which the Court still retains its doubt, whether it could, consistently with the act of parliament, admit any averment that the marriage took place in a parish which was not the parish of the parties, though that averment was introduced only as proof of fraud, and not as a ground of nullity, for here no such marriage followed from that act; it stands as a naked attempt of fraud, no consequence following from thence, and being such an attempt of fraud, so qualified, hardly comes within the prohibitory [506] language of the statute. It will not disturb a marriage effected by its means, but is a substantive attempt of fraud on the part of these persons, not immediately and directly contributing to the present marriage; and as being so, is more free from the objection to which it would be liable if it were. If so, here is a direct evidence of a fraud auxiliary to the imputation of fraud employed in the immediate transaction.

The probable disparity of years is another subsidiary circumstance; the boy is a school boy of sixteen years of age, the age of the other party does not appear; but certainly the fair presumption is that it exceeded that age.

Upon the joint effect of all these circumstances, I think myself justified in pronouncing that the publication containing this omission was fraudulent and false, and that the marriage had thereon is null and void.

REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOSEPH PHILLIMORE, LL.D., Advocate in Doctors' Commons, Chancellor of the Diocese of Oxford, and Regius Professor of Civil Law in the University of Oxford. Vol. II. Containing Cases from Hilary Term, 1812, to Easter Term, 1818, inclusive. London, 1822.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

WHINFIELD, BY HIS ATTORNEY *v.* WATKINS. Consistory Court of London, Hilary Term, January 31st, 1812.—The sequestrator of a benefice is bound to repair the vicarage-house and buildings; and liable for dilapidations in the Bishop's Court.

This suit was instituted by Mr. John Skinner, the attorney of the Reverend William Whinfield, vicar of the vicarages of Ramsay and Dover Court, with the chapelry of Harwich, against George Watkins, the receiver of the tithes and other emoluments of the said vicarages, in virtue of a sequestration issued under the seal of the Consistorial Court of London.

The libel pleaded that the Rev. W. Cowper was on the 3d of Feb., 1786, lawfully instituted and inducted into the vicarages of Ramsay and Dover [2] Court, with the chapelry of Harwich; and continued in possession of them till his death, which happened on the 26th of Nov., 1809: that from time immemorial a vicarage-house with offices, and premises at Ramsay, and a farm-house and out-houses at Dover Court, have belonged to the said vicarages, and a small house situated at Harwich has belonged to the chapelry of Harwich; and that the Rev. W. Cowper held and possessed the same during his incumbency.

That on the 29th of July, 1805, a sequestration of these benefices was granted to George Watkins, in virtue of which he, from that time till the death of the Rev. W. Cowper, received all the tithes of profits arising from them; that the said tithes and profits have been more than sufficient to defray the expences of repairing the dilapidations of the vicarage-houses, farm-house, &c.: and that George Watkins is by law obliged to repair the said dilapidations.

That, during the incumbency of William Cowper, and at the time of his death, the said vicarage-houses and other buildings were in a very ruinous condition; and stood in need of very many reparations: that to amend and repair them will, on the most moderate computation, amount to the sum of 565l. 3s. 6d.

That George Watkins has been asked and requested by the Rev. W. Whinfield, or some person on his behalf, to repair the dilapidations aforesaid; but has refused, and still continues to refuse so to do.

The libel concluded by praying that George Watkins might be compelled to pay the costs [3] and charges of the repairs of the said dilapidations, according to a schedule and estimate which were annexed to the plea.

Arnold against the admission of the libel. The act of sequestration appears here

in the ordinary form under the king's writ, the process issues for the purpose of the payment of debts, the common law takes cognizance of these matters, as appears from Degge: (a)¹ if so, it must be held that debts shall be preferred to dilapidations; [4] the sequestrator, therefore, being liable to satisfy the debts before he repairs the dilapidations, it is incumbent on the party proceeding to shew not only that he has received sufficient for the dilapidation, but also sufficient in the first instance to satisfy the debt: the case of *Hubbard v. Beckford* (Consist. 1798) will probably be cited; but in that case the Court found by the account that there was a surplus in the hands of the sequestrator; and, therefore, held him liable.

Besides, in the process of sequestration it is recited that previous sequestrations of the same kind had issued; the party proceeded against was only four years in possession of the sequestration; some of the former claims may be still subsisting; the dilapidations are pleaded generally to have [5] been incurred during the incumbency of the late vicar; may they not have occurred during the possession of the present sequestrator? The last sequestrator cannot be held liable for all the charges of this description, when he received his sequestration without prejudice to the former sequestrators.

There is another objection which applies to form rather than to substance; the suit is brought by the attorney of the present incumbent, the incumbent himself being abroad. In a libel, we apprehend, the party is bound fully to set forth the title under which he can recover; here the party acting has no title of his own; and, therefore, he is compellable to exhibit the authority under which he acts.

Swabey contra. The incumbent has not only named an attorney, but has also appointed him by special proxy; when a party sues by attorney, he is bound to produce the letter of attorney; but I know of no case where the power has been required to be strictly pleaded.

In the case of *Hubbard v. Beckford* (a)² it did [6] indeed appear that there was some

(a)¹ Suits for dilapidations are most properly and naturally to be sued in the Spiritual Courts; and, if any prohibition should be granted, the same ought to be superseded by a consultation; but this is intended where the suit is grounded on the canon law. But the successor may, upon the custom of England, have especial action upon the case against the dilapidator, his executors or administrators, whereof there are multitudes of precedents, even in the times of Popery. See Degge's Parson's Counsellor, p. 94.

The editor of Degge (for, from the statement of the case, it cannot be Degge himself) says that there is much curious learning on this subject in 3 Levins, p. 268. The case referred to for this curious learning is that of *Jones v. Hill*, K. B. 1 W. & M.: it was an action brought by a parson against his predecessor for dilapidations; the declaration stated that the defendant, being parson, had accepted another benefice, and left the houses out of repair; that, by the custom of the realm in such a case, he was bound to pay to his successor so much money as was sufficient for the repairs. After a verdict for the plaintiff, an arrest of judgment was moved, on the ground that the action did not lie. And of this opinion was Pollexfen, Chief Justice, who tried the cause at Warwick Assizes; and in the same opinion he continued, for he said the cause was only suable in the Ecclesiastical Court. In support of the action Degge's Parson's Law was cited, part 1, c. 8, p. 79, where he says that many such actions have been maintained, and cites *Hill*, 18 H. 8, Rot. 306. *Hill*, 15 Jac. 1, Rot. 474. *Mich.* 12 H. 8, Rot. 730. But on search of the Rolls no judgment was had in any of the said cases, but in some of them a verdict and divers continuances entered. But in the case of *Day v. Hollington*, *Mich.* 3 Jac. 2, C. B. Rot. 39, in a similar case judgment was given for the plaintiff on a demurrer.

The Court, however, inclined to the opinion of the Chief Justice Pollexfen; but the cause was put on the paper to be further argued; afterwards in Trinity Term, Pollexfen and Ventris being dead, the cause was again argued before Powell and Rooksby, Justices, and they gave judgment for the plaintiff.

Levins was himself counsel for the plaintiff.

See also the case of *Okes v. Ange*, 5 W. & M. in B. R., where a prohibition was granted because the party suing in the Ecclesiastical Court had already recovered dilapidations in the same case in the Temporal Court. Levins, 3, 413.

(a)² *Hubbard v. Beckford*, Cons. Trinity Term, July 30, 1798.

Judgment—Per Curiam. This is an allegation in a cause of dilapidations against

surplus in the hands of the sequestrator; but the Court said generally that it was inclined to hold a sequestrator liable for dilapidations; the writ mentions nothing but the debt; but it is inseparable from it that there should be charges over and above the debt which is to be recovered: the repairs of the vicarage and buildings are a necessary charge; a creditor has no greater advantage than another sequestrator: he must accept it as another sequestrator: as to the preference of debts over dilapidations, that can only be in the event of the death of the incumbent.

With respect to the prior sequestrations; I apprehend all the sequestrators were bound in the same way; this can make no difference with respect to the present sequestrator; it was not till these first debts were satisfied that the present sequestrator had any demand: it is a charge upon the living itself: the former sequestrators were to look to it, and might have held on the sequestration till the charges were satisfied.

Per Curiam. Let the power of attorney be produced on the next Court day; the inclination of my opinion is to admit the libel.

[8] *Judgment*—*Sir William Scott*. This is a libel given in by the attorney of the vicar of Ramsay and Dover Court against the Rev. R. Watkins, the sequestrator of that living. The sequestration issued in 1805 to George Watkins; and the libel states that he has received more than sufficient from the profits of the living to repair the vicarage-house and buildings; and that he is bound to repair them. The libel, therefore, is taken out against him, as a person acting under a sequestration; and I am willing to admit that the sequestrator is bound to repair edifices belonging to the

the sequestrator of the rectory of Shepperton. A libel has been given in, and this allegation is in answer to it.

It is objected to on principle—I shall, however, admit it—it appears that great part of it is merely introductory of the circumstances of the sequestrator, which it is proper the Court should have before it—it is right that the sequestrator should, in all cases, give an account to the ordinary: and though this account is stated to have been given in another cause, it may be introduced in this as an exhibit. I shall admit the allegation; but I propose to throw out a general idea of the cause to direct the parties. It is stated that there is no great difference between the demand and the sum which the parties are ready to pay. I am inclined to hold that the sequestrator will be liable for the dilapidations. The bishop's writ directs the sequestrator to levy certain sums for the payment of debts. The writ is mandatory; the sequestrator is only ministerial—he levies by sequestration—the sequestrator is a kind of bailiff to the bishop: the writ mentions only money to be raised for debt. But incident to and inseparable from the nature of the thing, it is that the sequestrator shall attend to certain points. The writ expresses that he shall supply the church with divine offices; and that all other charges and duties shall be sustained, and that he shall render an account to the bishop. It is the duty of the sequestrator to provide all the necessary charges of the church: and I know not on what principle it is to be contended that the repair of part of the church belonging to the rectory, and of the parsonage house, are not duties to which the living is liable. The incumbent is as much subject to these as to provide divine worship—he is compellable to the one as to the other; and subject to the same penalties for the neglect of them: he cannot exonerate himself from them by any private contract, or transfer the benefice discharged of them.

A creditor is usually preferred; but this is merely for the convenience of the bishop, for he has no right to it; it may be granted to the churchwardens, or to any person in the discretion of the bishop. If a creditor takes it, he has no greater advantage, or other right, than any other sequestrator, who would have to pay over to him what he received after providing for other duties, and not to give himself the preference. It is not asserted that the sequestrator is not bound to repair, for he pleads that he has repaired, and states the sum which he has expended on the repairs.

I am of opinion that the sequestrator is liable, in the first place; and that he is entitled for payment of his debt to the sum that remains. I consider these charges as necessary duties incident to the office, though not expressly mentioned in the writ of the bishop; yet legally contained therein, and not to be separated from it, even by the authority of the bishop himself.

benefice; and that there can be no doubt that he may be compelled to do so by a process from the Bishop's Court. The repair of the church is as necessary a charge as the supply of the church itself: he may therefore be compelled by the bishop and churchwardens to make the repairs: nothing would exonerate him from them.

But I do not undertake to say that he may not plead circumstances which may exonerate him from this obligation, as far as the authority of this Court goes. If he can shew that the sequestration has been finished and determined, and that the accounts have been made up, he may not be liable here: he may be liable elsewhere: but it does not seem to me that this Court can interfere after his sequestration has closed, and his connection with the living has ceased.

He is described as sequestrator; therefore, on the face of the statement, he appears liable.

[9] I shall admit the libel as it is reformed: it will be open to the party proceeded against to counter-plead to it.

I entertain, however, considerable doubts, if it shall be shewn that the sequestration has been entirely determined, with respect to the liability of a person whose connection with this Court has ceased.

[10] GREENSTREET, FALSELY CALLED CUMYNS v. CUMYNS. Consistory Court of London, Hilary Term, Feb. 2nd, 1812.—A marriage annulled on account of the impotency of the husband.

Maria Greenstreet was married to the Rev. Robert Heysham Cumyns, on the 26th of July, 1807: the present suit was instituted by her in Nov., 1809, to annul that marriage, on the ground of the impotency of her husband. A libel was given in alleging his incapacity to consummate the marriage; and the husband admitted this fact in his answers. There was in evidence, also, the report of two physicians and two surgeons, who had been duly appointed, and sworn to inspect the person of the husband; which stated in substance, that though the disease, and imperfection of the parts, was not such as to imply impotency to the execution of their functions; yet that, having heard his own accurate history of his alleged impotence, they put faith in his account; and as he was in good health, they could hold out no hopes of his impotence being remedied by any medical treatment.

Arnold and Jenner for the wife.

Swabey contra.

Judgment—*Sir William Scott*. I think there is enough to satisfy the Court that at the time this marriage took place, there was incompetency to perform the duties which the marriage [11] contract enjoins, and which were necessary to render it valid.

The fact is sufficiently established; and also that there is no collusion between the parties.

There is an air of truth in the evidence; and a great disposition, on the part of the husband, to atone for the injury he has inflicted on this lady; being in utter ignorance himself of his constitutional defects. It appears that he was incapable at the time of marriage, and has continued so ever since; and I pronounce for the nullity.

MAYHEW v MAYHEW. Consistory Court of London, Easter Term, April 17th, 1812.

—Nullity of marriage being asserted in answer to a libel, charging adultery, the question of nullity is first to be disposed of.

[Referred to, *In re Rutter*; *Donaldson v. Rutter*, [1907] 2 Ch. 595.]

Charles Mayhew instituted proceedings against his wife for adultery: the libel pleaded that the parties intermarried together on the 4th of Sept., 1806. The wife appeared by her proctor; and admitted in acts of Court that a marriage did in fact, though illegally, take place between the parties in the cause; but otherwise contested the suit negatively.

Swabey for the husband, prayed an assignation on the proctor for the wife, to plead the illegality of the marriage.

Stoddart, contra, contended that the husband must first prove his libel.

[12] *Per Curiam*. I think the preliminary question of the legality or illegality of the marriage must be decided, before the husband is put to the expence of examining witnesses on his libel.

Trinity Term, June 9.—An allegation was offered to the Court on the part of the wife; it was of considerable length; but the facts principally relied upon to establish the nullity were that she was described in the publication of banns as Sarah Kelso, widow; whereas she was in fact Sarah White, spinster; both parties were above twenty-one years of age at the time of the solemnization of the marriage.

Judgment—*Sir William Scott*. This allegation travels into history which I do not think important. I wish more attention had been paid to the relevancy of the matter pleaded. It recites the marriage act; and states that the woman, the daughter of Thomas and Sarah White, was baptized by the name of Sarah; that her parents died when she was about three years old: that she then went to Northumberland, thence to Denmark, and afterwards to the East Indies; and is the Court to go into all this history? It would lead to a monstrous mass of evidence which, after all, would be totally irrelevant: the only question being whether she was duly married under the publication of banns as "Sarah Kelso, widow." The allegation states that she made Mayhew acquainted with her real situation; that she ex-[13]-plained to him that she was not a widow, but a spinster: and that her real name was Sarah White, and not Sarah Kelso: and then proceeds to assert that the publication of the banns was directed by the man to be in the name of Kelso that he might avoid the marriage at a future time. I am of opinion that such a publication would not affect the validity of the marriage: on whom would be the fraud? not on the man; he knew all the facts and all the circumstances, and might think this the most proper name to be used. She had used many names; he might have doubts as to what she ought to be called—on whom else could there be fraud? The woman was a major: different from a case where the parents' rights would be invaded: no fraud can possibly be suggested against any one. The act of parliament does not require a description of the party.

I am of opinion that, if this allegation were proved, it would not dissolve a marriage which took place under such circumstances.(a)¹

Allegation rejected.

[14] *TREE v. QUIN*. Consistory Court of London, Easter Term, May 29, 1812.—A libel in a suit for nullity of marriage admitted, so far as it pleaded that banns were published under an additional christian name, which did not belong to the woman; but rejected as to that part which stated the non-residence of the parties in the parish where they were married.

This suit was instituted by a father, to set aside the clandestine marriage of his daughter who was a minor. The libel pleaded that she was baptized by the name of Martha only, and was known by that name, and by no other christian name whatever amongst her relations and friends, whereas the banns were published under the names of Martha Caroline. And also, "That neither she, nor her husband, were inhabitants of the parish in the church of which they were married; or had any house, lodging, or usual place of abode therein."

Edwards against the admission of the libel. The whole is inadmissible; but especially that part which states that the parties were not resident in the parish in which they were married: for the act of parliament (a)² directs that no evidence touching the residence shall be gone into after a marriage has been solemnized.

[15] *Swabey contra*. The non-residence is not pleaded as of itself inducing a nullity: but as a circumstance to shew the contrivance and clandestine conduct of the parties.

(a)¹ The case of adultery being substantiated against the wife the Court gave sentence in favour of the husband, and decreed a separation à mensâ et thoro, Mich. Term, Dec. 14, 1813.

(a)² Provided always that after the solemnization of any marriage, under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

Per Curiam. If I admit the libel, I think I must exclude that part of it which pleads that the parties did not reside in the parish in which the banns were published.

I shall admit the remainder without determining the law of the case, till I see what is proved; but let the cause stand over till the next Court.

Judgment—*Sir William Scott*. I think the words of the act are so strong as to bind the Court not to admit the article respecting the residence. The libel must be reformed as to that article, and admitted.^(b)

[16] ELLIOTT AND SUGDEN v. GURR. Prerogative Court of Canterbury, June 13th, 1812.—A voidable marriage cannot be rendered void, after the death of either of the parties.

[Referred to, *Rex v. Dibdin*, [1910] P. 71.]

Judgment—*Sir John Nicholl*. Sarah Lester, otherwise Gurr, died intestate in July, 1796: a marriage had been solemnized in 1787, between the deceased, then a widow, and William Gurr, then a bachelor, in the regular form. William Gurr survived his wife, but did not take out an administration to her effects. In 1812 a decree was taken out against him, to shew cause why administration should not be granted to John Elliott and Elizabeth Sugden, the brother and sister of the deceased: the suggestion being that the marriage was incestuous and void to all intents and purposes, and, therefore, that the deceased did not die the wife of William Gurr, but the widow of her former husband, Abraham Lester; and the question is whether Sarah Lester is to be considered as dying the wife of William Gurr, or as dying a widow.

The question appears rather a strange one to be brought before the Court; and it is brought in a strange manner: the decree issued at the suit of John Elliott and Elizabeth Sugden, in these terms, "Whereas Sarah Lester, otherwise Gurr, late of Chatham, in the county of Kent, deceased, departed this life in the month of July, 1796, in-[17]-testate, without having made any will, having, at the time of her death, goods, chattels, and credits in divers dioceses, or jurisdictions sufficient to form the jurisdiction of our said Prerogative Court of Canterbury; and that in the month of Nov., 1771, the said Sarah Lester, being then a spinster, intermarried with Abraham Lester, who afterwards died in her lifetime, whereby she became his lawful widow and relict, that some time after, to wit, in June, 1787, a marriage, or rather a profanation of a marriage, was had between the said Sarah Lester and William Gurr, the lawful sister's son of the said Abraham Lester, deceased; whilst living the legal husband of the said Sarah Lester, by reason whereof the marriage so had between her and the said William Gurr was, and is incestuous, illegal, and null and void to all intents and purposes in law whatsoever; and, therefore, it was alleged that the said Sarah Lester, otherwise Gurr, died a widow, without child, or parent, leaving behind her the said John Elliott and Elizabeth Sugden, her natural and lawful brother and sister, and only surviving next of kin."

I wish to know whether there is any precedent for such a decree; I have asked the counsel who supported the decree whether they could shew any authority for a next of kin obtaining an administration in exclusion of a husband or a wife so married: no authority has been cited. If consulted, the Court would not have allowed such a decree to have issued; for, on the face of it, it asserts that which, for reasons which I will presently assign, is [18] not law. I desire in future that no decree of a novel kind may issue without either being consulted in camera, or moved in Court by counsel. It is of consequence, because the instruments of the Court are generally presumed to be declaratory of the law of the Court.

The proceedings on the part of the husband are equally strange. He appears, and instead of asserting his right to the administration as husband, and praying to be heard on petition, in form of a protest or otherwise; he gives an allegation pleading the fact of marriage. The fact of marriage is admitted in the decree; so that it was unnecessary to plead it: but it is pleaded simply; omitting indeed the words free from impediment, but still not so as to raise the question, for that clause is not absolutely necessary. It is to be presumed all the essentials are pleaded; no person could infer from that clause being omitted that there existed a previous impediment by reason of affinity.

(b) The libel was admitted to proof as reformed; but no witnesses have been hitherto produced, nor have any further proceedings been had in the cause.

The Court will not withhold its opinion, as it is the object of the parties to obtain it, and I am unwilling to throw upon them any unnecessary expence; at the same time I must express some surprise that such a question should be made at this time of day; for any one might as well question the most established rules of the Court.

The marriage was within the prohibited degrees; for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity; but the marriage was not declared void in the lifetime of the parties. Now, the difference between [19] void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties.

Civil disabilities, such as a prior marriage, want of age, ideotcy, and the like, make the contract void ab initio, not merely voidable: these do not dissolve a contract already made; but they render the parties incapable of contracting at all: they do not put asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union; and, therefore, no sentence of avoidance is necessary.

The present is not a void, but a voidable marriage; and, therefore, not having been declared void in the lifetime of the parties, is valid to all civil purposes; and to all such purposes the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate; one of the civil rights of the husband is that of administration to his wife, which is held to be within the statute of administrations; and is expressly confirmed by statute 29 Car. 2, c. 3, both the administration and the property belong exclusively [20] to the husband, it is not an ecclesiastical but a civil right, though it is a right administered in this Court.

In a matter so clear of doubt it is almost waste of time to quote authorities. Modern cases would hardly be found, because such a point has hardly been questioned in modern times. But it is so laid down by Bracton and Holt; and it is thus stated by Lord Coke (Co. Litt. 33 a.), "If a marriage de facto be voidable by divorce, in respect of consanguinity, affinity, pre-contract, or such like, whereby the marriage would have been dissolved, and the parties freed ex vinculo matrimonii, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife de facto shall be endowed; for this is legitimum matrimonium quoad dotem; and so in a writ of dower, the bishop ought to certify that they were legitimo matrimonio copulati, according to the words of the writ; but if they were divorced à vinculo matrimonii in the lifetime of the husband, then she loseth her dower."

Here, then, it is clearly laid down that unless it is avoided in the lifetime it is legitimum matrimonium quoad dotem.

The distinction of a void marriage may be seen in the case of *Hemming v. Price* (12 Mod. 432). Hemming was libelled ex officio, for adultery with a person dead. She pleaded that they were married and had issue; it was replied that she had a former husband then living: a prohibition was prayed alleging [21] that the suit would have the effect of bastardizing the issue.

Holt, C. J. The issue are bastardized without any proceedings if the parents were never married; the Ecclesiastical Court shall not proceed to dissolve a marriage de facto after the death of either party, as in the case of consanguinity, pre-contract, and the like; but in this case, if the replication be true, the marriage was, ipso facto, void.

Per Cur. No prohibition.

In this case, therefore, the marriage was ipso facto void, because there was a former husband living, and therefore it required no sentence.

The case cited of *Haydon v. Gould* (1 Salk. 119) was a marriage between Sabbatarians not celebrated by a priest; this was held to be no marriage, a void marriage, a mere nullity. The Court said, Haydon demanding a right by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself to the administration.

In that case the ecclesiastical law held that they were never married; in the case now before me the ecclesiastical law, as established in these realms, notwithstanding the canonical disabilities (and the bishop is bound so to certify), holds that the parties were legitimo matrimonio copulati at the time of the death, the marriage being only

voidable, but not having been avoided by sentence of divorce during the lifetime of the parties.

In the present case, then, the parties having been [22] de facto married, and that marriage, though voidable, not having been declared void in the lifetime of the parties; the husband remained husband to all civil purposes, and is clearly entitled to the administration.

The constant course of practice is in entire conformity with this: both the husband and the wife uniformly take such administrations—no person can be found to question it, for no case can be produced; and no similar decree is brought forward. If parties will try experiments, and call in question rules clearly established by an uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the Court to check such novelties in practice by costs.

Costs given.

BELL v. TIMISWOOD. Prerogative Court, Trinity Term, June 20th, 1812.—The Court never forces a joint administration.

Judgment—*Sir John Nicholl*. The interest of Robert Timiswood has been admitted as one of the next of kin: Joseph Bell prays to be joined in the administration with him; Timiswood objects, and prays that it may be decreed solely to himself.

The Court never forces a joint administration, [23] and for an obvious reason; because it is necessary for the administrators to join in every act, there might be a complete contrariety of action, and it would be in the power of one of them to defeat the whole administration.

The question then is, to which of the two must the Court grant it in this instance? Both are in an equal degree of relationship; no objection is stated to Timiswood; but against Bell it is said that he has been twice a bankrupt, and that the last time there were no dividends.

Surely, if the Court has an option (as it undoubtedly has) between these two parties, I shall not think Mr. Bell, who has taken such bad care of his own affairs, the preferable person to be entrusted with the management of the affairs of others. One party is unobjectionable; the other is highly objectionable.

I shall grant the administration to Timiswood—and condemn the other party in costs.

RICKARDS v. MUMFORD AND FREEMAN. Prerogative Court, Trinity Term, June 20th, 1812.—By cancelling a will in his own possession, a testator cancels a duplicate in the custody of another person.

George Rickards died on the 25th of November, 1810. On the 11th of July of the same year he executed a will in duplicate, one part of which he retained in his own possession; the other he sent by his attorney to Mrs. Freeman. The former instrument was not found at his death; [24] the duplicate sent to Mrs. Freeman was propounded by her and Mr. Mumford, the other executor named in it; and opposed by Mrs. Rickards, the widow of the deceased.

Adams and Jenner for the executors.

Swabey and Burnaby contra.

Judgment—*Sir John Nicholl*. There is no question as to the due execution of this will; but the true question in the cause is, whether this will was revoked by the deceased.

Before I proceed to the facts of the case, it may be convenient to state the one or two positions of law, or rather of legal presumption.

Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself. It cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime. Again, if a testator executes a duplicate, and keeps one part himself, and deposits the other part with some other person, and the testator voluntarily cancels or destroys the part in his own custody, it is a revocation of both. So also, the act of cancellation or destruction is *primâ facie* done *animo cancellandi*, and a presumptive intention to revoke till the contrary is shewn. The reason is that the act of voluntarily destroying the instrument implies the intention of revoking its whole effect.

These positions have frequently been laid down in this Court as legal presump-

tions ; but, like all [25] other legal presumptions, they may be repelled by evidence. The *prima facie* presumption, then, is that the deceased himself destroyed the will in his own custody, with the intention of revoking it altogether. But to proceed to the facts of the case : The will was executed in July, 1810 ; on the 29th of October, 1810, he married ; previous to his marriage, but after making his will, he had executed a settlement of certain estates on his wife ; freehold property at Hatton ; leasehold at Kennington. The Hatton estate is specifically devised by the will to raise 600*l.* which is bequeathed in legacies to his cousin Freeman for life, and then to Mumford's children : Mr. Mumford himself is also a considerable legatee ; the whole fortune is divided by various legacies among his family and friends.

Such a will, therefore, could hardly by possibility have been intended, under such a change of circumstances, to have remained unaltered and unrevoked. His marriage, though not a revocation of it, yet is a circumstance to account for the destruction of the instrument by the deceased, as it would probably induce some alteration in the disposition of his fortune ; for, notwithstanding the settlement, Woodward admits that the deceased talked of perhaps doing something more for his wife ; and, as the settlement is only in bar of dower, the presumption is that he intended her to be benefited out of his personal property, and the will became inofficious.

But, supposing the settlement had done every thing he intended to do for his wife ; still, the [26] taking these estates out of the operation of his will would almost necessarily have induced a new arrangement and disposition of his fortune among his family and friends ; and, in conformity with this, the evidence on both sides concurs to prove that it was the intention of the deceased to alter the disposition of his property and to make a new will ; what that disposition would have been the Court has no means of knowing ; but there is enough to shew that it certainly would have been of a different tenor from the will in question.

Now, having arrived at this fact, we have a strong ground of probability not to repel, but to support, the legal presumption that the deceased himself destroyed the instrument in his own possession *animo revocandi*, it no longer containing that disposition which he wished to take effect.

Witnesses have been examined on both sides to declarations made by the deceased ; and also to declarations made by the widow after his death. The deceased made several wills which he destroyed ; and he seems always to have employed different attorneys. Woodward, an attorney at Pershore, made a will for him three or four years ago : Sandilands, an attorney at Tewkesbury, made a will for him in June, 1810 : Hervey, an attorney at Ross, made the will in question : White, an attorney at Tewkesbury, drew his marriage settlement in October, 1810 : and Mr. Hyde, an attorney at Worcester, was applied to to make his new will.

Tidmarsh, an intimate friend of the deceased, and a perfectly disinterested witness, says, "That [27] when he was talking to the deceased about going for his marriage licence, he said he would fetch down his wills and burn them ; and accordingly he went upstairs and fetched them, and said he would burn them : but the deponent advised him not, saying he might not marry ; he might die ; and he did not know what might happen ; and the deceased replied that is a good thought ; I will not burn them till afterwards."

Here then, the deceased's intention is to destroy his will ; his mode of revocation was, not by cancelling the instrument, but by burning it ; and he only defers doing it till after his marriage, lest any accident should prevent the marriage.

On the 1st of November, three days after the marriage, Mr. Woodward has a conversation with the deceased ; he tells him of his marriage ; he fetches down his wills ; he burns that prepared by Sandilands in June ; he has this will of July read over to him ; he says, "It will be a loss to Mumford, if I don't alter it ; perhaps, in a few days, I may send to you to do it ; till then, I shall take care of this ; and he carried it up stairs again." He says, "That on the 21st of November, the deceased again told him, I have not altered my will ; it remains as it was ; but I think I shall send or come to you in a few days : but, he added, in a jocular way, 'You lawyers charge so high ; it is dangerous to have any thing to do with you.'"

It has been inferred from this conversation that the deceased had not at this time destroyed his will ; but if this was so, it does not follow that he might not subsequently destroy it : it is clear, however, [28] that he was not sincere in his expression ; for he had that day been making arrangements to go over to Worcester to get Mr. Hyde to make a will for him.

The declarations on the other side are more direct, and such as, when connected with conduct, leave no doubt or hesitation on my mind. Mr. Baker, an intimate friend of the deceased, says that he applied to him on the 14th of November to prepare a new will for him; he said he had one at home which would serve as a guide: he appointed to be with him on the Sunday following: on Sunday he advised the deceased, as his property was considerable, to employ a professional man; the deceased thanked him, and said he would go in the course of a week to Worcester to a Mr. Hyde to do it; and he well remembers that he then said, "I will immediately destroy the will I have by me, and go to Worcester and make another."

The only will he had then by him was the will in question; for he had destroyed the will prepared by Sandilands on the first of November, when Woodward was with him.

The evidence does not rest here; for Mr. Tidmarsh says that "on the Wednesday following, i.e. (on the 21st of November) the deceased told him that Baker had recommended him to go to an attorney, and that he meant to apply to one at Worcester; he promised to accompany the deceased there on the Thursday in the following week, or sooner, if he wished it;" and that the deceased, in the same conversation, said, "Charles, I have burnt them wills you saw me with the other day, and the sooner we go to Worcester the bet-[29]-ter;" and he pressed the deponent very much to go to Worcester with him on the Friday following.

This is an express declaration that he had burnt the wills; and it is made the basis of his conduct; it is the reason assigned for hastening the going to Worcester.

Coupling this evidence together, the declaration to Baker on the 18th "that he would burn it immediately;" and the declaration to Tidmarsh on the 21st "that he had burnt it; and, therefore, that the sooner he went to Worcester the better:" we have the strongest confirmation of that which is the legal presumption, namely, that the deceased himself dissolved the instrument in his own custody, and that he did it *animo cancellandi*.

With respect to the declarations imputed to the wife, and her having said that the will was not destroyed, and also her silence, from whence it is inferred that she knew nothing of the destruction of the will by her husband; they are of little weight in themselves, and the evidence respecting them is at best contradictory. In her answers she states her full persuasion that her husband had destroyed it; there is nothing to impeach her character; it is impossible to infer otherwise, from the expressions attributed to her by the witnesses. Both Baker and Harris say that Mrs. Rickards declared to them that the deceased had, a few days before his death, produced his will to her, and asked her if she wished to see it before he destroyed it; and that she supposed he had burnt it.

Neither her silence, therefore, under the circumstances in which she was placed, nor any thing [30] she has said, raises any just suspicion that she was guilty of having destroyed the will.

The conclusion of the Court on the whole of the evidence is that the deceased himself destroyed the will in his possession; that he did this intentionally; and that he not only thereby cancelled the paper itself, but the duplicate which was not in his possession.

I pronounce against the will, and decree administration to the widow.

CARSTAIRS, the Attorney of Griffiths *v.* POTTLE. Prerogative Court, Trinity Term, June 20th, 1812.—Unfinished paper not established as codicillary.

William Wheeler sailed from Madras for England on the 16th of March, 1811: he died on the voyage on the 19th of May, of an abscess, which had formed on his side three weeks before his death; a week before his death he was sensible that he could not live. On the day before he left Madras, he made a will of the following tenor:—

"In the name of God, Amen, I William Wheeler, of Portsmouth, in the county of Southampton, and now of Madras, being about embarking on board the 'H. C. S. Anne,' for Europe; and being in sound mind and memory, make this my last will and testament. 1st, I resign to the Almighty my sole, to be disposed of as it may please him, [31] trusting it will be recevd into the kingdom, there to enjoy everlasting happiness, and my body to the earth from whence it came. 2d, I give and bequeath unto each of my uncel Lewises children, who now live at Waterford, near Portsmouth,

the sum of one hundred pounds sterling. 3d, I give and bequeath unto my cousin Nothem Bennetts son, Henry Bennett, the sum of five hundred pounds sterling. 4th, I give and bequeath unto my uncel Exeus children, and my uncel Morgans children, to be equally divided among them, all the remainder of my property, of whatever kind it may be: and I hereby wish R. Griffiths to be my attorney, to see that my poor relations recive all that is due to them from this will: in fact, I appoint the Mr. Griffiths to act in all matters that concern me. This is my last will and testament, written by myself, the 15th fifteen day of Marh, in the year of our Lord 1811, one thousand eight hundred and eleven. Amen.

"Madras, 15th Marsh, 1811.

"W. WHEELER.

"Witness, J. Baggett, S. James."

This will was proved in the supreme Court of judicature at Madras.

The three following papers, of a testamentary nature, were found in the writing-desk of the deceased, on board the vessel, after his death, viz.—

[32] (A.)	
Each of my uncel Lewis children	£100
Nathers son	500
Morgan and Exell to get the remainder	

(B.) (a)	
To Mrs. George or her daughters	£500
To Mrs. Morgan	500
To Mrs. H. the aboves sister	5
Mr. W Sabbin	300
To Mr. Joseph Read	100
To Miss Morratt, Madras	100
£6,000	
4,000	
1,000	
1,000	
600	
<u>£12,600</u>	

(C.)

"In the name of God, Amen, I William Wheeler, of Portsmouth, in the county of Southampton, and now residing in Madras, and at present am a partner in the firm of Griffith, Wheeler, Griffith, and Cook, and being in sound mind and memory, do make this my last will and testament.

[33] "1. I resign to the Almighty my sole to be disposed of as it may please him, trusting it will be received into the kingdom of heaven, there to enjoy everlasting happiness; and body to the earth from whence it came.

"2. I give and bequeath unto my cousin Morgan, who is married to Mr. Pottle, and I believe are now living at Fareham, about ten miles from Portsmouth, the sum of 6000l., to be equally divided among her brothers and sisters and herself.

"3. I give and bequeath to my cousin Isabella Breaden, eldest daughter of my uncel Exell, and her brothers and sisters, to be divided equally between them, the sum of 4000l.

"4. I give and bequeath unto master Henry Bennett, who is a son of my late cousin Nathen Bennett, and who will be found on enquiry at Mr. Morris, Piercy-street, Portsmouth, the sum of 1000l.

"5. I give and bequeath to my cousin Leah and Charlotte Lewes, eldest daughters of my uncel Lewes, who lives at Waterford, the sum of 600l. or provid'd either of them are dead, her share to be divided among her sisters."

The three testamentary papers, marked A, B, and C, were found in the writing-desk of the deceased on board the vessel after his death.

Mrs. Pottle propounded paper C as codicillary to the will of the 15th of March, 1811.

(a) In paper (B) there were several other names, with sums opposite to them, but both the names and the sums struck out with a pen.

[34] The allegation in which it was propounded pleaded, "That about a week after the deceased was confined to his cabin, an abscess broke in his side, and from that time he was sensible of his approaching death, and declared he thought it impossible for him to recover; that, whilst on shipboard, he was reserved upon the subject of himself and his affairs, and that he was attended only by a manservant: that he used, prior to his being confined to his cabin, to employ himself much in writing at his writing-desk, corresponding at times with friends of his, who were passengers on board other vessels of the fleet, and he was frequently observed to destroy the papers he had written. That after becoming confined to his cabin, he again wrote at different times, and was particularly remarked to be employed in writing the aforesaid papers, A, B, and C, or some papers very nearly resembling the same in size and appearance; and from the time of his being so confined to his cabin, he was not observed to destroy any papers. That on the second or the third day, immediately preceding his death, being then wholly confined to his cot, he requested his servant to bring him his writing-desk, as he wished to write, and it was accordingly placed upon a pillow across his knees, and he was raised up and supported by pillows at his back, after which he was left alone for about an hour; when his servant, returning to the cabin, found that he had folded up together several papers, upon some or one of which he had been writing; and he, the said deceased, then apparently much exhausted, desired his servant to lock up the same in the writing-desk, the key of which the deceased kept fastened [35] to his watch-chain, and the same was accordingly done, and from that time till his death the said deceased grew gradually weaker and weaker, and never again attempted to write, nor was he, from weakness, at any time able so to have done. And in the evening of the following day the aforesaid writing-desk fell down from the stand on which it had been placed, and the hinge was broken, and there fell out some pagodas in specie, and the aforesaid papers; which the deceased having observed, earnestly desired them to be replaced carefully, telling his servant not to mind the money, as that was of no consequence in comparison with the papers; and the papers, which were found to consist of two small papers, folded, or wrapped up in a large one, having been, together with the specie replaced, the desk was not again opened till after the death of the said deceased."

Swabey and Burnaby opposed the admission of the allegation.

Phillimore and Herbert supported it.

Judgment—*Sir John Nicholl*. I agree with the counsel for Mrs. Pottle, that if this paper should not be inconsistent with the will, it might be proved in conjunction with it. The rule is that, where there is a regular will and another paper begun as a new will which the testator has been prevented by the act of God from completing, the two papers may be taken together as the will of the deceased, and operation pro tanto be given to the latter paper, provided the proof of final intention be clear: but it will not wholly revoke the former paper.

[36] The present case, however, does not fall within this rule of law.

The deceased embarked from Madras for England, on the 16th of May, and on the day before executed a will, leaving legacies to different relations, and two bequests to his uncle's children: that will has been proved in India; shortly afterwards, as he was proceeding in his voyage, he is stated to have entertained an intention to make some alterations in the distribution of his property among his own family.

Three papers are before the court.

A is a short abstract of the executed will.

B is a calculation of his property without date.

C is the paper propounded. There are no executors named in it; it contains no disposition of the residue; it has no date, no conclusion; it is clearly unfinished; upon the face of it there is no constat when it was written; it might have been before the executed will; it might, and it really appears to me that it was, written before; it begins in regular form, and describes him "as now resident at Madras." Compare this with the inception of the will written before he left Madras; in that he states himself to be "about to embark." Paper C could not be copied from the executed will, for he had it not with him.

It has been urged that, from the extension of the legacy to his cousin Bennett's son, it must have been written subsequently to the executed will; it might have been the reverse, he might have ascertained his property to be smaller than he expected. In the allegation nothing direct is pleaded as to the date.

[37] As it is unfinished, and the object of it is to controul a will regularly executed a short time before, I must be satisfied that he was prevented by the act of God, from the due execution of it: independently of this, there is nothing to shew that he had made up his mind to this alteration as far as it goes; the deceased for three weeks was sensible of the dangerous state of his health: this paper was broken off in the middle, and there is not a single declaration that he ever meant to conclude it; he expresses no wish on the subject, there is no reference by him to any testamentary act.

Upon the whole, the Court would not be safe in pronouncing for this paper: if all the facts alleged should be proved, they would be insufficient to establish an instrument in this very incomplete and uncertain state, so as to controul a will regularly executed a short time previously.

I shall reject this allegation; at the same time it is very proper that it should have been submitted to the consideration of the Court, and I recommend the executors to pay the costs of the proceeding.

BUTLER v. BUTLER. Prerogative Court, Trinity Term, June 20th, 1812.—Objection to an inventory, over-ruled.

Judgment—*Sir John Nicholl*. Edward Butler is the party deceased: administration of his effects was granted to his widow: an inventory was called for by four of his next of kin, two brothers and two sisters, which was [38] exhibited in November, 1811; and the party prayed to be dismissed. She was assigned to be so, if not objected to, on the bye day; no objection was taken; and, on the caveat day, she was actually dismissed.

On the first session of Hilary Term, the proctor for the brothers and sisters alleged that he had been mistaken on the caveat day; and prayed still to be allowed to object; this indulgence was granted; an allegation was asserted, and then waived; an act on petition was gone into; if he did not make good his objections, there was some peril of costs, for he has kept the other party three terms before the Court, and put him to considerable expense.

The objection to the inventory is in three items, which are said to have been omitted; this is a serious charge; fraud and perjury are almost necessarily imputed by it to the widow; fraud by concealment and omission; perjury, in swearing that all the articles of the deceased's property were set forth in the inventory; this charge has been answered by affidavit, and is now abandoned; it is admitted that the deceased had no such property; and that there is no omission in the inventory. If the parties had inquired, they might have satisfied themselves that there was no ground of suspicion whatever; none for charging the widow with omission; the utmost length the Court would have gone, would have been to hold that, from the declarations of the deceased, there was reasonable ground of inquiry: a little diligent inquiry and candid examination would have cleared up this point.

[39] When this point was satisfactorily answered (and it was the only question at issue) a new objection was taken; not to the inventory, but to the administration. It is said that the administration is taken out under the proper sum; and that the securities ought to be called upon to justify. The amount of the property is stated in the inventory at 3550l., and the administration has been taken out under 3500l. The widow answers that the whole amount of the property, in value, is 3550l.; but that some of the debts due to the deceased have not been received, and probably never will be recovered; and if they should, she shall then take a new administration. The revenue requires the administration to be taken to the extent of the sum received, that is sufficiently hard, but the administrator is bound to take out the grant to the extent of the sum he expects to receive; this is as much as the widow can in this case expect to receive.

This appears to me a mere frivolous objection; why was it not taken as soon as the inventory was exhibited? The turning round in this way, so far from protecting the party from costs, is a strong additional ground for them; and it is lenient in the Court not to condemn in the whole costs; but I shall condemn in those costs which have arisen subsequent to the second session of last Easter Term.

With respect to the securities justifying; it is no part of the present petition; the petition relates only to the inventory, and the omission in the inventory.

[40] *COOKE v. COOKE*. Arches Court, Trinity Term, June 25th, 1812.—A moiety of the husband's property given to the wife for permanent alimony—but given from the date of the sentence, and not from the return of the citation.

[Applied, *Otway v. Otway*, p. 109, post; *Covell v. Covell*, 1872, 2 P. & D. 413; *Goodden v. Goodden*, [1892] P. 3.]

(An appeal from the Commissary Court of the Dean and Chapter of St. Paul's.)

Judgment—*Sir John Nicholl*. This was originally a suit, by reason of adultery, brought by Hannah Fox Cooke, against Richard Cooke, her husband: the wife succeeded in that suit; the judge pronounced the libel (Michaelmas Term, Nov. 9, 1811) proved, and decreed a separation: that sentence has been acquiesced in; the delinquency, therefore, of the husband has been established, and is admitted. The Court below then proceeded to allot a permanent alimony to the wife; no alimony during the suit had been applied for; but, as the wife had a separate income, it was understood that an application for any further allowance, during the suit, as alimony, would be resisted; and she remained content with her separate allowance. I consider this as tantamount to alimony during suit.

The question afterwards (March 6, 1812) came on as to the allotment of permanent alimony; and the husband [41] has appealed to this Court, complaining that too large a sum has been allotted to the wife: and the question which the Court has now to decide is whether the sum allotted be too large or not.

Now, although alimony, that is the allowance to be made to a wife for her maintenance, either during a matrimonial suit or when she has proved herself entitled to a separate maintenance, is said to be discretionary with the Court; but it is a judicial, not an arbitrary discretion, which is to be exercised; and therefore, it is clearly a subject of appeal: at the same time, upon a point where there is no other rule or criterion to guide than the *boni viri arbitrium*, it is only upon a strong difference of opinion where the Court of appeal would be disposed to disturb the sentence.

The first point to be ascertained is the meaning and extent of the sentence; the words are, "The Judge allotted the sum of 450l. per annum, in addition to the income which she (the wife) now receives in her own right, to be paid her as permanent alimony, to be computed from the return of the citation, and to be paid quarterly."

It does not appear, upon the face of the sentence, what it is that the wife receives "in her own right;" there is no statement of the sum, nor is there any reference in the sentence itself to any income, or to any part of the proceedings in which that income is mentioned.

In the first article of the allegation of faculties, certain property is referred to of that description, and it amounts to about 89l. a year, besides a house worth about 80l. annually: the answers to this [42] article admit these statements; but in the answers to the 8th article it is stated that, besides this property which was settled on the wife before marriage, there was a further settlement in 1815, subsequent to the marriage, of 162l. annually. An affidavit has been also made by the wife, in which she states the joint amount.

It is not quite clear whether the 450l. was in addition to both of these settlements, or only to one. I have enquired whether any thing passed in the Court below, or was understood there by the parties, which would afford a construction of the sentence in this respect; and no answer has been given: I must, therefore, seek the construction from the expressions; the words are, "In addition to the income which she now receives in her own right;" these words are only applied to the property mentioned in the first article, and in her answers to that article: there it is expressly so described; but no such expression is cited either in the answers to the 8th article, or in her affidavit, as applied to the second settlement, viz. the one made after marriage. The 450l., therefore, must be construed as additional to the sum secured by settlement before marriage, and not to include the subsequent settlement.

This property consists of three tenements which together are let for 99l. per annum, and a house in which the parties resided, worth now about 80l. per annum: the husband has retained possession of this house during the suit: but he has now declared in acts of Court that he is ready to deliver it up, with the improvements, to his wife; [43] taking then the house, in its improved state, at 80l., the other tenements at 99l., and the 450l. (the whole alimony allotted), taken together, would amount to nearly 630l., subject, however, to the property tax.

The question is, whether this be too large a proportion out of the joint fund?

It is unnecessary to ascertain to a few pounds the exact amount of the property ; but it is to be observed that in the particulars of the property in possession of the husband, amounting to 800l. per annum, he has deducted the property-tax and all other outgoings, and besides this he has the advantage of having the amount taken upon the representation given by himself, in his own answers ; so that the sum allotted to the wife is rather less than a moiety of the joint stock ; of this not less than 800l. per annum has been derived from the wife.

It has been truly stated that there is a material distinction between permanent alimony and alimony during suit ; it is unnecessary to enter into the reasons for this ; they are obvious ; it is sufficient that such is the rule of the Court.

In *Biggs v. Biggs* (Consist. of London, May 28, 1791) the alimony during suit was 40l. ; the permanent alimony was 75l.

In *The Countess of Pomfret v. The Earl of Pomfret*, though there was a large fortune, and the husband had to maintain the rank and dignity of the peerage, one-third was given, i.e. 4000l. out of 12,000l. Certainly the wife had brought a [44] large fortune, but then she was elevated in rank by the marriage.

In *Taylor v. Taylor* (Arches, May 14, 1796) the income was about 300l. and a moiety was given : it was certainly proved in that case, that a large proportion of the fortune came from the wife ; but it furnishes a precedent for a moiety : it is said that in that case the income was smaller, and that the Court always gives a larger proportion where the income is small ; there may be good reasons for giving less where the question is on alimony during suit ; when the wife is to live in seclusion, and wants a mere subsistence ; but on a question of permanent alimony, where the delinquency of the husband is established, and especially where a large proportion of the fortune comes from the wife, the same considerations do not apply : nay, they may be inverted ; it is the delinquent, then, who should have the mere subsistence, and who ought to live in retirement ; the larger the fortune is, the less reason there is why the wife should be deprived of any of her property to support a vicious and profligate husband : but, without going the length of this reasoning, the case of *Taylor* affords a precedent for a moiety. In some cases, even of small property, certainly a less proportion has been given ; but in those cases the husband has acquired his subsistence by his own personal exertions.

In *Biggs v. Biggs*, 75l. was given ; the husband was a seller of venison, and his income stated to be 300l.

[45] In *Dawson v. Dawson* (Consist. of London, July 23, 1802) 80l. was given ; the husband was a working jeweller, and his income stated to be 300l.

In the present case, the bulk of the fortune comes from the wife ; and the husband, so far from increasing the property by his own exertion, has neglected and given up his business, and is living in a state of open adultery.

I quite concur in all that has been said, as to its being a part of the duty of every Court of Justice to guard the public morals of society—this principle has been fully established, and forcibly applied to cases where the husband is the injured party : on this principle pecuniary damages are awarded in other Courts ; and where the husband is the delinquent, and the wife the injured party, the same principle may be justly applied, not vindicatively, nor excessively, but reasonably and moderately.

In this instance the husband raised himself to independence and affluence by marrying this young woman ; he has not only injured, but insulted her, by debauching a maid-servant who lived at the adjoining house ; for this servant he has taken a house, and for her society he has abandoned the society of his wife ; he has children by her, and receives his friends in the house, and introduces her to them as his wife.

It is a most offensive case ; if he violates the marriage contract, it might be equitable perhaps that he should lose the whole benefit of it, and be obliged to give up the whole of the wife's property ; at all events, it would be most unjust that the wife [46] should be deprived of any considerable portion of the property she brought, in order to support the husband in public scandal, and to enable him to continue his adulterous connexion, and provide for the issue which are the fruits of it.

Construing the sentence therefore as I have done, I do not think that the learned Judge went too far in the additional sum which he allotted. I am, therefore, in no degree disposed to disturb that part of the sentence, except so far as to add some words to it in order to render the meaning more clear and certain.

In respect to the time from which the alimony is payable, namely, from the return

of the citation, this, I apprehend, is contrary to the rule of the Court, and to the reason of the thing. No alimony was expressly allotted during the suit; but, on the one hand, as what she was willing to receive as a sort of separate allowance, while she was living under his roof, without the payment of either rent or taxes (in the hope, probably, of reclaiming her husband) is no criterion for permanent alimony; so, on the other hand, I can see no ground to depart from the ordinary rule of these Courts, by carrying back the permanent alimony beyond the date of the sentence.

It is clear from several cases that the true rule of the Court is to decree permanent alimony from the date of the sentence.

In *Taylor v. Taylor* no time was specified; the sentence and the decree for alimony passed on the same day; and, therefore, the alimony must have been from the date of it.

In *Biggs v. Biggs* the rule is more manifest; [47] the alimony during the suit was 40l.; it was increased to 75l. from the date of the sentence.

This case is directly in point, and under the authority of it I feel bound to reverse this part of the sentence.

Accordingly the Court pronounced for the appeal and complaint made and interposed in this behalf, and retained the principal cause, and therein affirmed so much of the decree appealed from as allotted the sum of 450l. per annum, as alimony, to Hannah Fox Cooke, the respondent, in addition to the income described to be received by her in her own right, so far as such income arises from the property mentioned in the first article of the allegation of faculties admitted in this cause, including the leasehold house situate in the terrace, Kentish Town, with its improvements, and in its present condition, agreed to be delivered up to her by a declaration made by Richard Cooke, the appellant, in acts of Court, on the third session of this term, but directed that any sum received by the said Hannah Fox Cooke, since the sentence given in the Court below, or which may hereafter be received by her under a certain settlement alleged to have been made subsequent to her marriage with the said Richard Cooke, and to amount to 162l. per annum, shall be considered as a part of the 450l. so allotted, and not as part of the income received by the said Hannah Fox Cooke in her own right, and moreover reversed so much of the said decree appealed from as directed the said sum of 450l. per annum [48] to be computed from the return of the citation issued in the Court below, and directed the same to be computed from the day of the sentence in the said Court; and further directed the costs to be paid by the appellant, and directed a monition to issue against Mr. Cooke for the payment of the alimony due.

HARLEY v. BAGSHAW. Prerogative Court, Trinity Term, June 27th, 1812.—

Three papers established as containing together a will.

Judgment—*Sir John Nicholl*. Several papers are propounded, as the will of Mrs. Anne Newton: they are propounded by Miss Harley, a legatee, and opposed by Mr. Bagshaw, the brother of the deceased.

Besides the papers propounded, there are two testamentary instruments of a much earlier date. The deceased was a widow, possessed of very considerable property, who resided in Harley-street: all the papers are in her own handwriting.

No. 1 is the inception of a will, in which no great progress had been made, the deceased having only written down the side.

No. 2 is a long will consisting of two sheets of paper, fully written, signed by the deceased in several parts; the last date is Jan. 16, 1808; the first date is June 1, 1804: there is another of Nov., 1804; and others of the 5th of Feb. and 6th of Jan., 1806. It appears to have been the habit of [49] the deceased to write her will at different times; adding to it from time to time, and whenever she ceased writing to subscribe the date; and this she did, even though she wrote at different times in the same day. The presumption is, that it was so dated, and so signed, to give it effect as far as she had proceeded; and possibly she had been told that any paper in her own handwriting, and signed, would be a valid disposition of her personal property.

No. 3 is a new will also, in two sheets of paper, fairly written, but in the same manner as in No. 2; the first date is 12th March, 1806; at the end of the third page this is signed; there are likewise other entries in 1806, which are also signed. In the second page of the third sheet there is a recital that two of the executors are dead, and that the third is in South America; and there is the appointment of Miss Harley, daughter of the Bishop of Hereford, as sole executrix; this is dated May,

1811, and signed: after this she proceeds to make additional bequests; she stops, dates, and signs at several different places; the final signature is in 1811.

No. 4 is a very short instrument, commencing in 1806; it is revocatory of a particular legacy; it is finally dated in 1811; it clearly refers to No. 3, and was altered at the same time.

No. 5 begins as a new will, and was manifestly so intended when originally commenced; after introductory words, it appoints Miss Harley sole executrix, and is dated 5th June, 1811; it afterwards goes on to give legacies to the same persons [50] as in No. 3; there are two or three stops, and signatures, but they are all of the same date, viz. 5th June, 1811.

Looking at all these papers together, it is highly probable that the deceased, in No. 5, had not gone so far as she had intended; she had many other objects of bounty, and there is no disposition of the residue: comparing it with former papers, and with the habits of the deceased, it looks as if she had broken off in the middle of what she intended to be a new will, but which was not to revoke and supersede others, unless finished.

It has been contended that, the instrument being dated, and signed at the end, the Court cannot go into the consideration of parole evidence as to intention; if it was a new will completed, parole evidence could not be gone into as to the construction; but in this case quo animo it was written; whether it was signed in order to finish it, or whether it was incomplete and imperfect, is a preliminary question, which this Court is bound to entertain; it must enquire into the fact of the intention with which it was written: that intention may be collected from other papers and parole evidence.

In the case of *Mathews v. Warner* (4 Ves. jun. 186) it was held, that in the Court of Probate all circumstances were to be taken together to ascertain whether it was a temporary or permanent act; the paper in that case was signed, but it was uncertain whether it was perfect or incomplete.

[51] This paper was written by the deceased herself, a female unacquainted with business; if it is satisfactorily shewn that it was intended at first as an entire new will, yet afterwards as codicillary, there is no rule of law to exclude evidence of intention; it is the very province of the Court of Probate to enquire into it.

Suppose she had signed this paper in the presence of witnesses, declaring that she was unable to go on, and that she signed it as giving effect to alterations pro tanto, and to be taken as a codicil; surely, on inquiring in this Court, as to the factum, we must receive evidence of that intention.

This paper (No. 5) contains no revocatory clause; no disposition of the residue; if it is a complete and finished paper, it does not require a clause of revocation; but if it is unfinished, it will not totally revoke. In such a case, though originally intended as a new will, yet if it is not finished it can only operate in conjunction with the other paper; it supersedes the other pro tanto; and both must be considered as containing together the will.

In *Goldwyn and Aspenwall v. Coppell*, there was a will regularly executed in Jamaica. The deceased gave instructions for an entire new will; before he had disposed of the residue he became incapable; the Court pronounced for the two papers, as containing together the will.

This has been the constant doctrine of the Court; where instructions are finished they are not revoked by an unfinished paper, except as far as it goes; [52] the law presumes that the testator would have adhered to the remainder.

In this case the Court is not left to presumption; the proof of intention in satisfactory, if the evidence is admissible, and if the witnesses are to be believed: the witnesses, it is true, are releasing witnesses, but they are competent witnesses; the Court must hear them with caution; but their evidence is so confirmed that, unless they have corruptly deposed, no doubt exists of the deceased's intention.

The deceased being in very ill health, removed in May from Harley-street to lodgings in the Edgeware road: on the 5th of June she told her maid "that she was going to copy her will, which she had altered in Harley-street in May." Mr. Griffiths, the apothecary, confirms this; he states, "That he found the deceased, one day in June, with papers before her, which she put into a box, saying, the will was in the box, and she was writing it over again." This box, with the papers in it, was delivered to Miss Harley in her lifetime; the deceased, then, did not intend to

revoke the former will, but to copy it; and though she might, in so doing, make alterations in form and substance, yet the effect will not be to revoke, but merely to alter as far as it has gone.

The deceased became worse, and did not go on to write after the 5th of June; but she repeatedly and anxiously declared to her maid, and the woman who attended her, that the will she had altered in Harley-street was to stand good if she did not [53] complete the other, and that the other was to be codicillary.

There is a particular conversation deposed to, as having taken place on the 14th of June: the deceased having become very weak, declares to three persons earnestly desiring them to entreat her brother to carry her intentions into effect, "I mean, she said, my will I altered in Harley-street, in May last, and my last, I mean my two last wills to stand good;" two witnesses depose to this. Mr. Bagshaw, in his answers, admits the same in effect—that the deceased requested he would not oppose her will; his admission strongly confirms the representation of the witnesses, that there was a solemn declaration, a sort of formal publication of these papers, as containing together her will.

On the 18th of June, also, the day before her death she recognized the paper No. 3, by referring to a legacy left in it to Sir Walter Farquhar.

Edwardes, the deceased's maid, says, that "she verily believes the deceased intended the papers 3 and 5 down to the time of her death should operate as her will;" and Worthing says, that "the deceased often expressed in the strongest terms that the will she altered in Harley-street, and her last, were to stand good, and not to be disputed."

This evidence, taken with her declaration to the apothecary, "that her will was in the box, and that she was writing it over again;" with the admissions of Mr. Bagshaw, in his answers [54] satisfy me that the deceased did not intend to revoke No. 3, but wished the instruments taken together to be considered as her will.

I pronounce, therefore, for Nos. 3, 4, and 5, as containing together the will of the deceased.

DAMPIER AND DAMPIER v. COLSON. Prerogative Court, Trinity Term, July 1st, 1812.—The application of a married sister to be joined in an administration with her two brothers, overruled.

Judgment—Sir John Nicholl. The deceased died leaving a widow, two sons, and a daughter; he made a will, appointing his wife executrix, and residuary legatee for life; and gave her the power of disposing of the residue among her children; but, if she made no disposition, then it was to go between them in thirds. The widow, in a state of mental imbecility, so that she can neither take probate, nor at present make any disposition of the residue.

The parties before the Court are, the two sons and the daughter, the substituted residuary legatees. The sons, Edward Dampier and the Rev. John Dampier, pray the administration jointly to them. The daughter, Mrs. Colson, who is a married woman, prays to be joined in the administration; to this the brothers object: Mrs. Colson then prays that a joint nominee may be fixed upon.

[55] Now, first, the two sons, who are willing to take it together, have a majority of interests.

In the next place, it is not the practice of the Court to force a joint administration upon unwilling parties; and, therefore, it would not compel the brothers to admit Mrs. Colson to be joined with them.

In the third place, it is not the practice of the Court to grant from the residuary legatees, to a nominee, where the parties cannot agree.

It is stated that the sons are indebted to the estate, but I do not see the strength of that objection; they must produce an inventory; they must charge their debt as part of the property: the other party will have as full means of investigating whether it is paid in part or not, as if she were to be joined with them, perhaps better. The administrators must give security; I do not see what risk there is to the estate, or what disadvantage it is placed under.

But there is another ground which alone would guide the discretion of the Court, if there was nothing else to guide it; the deceased has made the two sons trustees for the daughter's share, for herself for life, and then for her children; there is also some of the property given by will in the same manner to the two sons, in trust for

Mrs. Colson; by appointing the sons administrators, they will have an opportunity of executing this trust; but if Mrs. Colson is joined with them, she will have the property at least jointly, and she and her husband may dissipate it, and the trust may be defeated: it is clearly not the intention of the [56] deceased that Mrs. Colson or her husband should have the possession even of this third, or the management of his property; the two sons are the testator's own trustees; they are his nominees.

I reject Mrs Colson's petition, and decree administration with the will annexed, to Edward and John Dampier.

In respect to costs, I really see no ground on which Mrs. Colson contended for the administration; I think this is rather a case which calls for costs, as the opposition is frivolous and unfounded.

Costs given.

REEVES v. FREELING. Prerogative Court, Michaelmas Term, Nov. 5th, 1812.—The Court exercises a discretion as to the sort of inventory it requires from an administrator.

Probate of the will of John Reeves had been granted to the executors, but was called in by a son of the deceased, who had been advanced in his father's lifetime, and was no further benefited under the will than as a contingent legatee; the will was proved in solemn form of law, and probate decreed to the executors.

Lushington, for the executors, prayed costs.

Per Curiam. The son had a right to put the executors on proof of the will; I shall certainly not give costs.

Swabey, for the son, prayed an inventory, and [57] stated that the contingent interest of his party was sufficient to entitle him to it.

Lushington, contra, denied the right of the adverse party to an inventory; and said, that in this case it would be attended with great difficulty, as the deceased was engaged in a banking-house, and his profits would not be concluded till May, 1813.

Judgment—Sir John Nicholl. I have known the Court exercise a judgment on these questions, particularly in complicated cases.

It cannot be necessary for the party to enter into all the accounts of the banking-house; the Court will, in this instance, exercise a discretion as to the sort of inventory it will accept: it cannot be difficult to make one out: there must be an account for the rest of the family; and though the person calling for the inventory has but a contingent interest, he has a right to a constat of the effects.

BROUNCKER AND COOKE v. BROUNCKER. Prerogative Court, Michaelmas Term, Nov. 12th, 1812.—Probate refused to a codicil signed and executed.

Lewis William Brouncker, Esq., of Barford Hall, in the county of Wilts, died on the 29th of Jan., 1812. On the 21st of same month he had executed a formal will of considerable length, drawn up by Mr. Cooke, his solicitor, containing a complete disposition of his property; this will [58] was propounded by the executors, and was not opposed; but a codicil, dated three days only subsequent to this instrument, was propounded also on the behalf of the younger children of the testator. The deceased left a widow and nine children; his personal property amounted to about 70,000l.

The codicil was as follows:—

“Barford House, Jan. 24th, 1812.

“I am desired by L. W. Brouncker, to request that his executors will make the fortunes of his eight younger children to consist of ten thousand pounds stock, instead of five thousand, which he had given them by a will made by George Cooke, Esq., and executed in the presence of the Rev. George Chandler, of Dalkeith House. (Scotland, Duke of Buckleughs) John Hooper, surgeon, of the village of Downton, and Margaret Hawes, governess to L. W. Brouncker's children, on the 21st of January, one thousand eight hundred and twelve. The same to arise from the stock stated for the five thousand stock mentioned in the said will. The abovementioned will to continue in effect to all the other purposes therein contained.

“MARY STRODE.

“If the alteration for which these directions have been given has been already made, namely, five additional thousand pounds stock, this paper is not to be of any effect.

“MARY STRODE.

[59] "Further added by L. W. Brouncker's desire ; this memorandum I consider as a codicil to my will. "L. W. BROUNCKER.

"Witness, Richard Fowler, M.D., Mary Strode."

Jenner and Phillimore in support of the codicil.

Swabey and Lushington contra.

Judgment—Sir John Nicholl. The deceased, Lewis William Brouncker, died on Wednesday, the 29th of January, 1812. The codicil propounded is dated on the 24th of January, 1812. The deceased is stated to have been possessed of a very considerable fortune, about 70,000*l.* sterling, in money, and a landed estate worth about 4000*l.*, the whole producing about 3500*l.* per annum. This estate is charged with two annuities, amounting to 160*l.* per annum ; a settlement on his wife of 500*l.* per annum ; and 2000*l.* generally on his younger children.

On the 21st of January, three days only before the date of the codicil, the deceased executed a complete and long will, in full form, containing a just and proper disposition of his property ; it is of considerable length, and must have taken considerable time in making ; even the draft which is before the Court has the appearance of having been prepared a considerable time. He had an eldest son, and eight younger children : by this will he gives an additional annuity to his wife of 500*l.*, making her provision 1000*l.* per annum, [60] besides a legacy of 1000*l.*, and all his plate, linen, furniture, &c. ; and he bequeaths 5000*l.* 3 per cent. to each of his younger children.

By the codicil now propounded the fortune of the younger children is doubled ; 5000*l.* 3 per cents. additional is given to them ; so that there are 80,000*l.* 3 per cents., nearly 50,000*l.* sterling, given to the younger children, which will not leave a sufficiency to cover the annuity to the widow, and the other charges on the estate ; and must leave the eldest son destitute.

It is pleaded that the deceased had a strong affection for his eldest son ; there is no particular proof of this ; but it is clearly proved that he had no disaffection towards him ; his affection is evinced by the will of the 21st January ; and this, from the provisions it contains, is decisive of a firm intention to make an eldest son ; it shews it to have been his deliberate and firm intention.

The question then is, whether the deceased was in possession of a sound and disposing memory at the time of making this codicil, sufficiently so, to effect the almost entire subversion of his solemn will, executed only four days before, and to leave his eldest son for the present destitute, or at best dependent on his mother during her life.

The presumption of law is strongly in favour of the executed will : the Court must consider whether the capacity was adequate to the subsequent act : the proof of the capacity must depend upon the nature of the act ; and all circumstances must be taken together, to ascertain the real testamentary intentions.

[61] The testator was very ill at his residence at Barford House, about nine miles from Salisbury ; his sister, Mrs. Strode, came from London to see him on the 23d of January ; he appears to have had great confidence in her ; he mentioned to her his having made his will ; he seemed perfectly satisfied with the provision made for his children ; he only doubted whether there was a sufficiency for his wife.

The next morning he sends for his sister, is extremely eager for her arrival (she had returned to Salisbury to sleep), asks repeatedly whether she was come, a further conversation took place with her, and he again said he had made a handsome provision for his children, and only doubts about his wife ; this shews that his mind was dwelling on the subject ; but there is no appearance of any change in respect to the distribution among his children ; still less, that any thing had arisen in his mind adverse to his eldest son.

The deceased then said that he must exert his little remaining strength to transact some business respecting his brother, and for that purpose wrote a draft for a person under whose care he was ; that business being done, his sister left him, "concluding that all the deceased's worldly affairs were accomplished," she went down stairs to write some letters ; so that up to that moment there was not the least trace of the deceased's being dissatisfied with the provision for his younger children.

It is material to see what was his condition and state during this previous transaction ; this is fully detailed in the evidence of Mrs. Strode, and a [62] greater state of debility can hardly be imagined ; and the natural effect of his exertion was, that he should remain in an exhausted state ; and his mind of course more liable to wander.

It is also proved that before this time the deceased had occasional wanderings and deliriums; he had the bed-clothes and bolster put at the bottom of the bed, and slept several hours in that mode. The apothecary says, he gave odd and eccentric directions; and the servants who attended him speak to several instances of his mind wandering. He was so weak in body that when he was taken up it was necessary to fan him. Surely, in this state it is absolutely incumbent on the Court to be satisfied that the deceased fully comprehended the nature of an alteration made so suddenly, and in direct contradiction to the principle which had so long regulated his testamentary dispositions.

Within an hour after Mrs. Strode had left the deceased, under the impression that he had finished all his worldly arrangements, Mrs. Brouncker, the wife, came down in great haste and agitation to Mrs. Strode, and informed her that the deceased would have a codicil made to give 5000*l.* more to his younger children: Mrs. Strode, I doubt not, with perfectly good intentions, but under a great agitation, instead of going up and taking instructions from the deceased, so as to satisfy herself that his memory and recollection were complete, and that he really understood the important change he was about to make in his will in respect to the provision for his younger children, with which, up to that moment, he had appeared satisfied, wrote the [63] paper in question: Mrs. Strode deposes that Mrs. Brouncker said, "He wishes you now to make a codicil; and, apparently much agitated, said, she must come directly, and Mrs. Brouncker said the codicil was for the purpose of making the addition of 5000*l.* to the fortune of the younger children; and the deponent having some paper before her, in a rapid manner wrote the substance of what the said Harriet Brouncker then mentioned as the wishes of the deceased, and immediately proceeded with her into the deceased's bed-room." She continues to "depose, that she carried it to the deceased, who sat in an easy chair, and without any thing being said by the deceased or the deponent, she read over to him what she had written; he asked her why she had not written it in the form of a codicil." Not one word as to the contents, or the reason of the alteration; nothing to supply the defect of instructions, and the two ladies themselves appear to have been in such agitation and hurry, as scarcely to have understood what had been intended: there is nothing to satisfy the Court that the deceased was fully aware of the nature and extent of this alteration in the will; he merely takes notice of the form. Mrs. Strode goes on to relate "that from some observation, that fell from the deceased she doubted whether he had not by his will made such additional provisions;" and he was very desirous that the will should be opened, which she strongly opposed, thinking "he would almost have died before the transaction had been com-[64]-pleted, and some one gave him wine on account of his exhausted state."

Now, what must have been the state of the deceased's mind when he could not recollect so important an article respecting his will, made only three days before; it is very unfortunate that this lady undertook the transaction, and opposed the looking into the will; for, if there had not been so much haste; if the deceased had gone regularly through the transaction, the Court would have been better satisfied whether he did, or did not, really comprehend the nature of the act; the relation given seems to negative that he understood the act; when he talks of this additional provision, it rather points to the addition (to 2000*l.* under the settlement) after his wife's death; and, therefore, to a single sum of 5000*l.*; for, I do not see how it could properly be said that by will he had made an additional provision of 5000*l.* each, to the 5000*l.* given by the will itself, and exactly in the same manner: this would be absurd, and it shews such a confusion of mind, that it is difficult to think he could form any intention which could safely be carried into effect as the intention of a sound mind: the deceased was at least in a state of doubtful capacity.

Dr. Fowler, the deceased's physician, who has also subscribed the instrument, deposes, "That Mrs. Strode asked him in great haste to step into the deceased's room for a few minutes; she said he was desirous of making a slight alteration in his will, and had desired her to draw up a codicil; and it agitated her to death: they went [65] into the deceased's room, Mrs. Strode, in the presence of the deceased, said the deceased wished him to witness a codicil, and was merely making a trifling addition to the fortunes of his younger children; the deponent then asked the deceased whether it would not be better to have three witnesses? the deceased, apparently agitated and impatient, replied, 'It is not lands; it has nothing to do with lands—it is merely to

make a trifling or small addition to the fortunes of younger children.' The deceased shewed great eagerness to have it done; the paper was placed on a table; he proposed Mrs. Brouncker to be a witness: the deceased, in an uncommonly hurried manner, and as if he was working himself up to make an effort, signed his name; and the deponent and Mrs. Strode, without any thing further being said, signed their names.

To what does all this amount? that the deceased knew he was doing some testamentary act, so far as to be aware of something of these forms; he could call it a codicil; he knew it did not pass lands; and he could exert himself to sign his name: but it does not satisfy me that he knew the important alteration he was making; that he was doubling the fortunes of his younger children, and leaving his eldest son totally unprovided for: he hears Mrs. Strode describe it as a trifling addition; he repeats that it is a trifling addition to younger children; but, instead of that, it is doubling their fortunes; a bequest of 40,000*l.*: it shews that the deceased could not have comprehended it. There is not a single dictum from the deceased, either [66] before or after this codicil, that he was dissatisfied with the provision made for his younger children: there is not one witness who will venture to state that the deceased was of perfect sound mind; or, that he fully comprehended the nature and extent of the act; it has every appearance of being the sudden thought of a wandering and disordered mind, in extreme weakness of body.

Upon the whole, the evidence is by no means such as satisfies me that the deceased was in possession of sufficient memory and recollection to understand the import of this codicil: the presumption is in favour of the regular will, executed only three days before. The Court must be on its guard that the real intentions of the deceased are not defeated by the incautious act of the persons about him. I shall act more safely in adhering to the will, as the instrument which is most likely to carry into effect his real wishes and intentions; and I pronounce against the codicil.

[67] *SMITH v. SMITH*. Arches Court, Michaelmas Term, Nov. 19th, 1812.—Where cruelty and adultery are both charged against a husband, it is not absolutely necessary to prove cruelty.

[See further, pp. 152, 207, and 235, post.]

On the admission of a libel given in by the wife pleading cruelty and adultery against her husband.

Arnold and Lushington *contra*. The charge of cruelty, if proved, would not amount to that which would entitle the party proceeding to a sentence; it cannot assist the charge of adultery; therefore, all that part of the libel relating to cruelty should be rejected.

Judgment—*Sir John Nicholl*. The libel is not objected to altogether; the Court always considers whether the general substance is admissible; if it is, the smaller parts are not excluded. I do not know that the Court has ever laid down where cruelty and adultery are both charged that it is absolutely necessary to prove the cruelty: it may be of consequence on the question of permanent alimony. In this case I think that the cruelty and adultery are combined together; for the adultery pleaded is of a nature to include cruelty.

Where the wife is the complainant, and the husband to pay the expences on both sides, the [68] Court will be on its guard not to admit matter that is irrelevant; but it does not appear here that the case is unnecessarily loaded, or containing any matter which may not be of use to assist the Court in its determination.

Libel admitted.

[69] *BROWNING v. REANE*. Prerogative Court, Michaelmas Term, Nov. 21st, 1812.—Administration of the effects of a wife refused to the husband on the ground that his marriage has been illegally contracted: nullity of marriage established.

[Referred to, *Moss v. Moss*, [1897] P. 269.]

Judgment—*Sir John Nicholl*. Mary Reane, otherwise White, died intestate, in Oct., 1810; James Reane demands administration to her effects as her husband. Thomas Browning, her nephew, and one of her next of kin, denies Reane to be her husband; not denying that a fact of marriage took place, but alleging that, at the time of that marriage being solemnized, the deceased was incapable, from mental deficiency, to contract a marriage.

The issue, therefore, in the cause is, whether the deceased, at the time of the alleged marriage, was incapable of legally contracting it; and I am of opinion that the person alleging that incapacity must prove it, a marriage having in fact been solemnized.

Upon the law of the case there is little question; and, without going back to ancient authorities, it may be sufficient to state what Mr. Justice Blackstone says on this subject: "A fourth incapacity is, want of reason; without a competent share of [70] which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony; and neither ideots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void."

Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from ideotcy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is ideotcy, and what is lunacy; complete ideotcy, total fatuity from the birth, rarely occurs; a much more common case is mental weakness and imbecillity, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, [71] from mental imbecillity, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances; and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.

The case, as laid in the second and fifth articles of the plea, is to this effect; that she was always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached to ideotcy, and was considered to be, and treated as such; that as she grew older her mental faculties more rapidly decreased, insomuch that for several years, and more especially for the last three years of her life, she was wholly incapable of governing, or taking care of herself or affairs; and that, by reason of her weak and decayed state of mind, she was incapable of understanding the nature of courtship and addresses, or of consenting and agreeing to be married.

It is not denied that, if this case is made out by the circumstances, that the marriage was in law invalid: it becomes, therefore, necessary to examine the circumstances which are proved in respect to the state and condition of the deceased, and the transaction itself.

The age of the deceased is proved to be upwards of seventy; the age of the man about forty: it is [72] not controverted that she became possessed of considerable property by her brother's death; she was the daughter of a baker: it does not appear that she was, in her infancy, in such a state as to exclude all hope of her instruction or improvement, for she was sent to school; but it does not seem that she was ever able to read, or to write her own name legibly. She was put out as an apprentice to a mantua-maker; and it is to be inferred from this, that she was thought capable of learning to gain her own livelihood: but the fact is, she never did learn her business, but was employed as a servant in the house, in going on errands, and looking after the children.

Mr. Blissett, examined by the husband, says, "He lodged, about thirty years ago, in the house where the deceased served her apprenticeship, and where she was acting as servant; that she twice called upon him since, about five, and about three months before her marriage; she told him she was going to be married, and appeared then

as capable as when he formerly knew her." But he enters into no particulars of what her state was when he formerly knew her. He admits, upon an interrogatory, "That she was of a weak understanding, but he considered her as capable of taking care of herself." He had not seen her for nearly forty years; and, if he is correct in dates, the first of these visits, viz. about five months before her marriage, when she said she was going to be married, it was before Reane knew her; his acquaintance having commenced in December, and she was married on the second of March following [73]: whether this man is Blissett the player, mentioned in another part of the evidence, and whether it be true that the deceased had a child by Blissett the player, is not proved in any satisfactory manner; if it were, this man's credit as a witness would not rest on any solid foundation; but, taking it otherwise, this evidence is extremely slight, and too little instructed with circumstances for the Court to rely upon it. Eighteen or nineteen witnesses have been examined, who have known the deceased at different periods of her life, some from her infancy, others at a more advanced period; but it is the latter part of her life which is most important. The statement of some of this evidence will afford the best reasons for the sentence the Court is about to give.

Mary Silcox, aged eighty-five, deposes, "That she has lived all her life in Avon-street, Bath. White, a baker, the father of the deceased, lived in the same street; she has known her from five years old; she went to school with three sisters of the deponent's; about ten or twelve she was put apprentice to one Harper, but on account of her weakness of mind, instead of being taught business, she was put to mind Harper's children. She went afterwards to live with a Mrs. Fry, and used occasionally to call at the deponent's house. On the death of Mrs. Fry, twelve or fourteen years ago, she for some years, while living at different places, continued to call on the deponent, and complained of being starved; and out of compassion she took her to live in her house, about five years ago, where she continued three [74] years; and about two years ago one Mrs. Physic took her away, and placed her in some shop, as she told the deponent, and where she still continued to call; the deceased was always from her youth a silly or foolish person, possessing a very weak understanding, approaching nearly to ideotcy, and as such was treated; and her mental faculties more rapidly decreased as she grew older; during the last years of her life she was wholly incapable of governing or taking care of herself or her affairs; no rational talk could be had with her, for where any one spoke to her, or asked her any question, she would repeat the words in a silly irrational manner, instead of replying to the question; that she could not sit in a place for five minutes together, but when at meals would get up from her seat and run about the room, and when the deponent said to her, 'Molly, you have not eat half your victuals,' she would say she had enough, and would not abide in the house longer than to have her meals. The deponent being confined a good deal by gout had not an opportunity of seeing her from home: she has seen her pull up her petticoats and expose her person; and she was such a fool she would not mind making water before any person; she used very often to want to take the deponent's husband round the neck; she was worse in her conduct, and more silly, after the death of her brother than before; that she never could be made sensible of her conduct, whatever might be said to her, even in the lifetime of her brother, who died about five years ago, [75] and from whom deponent received a remittance of 20l. a-year for boarding and lodging his sister."

Mary Turner "knew the deceased as long as she can remember; she was a young woman when the deponent was a girl; their respective fathers had dealings together: the deceased was in the habit of coming to the deponent's house, and would help herself to any thing as if she was at home. Many years ago the deceased's brother desired her to look after his sister, which she accordingly did, and she used to come to her; after which, by his desire, she was placed at Weston, near Bath; she clothed her to go to this lodging, stripping her the same as a child: she lodged in different places in Bath with Mrs. Viston, Mrs. Bristow, and another person who took Mrs. Bristow's house. She was in the habit of coming to the defendant, and she saw a great deal of her till a few days prior to the marriage. From her acquaintance with her she is enabled to depose that the deceased was from her youth a silly or foolish person, possessing a very weak understanding, nearly approaching to ideotcy, not sensible enough to take care of herself, and she was always so considered and treated by her own family: after the death of her brother she became worse, or her mental

faculties more rapidly decreased, notions of her being possessed of a great property being put into her head, which were too much for her; she would sometimes repeat questions, would get up in the middle of meals without cause; would run about the markets and streets of Bath. [76] Seeing her ill used, the deponent has several times taken her home, and finding her violent she would be obliged to shake her; boys and idle persons used to follow her, calling out, 'Molly White, give a pinch of snuff, where is the fisherman,' alluding to a man in the market of whom she was very fond, and who could not do his business sometimes for her. The person with whom she was placed at Weston signified that she was so troublesome she could not keep her: in deponent's opinion she was totally devoid of common understanding, and incapable of comprehending the contract of marriage, or giving a rational consent thereto."

On third additional interrogatory, this witness states, "That George White paid for common necessities for the deceased till his death; after which Mr. Physic, for Mr. Browning, engaged with some person to provide for her: Mr. Browning frequently gave the respondent money to buy snuff for her."

Thomas Field "sells fish at the Bath market; about two or three years ago he first came to know the deceased by her asking him the price of fish; but he, concluding she did not want any, and observing her take snuff, asked her for some, which she gave him; that from that time for many months she was continually coming to the market, sometimes twenty times a-day, and used always to come up to the deponent, whom she frequently followed to a public-house: he used then to hear her called Mrs. Field, which she would repeat in a silly way: he first heard her [77] called Mrs. White by one Mrs. Turner, who had the care of her, and used to come to drive her out of the market; she used to say to deponent, 'Will you marry me?' and on his saying to her, 'When will you marry me?' she would repeat the very words. When she came to the public-house she would drink the beer of any one; she was a nuisance in the market, though she was worse sometimes than others; for if he did not offer to push her away, and talked to amuse her, she would be quiet: he used to pretend to be asleep, and she used to come up and offer to kiss him, and he having flour in his mouth for the purpose, would spout it over her; he considered her as a silly or foolish person, of a very weak understanding, which approached nearly to ideotcy: she was not sensible of the impropriety of her conduct, though sometimes a little steadier than at others, and would take an answer and go away when she was told: he believes she was incapable of consenting to marriage, and would have married him fifty times over."

Jane Bristow "knew the deceased eleven years ago, when she lived with Mrs. Fry in apartments in St. John's hospital; the deceased was then in poor circumstances, lived with Mrs. Fry, her aunt, on an allowance from her brother: on the death of Mrs. Fry the deponent succeeded to her apartment: the deceased, to whom she was in the habit of giving a penny to buy snuff, used to come daily to her, as well as to others in the hospital, till the day preceding her marriage." [78] She then proceeds to give the same account of her conduct and understanding that the other witnesses have given. There are two other women of the name of Light, who lived in apartments in this almshouse, and knew the deceased seventeen or eighteen years, who give exactly the same account. One of them says, also, "That she would come into their apartments when they were drinking tea, take up their cups and drink their tea; she would take things without being asked; she was guilty of indecencies, but not aware of their impropriety; was sometimes turned out of the apartment, but would return again in a short time; and that she often talked of going to be married, but could not say to whom."

Anne Bristow deposes, "That about Lady-day, 1808, in consequence of an agreement between her husband, brother, and Mr. Physic, the deceased came to board with them, and continued six months; she used to go out early in the morning, but return to meals, and to go to bed. The deponent, being desirous of getting rid of her, agreed with another woman to take her, but she still continued to intrude herself into the house; she found the deceased to be a silly foolish person, approaching nearly to ideotcy; that she never could have thought she would have been half so bad till she came to live with her; latterly she was worse, and her faculties rapidly decreasing, she was incapable of taking care of herself. She never attempted to clean herself; she never answered any question put to her, but in a silly irrational manner repeated

the question that had [79] been put to her; she never sat still a moment; in the streets the children would hoot her, and pelt her with dirt, and pull her clothes off her back; that she would pull up her petticoats, and expose her person in the most indecent manner; if talked to about it, she would laugh and repeat the words. She would walk about her rooms and hide candles and other things: on account of her childish and extravagant conduct, she refused to continue the care of the deceased, who was always treated, while under her care, as a person whose understanding was wholly deranged, or unsound and imbecile, that she had not sufficient to take care of herself and her affairs. That on her coming for snuff, the day before her marriage, she said, 'Mrs. White, I hear you are going to be married;' the deceased replied, 'Going, to be married, married.' She believes she was at that time quite incapable of understanding the nature of marriage, and devoid of understanding."

Mr. Bristow, the husband of the last witness, fully confirms this account.

At the time of the marriage the deceased lived under the care of Mr. and Mrs. Eyles; they and their maid-servant, Sarah Edwards, have been examined, and they continue the same account of the condition of the deceased, down to the very day of her marriage.

Eliz. Eyles says, "Browning worked for her husband, and boarded with them; and in consequence of his wishing to have a creditable place for the deceased, and saying he would allow 100l. [80] a year for taking care of her, the deponent was induced to undertake the same; but she had not been a week in the house before the deponent signified that in consequence of her conduct she could not stay there: she continued there eleven weeks, during which time the deponent saw, and was constantly with her; she used to wash her and put her to bed, for the servant could not manage her at all." She then gives the same account of her conduct as the other witnesses, and says, "That she could have been made to marry a boy, or any one, or to believe if a post was dressed in man's clothes, that she was married, and she used to have a great notion of being married. About eight o'clock on the evening before she was married she came home very much intoxicated; and the deponent did herself, on account of her ill-using the servant, put her to bed, and never afterwards saw her: she heard her early the next morning about her room, and in the course of the day, missing her, enquired at Emery's, and heard she was married." This account is confirmed by the husband and servant.

In the facts which these witnesses relate, and the conclusions which they draw from these facts, they are perfectly concurrent; and if they have not given a false account of the conduct of the deceased, and totally deceived themselves, it is impossible not to agree with them in their inferences. A more complete picture of a poor crazy old woman cannot well be drawn than is here exposed; totally incapable of doing any one rational act, and never having through life, but particularly in the [81] latter part of it, held a rational conversation, or done any one act in the management of herself or her property. Any attempt to explain this evidence by the deceased's voraciousness or love of drinking must totally fail; in the first place, this sort of voraciousness is rather a sign of the defect of the mind, and frequently accompanies it: occasional intoxication will as little explain it, as the witnesses are persons who did not see her occasionally, but who were with her at all times and all seasons, and state her to have been always foolish and deranged. Crazy persons, not having lost the use of speech, and possessing the external senses, can walk about and go of errands, and express their wishes and wants, and have some general impressions; but this poor creature's capacity, especially in the latter period of her life, seems to have been further removed from reason than many animals of the brute creation.

It is necessary, however, to look into the evidence on the other side: on the first allegation, merely pleading the fact of the marriage, the Court could not expect much that was satisfactory; if the marriage was brought about by a fraudulent confederacy, there would be two descriptions of persons present at it; the parties confederating, and those whose presence was necessary, and who might be deceived and imposed upon. Six witnesses have been examined as to the marriage; five of whom were actually present at it. Mr. and Mrs. Emery are two of them, who kept a retail shop at Bath, where the deceased used to buy snuff; they are the friends of the asserted husband; the whole [82] matter of the marriage was contrived at their house; there the courtship, whatever it was, was carried on; from thence they went to the church, and thither they returned after the ceremony. It is admitted that none of the friends

or connections of the deceased were in any degree privy to the transaction: clandestinity is the usual concomitant of fraud. Emery admits her great infirmities, her habit of drinking, and her indecent behaviour, but he attributes all her irregularities to her habit of drinking; he admits that on the evening of the marriage he went with the parties to the Cross Hands, where the old woman was extremely intoxicated, and that on the bridal-night they all three slept in a double-bedded room. Here then is a young man, in the middle of life, marrying an old woman of seventy, an habitual drunkard, and labouring under great infirmities, but possessed of a considerable property, which is to be acquired by this marriage, without the knowledge of any of her friends, or any settlement or security whatever. Upon uncontroverted facts the case has an unfavourable aspect, and has much the appearance of fraud and confederacy. Motives will not invalidate the act, however improper it may be, if the party was capable of acting for herself; but they excite the suspicion of the Court, and it will require evidence of capacity from other witnesses not concerned in the transaction; nor will it think the testimony of Mr. and Mrs. Emery deserving of much credit when it is opposed to a cloud of witnesses who give a description of the state and condition of the deceased, irreconcilable with their account.

[83] "Martha Solway never saw the deceased but once before the marriage, did not know her name, and has never seen her since; she was asked to attend the marriage by Mrs. Emery;" whether she is to be regarded as a confederate, or as a person imposed upon, her evidence is of no weight, for she says that the deceased and the other persons held no conversation; and the single observation she recollects is, that when the witness offered the deceased her arm, she said, "No, she would take her husband's." This goes affirmatively a very short way; but negatively it is strong that, during the time she was in the deceased's company she can set forth no other expression that she used, and can assert that she entered into no conversation. The remaining three witnesses are the clergyman, the clerk, and the sexton; and the main fact relied upon is, that she went through the ceremony; that alone cannot be held sufficient; if it were, no marriage could be invalidated, unless all the parties were confederates in the fraud; there is no reason to charge the officiating persons as confederates, but as persons deceived. He must be a careless observer of human life who does not know that foolish crazy persons of this description have yet some degree of cunning and docility; this poor creature, whose notion was to be married, and whose common question was, "Will you marry me?" by a very little tuition might be trained and instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract, without persons, previously unacquainted with her, discovering her incapacity; [84] the solemnity of the place, and the occasion, of which she might have some general impression, would render her more tractable and orderly. Her appearance, however, did not wholly escape the notice of the clergyman, though he was lulled by the answer given to his enquiries.

Dr. Phillot says, in answer to the fourth interrogation, "That previous to the ceremony he observed to the sexton that she was rather weak; and his answer was, that he believed her a well-disposed woman, and that she attended prayers at church every day, always behaving herself with decency." The mere circumstance, however, of attending church constantly, and behaving with decency, is no proof of capacity, for it has come under my own observation that a person more nearly approaching to absolute imbecility than any which has ever happened to occur to my notice, always attended church and behaved decently; the sexton does not pretend ever to have had any conversation with her. It appears also that the deceased had some degree of deafness and thickness of speech; and that at the beginning of the ceremony, where she was to repeat after the clergyman, he was apprized of this defect, in order that he might speak louder. These defects would further lull his observation, and induce him to attribute her appearance to them rather than to want of capacity. Dr. Phillot proceeds, "That after the marriage he asked the clerk who she was; who told him she formerly had an illegitimate child by Blisset; that he understood she had an annuity, and he supposed the man must [85] have married her for that; he asked the deceased, if she could write, to sign the register; she said she could; but, upon seeing the name unintelligibly written, he added 'the mark of Mary White.'"

Skrine, the sexton, says, "That he never spoke to her till the time of her marriage, on which occasion she said to the respondent, 'This is my husband,' pointing to the prosecutor, and smiling."

This is the whole of the evidence applying to the condition of the deceased at the time of the marriage; and the circumstances are so equivocal and unsatisfactory that the Court would have no great difficulty in its conclusion, if it stood on these alone. But whatever might have been that difficulty, it would be removed by the subsequent part of the case. Reane has had a full opportunity of producing other evidence, and going into proof which should repel that of the next of kin, and shew that they had given a false representation, or come to a false conclusion. And what makes the absence of such proof more forcible is that there could be no difficulty in producing it, if the deceased had been a capable person. The deceased did not live in a state of seclusion; of all persons she seems to have been most the object of observation; the whole of her life was passed in Bath; she was never at home but at meals; the rest was passed in the abbey church, in the market place, in the public streets of that great city; in these she was every day and the whole day. If she had been capable of taking care of herself, or of the [86] most ordinary conversation, fifty or five hundred witnesses might have been produced to repel the evidence produced by Browning. Reane did give in a long allegation contradictory of the case set up by the adverse party: upon that allegation he has examined six witnesses; of these six, two only had ever seen the deceased before the marriage; one of them is Mr. Blissett, who has been already noticed, who had seen her only twice within the last 30 years. The other is a day-labourer's wife, brought from Upton, in Gloucestershire, who says, "That she has known the deceased for 30 years and to the time of her death: after her brother's death the deceased was generally employed in going about on errands at Bath, where she often met her: that she talked as other people would do, and did not repeat questions." This witness, it is to be observed, lived 15 miles from Bath.

The absence of evidence, under the circumstances, is the strongest possible confirmation of the evidence given by the next of kin. Another species of evidence, always the most forcible, is the conduct of the deceased herself; if, throughout life, she had managed herself and her affairs, it would have afforded proof of her capacity: though not in actual confinement, she appears to have been in a state of pupillage, never a person *sui juris*—not proved to have done any one act of business, or to have entered into a contract of any sort. She was put out an apprentice, but fails to learn her business so as to get her own livelihood. Her brother supports her with common necessaries, not by allowing, or paying her money, but by paying [87] other persons to take care of her. After his death, though she became entitled to considerable property, yet she never had the use or possession of it; it is her nephew, or his agent, Mr. Physic, who agrees with people to take care of her. She is washed and cleaned and put to bed by others.

Having taken this view of the case up to the time of the marriage, it seems unnecessary to pursue it further with any degree of detail; but the sequel is exactly of the same character: the same strength of evidence on one side, coupled with conduct, and encountered by nothing of any force or effect on the other.

Upon the evening of the marriage Reane and his friend Emery take the old woman in a return chaise to an inn about twelve miles from Bath, called the Cross Hands: it is not worth while to examine whether she was or was not intoxicated when she arrived there, but she is not treated as a person having understanding; she joins in no conversation; she is carried up to bed, and undressed by the chambermaid; she will have her bonnet laid on the pillow. Reane and Emery, it is admitted, slept in the same room with her; though Emery denied that they slept in the same bed: the next morning very early they carry her off in a chaise towards Gloucester; Reane having been waiter at an inn there, and not choosing to exhibit her, they leave her at a little public-house, a few miles from that town. On the following day they return to the Cross Hands, and again sleep there in the same two-bedded room. On the next morning Reane applies to the landlord to get some person to take [88] charge of the deceased for a few days till he could provide a proper place for her. The landlord having known Mr. White, the brother, who used to mention to him his foolish sister, out of respect to him offers to take charge of her for a few days; Reane accordingly goes away, leaving her in his hands. While there, she conducts herself in every respect as a silly childish person, and is treated as such, and they are obliged constantly to watch her; she would go into all the rooms of the house, and take whatever belonged to the guests. She went up to all the carriages that stopped; she

accosted the coachmen and drivers, and strangers, clasped them round the neck, and called them her husband: she asked for "money, money," and the landlord gave her a post-horse ticket; she put it up safely, and supposed it to be a bank-note. In short, she became such a nuisance, that on Thursday the landlord wrote to Emery to desire Reane to come and fetch her away; and on Saturday, Reane, with another man (who turns out to be a sheriff's officer), fetched the deceased away, and carried her to Bristol.

These circumstances are very fully proved by several witnesses; at the inn at Bristol, which was kept by a friend of Reane's, the deceased remained several months; there a young woman, named Sarah Silon, was hired to look after her, as a childish person, and she is treated as such both by Reane and Mr. and Mrs. Griffiths. Silon gives an account of the deceased's conduct exactly corresponding with that of the Bath witnesses. She is confirmed by her mother, to whose house, at the [89] end of six months, the deceased was removed, and there she died. They are corroborated by Arnold, a whitesmith, living in the neighbourhood, to whom she appeared a silly person, always attended by Sarah Silon, as a guard. Griffiths and Peachey are produced to represent the deceased at this time as, in their opinion, capable: they are the agents and partisans of Reane, and their depositions make no great impression on my mind. Mr. Scott, a surgeon, who attended the deceased three times, about five months after her marriage, for a contusion in the temple, and an inflammation in the eye, deposes, "That he observed no symptoms of insanity, or idiotism: that the deceased being rather deaf, he spoke aloud, and she seemed attentive, and answered in a rational manner; but, having a fulness of mouth, disenabled her to articulate her words perfectly; that she was attended by a female servant; that Reane appeared attentive to her, and she was very partial to him."

He does not state what his conversation with her was, so as to enable the Court to judge whether he had any grounds to form his opinion: it is mere negative evidence that he did not discover her incapacity. Attending her for an external hurt, it was not necessary that he should ask questions about her mental infirmity; the deceased also, being rather deaf, and having a thickness of speech, and the husband and attendant being both present, it is not at all probable that such conversation should have taken place between the surgeon and the deceased as should have enabled him to judge of the state of her mind.

[90] With respect to the whole of the transaction, there is the same deficiency of evidence as before. No person can set forth the particulars of one rational conversation; no person appears who has had any social intercourse with her; who has ever visited her, or has been visited by her; no one act of business is spoken to; no buying, or selling, or hiring, or ordering; no appearance of self-dominion—of the care and management of herself. But as the brother, and afterwards the nephew, had taken care of her before marriage, now Reane takes care of her, providing the common necessities of life for her subsistence.

In addition to all this a writ de lunatico inquirendo was taken out and executed six months after her marriage; the verdict was found by a most respectable jury, consisting of twenty-one persons; the deceased was produced in person—Reane's counsel and solicitor attended; and, after examining her in person, they found her incapable from two years antecedent. No attempt has been made to impeach this verdict in Chancery; nor have the counsel, or the solicitor, been examined in this cause. If this inquisition had been taken before the marriage, it would by the statute (15 Geo. II. c. 30) have been conclusive against it—though not conclusive certainly against a will. But, taken after the marriage, and under the circumstances stated, the deceased having been produced in person before the jury, it is a strong confirmation, if confirmation were wanting, of the other evidence.

[91] Without the verdict, however, and looking only to the evidence adduced in this cause; in the view I have taken of it, I have no hesitation in pronouncing against the interest of the asserted husband; and, under the impression I have received, it would be quite inconsistent with the conclusion to which I have come on the merits of the case not to make it a part of the decree to condemn Mr. Reane in costs; and accordingly I condemn him in costs.

[92] **TURNER, FALSELY CALLED FELTON v. FELTON.** Arches Court, Michaelmas Term, Dec. 1st, 1812.—Nullity of marriage, by reason of the minority of the husband, established at the suit of the wife.

(By letters of request from the Official and Commissary of the peculiar of Hornechurch, and liberty of Havering de la Bower. (a))

Charles Felton was married to Mary Turner, by a licence obtained on his oath, in which both the parties were described as being upwards of twenty-one years old.

On the 18th of November, 1811, the wife instituted proceedings to annul this marriage on the ground that the husband was a minor at the time of the solemnization of it. A citation was taken out against Mr. Felton, and regularly served upon him; but no appearance being given for him on the first session of Hilary Term, 1812, the Judge signed a schedule of excommunication against him, but directed it not to go under seal for fourteen [93] days. Mr. Felton could no where be found; but notice was sent to his solicitor that the excommunication would be published, unless he gave an appearance. At length Thomas Saunders appeared, and stated himself willing to undertake the guardianship of the minor cited, for the purpose of defending this suit, and the Judge, at his petition, assigned him guardian for that purpose.

A libel was given in by the wife, and several witnesses were examined upon it, who proved that Charles Felton was born on the 21st of November, 1793, that his father died intestate, that his mother had married Mr. Harpur previous to his marriage, and that no guardian had been appointed by the Court of Chancery. It appeared also by the evidence of his mother that he was an illegitimate child, for she stated that she had never been married to Mr. Felton, his father.

Judgment—Sir John Nicholl. This is a suit for nullity of marriage, brought by the woman; the man is still a minor. The Court excommunicated him to compel a lawful appearance; a person, however, appearing ready to take the guardianship, the Court, ex officio, appointed him, with the consent of the proctor, who had been appointed by the minor.

Under such circumstances, the Court would naturally look carefully into the case, considering it in some degree as an ex parte proceeding. But the woman is not to be defeated of justice; the licence was not taken out by her, it was procured by the man—not by her perjury. The fact of [94] the marriage is proved by a person present, and by the register to have been solemnized on the 17th of March, 1811. The birth of the husband is stated to have taken place in November, 1793, his baptism in April, 1794; therefore, at the time of marriage, he was not much above seventeen. His mother speaks to his birth; and she is the best witness to that fact, if she is credible: but the Court was alarmed at first at finding no other witness to the age; I see nothing, however, to make me suspect collusion. The mother is confirmed by the register, which has been collated by the witness who speaks to the identity. The register mentions not only the baptism, but the birth.

Therefore, on the evidence of the mother, confirmed by the register, I think the fact is proved.

The questions remaining are, if he was a bachelor, and there was want of consent. He describes himself as a bachelor in the entry of his marriage, and his mother speaks to the same fact. The mother deposes that the father died intestate; she does not mention his name, states that the child was illegitimate, and that at his marriage she was married; if he was illegitimate, there could be no testamentary guardian: a search has been made in the Court of Chancery, and no guardian was appointed there. The mother could not give consent; and, even if she had been competent to this, she did not know of the marriage.

On the whole, observing all the caution which the circumstances call for, I think the necessary facts are proved; and I pronounce for the nullity.

[95] **OTWAY v. OTWAY.** Arches Court, Michaelmas Term, Dec. 10th, 1812.—A separation à mensâ et toro decreed, on account of the cruelty and adultery of the husband.

(By letters of request from the Consistory Court of Peterborough.)

Sarah Cave, the daughter and heiress of Sir Thomas Cave, Bart., of Stanford Hall,

(a) The peculiar of Hornechurch and the liberty of Havering de la Bower, in the county of Essex, belongs to the warden and fellows of New College in the University of Oxford, who exercise their jurisdiction by a commissary.

in the county of Northampton, was married on the 25th of Feb., 1790, to Henry Otway, Esq. The parties cohabited together till the 13th July, 1811, when Mrs. Otway quitted her husband's house; and on the 18th of November, 1811, she took out a citation against him in a suit for divorce, on account of cruelty and adultery. Her charges against him were set forth in a libel of twenty-five articles; sixteen witnesses were examined in support of them: the answers of Mr. Otway were taken to the libel; and interrogatories were put on his part to the witnesses produced by his wife, but he gave no responsive plea.

Swabey and Jenner for Mrs. Otway. Both charges in the libel are proved; and, consequently, a divorce must be decreed on both grounds. There is no proof, we admit, that Mr. Otway ever struck his wife; but a separation may take place for cruelty where no blow has been struck, particularly where there is, as here, a joint charge of adultery and cruelty.

[96] In *Robinson v. Robinson* (Arches Court, 1728; before Bettsworth) ill-nature, violent passions, and frequent abuse of his wife, were proved against the husband from the time of his marriage: he had frightened her so as to occasion several fits of illness; he refused her medical assistance; in short, he had been a bad husband, but had not beat his wife: that charge was not brought against him: several instances of adultery were proved, and the Court pronounced for a divorce on both grounds.

Arnold and Adams contra. We admit the adultery to be established, but deny that there is any proof of cruelty; opprobrious language is not cruelty; and this is the utmost that is proved, there is no instance of menace or violence.

Judgment—*Sir John Nicholl*. This is a suit brought by Sarah Otway for a divorce, on account of the cruelty and adultery of her husband: the marriage took place in 1790; the parties cohabited together chiefly at Stanford Hall, till July, 1811. The husband was a country gentleman; the wife, the daughter of Sir Thomas Cave, Bart.; she had nine children by him. This gentleman, living with his wife, with daughters nearly grown up, is proved to have made his own house a brothel.

Mary Lawrence, a young girl not eighteen, was debauched by him; the fact is incontestably proved; so that on this fact alone the wife would be entitled to a divorce.

[97] Another fact amounts nearly to a rape; the account given by the woman is confirmed by another person to whom it had been admitted. A third instance is proved by Gaudern, his steward, who was employed to get lodgings and to maintain the party.

This was in June, 1811, just before the separation.

A more profligate case of adultery cannot be made out—this being so fully proved, it is not necessary to scan with exactness the charge of cruelty—acts of personal violence are not proved, but a series of most unwarrantable behaviour is. The case cited shews that it is not necessary to prove acts of personal violence to substantiate a charge of cruelty; it is the acknowledged doctrine that danger to the person and health is sufficient. The wife pleads a state of delicate health, this one of her interrogatories is said to contradict: she might have been strong originally, but after having had nine children, and borne such treatment for so many years, it was natural she should become nervous.

Many of the servants who have been examined prove Mr. Otway to have been in the habit of putting himself into passions, of following her from room to room, abusing her, calling her by the most opprobrious names, accusing her of adultery and incest. I do not consider this as mere abuse, it implies menace.

Part of the evidence on the fourth article is objected to. I do not consider it (a) (as it has been [98] contended to be) a mere general article not to be examined to, or as merely going to the character of the party, which is now discontinued in practice; but it pleads the habits of the husband in abusing his wife, and in that view it is proper to be examined to: it might have been met by the husband by pleading that such was not his habit. Therefore, I consider this evidence as properly taken. There

(a) The 4th article pleaded, "That shortly after the marriage the said Henry Otway began to treat his wife, who was of a very delicate constitution, with indignity, severity, and cruelty; abused, and called her opprobrious names; swore at her, spit in her face, and threatened to beat her, to pull her nose from off her face, and to shoot her; and ordered her to quit his house, and declared he was determined she should go."

appears to have been no provocation whatever on the part of the wife; all the witnesses state this upon the interrogatories, except Gaudern, his steward, who has been brought before the Court by a compulsion. Mrs. Otway is proved to have been so much terrified and alarmed by his conduct as twice to have quitted the house; she came back, it is true; but this is not extraordinary, for she had seven children; but her health has been materially affected: she had fits afterwards from his violent conduct, and he would not suffer her to have medical attendance till he was told she was in danger. The apothecary says he put himself in such passions as to alarm him lest he should commit violence; then what must have been the fear of a nervous woman? she declared her fears for her personal safety; and on one occasion, on recovering from a fainting fit, she exclaimed, "Do not let him come near me." So Jackson speaks to a menace, and his saying, "I will murder you;" the next morning after this [99] she quitted the house. He had been in a passion about his daughter's going out. In the deposition of the witness who speaks to this fact the menace is not mentioned. On the interrogatories he is asked if he believes Mrs. Otway quitted the house on apprehension of ill-treatment; and, on his being called upon to speak more particularly, he states the menace.

It is objected that she could have no apprehensions, for she had lived with him 20 years, and no damage had ensued; but I have yet to learn that such passions, so indulged in, do not increase.

If no adultery had been proved, I am not prepared to say that a sufficient ground has not been shewn for a separation; but the adultery in this case is connected with the cruelty: the Court cannot separate the one from the other.

I pronounce for the separation as prayed.

[100] WILLIAMS v. WILKINS. Prerogative Court, Michaelmas Term, Dec. 13th, 1812. — *Cæteris paribus*, a man accustomed to business preferred as an administrator.

Judgment—*Sir John Nicholl*. Twelve persons are entitled in distribution, *cæteris paribus*, a man of business is more proper. The parties applying for administration are Mrs. Williams, who lived with the deceased, and managed his affairs; and Mr. Wilkins, who was his partner in a banking-house. The Court would not willingly give any person a power of looking into the affairs of this banking-house. There is no imputation against Mr. Wilkins; it is not likely he or his partners would make up a false account; by far the majority of the next of kin are satisfied with Mr. Wilkins.

It has been relied upon in argument that in a former will he had left Mrs. Williams property; but he had abandoned that will, and consequently that intention: the circumstance, therefore, is immaterial. The point now is, not whom the deceased would have chosen for his administrators, but who is most proper for the office. Eight out of twelve of the next of kin are for Mr. Wilkins; three are silent; though this expression of their [101] opinion is not binding on the Court; still, unless the person on whom the majority fixes is an improper person, it outweighs the other considerations which have been urged.

Mr. Wilkins I think the most proper person to have the administration; and I decree it to him.

[102] DOBBYN v. CORNECK, FALSELY CALLING HERSELF DOBBYN. Consistory Court of London, Hilary Term, Jan. 26th, 1813.—A libel pleading the interposition in banns of a christian name by which the woman had not been known, as a ground of nullity, admitted to proof.

William Augustus Dobbyn and Maria Corneck, being both minors, were married by banns, on the 19th of November, 1810, in the church of Newton St. Loe, in the county of Somerset: one child was born of this marriage.

On the 24th of April, 1812, Mr. Dobbyn instituted a suit of nullity of marriage against his wife, on the ground that he was married under the name of William Augustus Dobbys, and she under that of Maria Philippa Corneck, whereas his real name was William Augustus Dobbyn, and hers Maria Corneck.

The 7th article of the libel pleaded that in "the months of October and November, 1810, William Augustus Dobbyn resided at the house of his mother, situated in South Parade, in the parish of St. James's, in the city of Bath, and that during his residence there he became acquainted with Maria Corneck, who then resided with her mother, Henrietta, Corneck, who lodged in Stanhope Street, in the city of Bath;

and it being well known to Maria Corneek that the mother of the said William [103] Augustus Dobbyn was adverse to, and had refused her consent to a marriage between her and her said son, and also that William Augustus Dobbyn was then a minor and under her guardianship, yet she did propose and prevail upon the said William Augustus Dobbyn to consent to be married to her out of Bath, and by banns; and, still the more effectually to prevent the publication of the said banns from being known to his mother, did fraudulently procure the publication thereof to be made as between William Augustus Dobbys and Maria Philippa Corneek, which additional name of Philippa she then first assumed for that purpose, and that banns of marriage were accordingly published in the parish church of Newton St. Loe, in the county of Somerset, between William Augustus Dobbyn and Maria Corneek by the names of William Augustus Dobbys and Maria Philippa Corneek, instead of by the only true names of the said parties."

Arnold and Phillimore for Mrs. Dobbyn. The libel is inadmissible, as it does not lay sufficient ground for raising a question as to the validity of this marriage. Fraud is alleged in the publication of banns; but if there was fraud, the husband must have been a party to it. Then as to the nature of the fraud; it is stated that they were not married by their true names—this we deny—Maria and Corneek are the true names of the woman; Philippa is mere surplusage; no fraud could be intended or assisted by the introduction of that name; and whether the husband was called Dobbyn or Dobbys must be immaterial: it could [104] not affect the publication of the name so as to disguise the person from the auditors.

The parties have cohabited since 1810, there is no disparity of age, or condition of life; and if all the facts charged in the libel should be proved, the Court must sustain the validity of the marriage.

Swabey contra. The law requires the true names in the publication of banns; the parties in the present case were both minors; the intention of the marriage act was not only to protect the natural rights of parents, but to guard the infants themselves from improper connections: this is an undue publication; an undue publication will vitiate a marriage. On this ground the libel is entitled to be admitted to proof.

Judgment—Sir William Scott. This is a proceeding instituted by William Augustus Dobbyn to set aside his marriage, under the circumstances pleaded in the libel; it is stated that he was a minor, that there was a misnomer in the banns, and that he was not married in the parish where he resided; this last circumstance, however, is excluded from the consideration of the Court under the strong terms of the statute, which enacts that no evidence shall be received as to this fact, after a marriage has taken place.

The facts principally relied upon are the variations in the names of the parties—one, I think, cannot be admitted to be sufficient to affect the validity of the marriage; the use of Dobbys for Dobbyn: it is impossible but that any one of the family [105] being present at the publication, and hearing the name, could have thought it to be any other than the same person—I, therefore, throw this quite out of consideration.

The other variation is more important, that the banns of the woman were published under the names of Maria Philippa Corneek, her names being Maria Corneek only: it is pleaded that this was fraudulently done; I accede much to the observation that this name of Philippa could hardly have had the effect of deceiving or misleading any person, by being used together with the other names.

What fraud was used? What are the inducements to it? What the woman personally did is not set forth.

I think I may admit the libel without at all laying down what my final determination may be. Certainly it is a suit not entitled to encouragement; there is no disparity of age or of condition; there is no complaint on the part of the guardian of the minor; there is no ground to say that the man is subject to the imputation of fraud.

Preliminarily, I must say that the suit is not likely to lead to the conclusion prayed; at the same time I will not exclude the party from going into proof.

I shall admit the libel.(a)

(a) No witnesses having been produced to prove the libel, the judge, on the 25th of May, 1813, dismissed Mrs. Corneek from all further observance of justice in this cause.

[106] **COLE v. CORDER.** Arches Court, Hilary Term, Jan. 28th, 1813.—In defamation suits it is not necessary that two witnesses should speak to the same words being uttered in precisely the same terms.

(An appeal from the Commissary Court of Surry.)

Judgment—Sir John Nicholl. This is a suit for defamation brought by Jane Cole against John Corder—it is brought here on the same evidence on which it was heard in the Court below; in that Court it was dismissed with costs.

It is sometimes said that suits of this kind are to be discouraged by the Courts; and when suits arise between persons of the lowest description, the Court may lament that the parties should incur a ruinous expence: but it is necessary that the law should interpose to prevent the effects of malevolence; and the law gives no remedy but by an application to this Court. In the present instance the parties are in the middling rank of life: it is necessary that there should be a remedy for a real injury. The law requires proof of the defamatory words by two witnesses, but not that they should [107] speak precisely to the identical words in the same terms: allowance must be made for inaccuracy of recollection at a distance of some time from the date of the transaction.

The witnesses both agree that the defendant called some woman a whore and strumpet; the libel lays the epithet “damned whore;” they do not agree in this—which is immaterial; the epithet had better not have been pleaded. But the only question is whether the word referred to the party before the Court. It never can be maintained that it is necessary that the defendant should mention the name of the person defamed; otherwise the most malicious defamation might go unpunished: it would be more aggravated by contrivance: it is sufficient if it is made out to the satisfaction of a judge in a defamation suit, as to jury in the case of a libel at common law.

John Stock, the first witness, states “that he became a bankrupt, and that Corder was his assignee; that, at a meeting of the creditors, he exhibited his account, and it appeared that a large sum had been paid to John Cole and Jane his wife;” Corder said, “This is the way the money has been expended by or on a woman, who is a common whore, connected with a set of swindlers;” from referring to the circumstances, there can be no doubt but that he meant Jane Cole.

George Fair was present with Corder on “an occasion of a meeting at a coffee-house—he spoke of Jane Cole in opprobrious terms, and called her strumpet;” which, though not part of the [108] defamatory words, may explain to the Court who was meant by the words spoken.

“At another time he states that he was present at a meeting when Corder animadverted on the payment and expenditure to Cole, and said that the Bedford Place establishment was kept at the public expence, that she (alluding to the articulate Mrs. Cole) was a common whore, and he did not believe that there was any Mr. Cole; he adds that he believes Mrs. Cole was a person of good character, and injured by the defamatory words.”

When the witnesses coincide as to these facts, and agree in stating the defamatory words of some one, upon such a charge in the accounts—that such a reflection was made on the expenditure for the Bedford Place establishment, where Jane Cole lived—and that he did not believe there was any Mr. Cole; can the Court entertain any doubt, i.e. any judicial or conscientious doubt, that Jane Cole was the person alluded to; added to this, there is no denial of the charge; no attempt to explain away the words; several persons were present whom the party, if he had pleased, might have examined.

The words were not confined to a hasty expression at the first moment—they were repeated on other occasions.

The Court is not reluctant to apply the remedy which the law enjoins.

I reverse the sentence of the Court below, pronounce the libel to be proved, and condemn Corder in costs in both courts.

[109] **OTWAY v. OTWAY.** Arches Court, Hilary Term, Jan. 28th, 1813.—
Permanent alimony.

Judgment—Sir John Nicholl. In this case Mrs. Otway has succeeded in obtaining a sentence of separation from her husband in a suit brought against him for cruelty and adultery.

The question of permanent alimony was reserved, and now comes before the Court for its decision, and it is my duty to allot to the wife out of the joint income a fit allowance for her separate maintenance.

The principles upon which the Court is to exercise its discretion have been so recently laid down in the case of *Cooke v. Cooke* (see page 46) that I do not think it necessary to repeat them again at any length.

Undoubtedly a much larger allowance is to be made for permanent alimony than for alimony pending suit; the delinquency of the husband is now established; the wife is the injured party: she is separated from the comfort of matrimonial society, from the society of her family, not by the act of Providence, but by the misconduct of her husband; she must be liberally supported. The law has laid down no exact proportion; it gives [110] sometimes a third, sometimes a moiety; according to circumstances.

In *Lord Pomfret's case* the income was 12,000*l.* per annum, the alimony given was 4000*l.*: in that case the larger part of the fortune had come from the wife, and there was no family; but he was a peer, and had that rank and dignity to support.

In *Taylor v. Taylor* (Arches, May 14, 1796) a moiety—in *Cooke v. Cooke* (Arches, June 25, 1812. See page 40) about a moiety, were given—in these cases there were no children.

In the present case the joint income amounts to 5500*l.* per annum. 'The greater part of this property came from the wife, the delinquency of the husband is very gross. I should be disposed to give as large a proportion as in any case; if no third parties were concerned, I should give a full moiety, but there are six children, two sons and four daughters, whom the father is bound to maintain and educate; the suitable education for such a family will be a considerable expence; supposing that deducted, the sum I shall allot will give the wife about a moiety of the remainder.

I shall allot 2000*l.* per annum to be paid quarterly from the date of the sentence.

It appears that there are deductions from the estate from two jointures of 1500*l.* each; when they fall in, it will be open to the wife to apply for an increase of alimony.

[111] HARRIS v. HARRIS. Consistory Court of London, Hilary Term, Feb. 3rd, 1813.—The cruelty of the husband established, and a separation a mensâ et thoro decreed at the suit of the wife.

[S. C. 2 Hagg. Con. 148; 161 E. R. 697 (with note).]

Judgment—*Sir William Scott*. This is a suit for separation by reason of cruelty, brought by the wife: there is no defensive allegation on the part of the husband. It is not the habit of the Court to interfere in ordinary domestic quarrels; there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment and from violent and abusive language; but the Court will not interfere—it must leave parties to the correction of their own judgment; they must bear, as well as they can, the consequences of their own choice.

Words of menace are different; if they are likely to be carried into effect, the Court is called upon to prevent their being carried on to mischief. Where blows are resorted to, the case is still more aggravated, there mischief is actually done or inflicted to a certain degree.

In the present case it is impossible not to say that there is that species of misconduct which the Court notices.

[112] It is proved that for a considerable time the husband used towards his wife words of the most insulting nature; and that they were constantly used. This is proved by the evidence of the servants who appear to give impartial testimony, allowing the husband credit for affection to his children, but stating his misconduct towards his wife. I see nothing to lead me to impute undue favour or partiality towards him.

The first matter complained of is an actual blow, though there is no direct evidence of it. What leaves the Court fully satisfied that it did occur is the blow in 1803. Her two sisters say that at that period she abstained from her usual visits to them for some time. When she came, they saw marks, and asked her the cause of them; she declined at first to answer their questions, and did not appear eager to complain, but, when pressed, she said she had received a blow from her husband with a poker: this confession of hers confirms the statement made at a later time that her husband

had struck her before, which must either allude to this blow or it adds to the number of acts of violence complained of. She bore all with the patience required of a wife—she was degraded from the management of her family; dressed not suitably to her situation in life; obliged to resort to the charity of her own family for a supply of money. “Fool,” “devil,” and “liar,” were the best terms applied to her: words of menace are also proved; he would threaten to throw a knife in her face, when he had a knife in his hand; [113] he would threaten to knock her head off; words which to a mind of greater firmness than her’s would occasion alarm.

It has been suggested that she had habits of contracting debts which justified him in taking the management of the family from her; but when I see the manner in which she was kept as to her own clothes, I do not think these habits other than the husband himself occasioned, if they are true; but they are not satisfactorily proved.

The subsequent facts are clearly established: on the 11th of Aug. there was a quarrel on account of the allowance her father had given her for her own accommodation; the husband wanted to apply this to the use of the family. I do not see that her application of it was other than was intended by her father.

On Sept. 11 there is satisfactory evidence of a blow from a tea-cup; the child came down stairs and said her father had thrown a tea-cup at her mother—the witness went up stairs, and found the cup broken, and her face bleeding—he asked the witness what she had heard about it—she told him, and he did not deny the statement—his silence here leaves no doubt of the fact.

On the 14th of Oct. was the last outrage which led to their separation; it happened in the presence of the husband’s sister; the dispute arose about the testamentary dispositions of her father—it is a singular circumstance that the sister says she leaned her head on her hand, and did not see the parties. The husband, however, by his [114] own admission to another person, thrust his fist into her face with some violence.

The Court is called upon to prevent the repetition of such occurrences—I have no hesitation in pronouncing for a separation.

[115] **BUDD v. SILVER.** Prerogative Court, Hilary Term, March 13th, 1813.—Where there are several next of kin in equal degrees, administration is granted to the person who unites the majority of interests, unless there is some ground of objection, some reason for preferring another.

Judgment—*Sir John Nicholl.* The deceased is Anne Prime, who has died leaving a testamentary paper, not disputed, but in effect merely declaring an intestacy. There are nine cousins equally entitled in distribution—of these Budd and Silver contest the administration; four of the next of kin join in Budd’s prayer, three in that of Silver, so that Budd has a majority of interests. Where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate.

There is no objection to Budd’s character or his competency; the only point argued is that his competitor is a person of superior situation in life, being an alderman of the city of Winchester; whereas Budd is only a small shopkeeper in that city: but, independently of the majority of interests being in Budd’s favour, there is another reason why he should be preferred; for it seems a [116] considerable question is likely to arise between the estate of the deceased and a son of Mr. Silver, respecting the validity of a gift. The parties interested in the property might entertain a great deal of jealousy that the claims of the estate might not be so strongly asserted by the father against his son; the more so, as he has produced affidavits to shew that in his opinion it was a valid gift.

The Court grants to the person who has the majority of interests, unless there be some ground for setting him aside: here there is no ground.

Administration granted to Budd.

[117] **REEVES v. REEVES.** Arches Court, Easter Term, May 3rd, 1813.—The re-examination of a witness refused.

[See further, p. 125, post.]

An application was made to the Court on the behalf of the party proceeded against, to permit Mr. Gallatly, a witness who had been examined in this cause, to be re-examined; on the ground that he was so unwell during the time he was under

examination, that his memory had failed him, and, consequently, that his conscience now impelled him to wish to be re-examined.

Lushington and Herbert, in support of the application, cited *Griells v. Gansell*, 2 P. Wms. 646. *Sandford v. Paul*, 3 Brown's Chanc. Cas. p. 370. *Ingram v. Mitchell*, 3 Ves. jun. 297. *Sawyer v. Bowyer*, 1 Brown's Chanc. Cases, 388.

Swabey and Adams contra. The cases have no bearing on the point; this is not an application to state that he has been misconceived; but an application for permission to add to his evidence—he does not apply to rectify a mis-statement, but to supply a course of new facts.

Sir John Nicholl asked the examiner whether, at the time of the examination, he observed any incompetency in the witness from illness or any other cause.

[118] The examiner replied in the negative; and stated that all the material points were accurately put to him.

Judgment—Sir John Nicholl. The Court will not lay down that in no possible case, and under no possible circumstances, a witness may not be re-examined: but, under any circumstances, the Court would accede to such a proposition with extreme jealousy.

The party here is applying for the re-examination of her own witness; he has been very fully examined—and concludes his deposition in the strongest terms. It is confirmed by the examiner that he was fully and carefully examined; that the deposition was read over to him on the night on which it was taken; that he attended again on the following day, and the deposition was again read over to him.

It would go to the destruction of all evidence whatever, if a precedent of this kind were established.

[119] POOL v. POOL. Arches Court, Easter Term, May 3rd, 1813.—In a libel in a cause for the restitution of conjugal rights, it is not necessary to plead specifically that the parties were of 21 years of age; provided it is pleaded that the marriage was lawfully solemnized in consequence of a licence duly obtained.

On the admission of a libel in a suit for the restitution of conjugal rights.

Lushington and Cresswell contra. The libel does not plead that the parties were of the age of twenty-one at the time of their marriage; it is necessary to plead all that is necessary for the suit: in this case the party might give an affirmative issue, and yet the marriage might not be good. In *Heffer v. Heffer* (Consist. of London, May 17, 1811) the libel stated the parties were of lawful age: this was objected to, and the Court recommended the insertion of twenty-one years of age.

Arnold and Burnaby in reply. The libel avers that the marriage was lawfully solemnized in consequence of a licence duly obtained by one party; the affidavit leading the licence is exhibited, which states the age; this is sufficient in an ordinary case. If the objection to be stated is that the party was under age, the usual proof must be resorted to by the adverse party to establish that fact.

Per Curiam. I should wish to have precedents looked into, to see if there be any settled course of proceeding; if there be none, I should be disposed to hold that the fact is sufficiently pleaded.

[120] The object is to prove that the marriage was had; the licence was obtained on the affidavit of the party as to age—this would be proof of the marriage; the presumption of law would be that it was valid; it would lie on the other party to deny it. It is averred that they were lawfully married; and the licence duly obtained; and the affidavit is exhibited by which it was obtained. Proof of these circumstances is all that is required in ordinary cases; it is not requisite that the age should be proved more than by them; therefore, if an affirmative issue should be given, the marriage would be good.

I wish to have the precedents examined and exhibited on both sides; if I find a course of proceeding established, I shall require the party to follow it; otherwise, I shall hold the averment sufficient as it now stands.

June 11.—*Judgment*—Sir John Nicholl. I have caused enquiry to be made; and I find the libels (a) are given in sometimes pleading age, and sometimes not.

(a) In the search made, forty-six libels in cases of restitution of conjugal rights since 1770 were examined; it appeared that in twelve of them only the age was specified: in thirty-four, it was not pleaded, in thirteen of the thirty-four one of the parties was bachelor or spinster: these marriages were by licence after the operation

I am still disposed to hold that where it is [121] pleaded that the parties were lawfully married, and the affidavit is exhibited in which the age is averred, and the entry of the marriage, that the averments are sufficient; it lies on the adverse party to shew any thing he thinks may impeach it.

Libel admitted.

[122] READ v. PHILLIPS. Prerogative Court, Easter Term, May 13th, 1813.—Testamentary effect given to an unexecuted paper.

Judgment—*Sir John Nicholl*. Robert Phillips died a widower, leaving four children by three different wives: the will propounded divides the property in certain proportions amongst them; it is all in the deceased's own hand-writing; it was found after his death in a place where he is proved to have deposited it, by a person to whom he had read it.

The only question is, whether he intended it for his will or as a preparation for his will? The paper is complete as to disposition, but there is no executor; and it is neither subscribed nor executed; it becomes necessary, therefore, to account for these circumstances. It is very fairly written; great pains are taken in the composition of it, but there are no formal or concluding words at the end. His house-keeper says he told her "that he had a will by him at his late wife's death, which he had burnt, and that he had written another, which he would one day shew her; that every person should have [123] a will by them; that he one day took from the leaves of a large book a paper, and said, 'This is my will or wish;' she replied that it was neither signed nor dated; upon which he answered, 'That made no difference;' he told her he had written it all himself; that she said it ought to have been drawn up by an attorney; to which he replied, it was all in his own hand-writing, and as good as if drawn up by fifty attorneys."

Under these circumstances I am quite satisfied that he intended it to operate as his will: the presumption of law, which is very slight in this case against the paper, is repelled: and, therefore, I pronounce for the validity of it.

[124] ADDAMS v. KNEEBONE. Arches Court, Easter Term, May 20th, 1813.—An allegation rejected in the Court below, admitted in the Court of Appeal.

An appeal from the Consistory Court of Exeter.

Judgment—*Sir John Nicholl*. This is a testamentary cause, in which several papers have been propounded; the first allegation was little more than a common conditit; five witnesses were examined upon it; publication passed, no allegation was given in opposition to it, and the Court below pronounced against the will. An allegation is now offered in support of the will, and there can be no doubt that, if it had been offered in time in the Court below, it would have been relevant and admissible; it pleads affection to the party benefited, testamentary declarations and capacity. The Court below, if applied to, might, in its discretion, have rescinded the conclusion of the cause for the purpose of admitting this allegation. The limitations which the Court of Appeal prescribes to itself do not apply to this case; certainly not to an appeal from a country court, on account of the irregularities which occur in the proceedings of the country courts.

[125] If the Court at Exeter precluded the parties from supporting the factum of a will by an allegation, it would have done the greatest possible injustice; suppose the parties entitled in distribution acquiesce for ten years in a will, the writer of the will dies, and then they oppose it; there would be manifest injustice if the executor was not allowed to plead supplementary matter—justice might be defeated by management.

However cautious the Court is, in general, against admitting an allegation after publication; yet, under the circumstances of this case, I am clearly of opinion that it ought to be admitted.

I shall expect all diligence in this case.(a)

of the marriage act. *Heffer v. Heffer*, in which the objection is stated to have been taken, was a marriage by banns.

(a) Many witnesses were examined on this allegation; and in Easter Term (May 9), 1813, the cause came on for hearing—when the Court reversed the sentence of the Consistorial Court at Exeter, and pronounced for the validity of one of the papers propounded, but gave no costs.

REEVES v. REEVES. Arches Court, Trinity Term, June 11th, 1813.—Separation on proof of the adultery of the wife, not barred by the conduct of the husband.

[Distinguished, *Hodgson v. Hodgson*, [1905] P. 240.]

Judgment—*Sir John Nicholl*. This is a suit for separation by reason of adultery, brought by the husband against the wife; the adultery is fully proved; that proof not being resisted, it is unnecessary to detail it. The wife [126] defends herself, not on the ground of her own innocence, but by bringing an accusation against her husband, not of mere connivance, but that he has been the active instrument of his own dishonour. If proved, this is a sufficient defence; for he cannot come into a court of justice, complaining of that as an injury, which he himself has caused to be done.

The history of the case as given by the wife is that she, while living with her mother, was induced to marry Reeves clandestinely; both were minors. In 1810 Reeves's father discovered the marriage, compelled his son to quit his wife and go to America; that the father afterwards, with the privity of the son, used means to seduce the wife to commit adultery, but that she returned to her mother, and lived in an irreproachable manner till this suit commenced.

This, if proved, would be a strong case of defence; for, though the privity of the son should not be proved, the Court would go far to presume it; if it should be shewn that the son has left the father his agent, with a proxy, enabling him to proceed against his wife in the event of her committing adultery.

It is pleaded that the parties became accidentally acquainted, and in a short time were clandestinely married; but it appears by the evidence of the mother herself, that her daughter had, in the course of the preceding year, cohabited with this young man, and that it was not until five months after their first cohabitation that the banns were published in a parish in which neither of them re-[127]-sided: under which publication the marriage was had; and they then went to her brother's. Mention is made of a bond given by Mr. Henderson of 80l. per annum to Mrs. Reeves; but this is wrapt up in mystery; therefore, as if there was something not creditable to the party to disclose, it has been suggested that the bond was from a person with whom she had a prior connexion; but that would not avail the husband: it is said that she resided with her husband some months before marriage, but neither will this affect the case: antenuptial conduct cannot lay the foundation of a suit for divorce by reason of adultery; nor can it be brought forward as such against her; but antenuptial irregularities do repel the sort of defence set up here that she was maliciously deserted by her husband, and her virtue undermined by artifice and stratagem.

Reeves was the son of a colourman in the Strand; he was an apprentice to his father, from whom, as has been stated, he kept his marriage secret: the father was informed of the connexion by an anonymous letter; on taxing the son with it, he denied it; but the next day he wrote a letter to his father, deploring, as unfit, the connexion he had formed, stating that he knew his wife had been guilty of adultery; that he was unhappy and was going to sea. He went shortly afterwards to Ireland, and was not heard of again till January, 1811; so that he was not compelled by his father to quit a virtuous wife; but he left her under the impression that she had been guilty of adultery. Reeves returns from Ireland, and is reconciled to [128] his father; he is informed that his wife conducted herself during his absence as a common prostitute; he determines never more to live with her; and in June, 1811, he went to America, where he has continued ever since. These circumstances are deposed to by different witnesses: no imputation can be raised from them of a malicious desertion; he quits his wife under the impression that she was an adulteress; the foundation of the defence laid in the plea wholly fails. The mother ventures to depose, as pleaded, to the virtuous conduct of her daughter; other evidence impresses me with a contrary belief, and also with the idea that the mother must have been aware of it; her brother and sister were both satisfied of her criminality; and, as she expresses it, gave her up. It is proved that she used to dress herself and go out in the evening; and not return home till late the next morning. Full credit cannot be given to her mother that she conducted herself with perfect propriety: the husband has left the country under the belief that his wife was an abandoned woman, but having no positive proof of her guilt; it is no imputation against him that he wished his friend to watch her conduct. He is charged with having used means to induce her to commit adultery. Dunbar states that application was made to Reeves's father for a maintenance. That Ann Thompson, to whom the application was made, said, "Adultery must be committed,

she stands in her own light, there must be a divorce, the sooner the better." But Thompson, and Reeves the father, deny any such conversation or any such intention: Dun-[129]-bar stands forth as her protector and paramour, he had criminal connexion with her; he is represented as a person preparing himself for the bar, and an officer in the London militia; his application to the father (he not being her attorney) leads to the belief that a connexion between them had then commenced. I am of opinion that the plan to seduce her into adultery is by no means established; and that the friends of Mr. Reeves were only watching her for the purpose of detecting her. But one act of condonation is stated subsequently, namely, the sending her tickets for the play; it is said this was only to prove her identity; but he should have done nothing which would have led her into temptation; and if she had been that night led into adultery, and that had been the only act of adultery proved, I will not say what the consequences might have been, or how far the Court would have decided on a single act: the Court will countenance no active step which leads to a criminal act; here it led to no consequences, as the tickets were not accepted.

The father would have acted more judiciously to have afforded her some support: a husband is bound to support his wife, to alimant her during suit; but here he was a minor, and an apprentice, wholly dependent on his father. The wife had friends, a mother, brother, and sister, with whom she lived.

The husband had no means of providing for her. The only question then is whether the husband, not maliciously deserting his wife, but under the conviction of her adultery, leaving her [130] without provision, not having the means of supporting her, is barred of his remedy. I do not find that any of the cases cited go this length. The Court is to administer the law, not to make it: if the husband connives at, or acquiesces in adultery, the law is clear, he loses his remedy, *volenti non fit injuria*; still more so, if he actively promotes it. But to say that a husband quitting his wife because he is convinced of her adultery, and only waiting for full proof before he institutes proceedings, and not supporting her because he had no means of doing so, is guilty of connivance, would be to state a principle void of authority.

The Court is reminded of the care of morality confided to it; and to be careful of laying it down that any woman, left without support by her husband, may resort to prostitution for the means of livelihood; I see not how the cause of morality will be supported by giving a woman encouragement in conduct of this description. In this case I am not to strain principles. The woman, both before and after marriage, appears to have conducted herself with great profligacy. I have admitted her to go into her defence; but, after full consideration of the evidence, and the arguments by which her defence has been supported; I am of opinion that I am warranted in pronouncing a sentence of separation.

[131] BUCKERIDGE v. GOOCH, FALSELY CALLING HERSELF BUCKERIDGE. Consistory Court of London, Trinity Term, July 2nd, 1813.—In a cause of nullity of marriage promoted by the father of a minor, the evidence of the wife of that father is admissible.

A suit was instituted by the husband for a nullity of marriage by reason of the minority of his wife at the time of the celebration of the marriage. The woman's father appeared as her guardian to conduct the suit. Her mother was examined; objection was taken to her evidence, as being the wife of the party in the cause. To this it was answered—that he was not a party suing in his own right—but merely a formal party to make a lawful appearance for his daughter.

Per Curiam. The objection was over-ruled.

[132] WARING v. WARING. Consistory Court of London, Trinity Term, July 1st, 8th, 16th, 1813.—Charges of cruelty brought by a wife against her husband not substantiated.

[S. C. 2 Hagg. Con. 153; 161 E. R. 699 (with note).]

Judgment—Sir William Scott. This is a proceeding by Mrs. Waring against her husband for cruelty and adultery. The parties were married on the 5th of October, 1800, and have five children—she left her husband in Jan., 1811, and soon after applied to this Court, charging cruelty and adultery against her husband. The charge of adultery has not been pursued; there is a letter indeed introduced annexed to an interrogatory unknown to the other party, on which some observations have

been made; but it is impossible for the Court to give attention to it, or to the observations made upon it, as no opportunity has been offered to the other party of contradicting it. I shall follow the example of the adverse party, and dismiss that part of the charge from my observation; there only remains, therefore, the case of cruelty.

The definition of legal cruelty is that which may endanger the life or health of the party—it generally proceeds from the wife as the weaker person—but it may come from the man, and has so done in several cases; but, generally, the wife complains of what is dangerous to her—on the shewing of which the Court releases her from cohabitation.

In doing this the law presumes her not to have been the authoress of her sufferings; it is on [133] the presumption that her own conduct has been proper, if not, the remedy is in her own power; she has only to change her conduct; otherwise, the wife would have nothing to do, but to misconduct herself, provoke the ill treatment, and then complain. I do not mean that the law would not interfere, if this misconduct was visited by the husband with intemperate violence; there may be failings, if inordinately resented and visited with a harsh and more than due authority, upon which the Court would not decline to interfere. But if her conduct be totally incompatible with the duty of a wife, if it be violent and outrageous, if it justly provoke the indignation of the husband and causes danger to his person—she must reform her own disposition and manners; she must remedy the evil by changing her own measures, and it is to be hoped that the evils will cease with the behaviour which produced them: and, if they do not, she may then complain to the Court, and solicit its interference with effect.

On these principles this cause is to be examined. It most certainly appears that in this family grievous dissensions have existed, unbecoming the situation of the parties in life, and the duty of their relationship to each other—gross abuse—violent language—personal struggles—disturbance of the neighbourhood; in short, such scenes as the Court has seldom witnessed in its experience of these cases. It does not necessarily follow that these dissensions are the husband's fault—they may be the fault of both—or pre-eminently of the complaining party herself.

Before I proceed to examine the principal parts [134] of the case, some observations occur with respect to the witnesses. The greater number are produced by the complainant—they are servants, and where husband and wife disagree servants are witnesses to be heard with caution—they have their prejudices—the females generally take the part of their mistress—some are dismissed by one, some by the other; they speak according to their supposed injuries. Three are cookmaids, who, from their situation, can know but little; they come in where the parties are in contention, but must be ignorant how the contention arose. Two are housemaids: the same objection applies to them; they come in when open hostilities have broken out, but do not see the origin of them. The footman or butler is also produced, who, perhaps, had more access to them; but his account shews that his opportunities of observation were very imperfect. A surgeon likewise, Mr. Cooper, has been examined, who appears to have had some differences with the husband, which may have coloured his evidence—but his knowledge, from his own observation, is of a very superficial nature. In one particular illness he thought Mr. Waring's attention to his wife was not such as it ought to have been: this is matter of opinion—this may depend on the different degree of warmth of feeling in different men, and cannot be made a charge of legal cruelty.

Mr. Utterson, a gentleman at the bar, speaks to one fact from which he infers harsh conduct, of which he can know little: she came in a state of distress; but he knows nothing of the commencement of the quarrel, and so judges only from her appearance; if the husband had come in in equal [135] disorder he might have excited equal sympathy; frequent noises are heard; appeals are made by the lady from the windows, which shew great disorder in the house. Twelve of the witnesses are subject to this objection, that they never saw the origin of the quarrels. Cooke and others saw the quarrels, but did not see the beginning of them—what appears offensive and harsh might be justified or palliated by its commencement: that which would be violent, if aggressive, might be justified if defensive. If the wife was the prior lādens; if she gave the first blow, though it may have been unmanly to return it, the law will allow for the infirmities of human nature and make allowances for

conduct provoked by gross and scandalous indignities. The representations of such witnesses are entitled to little credit; but I must observe that several of them throw the blame upon the party complainant.

Mr. Henry Waring is the witness whose evidence, I think, entitled to the greatest credit—he is the nephew of one of the parties; but he has been examined on both sides, and speaks with moderate allowance for the faults of both parties. He saw them daily; in their quarrels he says the conduct of the wife was provoking, and soon became violent.

Chapman, who was employed in waiting on the children as a nursery maid, says, “She frequently put herself in a violent passion; often said provoking things to him, which, as it were, made him quarrel with her.”

Elizabeth Wickens “considered her as very [136] provoking and sullen; she frequently locked herself up. One day, when she did not choose to go down to dinner, she sent a message by one of her own children to her husband, that if he did not send her up some dinner, she hoped the bones would stick in his throat and choak him.”

Lucy Wickens says, “She frequently dined in a different room from her husband—witness saw them frequently together; that her conduct was frequently very provoking to her husband: several times she locked him up in his rooms and refused to let him out, notwithstanding the messages he sent to her; once he was obliged to get out at the window.”

Susan Wickens “thought her conduct very irritating, speaks to her locking up her husband, and that she would sometimes order no dinner to be prepared for him.”

These are her own witnesses, who depose to her conduct, which is highly reprehensible; which must be expected to draw down severe treatment on her; in which she would be the authoress of her own wrong, and not entitled to relief.

I will now dismiss some charges, of which there is no evidence—the giving her an emetic to procure a miscarriage; of this there is no evidence whatever, but some declaration, made by herself, to Mr. Cooper the surgeon, and the servants; and seeing the nature of the declarations in which she has indulged herself, respecting other acts, I do not think, in this instance, she is entitled to much credit. I have looked into the husband’s answers, [137] he denies the charge upon oath—he may have offered her medicines, he says, but it was for no such purpose—her sister has not been examined on this article; which is singular, as she appears to have been much in her confidence.

Another charge alleged is that she had no supplies of money while her husband was absent in Ireland: this is not only disproved, but the fact turns out to be directly the reverse; she was regularly furnished with money from his counting house.

Another accusation is that she was compelled to come down stairs to dinner when she had just had a miscarriage—that she came down to dinner when she was very infirm is true—nothing further is proved, but her own complaint; to which, considering the colour of her operations, I do not give credit.

Another charge is that her husband for some years forbade her intercourse with her own family: it was not without hesitation that the Court admitted the pleading this fact; for, though it may be a harsh exercise of the husband’s authority, yet he may be justified in such a prohibition: though a woman may be amiable, her connexions may not be so; and there may be many reasons to justify a husband in denying such an intercourse—though it may be harsh, it would be going too far for the Court to interfere. But it appears that some coolness took place between her husband and her father, on account of some pecuniary matters, in which the former thought, whether justly or not is immaterial, that he was ill-treated by the father—[138] that he had provided articles for another person, on her father’s recommendation, for which he thought him responsible, but he thought he was not. The husband complains that she threw the note from her father respecting this transaction into the fire—she admits, in her own plea, such facts as might fairly have given the husband ground for such a surmise.

The substantial charges of ill-treatment are three, they are admitted to be so by the counsel; but, if they are not proved, in point of severity, so as to carry legal consequences with them, the suit is at an end: it is necessary, therefore, to examine these facts.

On the 6th of April, 1808, the libel pleads that Mr. Waring, without any provoca-

tion, put himself in a passion, swore, attempted to drag her, &c. and beat her head against a marble chimney piece; that he broke her comb, which he forced into her head—she fell; he dragged her; the servants interfered on hearing her screams, and the husband then desisted. Several witnesses speak to this; but these servants come in after the heat of the battle, and know little or nothing of the circumstances that led to it; it turns out that Mr. and Mrs. Waring were invited to spend the afternoon with Mrs. Rule, and that there was some altercation about a coach. Mrs. Waring's sister does not mention the preliminary circumstances of the quarrel in her examination in chief, but when pushed by interrogatories, she says that the quarrel happened just as they were going out; that, in consequence of it, he went alone, and she, unwell and agitated by the [139] altercation, staid at home. On the same interrogatories she says they were both going out, but the husband went alone—the cause was, the wife sent her to ask him if he would have a coach—he answered in the negative—she sent again—he again answered in the negative—she, ten minutes after, sent a message by one of the children to say she would have one got: from the lateness of the hour and the uncertainty of getting it, she determined not to go; he was angry and went alone, leaving them to follow him—afterwards rain came on. I see no reason why the parties should be so violently dissatisfied with each other. A message was sent from Mrs. Rule to desire her to come, or say whether she was coming or not—the servant was called in; Mrs. Waring informed Mrs. Rule and her party, by this servant, that Mr. Waring himself could tell the reason why she did not come; and, after delivering this reply, the messenger was sent back. I cannot but think it was a rude and improper message, tending to expose the husband to the ridicule or censure of the company with whom he was—she could have gone—and I think the message was sent evidently with a view to draw that consequence upon him. Take it any how, her conduct was irritating; and it is not surprising that it should bring him home a provoked husband. What passed at first appears only from the sister; and considering how much she had made herself a party, that she had not dissuaded the wife from the behaviour and message before, I think her account of what followed is imperfect and not perfectly credible: she says that, without [140] saying a word, Mr. Waring passed her jerked his wife off her chair across the hearth, by which she fell and struck her head; she screamed, and the servants came in—Wells says he found her on the ground, crying, "Oh my head;" he said, "Yes, with a violent oath, and it's oh my head too;" it appears then that they were both complaining of mutual violence; he calls it a battle, another scuffle—it is extraordinary that the next day they dined together; and Wells says they appeared to be reconciled; if it happened as stated, I think she would probably have put herself for some time under the protection of friends; I think originally there was a provocation in not going, and a grosser one in sending the message; a message passed after the conflict on his return, in which both complained—they dined amicably together the next day; and a formal reconciliation took place, through Mr. Abernethy, by the recommendation of her father.

Her husband went to Ireland—but Abernethy says he gave her a letter and told her her husband was coming home; she burst into a passion of tears, continued hysterical all day, wished he might never return, but he drowned on his passage.

Connect this with the message sent by one of the children, and I ask whether every thing outrageous is not to be expected from a person who so gave herself up to the expression of such an ungovernable passion.

Every thing ungracious appears to have passed on both sides. No open quarrel is brought forward till they were at Sandgate in 1809. Henry Waring's account (which, as I observed before, is [141] the most credible) of the mode of living then is not favourable to her. The servants would tell him as she had ordered no dinner for him none was prepared; at times she was violent and outrageous, particularly about the carriage.

Elizabeth Wickens speaks to the same effect.

Looking at this system of life I think the wife could not more effectually try her husband's temper; contradicted in every thing, he appears to have borne it in a way rather inconsistent with that irritability of temper which is attributed to him—it makes evident what Henry Waring says; she frequently told him, viz. that she would tease her husband into a separate maintenance, and would have 600*l.* per annum. Mrs. English says 800*l.*; they may have mentioned different sums, but I think the

intention was to force a separate establishment by determined contradiction—such conduct could answer no other purpose.

Another fact complained of occurred on the 10th of October; Henry Waring says she asked him to go and see the fireworks: the husband said he wanted him—she said if he would not let him go he should not go himself—she locked the door, he opened it, she laughed insultingly, and he gave her a slap on the face; the witness thinks it did not hurt her, but it must have made her face smart—she attacked him, scratched him, pulled off his wig, took hold of the poker, and said she would settle him—it was not an inercuenta victoria, but she carried off the wig, the opima spolia, which were pinned up in the window-curtains, and were not recaptured till the next day. It is scarcely possible [142] to speak of such scenes with gravity, if they did not seriously affect the peace of a family. The lady seems to have taken the law into her own hands, and employed those hands most energetically on this occasion.

The husband, not unnaturally, returned to town in anger—a reconciliation between them was attempted by their friends—it might have been hoped that a sense of duty might have returned—something of that kind appears in a letter of hers which has been exhibited, acknowledging misconduct—he required that she should retract her dreadful expressions, what they were is not mentioned; however, she does retract them; and thereby admitted, undoubtedly, that such had been used—it has been answered that this was wrung from her, and it certainly appears not to have been a sincere and serious disavowal—her conduct was quite the reverse of what should have followed it, if sincere—her very penance was little short of renewed misconduct.

The last act was that of the 22d of January, 1811: this led to their final separation.

Henry Waring says that the husband asked him to go to the theatre—she desired him to stay and take her the next day—he said he would go then too—she said he was going to a mistress. She went out, and locked the area door and the house door. Suppose her suspicions were true, was this the proper way to regain her husband's affections? to turn his castle into a jail, and to become his jailer? it would probably lead to the opposite result—it would drive him to some [143] more indulgent society. The committing an act of false imprisonment is an extraordinary way of breaking up an illicit connexion, and recovering alienated affections. He demanded the key, she refused it—he desired her to observe that he did not mean to use unnecessary violence—he attempted to take the key, she screamed—he said he would not hurt her, but he would have the key, which he had a good right to have: a great struggle took place, the servants desired her to give up the key—she answered, how can you plead for such a villain—consider the effect of such an expression to a husband locked up, and demanding possession of his own house, and the use of his own liberty—the servants remonstrate. She threw a little trunk at him, aimed a blow at him with a candlestick, got him down on the chair, bit his nose; and said, if he would not go out, she would give up the key; he got it, but it was a conditional surrender.

It is not necessary to pursue this history, which has degraded the attention of the Court for three days.

After this the consequences, which it is quite impossible, as I think, not to expect, followed. The husband found means, somehow or other, to effect the dismissal of his wife, and I cannot say if he was reduced to the alternative, either to be deprived of his own liberty and locked up in his own house, or to part from his wife, that he was blameable if he took the latter course. In the conflicts between two such dispositions, there is no saying what might ensue. I do not enter into [144] the mode which he took—all that followed was nothing more than the natural sequel of what went before.

On this state of the evidence, I am not entitled to say that either party is free from fault: to enter into personal scuffles with a woman and a wife is a hard extremity; but a man may defend his own life and liberty, and it is a hard task always to return blows with mere words, he may defend himself by force, if attacked by force.

But though I may not be able to exonerate the husband from blame; the wife's own conduct does not give her a title to complain. I am unwilling to describe it in the terms which properly belong to it: it might look too much like that indignation which every Court must naturally feel at having such scenes brought before it. I recommend to her the duty of self-examination: and to consider whether her own behaviour may not remove the evil, and consist better with her duty to her husband, her children,

and herself. In the hope that this may be the case, I dismiss the complaint, and exonerate her husband from all further attendance in this Court.

[145] *VERELST v. VERELST*. Arches Court, Michaelmas Term, Nov. 25th, 1813.—
On the admission of an exceptive allegation.

An appeal from the Consistory Court of London.

In this case a suit for divorce, by reason of adultery, had been instituted by Mr. Verelst against his wife; and a libel had been given in by him. Mrs. Verelst gave in two successive allegations responsive to the charges brought against her in the libel, and recriminating upon her husband. Witnesses were examined on both sides, and publication was decreed.

The present question arose upon the admission of an allegation excepting to the credit of four of Mr. Verelst's witnesses. A part of this plea had been rejected, and a part of it admitted in the Court below.

From that sentence Mrs. Verelst appealed.

Swabey and Jenner argued in support of the sentence of the Court below.

Arnold and Herbert for Mrs. Verelst.

[146] *Judgment*—*Sir John Nicholl*. This suit originated in the Consistory Court of London; a libel was given in by the husband, and eight witnesses were examined upon it—an allegation was brought in by the wife, on which she examined twelve witnesses; and afterwards another allegation on which she examined four witnesses. Publication passed in the cause, and an exceptive allegation was then offered attacking the character of four of Mr. Verelst's witnesses. The Consistory Court rejected a considerable part of it, from which sentence the wife appeals; and this Court is to decide whether the judge of the Consistory Court has done right in rejecting it.

Before I examine the contents of the allegation I will notice some of the principles laid down. It is admitted, on all hands, that exceptive allegations are received by the Court with great caution and jealousy: it is a principle of all Courts, whose proceedings are regulated by the civil law, that all facts shall be pleaded and proved before the depositions of the witnesses are seen, from the danger which might arise from the fabrication of evidence to meet the defects of the case. The Court is not the less cautious, when an allegation of this description is offered by the wife; for, though it is not the wish of the Court to narrow her defence, yet it must recollect that she has not the usual restraint of costs to operate as a check upon her conduct, as the expences on both sides are defrayed by the husband. It has been suggested that the particulars of this case may justify a re-[147]-laxation of this principle; but the Court must be cautious not to endanger the principle itself. It is said that the husband is charged with having obtained a verdict by collusion, and with tampering with the witnesses: but I have to remember that the wife has pleaded recrimination, and, in some articles, collusion, and that the husband had declared he knew of her adultery; therefore, though not inconsistent with innocence, yet the tendency of the charge was such as made the Court vigilant as to the subsequent defence by charging the witnesses.

In the second allegation there was no attack on the general character of the witnesses; but it is pleaded that the verdict was obtained by the defendant having been persuaded not to bring forward her witnesses, and that the damages were agreed upon. If such is really the complexion of the cause, the husband would do well to consider what advantage would result to him from proceeding in this suit. It is competent to the wife to offer such a defence, and to shew that the husband has brought unfounded charges; but this is not a case in which the Court can relax the principle on which it usually proceeds.

An exceptive allegation must not merely shew slight variations in the testimony of witnesses; but it must shew that the witnesses have wilfully sworn falsely; it must overturn their credit.

The first article has been ordered to be reformed, I suppose, by striking out the names of the witnesses against whom no article has been admitted.

The second article recites various parts of the [148] depositions of the witness, William Preston, both in chief and on interrogatories—he had deposed to two acts of indecent familiarity. He was a gardener, employed in the absence of the footman; and sometimes, when the footman was not absent, to wait at table. The acts of indecent familiarity he states to have occurred at different periods; one on a day soon

after breakfast; another, on a Sunday, about five weeks afterwards, when there was company in the house. In contradiction to this it is pleaded that the one footman left the family on the 24th of October; and a new one succeeded him on the 6th of December, and that there was no company in the house; and that Mr. Staples, with whom the wife is charged to have committed adultery, was only once there in that period. The witness, however, whose credit is impeached, is not, in his deposition, precise as to time; he was several times employed as footman, and might easily mistake the time when he saw the facts; it might possibly be when he was assisting the footman—he may have confounded the times—if these facts, therefore, should be proved, they will not satisfy the conscience of the Court that the witness has deposed knowingly and wilfully falsely—if he had been precise, and tied himself down to time, and it could be proved, on the other hand, that Mr. Staples was only once there; his own evidence would weigh a little against the witness—but if he could prove an alibi, it ought to be distinctly set forth—I think the judge of the Consistory did right in rejecting this article.

The third article pleads that the witnesses gave [149] a different account on the trial at common law from that to which they have now deposed. I do not see from the statement that it amounts to a contradiction; it is only that they express the same fact in different terms.

The fourth article pleads a direct and positive contradiction of Preston; and, as the party will have the benefit of this article which is admitted, it makes it still less necessary to have admitted the second and third. Let this article be reformed.

The fifth article is an attack on the witness, Humber, who has deposed that “while they were at an hotel at Harrowgate, by means of the lamps in the passage, and a light from the window on the stairs, she plainly saw Mrs. Verelst go to Major Staples’s bed-room door in her dressing gown.” In answer to this they undertake to prove there was no lamp or light on the stairs—but really, considering the distance of time at which this transaction happened, I think it would not be possible to produce evidence so precise as to satisfy the Court that there was no light by which the witness could see the transaction she relates. I reject this article.

The sixth article has been admitted against Humber, and in that the party has the benefit of a stringent contradiction.

The seventh article states that Humber at different times has given different reasons for not communicating to her master what she had seen. I think, however, the reasons stated might very well concur, and I confirm the rejection of this article.

[150] The eighth article states that Humber says she watched the transaction from the best bed-chamber; and it is pleaded, in contradiction, that she could not get into the best bed-room from her own bed-room, without going through the kitchen; and that a person slept in the kitchen, which person will depose that, after she went to her bed-room, she did not return to the kitchen. The objection to the admission of this contradiction is that these circumstances might have been pleaded in contradiction to the libel; and that, by admitting it in this stage of the cause, I should break in upon a rule, than which none is more cautiously observed in this Court, viz. that a party shall not lie by and contradict in exception that which he might have contradicted before publication in plea. Without this rule the purity of evidence could not be preserved; and on this ground I reject the article.

The ninth article is admitted.

The objection to the tenth and eleventh articles is that, if the circumstances should be proved, they would not amount to a sufficient contradiction. I think the variations stated would not discredit the witness—he does not pretend to have taken down what was said, but the substance of what was said. She might easily mistake the 20th for the 21st of October—he states himself that if it was so in the paper, it was there by error, and the Court would put that construction upon it; it would not consider it as a wilful and corrupt misrepresentation. I see no inducement to falsify it.

The same observations apply to the thirteenth article.

[151] I have now disposed of all the articles but the twelfth; which is given in contradiction to the evidence of Dorothy Sayer. She deposes, on her examination on the tenth article of the libel, “That the clock had just struck twelve, when, by means of the light which came through the glazed fanlight over Major Staples’s bed-room door, she plainly saw Mrs. Verelst come out of her own bed-room.” Whereas, on her examination in the Court of King’s Bench, on being asked, “Did you leave the

best bed-room door open so as to see," she answered, "Yes." And, on being afterwards asked, "How long had you been there before you saw any thing?" she answered, "The clock struck one, and, about five minutes afterwards, she stepped out of her own room, on the landing place." The witness gives no particular reason why she should fix one hour more than another—there is something of a variation certainly in this account, but it is not a material variation; if any reason had been assigned for it, the Court might have attributed corrupt motives to her; but, as it is, I must impute it to have arisen from mistake, from want of recollection, or from that confusion natural to a female on being examined in a public court of justice.

The evidence on which the Court is to rely, for the decision of the cause, is more to be collected from the substance of the depositions, than from anything usually brought forward in an exceptive allegation. Circumstances material to the elucidation of the cause seldom come out on a plea of this description.

[152] SMITH v. SMITH. Arches Court, Michaelmas Term, Dec. 7th, 1813.—

Alimony pending suit.

[See p. 67, ante, and pp. 207, 235, post.]

By letters of request from the Consistory Court of Bangor.

Judgment—*Sir John Nicholl*. This suit is brought by the wife for cruelty and adultery. She now applies for alimony pending the suit; and certainly the Court will not allow the same as if such a charge was established; yet, I think, the nature of the suit is to be considered; the charge is made—the answers are given in; as yet there is no allegation on the part of the husband; there is no ground to consider the suit as vexatious—no proceedings appear to have been had for the purpose of unnecessary delay. Therefore, the wife has a right to be maintained with some reference to her former comfortable state, yet with moderation.

Under the circumstances it is to be considered that a very great part, though certainly not the whole, of the fortune belonged to the wife—there is one child; in the proceedings it appears that the wife is desirous to have that child; but the husband, charged with adultery, will retain it. [153] The Court is not inclined to lessen the alimony on account of the maintenance of this child.

The Court must consider what is the fair and reasonable proportion. I do not exactly ascertain the income of either party from their answers. I take the husband's income to be about 1500l. per annum, and that which the wife has as a separate allowance to be about 300l. per annum. I think 200l., in addition to the 300l. the wife already receives, will not be an improper allowance. I give it clear of the property tax, because that is deducted in the husband's estimate.

WALKER v. WALKER. Arches Court, Michaelmas Term, Dec. 7th, 1813.—A

matrimonial suit dismissed on account of delay in the proceedings.

By letters of request from the Consistory Court of Worcester.

A libel was offered to the Court by the wife, charging her husband with various acts of cruelty and adultery, and praying a separation à mensâ et thoro.

Jenner for the husband, was proceeding to state his objections in detail [154] to the admission of the libel, when he was stopped by the Court, who called upon the adverse party to account for the delay which had taken place in the proceedings of the suit.

Lushington, for the wife, stated that Mrs. Walker had been confined by her husband, and denied access to her advisers, and that she was a person very weak in mind.

Per Curiam. The whole complexion of the case is that of complete condonation and acquiescence—the suit was commenced and then as it were abandoned, for a delay of nine months takes place; unless this is satisfactorily explained, I shall dismiss the cause. An instrument was signed by the wife; it appears to have directed an end to be put to the cause, this instrument is stated to have been obtained by duress; but that duress, by their own statement, must have ceased in February last.

If I suffer it to stand over till the first day of next term, I shall expect such an affidavit as will satisfy me. If she is a poor weak woman, without friends, I shall be loth to preclude her from bringing forward her case; but for some circumstances of this kind, which appear upon the face of the proceedings, I should have dismissed the suit. She seems to have allowed herself to be superseded in the management of her family for a number of years, and to have acquiesced in it—then an arrangement is made, and she is the person to break that arrangement.

There is a presumption of acquiescence, but I [155] will allow it to be repelled before the first day of next term.

Let the cause stand over.

Hilary Term, Jan. 27, 1814.—*Judgment*—*Sir John Nicholl*. I find a case, in which the Court has dismissed a suit on the ground of delay, in the parties proceeding. In *Betcher v. Betcher* (a) a suit brought by a wife against her husband for adultery, a petition was presented to the Court, stating that the depositions were lost, and praying that the cause might be heard, on official copies of them. The objection taken was, that there had been such a delay as amounted to a condonation—the suit had commenced in 1775, proceeded till 1777, and from that time nothing had been done till 1787. The Court said it looked with jealousy into matrimonial cases; particularly when they were brought by the wife—and dismissed the suit on the ground of delay in the proceedings.

In the present case the suit has not been so long pending; but there are other circumstances which lay a stronger presumption of condonation. It began in Michaelmas Term, 1812, by letters of request—and a proxy was exhibited by the wife's proctor, and no further proceeding took place till Michaelmas Term, 1813. This is such [156] a delay as might have induced the Court *ex mero motu* to dismiss the suit—but, when the libel is given in, I might have expected it to be perfect in form; none, however, of the dates are filled up—they are all in blanks. Again, the Court would have expected a strong case—but here is long acquiescence and condonation. Condonation will not so soon bar a wife as a husband—but the misconduct charged is for thirty years, during which the husband has been living in open adultery; and, at last, it is not the wife who leaves him, but he who leaves her—this looks as if she had not considered the adultery such a grievance as she now wishes to represent it.

The 16th article states that, since the institution of the suit, viz. in February, 1813, she was compelled by her husband to execute a deed of separation, on an allowance of 50*l.* per annum; and then she gave an order to her solicitor to stop proceedings here: but it does not state that she has taken any steps to avoid the deed, or to punish the parties for a conspiracy—the story is improbable—she is stated to have been confined ten days in the city of Worcester. The going two or three times to a solicitor's office does not apply to this—but she does not proceed in the cause when the duress ends, but waits till Michaelmas Term.

It would be satisfactory to the Court to hear that an arrangement was going for securing this woman's subsistence; but I must look to her conduct in the proceedings in a judicial view.

[157] If the husband continues to live in adultery, I do not know but that the wife may have a remedy by a fresh suit—the condonation would be taken off. I shall dismiss the parties from this suit.

[158] PARNELL, ACTING HIS COMMITTEE v. PARNELL. Consistory Court of London, Hilary Term, Jan. 25th, 1814.—The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery.

Judgment—*Sir William Scott*. This is a suit brought against the wife of a lunatic, for adultery, by his committee. The facts of adultery are charged in a number of articles—the admission of the libel is contested on the ground that the party proceeding is incompetent to bring the suit; and I must acknowledge that there has not occurred, to my observation and experience, any case in which a lunatic has appeared in such a case by his committee—it cannot, therefore, be determined by precedent, but must be decided by principle and by analogy.

On principle it resolves itself into two questions; first, whether a lunatic is put out of the protection of the law of England in such a case; secondly, whether there is any other mode of proceeding by which he can obtain redress.

On the first point there can be no doubt it would be a most monstrous proposition that the wife of every lunatic was absolved from all the obligations of marriage, was at full liberty to commit adultery, and to fill her husband's house with a [159] spurious issue—the unfortunate husband cannot be left in such a state of aggravated misfortune. It is impossible that any system of law can have been so improvident as to have left

(a) Consistory Court of London, Michaelmas Term, 1787, before Dr. Calvert.

such a class of persons without any remedy ; their claim to protection is stronger even than that of other men : the law must apply that vigilance for them of which they themselves are incapable—it must afford them relief against the greatest of all injuries, affecting every consideration dearest to the hearts of men ; for the sake of their families, also, lunatics must be protected by some mode or other.

The question then is, in what way relief is to be afforded them. I should answer in the same way that it is when their other rights are disturbed, namely, by means of the committee—who, being specially appointed the guardian of the lunatic, represents to the Lord Chancellor—he has the care, in the language of the petition, of the person and property of the lunatic and of his family—he is to take care, not only of his personal rights, but of the general interests of his family. The lunatic must act by his guardian, by that person to whom the care of his fortune and property is confided.

The lunatic cannot directly institute a suit here ; in momentous concerns connected with the Court of Chancery the committee usually applies to the Lord Chancellor for directions—to him the accounts of lunatics are submitted ; but it is not necessary to resort to the Lord Chancellor for the purpose of exercising an authority to institute proceedings here. This Court, however, stands in no such re-[160]-lation to the lunatic ; but it is bound to entertain a suit when the committee has determined to bring it—it has no discretion to refuse it.

On these grounds, and upon principle, the power of the committee must be upheld : it is exercised to protect the lunatic from the greatest possible injury—from the alienation of his family property—from making him responsible for the support of a wife entitled to no maintenance.

Upon analogy to other cases, in what way do persons bring suits when labouring under infirmity of understanding, and imbecillity from the immature period of their life? The suit then is the act of their guardian ; he is to the minor what the committee is to the lunatic—he is appointed to have the *persona standi*.

In suits for nullity, the power of the committee has been admitted—and he has proceeded to the dissolution of marriage on account of the alleged incapacity of the party. Why not in this suit, which is not so momentous in its consequences? No injury is done the woman ; if the lunatic recovers possession of his senses, he has the power of condonation if he should think her still an object of compassion.

On these grounds I am without any doubt that this libel ought to be admitted.

[161] **BEST v. LADY EMILY BEST.** Arches Court, Hilary Term, Jan. 27th, 1814.—

Delay in instituting proceedings in a matrimonial cause to be accounted for.

Judgment—Sir John Nicholl. This is a suit brought by Thomas Best, Esqr., against Lady Emily Best, for separation by reason of adultery. The marriage took place in September, 1804 ; they cohabited together till 1807, when Mr. Best was confined within the rules of the King's Bench prison. Lady Emily at first continued to reside in her own house, but afterwards went to her father's (the Earl of Alboroughs) in Ireland—in 1808 she returned and cohabited with her husband in Temple Place, within the rules of the King's Bench—it appears there is, at least, one child, the issue of this marriage.

In July, 1808, she quitted her husband, and went to live with Mr. Henry—she cohabited with him at the Pack Horse, at Turnham Green ; and afterwards went and resided with him at his seat, in Ireland—she lived with him till he died, which was in February, 1810. During this cohabitation a child was born, which was baptized as the child of Mr. Henry and Lady Emily Best.

[162] In 1808 Mr. Best brought his action against Mr. Henry, for damages, in the Court of King's Bench—in 1809, 2000*l.* damages were awarded to him—judgment went by default.

The present suit was instituted in 1813.

Of the proof of adultery there is no doubt—her cohabitation with Mr. Henry is completely proved—but the Court requires something more—the parties lived in open adultery for a year and a half, and it was not till five years afterwards that this suit was commenced—without deciding how far this delay in bringing the suit may amount to a condonation, at all events the delay requires explanation. Why is the husband better able to bring this suit in 1813 than in 1808? This excites the suspicion and presumption of former connivance, which must be removed. The Court would expect

to be informed how the adulterer became acquainted with the husband? And whether the intercourse was carried on with clandestinity? All now stated is consistent with the husband's privity, though it is very possible that no privity existed. Mr. Henry visits Mr. Best at Temple Place—Lady Emily kissed her child at parting, and told her maid she should return the next day—which she did not—she wrote to the maid the next day to take care of the child—Mr. Best had already procured a nurse for it; and her maid went and found her the next day, and continued to live with her and Mr. Henry.

The question is, whether this was a voluntary transfer of his wife? The Court would like to be informed whether he felt any distress at his wife's [163] not returning; whether he gave her licence to go: but there is no one fact to shew what his conduct was on the occasion.

It is true an action was brought in 1809—but then judgment went by default. A verdict was given for 2000l.: this negatives a part of the excuse that the husband was unable to sue for a divorce on account of poverty. Either the damages were recovered, or not; if they were not, the circumstances leads to the suspicion of collusion—if they were recovered, they must have supplied a fund for the prosecution of this suit.

There was every motive to accelerate the proceedings here; a child was born, within eight or nine months after her cohabitation with Mr. Henry. There was every danger of a spurious issue; the husband was conscious of the situation of his wife—the fact was not disguised—the child was openly registered—in fine, there is that degree of acquiescence which requires explanation.

It is pleaded, as usual, that the husband has not cohabited with his wife since the discovery of the adultery—the Court is not strict in requiring proof of this article—it generally is unnecessary from the *res gesta*—the indignation of the husband, or the rapidity with which the suit has proceeded, generally repels all probability of connivance—but, in the present case, five years have elapsed without any proceedings.

These are difficulties which I certainly feel it necessary to have removed before I grant the prayer of the husband.

The party may either pray to have the conclusion [164] of the cause rescinded, and then offer an affidavit to shew how he received the intelligence of his wife's departure, the embarrassment of his circumstances, and the reason of the delay. For where there is such full proof of the adultery, I am unwilling to drive a person, already in distress, to resort to the superior Court. Or, if the husband is dissatisfied, and thinks he is now entitled to a decree, I am willing to pronounce my final opinion immediately—and he may carry the case by appeal to the superior Court.

The Court would not have granted this indulgence to the husband, but that the adultery is fully proved, and that the embarrassment of the husband is clear.

Hilary Term, Jan. 25.—Jenner and Lushington tendered an affidavit on the part of Mr. Best.

Phillimore and Dodson contra. It is impossible for the Court to admit any affidavit, or, indeed, any statement whatever, from the husband.

In all matrimonial causes the judge is bound to decide according to the proofs before him, *secundum allegata et probata*; (a) if the case is not proved, the cause must be dismissed; but, above all, it has been universally held, as essential to the pure administration of justice, that in all questions, involving either the dissolution of marriage, or se-[165]-paration à mensâ et thoro, no credit whatever should be given to any statement, upon oath, either of the wife, or of the husband. In the present instance the Court is called upon to rescind the conclusion of the cause, not to introduce new matter alleged to have come to the knowledge of the party, subsequent to the publication of the evidence; but to admit the oath of a party principal, to purge away a grave judicial suspicion, growing out of the evidence which he has himself introduced. This is contrary to the practice of all matrimonial courts—a practice having a deeper foundation than mere technical regulation and convenience, inasmuch as it is interwoven with the very essence and foundation of justice. All writers on the canon law enforce and uphold the necessity of it (b), (c). Gails. *Observ. lib. 2. Marantæ Spec. Aur. par. 6, 1, 7.*

(a) *Actore non probante solvenda est rea.* Gail. *Obs. p. 93.*

(b) *Quapropter sicut in criminalibus ita quoque in hujusmodi civilibus arduis causis, probationes luce meridianâ clariores requiruntur, et hoc omnium maximè*

Nor is this practice confined to the Rota, or to the Imperial Chamber. Ayliffe, in his *Parergon*, p. 365, lays down the same doctrine. The 105th canon is to the same effect. It is indeed essential that the old practice should be adhered to as [166] affording the only safeguard against collusion and perjury, which experience has been able to suggest.

The particular circumstances of this case are not such as to justify the departure from so unbending a rule. We deny that the facts stated in the affidavit can be introduced after the evidence has been made public; but if they are to be introduced, it should be with all the formality of plea and proof—thus affording to us an opportunity of trying their validity by the test of cross-examination. But, the husband not having proved his case to the satisfaction of the Court, we submit that the only course to be pursued is, to dismiss the parties.

(d) A matrimonial cause, in the canon law, is deemed a cause of an arduous and important nature: and hence it is that, in such a cause, an oath is not given in supply of proof, according [167] to the common and received doctrine of all the commentators, and the gloss of the canon law.

Jenner and Lushington in reply. The arguments do not apply; as the authorities cited go to cases of dissolution of marriage. Here we only wish to introduce the *juramentum suppletorium* in aid of that which is imperfectly proved—not to substantiate adultery—that is established beyond all doubt, but to clear up another point on which the Court is not quite satisfied. The Court is not restricted as to the mode by which it shall enquire and satisfy itself as to any suspicion it may entertain of connivance or collusion.

No hardship is inflicted on the wife by this mode of proceeding; she might have pleaded any facts in bar of divorce: the husband would then have had an opportunity of putting in his answers; but she offers no defence.

In the present case we do not, by affidavit, attempt to prove the criminality of the wife, or to oppose any defence set up by her; but to explain the conduct of the husband, on a point respecting which the Court has expressed some doubt.

Per Curiam. A preliminary question is raised, whether the satisfaction required can be given by the affidavit of the husband.

In the principal cause I was fully of opinion that there was entire proof of the criminality of the wife, but I thought that the delay in bringing the suit required some explanation. The wife set up no case; she did not suggest connivance, nor subsequent condonation. The Court itself took the [168] objection, thinking itself bound, in point of justice, to give the husband an opportunity of explaining his conduct. The Court rescinded the conclusion of the cause not to allow the husband to supply proof of the criminality of the wife, or to answer any defence set up by her, but merely to explain the delay, and the Court thought the explanation (being merely confined to that point) might be made by affidavit—the wife had made no reply—she

procedit in matrimonialibus si ad dissolvendum matrimonium agatur. Et quemadmodum in criminalibus regulariter non deferitur juramentum in defectum probationis: ita quoque in causâ matrimoniali juramentum locum non habet. Itaque probationes debent esse plenæ et perspicuæ per confessiones, et testes omni exceptione majores. Obs. lib. ii. p. 94.

(c) In causâ arduâ vel criminali non deferitur (videlicet, *juramentum suppletorium*). *Marant. Spec. Aur. par. 6, 1, 7.*

(d) No sentence of divorce to be given upon the sole confession of the parties. Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest; and, therefore, require the greatest caution, when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled: we do straitly charge and enjoin, that in all proceedings to divorce, and nullities of matrimony, good circumspection and advice be used; and that the truth may (as far as is possible) be sifted out by the depositions of witnesses, and other lawful proofs and evictions; and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the Court. Canon 105.

The concluding words of the Canon of 1597 are *nec partium confessioni, quæ in his causis sæpe fallax est, temerè confidatur.*

had no right to require a more formal mode of enquiry; for there was no objection, taken on her part, to the conduct of the husband. The Court called for explanation to satisfy itself and its own difficulties, to protect itself, or rather to protect society from the collusion of both parties. If there is any connivance, the explanation would operate as much against one party as the other. In this view it does not appear to me that the Court is precluded from admitting the explanation in the form of an affidavit.

In this view also it does not appear that the authorities cited apply to the question. It is true that, in matrimonial causes, there must be proof of the fact by witnesses. The presentim of the 105th canon (see page 166) seems to apply to cases of nullity—but, in the enacting part, it applies to divorce as well as nullity.

In this cause is the Court, by admitting the affidavit, violating the injunctions of the canon? It has observed due caution; and, in consequence of that caution, the affidavit is required—it gives [169] no credit to the confession of the parties—this affidavit is merely explanatory—if a plea had been given in by the wife, and the husband had put in answers to it, upon oath, the Court would have been at liberty to have looked into those answers.

After paying every attention to the arguments advanced, I am of opinion that I am not violating any principles of law, or any rules of practice, in admitting this affidavit—it is not admitted as suppletory proof, but merely to explain whether the husband has come into Court with clean hands.

All the necessary circumstances being proved against the wife, the affidavit is called for to remove the scruples of the Court. I shall allow it to be read.

The affidavit of Mr. Best was then read; it stated in substance—

“That in 1807 he had become embarrassed in his circumstances, and under the necessity of surrendering himself to the King’s Bench prison, and his wife went to reside with her father and mother the Earl and Countess of Alborough, in Ireland; that, in March, 1808, he obtained the rules of the King’s Bench prison; and the best habitation he could get within them, situated at Temple Place; and his wife then came to reside with him, and continued to do so till she eloped with Joseph Henry, as described in the libel: that prior to his marriage, when he was paying his addresses to Lady Emily, he had frequently met the said Joseph [170] Henry at her father’s, and had always studiously avoided him; and that when he called on him, after his marriage, at his residence in Stratford Place, he had not returned his visit.

“That after Lady Emily took up her residence in Temple Place, he was one day told, by his servant, to his great surprise, that Mr. Henry had called upon him—that he called again about a week afterwards, and the deponent found him in the drawing room waiting his return; and he expressly swears that he had no other intercourse whatever with the said Joseph Henry than he has stated, and that he had not the least suspicion of any improper intercourse subsisting between him and his wife.

“That when Lady Emily eloped from his house, she was suckling a child, and he was obliged to engage the wife of one of his servants to take charge of, and to suckle, the infant which she left behind her. That he employed Mr. Stokes as his attorney, who, by his direction, brought an action against Joseph Henry, in the Court of King’s Bench, for criminal conversation with the deponent’s wife; and Joseph Henry having suffered judgment to go by default, the sheriff’s jury awarded 2000*l.* damages. Judgment was signed in Hilary Term, 1809, and Joseph Henry paid the damages to Mr. Stokes, in April, 1809: but Mr. Stokes retained the same on account of his demands against the deponent; that he then instructed Mr. Stokes to take the necessary steps to procure a divorce; but he was advised that he could not then proceed against his wife, on account of her absence in Ireland. But, on her return to England, in March, 1810, he [171] again urged his attorney to proceed against her; that he said it would be attended with considerable expence, that he had no funds in hand to meet it; that he had applied the 2000*l.*, recovered as damages, in payment of his own demands and for other debts; and that there was still a considerable balance due to him—that the deponent was then wholly in the power of Mr. Stokes, to whom he had conveyed his estates, in trust for the benefit of his creditors; and that he was unable to proceed against his wife for want of money to carry on the suit—that a suit in Chancery was instituted by his creditors against the deponent, Mr. Stokes, and Messrs. Barrow, Lousado and Co., to whom the produce of the deponent’s estates in the West Indies had been consigned, and thereby his whole affairs were thrown into confusion, and he could barely obtain an allowance sufficient for his subsistence—that

he frequently entreated Messrs. Barrow, Lousado and Co. to advance him a sufficient sum to enable him to proceed in obtaining a divorce. That in 1812 he determined to employ another attorney, and dismissed Mr. Stokes; that in April, 1812, an order was obtained to dismiss the Chancery suit; that his creditors were then paid their demands by Messrs. Barrow and Lousado. That one of the first instructions he gave his new solicitor was to proceed in obtaining a divorce; that in the spring of 1813 his merchants promised to supply him with sufficient money for that purpose; and that subsequently he has not lost any time in instituting and conducting proceedings in this Court."

[172] Feb. 24.—Affidavit of the husband admitted to satisfy the Court as to the reason of his delay in instituting proceedings.

Judgment—*Sir John Nicholl*. The affidavit appears to go satisfactorily to all the points: previous knowledge is negatived, the means the husband used to obtain redress, and the causes which prevented him, are set forth, and, lastly, there has been no condonation.

In any other than a matrimonial cause the Court would not have required such an explanation—if the defendant had not set up such matter in defence, the Court would have presumed that no such ground of defence existed.

In the present case the Court has received explanation in the solemn and full affidavit of the party; and feels itself bound to pronounce that Mr. Best has proved his libel, and is entitled to a sentence of separation from his wife.

[173] DICKENSON v. DICKENSON. Prerogative Court, Hilary Term, Jan. 29th, 1814.—Alterations in pencil on a regularly executed and attested will, admitted to probate.

William Dickenson, of Brocklesby, in Lincolnshire, steward to Lord Yarborough, died on the 19th of July, 1813, possessed of considerable personal property—a will, dated January 8, 1795, was found in a book-case in the steward's office, at Lord Yarborough's, together with other private papers, and securities belonging to him—the will was regularly executed and attested by three witnesses; but several alterations and erasures had been made in it, by the deceased, in pencil—and there was on the enclosure the following indorsement, written also in pencil by the deceased:—

To my wife one hundred and sixty pounds per annum, so long as she remains a widow; in case she marries again, this annuity ceases; and the money in the fund in my name, she to receive for her own use and benefit. The furniture, as mentioned within. The books to be given to R. Jowitt, of Leeds, Woolstapler, as desired by J. D. deceased.

The question before the Court was as to the testamentary effect of the alterations in pencil—[174] they were propounded by the widow, and opposed by the brother who was one of the executors in the will.

At the period when the will was originally executed, the deceased had two sons living whom he had constituted his residuary legatees. The one had died on the 13th of September, 1804; the other on the 16th of August, 1811. It was pleaded, that by the initials "J. D." on the indorsement the deceased intended to designate Joseph Dickenson, the last of his sons who died.

Swabey, Jenner, and Gostling in opposition to the allegation. The question is quo animo this paper was altered—the circumstances pleaded are not sufficient to sustain an imperfect writing—the death of the two sons, the handwriting of the deceased, and the custody of the paper, are all the facts relied upon—the time when the alterations were made is not clear—it might have been at any period subsequent to the death of the first son, in 1804. There is no recognition—no sudden death—the material with which it is written is not unimportant as was held in *Rymes v. Clarkson* (1 Phill. Ecc. 22)—in fine, the memoranda are such as a man writes when he has it in deliberation to do a future act.

The envelope carries the case no further; it is merely deliberative, and shews an intention to do more.

Adams and Lushington contra. There can be no doubt that the deceased's in-[175]tention was to increase his wife's annuity, and to substitute another executor; there is no great improbability that he should do it in this form—on the face of another paper coming from him, he is proved to have been an ignorant man—he might suppose (as is commonly supposed) that any writing would dispose of personal property.

Judgment—Sir John Nicholl. The deceased made his will in January, 1795; it was regularly executed and attested by three witnesses—and he left his two sons his residuary legatees.

The sons died before the testator—one in 1804—the other in 1811—the will was found in the repositories of the deceased—in an envelope endorsed “William Dickenson’s Will”—there are alterations in pencil in the body of the will—these alterations are all pleaded to be in the handwriting of the deceased—the exact time when they were made is not pleaded—but there is a strong probability that it was after the death of both the sons.

The question is whether probate is to be given of this paper as it was originally executed, or with the alterations: the alteration being in pencil increases the difficulty—it has been argued that, from this circumstance, they must be considered as merely deliberative; but there is no doubt that, in point of law, they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect.

Primâ facie it may be supposed, under the circumstances, that the alteration was intended—[176] and, as such, the paper at least ought to go to proof. I say primâ facie, because other extrinsic circumstances may hereafter be offered which may shew that they were merely deliberative.

The alterations are made with considerable care—the sum is carried out into the opposite side—the difficulty is that the annuity, twice in the will, remains uncorrected—but it is observable that it is no where left uncorrected in the dispositive part, but merely in the recital.

The alteration also is highly probable—after the death of his children it was natural that he should increase the provision of his widow—the memorandum on the envelope is strongly confirmatory of the intention of the deceased—it might be made in order to render more clear the alterations in the will; and, also, to have effect, if a more formal will should not be drawn up.

If the deceased meant these alterations as a substratum for a new will, it does not seem probable that he would have written this indorsement on the envelope—again, it is pleaded that the instrument was put away securely in his repositories with money and other papers of concern—it was not at hand as if he was deliberating upon it—his death was not sudden, which confirms the idea that he did mean and intend this paper to operate in its present form—the probability of this is strong, if he lived on affectionate terms with his wife.

The circumstances taken together lead my mind strongly to the conclusion that the deceased did intend this provision to be made for his wife—and I shall admit this allegation to proof.

[177] The counsel should consider in what way probate may best be prayed. There is a strong impression on my mind that by granting probate I shall carry into effect the intentions of the deceased.(b)

HARRIS v. BEDFORD, FORMERLY MANOOCH. Prerogative Court, Hilary Term, Jan. 29th, 1814.—The presumption of law against a will having an attestation clause unwitnessed, repelled.

Judgment—Sir John Nicholl. The facts of this case are beyond all controversy; for they are admitted in the answers. The will is in the handwriting of the deceased, concluding in the following terms:—

“This being written throughout with my own hand, I am led to believe, from counsel’s opinion, that it will stand good in the eye of the law. I, therefore, revoking all former wills by me made, in witness whereof set my hand and seal the seventh day of January, one thousand eight hundred and nine.

“Jan. 7, 1809.

“Signed, sealed, and declared by the testator, F. F. Manooch, as his last will and testament in the presence of us. “F. F. MANOOCH.”

[178] From the circumstance of there being no witnesses to the attestation clause, the Court is bound to presume that the deceased intended to do some further act—certainly the paper is imperfect—and the presumption against it must be repelled, either by its being shewn that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. It differs from the last case

(b) No further opposition was offered in this case; but on the 20th of July, 1818, probate was taken of the will as propounded with the alterations in pencil.

(*Dickenson v. Dickenson*. See p. 173)—for there was nothing in that from whence it could be inferred that the deceased intended to do something more—here, certainly, such an intention is to be presumed—but the presumption is slight, and may be repelled by slight circumstances. He was a military man, had lived much abroad, and was unacquainted with business.

The following circumstances shew that the deceased intended this will to take effect—he left a natural son—brought up with great care and attention, and treated with great regard till the time of his death—his wife and daughter were provided for by his marriage settlement—the object of this will was to divide his property into thirds between his wife, his daughter, and his natural son—his wishes on this head are strongly expressed in a letter which has been exhibited.

“Believe me, my dear Henry, when I assure you that my wife, little Anne, and yourself, are the most particular considerations I have on earth; and that whatever I may say or do, with regard to either, proceeds from the strongest affection.”

[179] It is impossible that words can stronger express his intention than these do. He addressed this letter to his son about a fortnight before his death; it is admitted that the deceased was a reserved man in his affairs, except to his wife—and it is proved he, at different times, and particularly within a short time of his death, declared to her that he had made his will, which he produced and read all over to her. This is a sort of publication of it in its present form—the leaving his natural son unprovided for was the thing furthest from his mind. I am convinced that he died with the full intention that this paper should operate as his will; and I pronounce for it as such.

[180] *NICHOLS AND NICHOLS BY THEIR GUARDIAN v. NICHOLS*. Prerogative Court, Hilary Term, Feb. 10th, 1814.—A will, not written with a testamentary intention, set aside.

Thomas Nichols of Southampton died on the 23d of January, 1813—his wife survived him: and he left a son and daughter, by a former wife, who were minors. The children appeared by their guardians; and propounded the following paper as the last will of the deceased:—

“I leave my property between my children; I hope they will be virtuous and independent; that they will worship God, and not black coats.

“July 30, 1803.

“THOMAS NICHOLS.

“Witness, Thomas King.”

The widow opposed the validity of this testamentary paper, and prayed the Court to pronounce for an intestacy.

Burnaby and Herbert in support of the will. The paper was executed and written by the deceased, a professional person; and found after his death in the custody of the friend into whose hands he had delivered it—it speaks for its own validity—the attention of the deceased was particularly called to consider what would be the operation of such a paper—there was a moral approbation of its contents—it makes the same distribution that the law would have made; if he had forgotten it, that circumstance would not impeach its validity—at all events the evidence of the only witness examined is wholly [181] inadmissible, as it is in direct contradiction to his own act.

Adams and Lushington contra. The instrument has no appearance of a testamentary paper; it is admitted to have been written in a moment of levity, on a careless occasion, after dinner and after wine—it was not intended to be operative, but to be imitative of another paper; there was no publication of it: the writer left it to its fate—King took it up, wrote his name without being asked, and locked it in his iron safe. There is a total failure of proof that the deceased had a mind and intention to consider it as his will.

Burnaby and Herbert in reply. The words distinctly amount to a publication, “There is as good a will as I believe I shall now make:” the whole rests on the testimony of one witness—his conduct is most important, because it is in direct opposition to his testimony; if King had died at any moment within the last ten years, no objection could have been raised to the validity of the paper.

Judgment—*Sir John Nicholl*. This is a case under singular circumstances—the deceased died in January, 1813, leaving a widow and two children by a former wife—the will is in these terms:—

"I leave my property between my children; I hope they will be virtuous and independent; that they will worship God, and not black coats.

"July 30, 1803. "THOMAS NICHOLS.

"Witness, Thomas King."

[182] It is proved and admitted that this paper was written and signed by the deceased, and that he was of sound mind at the time; but Thomas King, a subscribed witness, gives the following account of the transaction:—

"The deponent is steward to Sir Charles Mill, whose solicitor the deceased was—he knew him intimately for twenty years—when they had any business to transact together, it was their custom to dine together at the house of each other. On the 30th of July, 1803, the deceased dined with the deponent—after dinner they adjourned, as usual, to the deponent's book-room, where they drank their wine, which never exceeded a pint each, with, perhaps, a glass or two of white wine. The deponent and the deceased used to talk familiarly with him on many subjects—he was in the habit of ridiculing the tautology of lawyers who, he said, employed a vast number of unnecessary words—that having finished their wine, the deponent took from a drawer a paper which he had drawn up as his will; and, shewing it to the deceased, said something ridiculing lawyers spinning out papers, and asked him if it was not as good a will as if it had been spun out to a great length by a lawyer—the deceased replied, not only a valid will, but a devilish good one; and, asking for pen and ink, took a sheet of paper, and writing the paper propounded, threw it towards the deponent, saying, very carelessly, there, that is as good a will as I shall probably ever make. These he recollects to have been the very words spoken—he did not request [183] the deponent to take care of the paper, or say another word about it—or, from that time to his death, ever allude to it—and the deponent verily believed that he never recollected that such a paper was in existence—a very short time afterwards the deceased shook hands with the deponent, and went away, leaving the paper on the table. When the deceased was gone, the deponent wrote his name as witness to the signature (he was not requested by the deceased so to do); he then folded up the paper, wrote on the back, 'The will of Thomas Nichols, Esq., of Southampton, July 30, 1803;' and put it into his iron safe, where it remained, with many other loose papers, till after the deceased's death. The deponent does not believe that the deceased, when he wrote the paper, intended to make his will, or that such paper should ever operate as such; but he always considered, and does still think, that it was written without any other view than in imitation of the paper the deponent had so shewn him—a copy of which he annexed to his deposition, and to shew the deponent he could exceed him in brevity—and the deponent is confirmed in this opinion by the practice of the deceased on other occasions; the deponent being in the habit of drawing specimens of leases and other instruments, wherein very few words were used, which he shewed to the deceased; and he, upon such occasions, uniformly wrote others still shorter, by way of shewing that he could exceed him in brevity. The deponent never considered the paper as the [184] deceased's will, but as the deceased's specimen of a short will; and as such he signed his name as a witness to it, and endorsed it, and put it in his iron safe. He further saith that his intimacy with the deceased continued till his death in January last—that, during his illness, he visited him about once a week, for five weeks together—upon those occasions, not considering the aforesaid paper as intended as a will, and understanding from the deceased that he had made no will, he was very urgent with him to make a will—the deceased's answer to such applications being that he did not know but that the law would make a better will, or as good a will for him as he could make—but the deponent and others having pressed him to make a will, the deceased did at length, shortly before his death, say that when he got a little better he would, to satisfy his friends, make a will; but this he did not live to do—he grew worse daily—that the deponent never alluded to the paper writing, for he had himself forgotten that such a paper was in existence."

The same witness, in answer to an interrogatory, says, "That a few days after the death of the deceased, Sarah Nichols, his widow, told the respondent she could find no will; and asked him, as he was the confidential friend of her husband, if he had left a will in his hands. He replied, No, he never left any will with me; but added that, if it would give her any satisfaction, he would search his papers, which she requested he would do, saying that she concluded from the intimacy [185] that subsisted between them, if her husband had left any will with any one, it would be with

the respondent. The respondent had then no thoughts of the paper in question; nor did the circumstances of the same having been written occur to him till, on turning out the various papers that were in the safe, he found it there—that the respondent thought so lightly of it when he went to Sarah Nichols, and shewed it her, that he said, This is all I have got, and you may put it into the fire. The respondent does verily believe that the deceased departed this life without the least recollection of the paper being in existence—that the deceased and his wife lived on the best terms together, and the greatest love and affection subsisted between them.”

This is the account given by the only witness whose name is subscribed to the paper; and if this evidence can be received, and is to be credited, this is not the will of the deceased, for it wants the great requisite, the *animus testandi*; it was not written with the mind and intention to make a will. A question has been made whether this evidence can be received. I am of opinion that it can and must be received; it is the evidence of the attesting witness, who must be produced, and whose testimony is common to both parties. What credit may be due to it is another question. A witness attests a will for the purpose of giving authenticity to the factum of the instrument: the *animus testandi* is the very point into which the Court of Probate is to enquire—the mere act of witnessing or signing does not exclude, of neces-[186]-sity, the absence of the *animus testandi* any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi*. It may have been signed under duress or under other circumstances when there was no intention to make a testamentary disposition.

The evidence is admissible, but is certainly to be received with great caution, the paper being dispositive; and the witness having signed it must be heard with jealousy to depose against the effect of his own act—it is true the attestation clause is not in the usual form; it is merely the word “witness:” but still that infers an attestation of the act of the deceased; and the witness must be carefully heard by the Court.

The evidence then being admissible, the next question is, Does the Court believe this account? The witness is in a respectable situation in life; wholly unimpeached in credit and character; the confidential friend of the deceased; and no possible inducement is suggested why he should declare upon oath a false account of the transaction—the account he gives, though whimsical, is neither unnatural nor improbable; the internal evidence of the paper strongly corroborates it, as do also the extrinsic circumstances—he says the deceased wrote it in order to shew in how few words a will might be written—there is something of levity in the expression “Worship God, and not black coats:” it is in imitation of one written by the witness; his is in these words:—

I give and devise all my property, real and personal, to Mary my wife, to be divided by her, [187] as she shall think proper, between all my children, either in her life-time or by will (reserving enough for her own comforts). I hope my children will obey their mother, love each other, and be pious and virtuous; that they worship God and not man, nor ever practise the trade of a butcher, nor ever accept of any place in the navy or army. But they will endeavour to plant and extend happiness, to raise cottages for industry and honesty, and make the desert smile with plenty and innocence; that they will despise only those who monopolize the earth for the gratification of their own luxury and pride; and that they will look up to none as their superior but those only who exceed them in good works; and never treat any of God’s creatures with contempt but the proud and profligate; and never bend their knee but to their God. This is my will; and I do hereby appoint my wife sole executrix thereof. In witness, &c. &c.

Signed, THOMAS KING.

Upon comparing the two instruments, I think the one a compressed imitation of the other—the admonitory part in the one occupies twenty lines; in the other the same idea is given in more concise words. It is an extremely strong circumstance that it makes no alteration in the disposition the law would have made of his property. For what purpose could he have intended this paper? In it there is no legacy, no executor, no guardian to his children—this is a strong confirmation that it was not written *animo testandi*, but for the purpose mentioned by Mr. King—subsequent circumstances still more confirm this; the deceased afterwards married—he [188] lived on terms of affection with his wife, and he said he had no will, that the law would make a good will for him—so that it was his intention that his widow

should possess, after his death, the provision which the law would give her—during none of these conversations does he make any allusion to the existence of this paper—his forgetting it would not operate as a revocation; but it is a circumstance to shew that he originally never intended it as a testamentary paper. There is little doubt that when he threw it across the table he meant it should be put into the fire.

With all the possible caution that the Court can exercise where a witness is deposing against his own act, I am yet fully satisfied in my mind and conscience that the deceased never intended this as his will: I, therefore, pronounce against it; and decree administration to the widow, her husband having died intestate.

BARCLAY v. MARSHALL, FORMERLY KEITH. Prerogative Court, Hilary Term, Feb. 10th, 1814.—A creditor is entitled to a statement of the effects which have come into the possession of the executor.

Eleanor Barclay, a creditrix of James Keith, deceased, took out a citation against Mary Keith, his executrix, to bring in the will, and accept or refuse probate of it, and to exhibit an inventory of the effects. Mary Keith brought in the will; accepted the probate; and, after some delay, [189] exhibited an inventory. Eleanor Barclay gave in an allegation, pleading certain sums of money as received by the executrix, which were omitted in the inventory. Whereupon Mary Keith gave in a declaration instead of an inventory, in which she admitted one of the sums pleaded to have been omitted.

Jenner for Eleanor Barclay moved for the admission of the allegation.

Stoddart *contra*. The only object of this application is to falsify an inventory.

Judgment—*Sir John Nicholl*. The object is not to falsify an inventory, but to obtain a full one. Why did not the party give in her answers to the allegation instead of a declaration? She is bound to answer; the very use of giving in an allegation in objection to an inventory is to get a specific answer to a specific averment. Many persons will evade, under a general denial, that which they will be afraid to deny specifically.

I think the creditor is entitled to have a constat of the assets that have come to the executors' hands.

I shall admit this allegation.

[190] **BENNETT v. JACKSON.** Prerogative Court, Hilary Term, Feb. 26th, 1814.—

A nuncupative will not established for want of a sufficient rogatio testium.

Mrs. Susannah Jackson, of the city of Bath, died a widow, on the 10th of May, 1813, leaving ten children: on the 29th of April preceding her death, being in her dwelling-house at Bath, and in her last sickness, she summoned several of her children, and the daughter of the person with whom she lodged, to her bedside, and declared herself to the following effect:—

“Joseph Henry Bennett, your brother, is my heir, and all that I have is his. Tell him to pay all my debts; give my love to him, and tell him to take me home, and by no means to leave me here; tell him to be a father to you children. I know he will for my sake; I know the goodness of his heart; he will be a kind father to you.

“Edward, my wish is that you should follow the profession I have chosen for you; and let no one persuade you from it.

“With respect to you three girls, if George and Keller send for you, you must go; but never do any thing without consulting your brother Joseph, not even the smallest thing.”

These words were reduced into writing on the 13th of July following, and attested by three of the persons present at the time they were uttered; and were now proposed by Joseph Henry Bennett, the eldest son, as a nuncupative will.

[191] Decrees were taken out against the other children, to shew cause why a probate of the aforesaid will nuncupative should not be granted to him as the sole executor named therein according to the tenor thereof. The process of the Court was served on all of them; but no appearance was given for either of them.

Judgment—*Sir John Nicholl*. Probate is called for of a nuncupative will; minors are concerned. In cases of this description the statute enjoins several requisites—the principal one is the rogatio testium, the calling upon persons to bear witness to the act—my doubt is, whether there is sufficient evidence here to this point: the

words of the statute (a) have always been strictly construed ; it was so held in *Parsons v. Miller* (Hilary Term, 1797, p. 194, post).

[192] In that case a paper was propounded as nuncupative ; the credit of the witnesses was unshaken : but the Court thought the words addressed to the witnesses did not in effect desire them to bear witness. The deceased himself is required by the statute to bid the persons present bear witness.

In *Darnbrook and Sawyer v. Silverside* (Prerog. 1767) it approached very near a rogatio testium ; but it was said by the counsel in that case that Sir George Lee had rejected an allegation on similar grounds.

Now in the present case, at the beginning of the transaction, there was clearly no rogatio testium : the statement is "that the deceased having called Anne Jackson and Elizabeth Warren Jackson (a minor), her daughters, to her bedside, and spoke to them of the disposition of her effects ; and Edward Bennett Jackson, her son, being sent for, to be also present to hear his mother's declaration ; and her said three children being all present, and at her bedside, she, the said Susannah Jackson, did, in the presence of us, whose names are subscribed (the three attesting witnesses) and of the said Elizabeth Warren Jackson, declare and direct, &c."

This is the statement ; and neither in this nor in the words spoken is there any thing to shew the animus testandi.

There is no declaration that the words were spoken with the intention of making a will at the [193] time : which the statute particularly requires. The affidavit goes on to state that Susannah Jackson, "after making the declaration aforesaid, observed that it should be committed to writing ; but afterwards said that the deponent's hearing it would answer the same purpose ; and, lastly, these deponents make oath and say that the deponent, Ruth Sidewell, having afterwards left the bedroom of the said deceased, for a short space of time, unperceived by her ; the deceased, who had noticed the return of the said Ruth Sidewell, said, Mrs. Sidewell, why did you leave the room ? I wished you to witness all I had to say to my children."

I have considerable difficulties in holding this to be a sufficient compliance with the statute. It does not appear that the words were spoken animo testandi ; there is no rogatio testium at the beginning, no declaration that the words were spoken with the intent of making a will at the time. The words of the statute are very strong, and must be held strictly.

Allegation rejected.

[194] PARSONS v. MILLER. Prerogative Court, Hilary Term, Feb. 17th, 1797.

Dr. Laurence. The statute of frauds meant to place extraordinary checks on such wills, as being more particularly liable to fraud—they are to be construed strictly. The opportunity of detecting fraud would not so readily occur ; they might be set up by a conspiracy of the persons present—in this instance, also, there is no rogatio testium.

Dr. Swabey on the same side.

Sir William Scott in support of the will. We admit the rogatio testium to be necessary ; but no particular words are required by the statute : it is sufficient if the Court is satisfied that the deceased meant to do a testamentary act, and wished the persons to attest it. The statute does not require them all to attest ; it says "or some of them ;" if he signified it to one, it is sufficient—it is a rational compliance with the statute.

(a) And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury, be it enacted by the authority aforesaid, that from and after the aforesaid 24th day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of 30l. that is not proved by the oaths of three witnesses at the least, that were present at the making thereof ; nor unless it be proved that the testator did, at the time of pronouncing the same, bid the persons present, or some of them, bear witness that such was his will, or to that effect ; nor unless such nuncupative will was made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Dr. Nicholl on the same side.

Judgment—Sir William Wynne. The paper before the Court is propounded as the nuncupative will of John Saunders—it has been reduced into writing in the usual manner, purporting that it is by the desire of the deceased; and it is signed by three witnesses.

Objection has been taken to the credit of the witnesses; but it is of no weight—it is said two [195] of them are relations; this is no objection in this Court, as it would not be in another. The history is perfectly credible; no person can doubt that the fact passed as stated.

The only question is, whether what passed is sufficient to satisfy the statute 29 Car. II. c. 1, s. 9.

It is in evidence that he spoke these words: "50l. for Anne Bedford that was; 50l. for ; 50l. for ; and two bonds I give to and all interest." He spoke these words, 1st, before one witness, then before two, then again before three. The witnesses speak fully to capacity. But the question is, whether these words were spoken with the expression of the testator requiring them to bear witness. I cannot find any such expression. The conversation began between the deceased and Mary Parsons—he did not begin to converse about the will; she began by enquiring if he had settled his affairs—he replied he had not made a will; she asked if she should send for Mr. Mitchell to make one—he said he was too ill to make a will—she asked if there was any thing he would have done, and she would see it done—he began at once, repeating the words pleaded, but without desiring her to bear witness. She then, thinking it necessary to have another witness, said "she would call up Mary Carter that she might hear and be a witness." The deceased answered, "Do." This is the only word of the deceased's expressing any wish on the subject. She called Mary Carter, and said, Now repeat before Mary Carter, and she will be a witness—this is a rogatio testium, but not by the testator—I cannot [196] hold here *qui facit per alium facit per se*. The testator repeated 50l. for Anne Wilford, &c.

The witness says that, having heard that three witnesses were necessary for a will, of her own accord she called Samuel Clarke; and when he came, Parsons said, Do you take notice what Mary Saunders is going to say; and then desired her to repeat it, which she did. She does not prove that he did, but she proves that he did not express any words which are made absolutely necessary by the statute—I do not say there was any ill intent on the part of the witness; for the deceased had said he was not capable of making a will on being told by Mrs. Parsons she would see it done—she repeats the four legacies, &c. twice over—it is a rational compliance with the statute to say this is not within it. The statute is to be taken strictly—it meant that persons should not get about the deceased, and ask him questions; but that it should originate from himself—I think this so clearly necessary that if no rogatio testium should be pleaded in an allegation, it must be rejected.

In *Darnbrook and Sawyer v. Silverside* before Sir George Hay in 1767, there was a decree to shew cause why an administration should not be revoked and granted with a nuncupative will annexed. It was pleaded that the deceased was ill in bed of the sickness of which he died the next day at his own house; and that, with the intent to make a nuncupative will, he did utter words in the presence of three witnesses. Shean asked "if he had made his will;" he said, "No." Shean said, "A verbal will would be sufficient, as there were a [197] sufficient number of witnesses present;" he said "he knew it would," and then he uttered the words pleaded. The Court said it would be very unwilling to reject any plea if the parties could possibly obtain the effect of their prayer; but that the Court was tied down by the statute, and it did not appear that the deceased addressed himself in any such manner as was required, before the words were spoken; and the allegation was rejected. It was said by counsel in the hearing of that cause that Sir George Lee had, in 1755, rejected an allegation on the same ground.

Here the fact is pleaded but not proved. I think I am bound, especially under that case, to say that this will is not proved to be made as the statute requires; and I must pronounce against it.

[198] THE OFFICE OF THE JUDGE PROMOTED BY CARR v. MARSH. Arches Court, Easter Term, April 25th, 1814.—A bishop cannot consecrate a chapel, or authorize a person to preach in it without the consent of the incumbent of the parish. The

office of the judge allowed to be promoted, not upon the merits of a case, but from the nature of the suit.

[Referred to, *Reg. v. Bishop of Oxford*, 1879, 4 Q. B. D. 267, 582.]

By letters of request from the Commissary General and Official Principal of the Diocese of Chichester.

The Reverend Robert James Carr, vicar of Brighthelmstone, in the county of Sussex, cited the Reverend William Marsh for publicly preaching and administering the holy sacrament, and performing other ecclesiastical duties and divine offices in a certain building not consecrated, or in any manner whatever dedicated to divine worship according to the rites and ceremonies of the Church of England, without a sufficient licence or authority. The Reverend William Marsh appeared under protest, denied the jurisdiction of the Court—and, after reciting the 52 Geo. III. c. 155, alleged that the building mentioned in the proceedings was a chapel built by subscription for the purposes of public worship, according to the rites and ceremonies of the Church of England, at the particular instance of the Reverend Robert [199] Carr himself, and under the sanction of the Bishop of Chichester, within whose diocese the parish of Brighthelmstone is situated—that, according to the tenor of the deed of trust relative to the government of the said chapel to which the Reverend Robert Carr was also himself a party, the appointment of the minister, to officiate in the said chapel, became vested in certain persons, who, upon the recommendation of the Bishop of Chichester, appointed the Reverend William Marsh to the chapel, with the consent and approbation of the Reverend Robert Carr—that, upon this appointment, the Bishop of Chichester authorised the said William Marsh to commence the performance of divine service in the chapel, without the usual and formal licence—he further alleged that due notice of the intended opening of the chapel was given to the Bishop of Chichester as required by the act of parliament; and the Reverend William Marsh officiated as minister therein, on the 25th of July, 1813. And, finally, that the Reverend William Marsh would have been by law entitled so to officiate, even had there been no authority, in that behalf, given to him by the Bishop of Chichester. That inasmuch as the Reverend Robert Carr had given his consent to the building and opening of the chapel, and the appointment of the said Reverend William Marsh as minister of it—it is not by law competent to him to promote the office of the judge in the present suit—nor as the said William Marsh has duly complied with the provisions of the statute aforesaid and commenced the performance of divine service in the chapel, with the know-[200]ledge and approbation of the Bishop of Chichester, and has never since received any intimation or direction from the said Lord Bishop to discontinue the same—is it competent for any person now to promote the office of the judge in this behalf.

On the behalf of the Reverend R. Carr it was alleged that the statute of the 52 Geo. III. c. 155, was irrelevant—and that the citation was preceded by, and issued in pursuance of, letters of request under the hand and seal of the commissary general and official principal of the Lord Bishop of Chichester, which were duly presented and accepted; and, consequently, that the jurisdiction was well founded.

Burnaby and Jenner for the Reverend Mr. Marsh. The act of 52 Geo. III. must be considered as extending to the Church of England; and, as general, to all Protestants. The act of William III. goes as far as the latter act, with respect to Protestant dissenters; therefore, if the latter did not include the Church of England, it would be nugatory and mere surplusage.

In one of the most populous districts of the country a subscription has been entered into for the purpose of building a chapel for the accommodation of the poorer classes of society—this was done with the knowledge of the incumbent (Mr. Carr) and under the sanction of the bishop—a deed of trust was executed—Mr. Marsh was recommended to perform the service of the chapel. The incumbent himself was a subscriber and principal mover in [201] the business. Mr. Marsh received the appointment from the trustees. In March, 1813, Mr. Carr suggested that some doubts having arisen as to Mr. Marsh's religious tenets, it was necessary that he should satisfy the bishop on this head—Mr. Carr then suddenly objected to the opening of the chapel on the evening before it was to have been opened, without expressing any reason for his conduct.

Under these circumstances we contend that it is not competent to any one now to promote the office of the judge against Mr. Marsh, he having acted under the

sanction, and with the approbation, of the bishop, and that sanction never having been withdrawn. The office of the judge cannot be promoted without the approbation of the judge himself. From Ayliffe (Parergon, p. 398), Clarke (Praxis, p. 132), and Oughton (tit. 150) it appears that there must be an asking of the ordinary. How can the bishop proceed *ex officio mero* against Mr. Marsh, when he has already sanctioned the act which he is brought forward to impugn? The bishop ought to be a party to this suit. The bishop may authorise a person to preach any where.

Per Curiam. Can a bishop consecrate a chapel or authorize a person to preach in it, without the consent of the incumbent? I should like to hear some authority for that position. The building of the chapel may be a most meritorious act, and the [202] incumbent may be in the wrong, but still he has a legal right.

ARGUMENT RESUMED.

The circumstances of this case seem to form an exception to this doctrine.

Another ground for this Court not interfering is, that an application has been made to the Court of Chancery to compel Mr. Carr to the performance of that obligation by which he is conceived to be strictly bound.

Swabey *contra*. Mr. Carr has the cure of souls exclusively within his parish. No clergyman can preach in any place, either consecrated or unconsecrated, without the licence of the bishop—the licence of the diocesan is essential to a chapel of this description—it is idle to set up a constructive licence, a licence must be in writing, and such a one as will bear the test of a court of justice. 48th (a) and 77th (b) canons are clear to this point. The licence to which [203] the law looks must be in writing and under the hand and seal of the bishop. The conduct of Mr. Marsh appears to be in defiance of the incumbent, and of the ecclesiastical law; the facts stated may be relevant or not to the merits of the case—but they are wholly irrelevant to the present question, which is simply that of jurisdiction.

Judgment—Sir John Nicholl. This is a cause of office promoted by the Reverend Robert Carr, against the Reverend William Marsh, for performing divine offices in a place not consecrated according to the rites of the Church of England, and without any authority from the bishop.

An appearance has been given under protest for Mr. Marsh, denying the jurisdiction of the Court—and the sole question, properly before me now, is whether the Court has any jurisdiction?

The cause comes by letters of request from the commissary general and official principal of Chichester—Chichester is within the province of Canterbury—as to the place, therefore, there can be no doubt that the jurisdiction is founded. As to the nature of the offence set forth in the citation—surely, under the general ecclesiastical law, unless it has been recently altered, it must be an offence under the ecclesiastical jurisdiction—a minister of the Church of England is amenable to this Court if he performs divine offices in a place not consecrated without the leave of his diocesan.

There is jurisdiction then over the place and person unless the law is altered—it is contended [204] that it is altered by the act of 1812—this statute, however, in my judgment, does not, in the slightest degree, apply to the case, notwithstanding the word “Protestant” stands without “dissenter” in one clause (52 Geo. III. c. 155, s. 2), still, taking the preamble and the context together, and especially considering the proviso in s. 3, I am clearly of opinion that it was not intended to alter the laws and discipline of the Church of England—but confined to dissenters. The place here is not a place to be certified under the toleration acts, but a chapel for worship according to the Church of England. If the act would bear the construction contended for, it would be a complete alteration of the fundamental laws of the Church of England.

(a) 48th canon. None to be curates but allowed by the bishops.

No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the care, and the meetness of the party, &c. &c.

(b) 77th canon. None to teach school without licence.

No man shall teach either in public school or private house, but such as shall be allowed by the bishop of the diocese or ordinary of the place, under his hand and seal, being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation; and also for right understanding of God's true religion, &c. &c.

It is said there is a discretion in this case—and that the Court should not allow the office of judge to be promoted in such a cause—but the cause must be tried before we arrive at this conclusion—otherwise we enter upon the merits of it prematurely. Application is always made to the judge before a citation issues in a cause in which his office is promoted: but that is not for the purpose of considering the merits of the case; but from the nature of the suit. Whether it be of ecclesiastical consuance, or the fitness of the person to be made responsible for costs to the other party.

There are several instances of suits of this sort originating with the vicar—indeed, he is not only a competent, but the most proper person to promote them; there can be no doubt as to his responsi-[205]-bility for costs; and besides, as vicar, his rights and duties are most affected—if he had consented to all the transactions which have occurred, and even to the appointment of the party proceeded against—still, if he officiates without the licence of the diocesan, by which I understand only a licence in writing, I do not apprehend that would be any bar to proceedings of this description, or any ground to stop proceedings here in the first instance. If Mr. Carr has acted improperly, it may be a ground of consideration hereafter for costs; but it is none with respect to a protest.

It has been objected that a suit is pending in the Court of Chancery; but the Ecclesiastical Court cannot be called upon to stop its proceedings on a question of discipline against a minister of the Church of England, because proceedings have been instituted elsewhere respecting his civil rights.

The history set forth in the act is irrelevant to the question of jurisdiction—the Court must be careful to support its practice—to keep that which is matter of protest separate from that which is matter of defence. If it could be alleged that the transaction had taken the most formal shape, that there had been a regular deed, that the chapel had been regularly consecrated, that Mr. Marsh had been appointed by the vicar and regularly licensed by the bishop—in short, if the most complete defence could have been made out, still that would not bear upon the protest.

The utmost now stated is something of constructive and implied assent given by the vicar, and approved by the diocesan.

[206] The point, therefore, which the Court has to decide seems so plain and clear that it is difficult to account for the irregular course which has been taken—if I could imagine that this was done merely to gain time, and to keep the chapel open, I should not hesitate to condemn the party in costs as prayed—but seeing the highly respectable names signed, and the laudable purpose for which the chapel was intended, viz. that of giving instruction to the poor according to the rites of the Established Church, I will not allow myself to suspect that the parties have resorted to this protest for the unworthy purpose of keeping the chapel open longer than they otherwise could have done in defiance of the law. But if the whole object disclosed in the affidavit, and the act (as has been suggested) is only to obtain some opinion from the Court as to the general merits of the question—though it would be irregular; yet to put an end to litigation—to restore harmony in the parish—and between parties who have gone hand in hand to a certain degree—for so laudable an object I would not, on mere form, decline to intimate my present impression.

I apprehend that by law no persons can procure divine service to be administered without the consent of the incumbent, and the licence of the bishop (to which, in some instances, must be added the consent of the patron)—and that the person officiating without such consent is subject to ecclesiastical censures. And, seeing how the law protects the rights of the incumbent and the ordinary, I think the party in this case would do well to [207] take the advice of his counsel whether this or any other minister can, without the leave of the incumbent, be justified in officiating within his parish, and whether the Court will not be bound to inflict punishment for such an offence if proved. The Court has no discretion to consider whether the vicar has unhandsomely withheld leave—whether he has or not I do not mean to say, or in any way to intimate.

Under such advice the matter might be settled, and the very desirable object in view might go on to the satisfaction of all parties.

I shall overrule the protest.

SMITH v. SMITH. Arches Court, Trinity Term, June 27th, 1814.—A separation decreed at the suit of a wife, for the cruelty and adultery of her husband.

[See pp. 67 and 152, ante, and p. 235, post.]

Judgment—*Sir John Nicholl*. This is a suit for cruelty and adultery brought by the wife. The libel was opposed, but admitted. Eighteen witnesses have been examined upon it—there is no allegation on the part of the husband. It will be sufficient to state the facts proved, without detailing the evidence.

The parties were married in 1794; she was a widow with a large fortune; he a minor and an officer in the Life Guards—the disparity in their years [208] did not promise happiness. In 1795 he began to treat her with indifference; and proceeded to acts of violence, though not proved to be for the purpose of inducing her to give up her property. In December, 1795, she went to church in her own carriage, and staid to receive the sacrament. While she was there he ordered the horses to be sent to Tattersall's to be sold, and told the servants not to obey her—she insisted on keeping the horses which were her separate property; and the sale was prevented. On his return home there was a quarrel; he locked her up in his dressing-room, and went out; she was released by the servants. On his coming home and finding her at supper below with his sister, in a passion he seized her by the wrists in order to force her up stairs: the servants were deterred by his threats from interfering. She opened the door and called the watch: two neighbours came in; she escaped to Mr. Dashwood's at next door; and went with a Mrs. Purchase, who was there, to her house.

A separation took place by consent in August, 1796—she agreed to allow her husband 200l. per annum, in addition to what he had of his own. The separation continued till 1800; in that time he formed an adulterous intercourse with a Mrs. Trefusis. In 1800, through the interference probably of his friends, who resided much with Mrs. Smith—a reconciliation took place. They went to Pendyffryn, where she was building a house—she was prevailed upon to execute a deed by which her property was settled on him and his issue—she came to town in 1807, and lay in of a daughter—[209] he went to Pendyffryn—there were two maid servants there—he slept in his dressing room, and lived in it, and had one of the maid-servants to make his bed—he had, therefore, full opportunity to solicit their chastity—which he did not pass by—the first he attempted seems to have been attached to another person and resisted him: with the other he formed a criminal connexion: this is proved on her own confession.

When his wife returned to Pendyffryn; when all the affections of the father and the husband should have been excited—on pretence of her nursing her child, but for the purpose of keeping up his connexion with the housemaid, he slept apart from his wife. Soon after there was an act of violence, which, from defect of memory in Major Hamilton (who deposes to it) is not clearly set forth—but she complained, in the presence of Major Hamilton, to her husband. The next day he took the child with such violence from her as to endanger both one and the other; and he said if she resisted, she should be confined as a mad woman. Major Hamilton states his memory to be defective; but, from all he remembers of her character, it was mild and gentle. Soon after this she appears to have discovered his intimacy with Hannah Dod: she put a letter on his table remonstrating—and stating that she must leave the house if Hannah Dod was not sent away. This letter producing no effect, she applied to Mr. Lloyd to remonstrate with her husband, which he did, and, together with Major Hamilton, endeavoured to impress upon him strongly the impropriety of his conduct—[210] but he persisted; they repeated this to him, and expressed their hopes that he would relent—he did send Hannah Dod away; but only to abandon his wife and child, and to live in adultery with Hannah Dod, which he did at West End. It is fully proved that Mrs. Smith continued to reside at Pendyffryn till she had no longer means so to do. She went to her brother, and occasionally to Leamington. Smith returned to Pendyffryn, followed by Hannah Dod, who lived with him as housekeeper. He thought proper, about two years afterwards, to claim the rights of a father—he went to Leamington, and insisted peremptorily on taking the child—Mrs. Smith, who is described by the witnesses as a most tender mother, said, "If he takes the child, he must be troubled with me also." This he refused. She said he might as well take her life as her child from her: after some hours he was prevailed upon to allow his wife to return to Pendyffryn—refusing her offer to

come and live in the neighbourhood in some place where he could see the child continually.

In this conduct it is clear that she was solely actuated by maternal feeling for the child—not by any consideration of what had passed—she slept in a separate room with her child and a maid-servant. What was the conduct of the husband? He sleeps on a separate floor, and Hannah Dod had ostensibly a separate room: but there can be no doubt but that she frequently partook of his bed. He treated his wife with the most marked disrespect and contempt; he took his meals with her, but seldom spoke to her—she had no part in the management [211] of the house or the family; that was vested in Hannah Dod—Hannah Dod was the constant companion of his walks, and the child was with them—Mrs. Smith endures all this insult and indignity for the child's sake—at last he determined to rob her of this her only comfort. The child was a little unwell—some trifling medicines were given—she got quite well again—she went out to dine at Conway—he had the child's bed taken down, and put up in his room—on her return she asked him if he meant to take the care of the child from her—he said he did, for she had treated her ill—this was done with the sole view, as the witnesses say, of distressing his wife; her judicious care of the child is proved: he persists in his determination to take care of the child; to take it from a mother to sleep in a bedroom which was no doubt the scene of his constant adultery. When she left her husband, on this remonstrance, he called her back to shut the door. This trivial circumstance, in such a moment of distress, is such an act of unfeeling insult, as proves, to my mind, the tyranny of his disposition, and shews her passive obedience and entire submission to his will.

Deprived of the only inducement she had to reside in this scene of insult, of disturbance, and of profligacy—she quits the house, and goes to that of a clergyman in the neighbourhood—she wished to leave her own maid to take care of the child; even this he refuses—she returns to pack up her clothes—he makes this a pretext for refusing to allow her to see her child, not only then, but ever after. Ever since this, the parties have been living in a state [212] of separation; the husband in adultery with Hannah Dod, and in possession of his daughter; depriving the mother (to whose moral character no blame is imputed) of the only comfort and satisfaction of her life.

This is the history of the facts—the conclusion is short—adultery is proved, and that alone entitles the wife to a separation. Cruelty, in my judgment, is also proved. Here is violence preceded by deliberate insult and injury. The sending away her horses, and putting them up to sale, while she was at church; the forcibly carrying her and confining her to her room; afterwards attempting forcibly to carry her back to her place of confinement—the forming an adulterous connexion with her maid—the keeping that servant in the house, notwithstanding the remonstrances of his wife and her friends—the deposing his wife from the management of his family, and vesting it in this prostitute—such circumstances have always been held by the Court, not merely as acts of adultery, but as connected with cruelty. In addition to this, there is his conduct respecting the child—notwithstanding the pretext of paternal right, the exercise of which, courts of justice will not be disposed to scan too nicely; yet here it was done, as has been shewn, merely to distress his wife—this is marital tyranny—it is as clear an act of deliberate and unmanly cruelty as can be committed.

Upon the whole, I have no hesitation in holding the libel proved as to cruelty as well as adultery—and I decree a separation to the writ à mensâ et thoro.

[213] HUNTINGTON v. HUNTINGTON AND OTHERS. Prerogative Court, Trinity Term, June 29th, 1814.—Instructions established as a will.

The Rev. William Huntington, of Pentonville, being taken ill early in the month of June, 1813, went to Tunbridge Wells for the purpose of obtaining the professional assistance of Mr. Stone, his solicitor, who was resident there, in the making and executing his will. For the first few days after his arrival at Tunbridge Wells, he was prevented by the visits of his friends from engaging in any business—but on the 27th June he sent for Mr. Stone, and told him that he had the whole of his will in his own mind, and that Mr. Stone should write it all down from his own mouth; and he particularly desired it might be written on one sheet of paper, as he did not wish it to be long; and he appointed him to come to him on the next day: on the next morning Mr. Stone came, and the deceased dictated to him No. 1. On the 29th Mr. Stone was prevented by other business from attending Mr. Huntington in the

morning; and in the evening the latter (though he had sent for Mr. [214] Stone) was too much fatigued by an alarm he had experienced respecting the journey of a part of his family, to dictate to him. On the 30th, however, he dictated the remainder of his instructions contained in papers No. 2 and No. 3—and approved of them when read over to him—and directed Mr. Stone to have the whole fairly copied and to bring early the next morning a fair copy for him to sign and execute. In the afternoon, a doubt having suggested itself to his mind respecting one part of the instructions, he again sent for Mr. Stone, and explained it to him; afterwards the deceased expressly informed several persons in his family that he had been making his will and settling his affairs, and had that morning finished it. On the next morning (July 30) he was suddenly attacked by a fit, and rendered incapable, and so continued till the evening, when he died.

A caveat was entered by the seven children of Mr. Huntington (viz. Gad Huntington, Ruth Blake, Naomi Burrell, Lois Clark, Ebenezer, Benjamin, and William Huntington)—this caveat was warned on the part of Lady Sanderson, the widow of the deceased, who propounded the instructions dictated to Mr. Stone, as containing together the last will and testament of her husband. The instructions were as follows:—

“In the name of God, Amen.—I, William Huntington, being now in my right mind and memory, and not knowing the day of my death, do make and declare this my last will and testament, in manner and form following: imprimis, that is to say, I leave [215] my body and soul in the hand of my Saviour in whom I have been enabled to believe, and in whom I am saved. All my gardening utensils, all my coppers and brewing vessels, all the casks of my cellar, my carriages, my horses, and all the furniture and effects of my house, this I leave and bequeath to my beloved wife, to be enjoyed by her as long as she shall live, so that no room shall be spoiled of its furniture, nor even my study, nor my book-cases shall be dismantled. The house which I have built on the leasehold ground in Gray’s Inn lane (the rent of which is seventy pounds per annum) this, and the rents thereof, I give to my said beloved wife, to be enjoyed by her, so long as she shall live. Moreover, the three ground rents of the houses in Gray’s Inn lane, at nine pounds per annum each, for the erection of which I have granted building leases; these rents I give to my beloved wife, to be enjoyed by her as long as she shall live. The chapel also which I have erected on the said leasehold ground I give my said wife, for her life, subject to her paying to Mr. Chamberlain, or whoever it be that succeeds me in the ministry, the sum of two hundred pounds per annum out of the profits thereof. The little piece of ground, which I purchased, Hayseldon’s Wood, in Cranbrook, and erected a double cottage thereon, for the benefit of three poor aged sisters of mine, and which cost [216] me better than five hundred pounds, I give and devise to my beloved wife, and her heirs, to do as she pleases with after my said three sisters shall be dead; and, exclusive of the five thousand pounds my wife’s father settled upon her, and exclusive of the fifty pounds a year annuity likewise, which he settled upon her; exclusive of these two sums, I have received with my said wife, eight thousand six hundred pounds; three thousand six hundred pounds I received of Mr. Dyke: and five thousand pounds I received from the Court of Chancery, being the sum her first husband, Sir James Sanderson, left her upon her second marriage; this sum of eight thousand six hundred pounds I have not diminished ought, but rather increased: there is seven thousand six hundred pounds five per cent., navy stock; and there is one thousand one hundred pounds lent, the vouchers of which my said wife has got by her; and, as it is in good hands, I would wish her not to call it in unless necessitated so to do: there are a few more hundred pounds which my said wife knows of, and all these several sums of money, and my power over them, and all that is due to me or may become due to me, at my death, whatsoever the amount, or wheresoever found, I give and bequeath the whole thereof unto my said wife absolutely. At the death of my invaluable wife, I will that all my garden tools, my iron roll, and watering en-[217]-gine, all my coppers and brewing vessels, all the beer and wine casks of my cellar, my carriages and horses, and all the furniture of my house, my library and books, and every thing else appertaining to me, in my said house (except what is, strictly speaking, Miss Sanderson’s own) I will that it shall be all sold at my wife’s decease; and the money arising therefrom shall be distributed in the following order (that is to say) my son Ebenezer has run through between two and three thousand pounds, in which

he has done no good ; being very desirous to live, but not to work, he has been a heavy burthen to me in my old age ; he has abilities sufficient, not only to run through his own share, but the share of all the rest ; therefore, I give him ten pounds, and no more. My son Benjamin has run through more than five hundred pounds ; therefore, I give him two hundred pounds which I desire may be paid into the hands of Mr. Edward Aldridge, for his use. My son Gad has run through three hundred pounds ; and, therefore, I give him three hundred pounds more : the residue of the money arising from such sale I give to be equally divided between my daughter Naomi Burrell, my daughter Lois Clark, and my granddaughter Naomi Wayte, share and share alike. The chapel in Gray's Inn lane aforesaid, after my said wife's decease, and her heirs jointly, which they shall have no power [218] to mortgage, nor sell, nor disturb the congregation therein ; the managers of the chapel shall pay to my son William, and son-in-law James Blake, and their heirs, two hundred pounds per annum, clear of all deductions, except the property tax, as a rent for the same ; also my said house which I built in Gray's Inn lane (after my said wife's decease) I give to my daughter Naomi Burrell for her life, and, at her death, to devolve upon her said daughter, Naomi Wayte, and her heirs. The said three ground rents I give to my daughter Lois Clark, to her and her heirs, after the decease of my said wife. And my copyright of my own writings I give and bequeath, jointly, to Mr. Thomas Bensley, and my son-in-law William Clark. This I do, because my son Ebenezer is determined to live without work ; and, indeed, I have no doubt but he would sell them into the hands of any man, whereby spurious works in my name might be attached to them, and the world be abused by such publications ; to prevent which I have adopted this method, Mr. Bensley being fully able to detect any thing of this sort, he having printed and published all my works. And I do direct that the whole of the printing and publishing my said works shall be under the management of the said Thomas Bensley. And I do hereby appoint Sir William Kaye and Sir Ludford Harvey joint executors, they [219] having been graciously pleased to express that they will perform the executorship of this my will. As for me I stand executor to no man's will ; I am trustee to no place of worship ; so that no troubles, from these quarters, can, in any way, fall to my executors. I give my cook ten pounds, if she is in my service when I die ; and my man, Peter Spinthorp, the coachman, the like sum of ten pounds, if in my service when I die. The place of my interment I direct to be at Lewes, in the same vault in which my late valuable friend, the Reverend Mr. Jenkins, was buried. I will that they bury me in the vault that was prepared for me at Lewes ; and that they lay me as near as they can to my late friend Mr. Jenkins. Let no pulpit be hung in mourning for me ; let no funeral sermon be preached ; let no ex-temporary oration be delivered at my grave ; let no funeral ode be sung. The Lord Jesus Christ is my exceeding great reward ; to this portion nothing can be added, and from this inheritance nothing can be taken away. And I revoke all former wills, by me at any time heretofore made.

"Taken this 30th of June, 1813.

"No. 2. And as I have gone as far as I can in making her life comfortable, I hope that she will do her part towards assisting the indigent of my family.

"No. 3. And, moreover, I give and bequeath unto my said wife, her executors, [220] administrators, and assigns, the chapel called Providence Chapel, with the vestry's yard and appurtenances thereunto belonging, situated in Gray's Inn lane, in the county of Middlesex, for the remainder of the term therein. And it is my request that my said wife shall settle the said chapel and premises to and for the use of the congregation of Protestant dissenters assembling therein, and the minister who shall succeed me therein, in the same way and manner that I formerly settled the chapel that was burnt down, in Riding-house lane ; and it is my wish that the same may be conveyed to the following trustees, namely, Mr. Thomas Bensley, Mr. Christopher Golding, Mr. John Holland, Mr. Edward Aldridge, for that purpose ; and I give the profits arising from the said chapel to my said wife for her life, she paying thereout two hundred pounds per annum to Mr. Chamberlain, or whoever it be that succeeds me in the ministry ; and, after my said wife's decease, I will and direct that the said trustees shall pay to my son William and my son-in-law James Blake, and their heirs, to be equally divided between them, the sum of two hundred pounds per annum, clear of all deductions except the property tax, as a rent for the said chapel, which they shall have no power to mortgage, nor sell, nor disturb the congregation therein."

There was also before the Court a will of the [221] deceased, dated January 17, 1812, regularly executed and attested by three witnesses. It gave Lady Sanderson her own fortune, left the bulk of the property amongst his grandchildren; and the rest and residue of it to his daughter Lois Clark—and, in fine, was in most respects different from the instructions propounded—it disposed also of freehold property.

Swabey for Lady Sanderson.

Burnaby and Phillimore contra.

Judgment—Sir John Nicholl. There is no sort of difficulty in this case—there is no room for judicial doubt. The propriety of the disposition cannot be taken into consideration—all the requisites of law are complied with: it is clearly proved that the deceased intended to die testate—he had mentioned this intention several times; he mentioned it to Mr. Stone his solicitor—he was taken ill; and, being impressed with an idea that he should not live long, he determined to go to Tunbridge Wells to see Mr. Stone: he arrived there on the 18th of June: for several days after his arrival he was so interrupted that he had no opportunity of setting about business. He did not apprehend that he should live long, yet he had no idea that he was so near his death: he sent for Mr. Stone his solicitor on the 27th of June and told him he was determined to set about his will—he does not on the next day, which was Sunday; but on the following morning he dictated to Mr. Stone great part of the paper propounded—he then said he was tired with so much speaking; that he had [222] done enough for that day, but would proceed on the following morning—he does not do so, but a satisfactory reason is assigned why he did not—on the day after he sent a message to Mr. Stone, who came and read over the paper to him he had written at his dictation—the deceased approved of some parts, and made alterations in others—he dictated also another paper to Mr. Stone for his wife, which, in some degree, accounts for his not having done more for his family. Mr. Stone having received by dictations the contents of this paper, the deceased then suggested something further respecting his chapel; and then added “he had now nothing to do that required a thought.”

On the afternoon of the same day the deceased sent to Mr. Stone again; and asked him “if he had fully understood him as to the chapel being in trust, and the trustees.” Mr. Stone replied, “He understood his intention to be that he would leave the chapel to Lady Sanderson, with a request to convey it to the four trustees he had mentioned: and adding it was to be on the same trusts as the former chapel, fully explaining the contents of paper three.” The deceased replied, “That is exactly according to my mind, or words to that effect; and added, that is all settled, you will now make it out fair, and bring it to me to sign to-morrow morning.” On the following morning the deceased was seized with a fit, and rendered incapable of signing this instrument, which was all that remained to be done—he was prevented from executing it by the act of God. But having made up his mind; going to Tunbridge Wells for the [223] express purpose of making his will; and execution being only prevented in the manner just detailed; it is as clear a case as ever came before the Court. The execution having been clearly prevented by death the instrument is not rendered less operative for the disposal of this property.

An application being made for costs, on the part of the next of kin—

Per Curiam. Let each party pay their own costs.

[224] **NEWELL AND KING v. WEEKS.** Prerogative Court, Trinity Term, July 6th, 1814.—Next of kin held to be barred from calling in a probate from the circumstances of their having been consant of a prior suit, in which the validity of the same will had been contested by other parties.

[Followed, *Ratcliffe v. Barnes*, 1862, 2 Sw. & Tr. 486. Applied, *Young v. Holloway*, [1895] P. 87.]

Judgment—Sir John Nicholl. Thomas Weeks, the executor of the will of Martha Trotman, has been cited by William Newell and Mary King to bring in the probate, and shew cause why it should not be revoked. Weeks has appeared under protest, alleging various circumstances, and supporting them by affidavits. The proctor for Newell and King has replied to the act, and has also exhibited affidavits.

In ascertaining the facts of the case, the Court will assume the facts alleged by Weeks, and which are not specifically denied to be true. Upon these statements it appears that on the death of the deceased, in December, 1808, no will being found,

several next of kin proceeded in this Court to claim the administration. While these proceedings were going on, a will was found dated February 9, 1807. Weeks was the executor—he propounded the will—it was opposed by three persons, John Newell, and Daniel and Maria Wyatt—they were admitted by the executor to be contradictors—several pleas were given in—and about seventy witnesses were examined. The cause came on for hearing in July, 1811, and the Court pronounced for the will—an appeal was carried to the Delegates: before proceedings went to sentence there, the appellants [225] declared they proceeded no further—the sentence was affirmed in April, 1812; and the cause was remitted—and on the 24th of April, 1812, Weeks took probate. In the course of the proceedings the contradictors pleaded that they, together with William Newell and Mary Newell, were the only next of kin; so that their interest was not only not denied, but expressly asserted and averred by the other three contradictors. These two persons, however, after all these proceedings, after Weeks had been many months in possession of the probate, under a sentence of this Court, confirmed by the Court of Delegates, call in the probate and require Weeks again to prove the will in solemn form of law—meanwhile Humphreys, the principal witness in the cause, died.

Weeks now alleges that the suit was carried on, though in the name of John Newell and the two Wyatts, yet with the privity of William Newell and Mary King; and that he and Mary Wyatt were not only privy, but had frequent consultations with the solicitors, proctors, and others, concerned in carrying on the same, and were active in procuring information to enable them so to do; and that they thereby became liable to pay a proportion of the costs. In answer to this, what is alleged on the part of Newell and King? Simply that they were not parties to the suit, and were not cited to see proceedings—they do not deny that they were privy to the proceedings—that they were active in procuring information—that they held consultations with the solicitors, proctors, and others. They make affidavits, confining themselves to the [226] same facts: viz. “That no appearance was given for them, and that they were not cited.” Mrs. King indeed makes a further affidavit, “That she was not responsible for, and has not contributed to the costs.” William Newell does not even deny that he has contributed to the costs; so that the facts already stated of their being privy to the proceedings, of their attendance at consultations, and their activity in procuring information, are in no manner denied. It is further more specifically alleged, “That certain solicitors were employed for the several parties. J. Richardson on behalf of John and William Newell. William Bishop for the Wyatts and for Mary King—that Richardson and Bishop employed Hart as their agent in Gloucestershire, for procuring information; and they both instructed the proctor on behalf of their respective clients, and attended the execution of the commissions for examining witnesses; that they informed themselves from time to time of the progress of the cause, and communicated the same from time to time to their respective clients, particularly to William Newell and Mary King—so that they were as well informed of the merits and circumstances, and enabled to protect their interests as effectually as if the cause had been carried on in their names.” All this again is in no manner contradicted—it is further stated, “That, pending the appeal, a proposal was made to Weeks, that if he would advance 100 guineas towards the expenses of the opposers, they would give no further opposition to the sentence of the Court below, nor enter any caveat on behalf of the other next of kin—that the [227] 100 guineas were paid, upon the express consideration, as was then understood by all parties, that all opposition on the part of the asserted relations was to cease.” An affidavit is made by the managing clerk of the proctor for Weeks to the same effect.

This again is not denied either by the proctor, or the parties themselves.

These are the facts; and, upon these facts, the real justice of the case cannot be doubted by any individual. The Court would deeply lament if any rule bound it down so strictly that it must do so great an injustice as to allow the parties again to put the executor on proof of his will. On what do they stand? they rest simply on not appearing, and not having been cited to appear. If there had been distinct authorities, or a series of adjudged cases, affirming the proposition that, in all cases where a next of kin had neither appeared nor been cited, he should possess an indefeasible right to put the executors to proof, the Court must have bowed to those authorities: but no authority has been cited to that effect, no case has been produced, no dictum even of any of my predecessors has been referred to—all that has

been relied upon is the practice of citing parties to see proceedings on pain of their not appearing—which proves no more than that you may affect them with a legal notice which may bind them—but the converse of the proposition is by no means established; it does not follow that they may not be bound, or rather may not bind themselves by other means. The process of citing parties is a convenient one for all [228] suitors, because, when that is done, you need not prove actual privity—the law presumes actual privity after the legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests—but if you can prove actual privity, the legal process, in point of solid justice and sound reason, is superfluous; though, *ex abundanti cautela*, it may still be convenient to resort to it, and have it upon record.

The practice, therefore, may be explained and accounted for upon other grounds, short of going the length contended for; viz. that unless either there is an actual appearance, or the party is formally cited, the proceedings will not affect him however distinctly it may appear that he was privy to the whole of them—indeed, as I have before stated, no authority, case, or even dictum, to support the rule to the extent set up, has been offered to the consideration of the Court. There are cases, however, the other way, which, though not precisely the same as this, yet shew that the Court looks to substantial justice, and that which right reason requires, and does not require indispensably the strict formality of citing.

There was a case in 1802, *Richardson v. [229] Claney*, (a) where the Court held that

(a) *Richardson v. Claney*. (Prerog., Easter Term, May 22, 1802.)

Judgment—*Sir William Wynne*. In this case a decree issued on the 28th of January, 1801, citing all persons in general having, or pretending to have, an interest in the effects of the deceased, to appear on the 30th of March, and all succeeding court days, to see the will propounded by one of the executors, and all other judicial acts, with the usual intimation; which is, that if they did not appear, the executor would proceed to establish the will. The decree is not drawn quite in the usual form, but in the fullest possible manner to affect all persons not personally served—it was served, in the only way it could, on the Royal Exchange, it not being known where any relations might be; and an advertisement was inserted in the public newspapers.

An allegation was given in, and two witnesses were examined upon it—a party appeared as first cousin; but declared that he would proceed no further. The Court in *penam* pronounced for the will on the third session of Michaelmas Term, 1801, and granted probate: three days after, before it passed the seal, a caveat was entered by the proctor who had appeared before—it was warned; the same proctor appeared for Thomas Claney, and alleged him to be a nephew, and prayed an answer to his interest, which was assigned, and an affidavit of scripts by both parties. A petition was brought in that the executor might be dismissed, and the probate which had been granted might be delivered to him; and it was objected that the party, not having appeared till after sentence, could not intervene. The counsel have stated the will, and the proceedings which have taken place—this is not mere suggestion—both parties have joined in it; and the whole being before the Court, the Court has a right to refer to them. The paper is in the handwriting of the deceased—with this there is annexed to the affidavit of scripts a letter from the deceased to his agent, in which, after stating his affairs, he says he has no relation; and, therefore, that it was the more necessary that he should make his will—the will was put in an envelope, and addressed to the executors, and endorsed “This is my will.” It is objected to the will that there is a clause of attestation, and no witnesses—this is supplied, and the Court thought it supplied, by the testator’s putting the will into a cover, addressing it, endorsing it, and by other circumstances. These circumstances being all in the registry, and on record, as far as this Court can make them of record, I think I have a right to consider them, and to see what the justice of the case is, and what the party would be likely to obtain; and it does appear to me that there is scarcely any possibility that he could obtain any thing. Besides I must consider how far this person is to be considered as consulant of the proceedings—he is of the same name and family as the other who appeared; he alleged himself to be first cousin; this calls himself nephew. The assignation of the Court on the 11th of January to give a proxy and an affidavit of scripts is in the usual form: none was given; therefore, there was no preparation to proceed with expedition, as there ought to be in such a

though a party was not strictly bound by proceedings in *pœnam*, yet in justice he could not be allowed to proceed.

[230] Another case comes nearer the present, where the Court held that the next of kin, being privy to the probate and acquiescing in the will, was not at liberty to put the executor on proof, even though the will had not been proved *per testes*. I allude to the case of *Hoffman v. Norris and White*,^(b) [231] Prerog. Hilary Term, 1805. This case establishes that it is not necessary, in order to bar a party [232] from proceeding, that he shall actually have been cited here; but that the Court looks to the substantial justice of the case: the next of kin, though acquainted with the will in that case, and though he had actually averred the validity of it in the Court of Chancery, yet was totally ignorant of the circumstances under which it had been made, or the state of incapacity of the deceased, or other circumstances, rendering the will invalid. There are many cases in which parties have received legacies, and afterwards contested the validity of the wills under which they received them. The suit in Chancery was not one respecting the validity of the will—it was a suit *diverso intuitu*. The will had not been proved *per testes* at all; and yet the Court held that, under the acquiescence of nine years and without cause shewn, the party was barred from calling upon the executor to prove the will *per testes*; and that, before he could do so, he must explain and account for the delay which had taken place.

[233] In the present case the deceased has been dead six or seven years—but here a suit has been instituted, the will has been proved *per testes*, and solemn proceedings have been had between competent parties in the same interest, and averring the interest of the parties who now wish to institute proceedings afresh, and the judgment of this Court has been affirmed by that of the Court of *derniere resorte*—Newell and Weeks have not only been privy to all these proceedings; but substantially have been parties themselves to this suit, quite as much as if they had actually appeared—Spectators to the whole, and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privy to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance. In the former cause they had not only a right, but it was their duty to intervene if they meant not to abide by the decision—their interests were directly affected; if the will had been set aside, they would have established their claim. The *lis pendens* served as a public notice on which they were

case. The executor is gone to the East Indies; his answers may be prayed, and then the matter must be hung up for two years. Taking all these circumstances into consideration, and having a just and legal right to consider them, I think this is done only for the purpose of harassing the executor, and perhaps of driving him to a compromise which this Court will never allow. Under all the circumstances of the case, I think myself at liberty to dismiss the party and to direct the probate to pass the seal immediately.

(b) *Hoffman v. Norris and White*. (Prerog., Hilary Term, Feb. 18, 1805.)

Judgment—Sir William Wynne. George Hoffman made his will in May, 1791, disposing of real and personal property between a brother and sister, and excluding his brother Lewis Hoffman for reasons mentioned—he died in 1795. In March, 1795, the will was proved by the two executors—doubts having arisen respecting the will, a suit in Chancery was brought against the executors, and against Lewis Hoffman, praying an account, &c.—this was answered by all the parties. Lewis Hoffman, in his answers on the 26th of January, 1796, stated that he believed the deceased had made his will as set forth; that the will was duly proved; and he claimed all such right as he was entitled to as brother and next of kin; particularly submitting whether a legacy did not lapse, and that he was so entitled. On the 26th of June, 1796, the Master decreed accordingly; and that, by the death of William Hoffman, the legacy had lapsed and consequently was distributable; and that one-third of one-half belonged to Lewis Hoffman—pursuant to this the money was laid out; and Lewis Hoffman received the interest of the one-third of the moiety proceeding under the will, as if the legacy had lapsed.

In 1804 a decree was taken out in this Court by Lewis Hoffman against the executor of his brother's executor to bring in the probate and prove the will. There can be no doubt but that as a brother he is entitled to controvert the will; and, if

bound to act. But that which marks, if possible, more strongly the unfairness of the present attempt (though this circumstance is not necessary for the decision of the question) is the agreement made during the appeal, in which it is stated to have been expressly understood, that on the payment of 100 guineas, not only was no opposition to be given to the affirmance of the sentence, but [234] no new caveat was to be entered by any of these parties; and the parties now proceeding do not deny the fact or their privity to this agreement. It is a most unconscientious attempt again to put the executor on proof of the will.

As to the new facts which are pretended to have been discovered, they are stated too generally, and too indistinctly, to deserve notice; and, even if they had been more distinctly and more circumstantially stated, they would have come too late after the affirmance of the judgment of this Court by the Court of Delegates.

I allow the protest, and dismiss the executor from further proceedings; and I think I am bound to give costs against the other parties.

[235] SMITH v. SMITH. Arches Court, Trinity Term, July 4th, 1814.—

Permanent alimony.—A moiety given to the wife.

[See pp. 67, 152, and 207, ante.]

Judgment—*Sir John Nicholl*. It is a general rule that permanent alimony shall be larger than that which is allowed during suit. Even when the bulk of the fortune originally belonged to the husband, the Court allows a competent income to the wife. She is the injured party, and has a strong claim upon the Court: though with respect to the quantum there is no established proportion of the joint stock: each case must depend on its own particular circumstances: no two cases are exactly alike. But there is in this case a circumstance which ought to weigh specially in favour of the wife; viz. that the bulk of the fortune originally belonged to her; and this circumstance is still strengthened by another, namely, that the property was settled on the wife, and that she was induced, by the hope of better treatment, to give it up to her husband. He has been not only adulterous, but cruel—and, in order to [236] buy off his cruelty, he obtained possession of the property which had been settled on his wife.

It is a rule of equity that no man shall take advantage of his own wrong—perhaps it would be but just that where the husband violates the matrimonial engagement, and the fortune was originally belonging to the wife, that he should give back the whole of it—Courts, however, have not gone that length—yet, in such a case as the present, this Court would give as large an allotment as in any.

In *Lord Pomfret's case* (*The Countess of Pomfret v. The Earl of Pomfret*, Arches, May

probate has been obtained in common form, he can call it in, and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795; this decree was taken out in 1804, so that there had been a quiet possession for nine years. I think I know instances in which the Court has allowed the probate to be called in after a longer time, that may be done with cause shewn: that it may be done under any circumstances is what I cannot admit: it would be contrary to reason and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; if he has been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to shew that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery soon after the probate was taken out, the case is different. By his answers he admitted both the will and the probate: a decree was made operating on the lapsed legacy; and he acted under that decree not upon an intestacy, and continued to receive the interest for five years together—not offering to bring up what he has received, but stating only that he had strong reasons to doubt, but did not know that he could call them in question after probate—ignorance of the law is not an excuse; but this is so plain; and, having advice as to the deceased's affairs by the suit in Chancery, I cannot admit this. He speaks of additional facts—but this is mere general assertion—there is little reason to think that a will written with the deceased's own hand in the East Indies, he having lived in this country four or five years afterwards, could be improperly obtained.

I dismiss the suit with costs.

14, 1796), where the fortune came principally by the wife—the income was 12,000*l.* The Court allotted one-third to the wife—what weighed there was that the husband was a peer, and that the public had an interest that he should be able adequately to maintain his station.

In *Taylor v. Taylor* (Consistory of London, May 28, 1791), where the property was small, the Court gave a moiety.

In *Cooke v. Cooke* (ante, p. 40) the property came by the wife; there also the Court gave a moiety.

In *Otway v. Otway* (ante, p. 109), where the bulk of the fortune came from Mrs. Otway, the Court would have given a moiety, but the husband had six children to maintain; and, on that account, though it gave less than a moiety, still the Court thought it placed the wife on an equal footing with the husband.

In the present case there is but one child—[237] an infant daughter which the husband has taken away forcibly from the wife, and which the Court considers as an aggravation of his misconduct. I shall make no deduction on that account. No doubt the wife will gladly maintain the daughter, if he will allow her to return to her mother.

The joint income is about 2000*l.* In addition to the 450*l.* per annum allotted to the wife pending suit, I shall allot 550*l.* per annum. She will then have 1000*l.*, and he about the same: but as the Court takes the husband's calculation; which may be presumed not unfavourable to himself, in all probability he will have the better half.

[238] FELLOWES, FALSELY CALLED STEWART *v.* STEWART. Arches Court, Michaelmas Term, Dec. 3rd, 1814.—Libel pleading the insertion of a false name in a publication of banns, admitted to proof.

[See further, p. 257, post.]

Brought by letters of request from the Commissary Court of Canterbury.

William Stewart, the son of a gentleman's servant, at Edinburgh, in the year 1811, having raised himself to the rank of a captain, paid his addresses to Jane Fellowes, then resident with her mother, a widow, in Nelson Square, Blackfriars' Road. He described himself to her as the son of a gentleman of considerable landed property, and as presumptive heir to the earldom of Moray; and in fine persuaded her to be married to him without the knowledge, and consequently without the consent, of her mother.

The marriage was solemnized after a publication of banns in the Church of St. Margaret's, Westminster. On the first Sunday of the publication he was described as William Douglas Dundas Stewart. On the second and third Sundays, under his particular direction, the name of Douglas was omitted; and the banns were published under the names of William Dundas Stewart—his only baptismal name was William; he was about twenty-eight years of age—and Miss Fellowes was rather more than eighteen.

[239] On the 23rd of July, 1814, the wife instituted a suit to annul this marriage—the libel stated the nature of the fraud which had been practised against her, the want of consent of her mother, and the circumstances under which the publication of banns had taken place.

Burnaby against the admission of the libel. This libel is inadmissible on every ground—there is no case in which the assumption of an additional name has been held to vitiate a marriage—nor has it ever been held that the false representation of rank and fortune can affect the validity of a marriage once established. It is also utterly irrelevant to plead the want of the mother's consent; for by the marriage act publication by banns supersedes the necessity of parental consent.

Swabey and Lushington in support of the libel. In the cases of *Tree v. Quin* (Consistory, Easter Term, 1812. Vide supra, p. 14), and *Doblyn v. Cornock* (Consistory of London, Hilary Term, Jan. 26, 1813. Vide supra, p. 102), both turning on the point of the assumption of a false name in the publication of banns, the libels were admitted to proof. In *Frankland v. Nicholson* (Consistory Court of London, Easter Term, May 29, 1804), a marriage was held null for the substitution of a false name for the true one—so also in *Mather v. Ney* (Consistory Court of London, Trinity Term, July 10, 1807).

The object of the statute is to give notoriety to the transaction in order that if any impediment [240] exists to the marriage, it may be prevented. Banns which do

not establish the identity of the parties must be considered as unduly published. And the identity of a party may be as much concealed by the introduction of a false name, as it may be by the omission of a true one.

Judgment—Sir John Nicholl. Being of opinion generally that this libel is admissible, I shall not now enter fully into the question.

The intention of the publication of banns is to make known that a marriage is about to take place between the individual parties—if, therefore, the publication is such as not to designate, but to conceal, the parties—it is no publication. This may as well be affected by the insertion of an additional name, as by the omission of one. Here the insertion is pleaded to have taken place in connexion with fraudulent circumstances. It is, therefore, the publication of banns with an additional name for the purpose of deceiving the party who is a minor, and for the purpose of imposing upon the mother—this, therefore, is directly connected with the great object of the suit: viz. the false publication of banns—it is stated to be a publication to deceive on that point which the act of parliament intends should be made known to the whole world.

I am clearly of opinion to admit the libel, reserving my final opinion till a future stage of the cause.

[241] JONES v. JONES. Prerogative Court, Michaelmas Term, Nov. 5th, 1814.

—A commission to swear witnesses insufficiently executed.

Several of the next of kin of William Jones, of Sudbury, in the county of Suffolk, cited his executors to propound his will in solemn form of law.

A commission issued to take the affidavits of the executors who resided in and near Sudbury, to the testamentary scripts of the deceased. This commission was in the usual form: it was addressed to two clergymen; and it directed that the executors should be sworn in the presence of a notary public. But, there being no notary public resident within ten miles, the oath had been administered by the commissioners in the presence of two witnesses, instead of a notary public.

Jenner and Lushington for the next of kin. The directions in the commission are not fulfilled; consequently, the return is void, and the affidavit no affidavit at all: the presence of a notary public was essential to the execution of the commission—it may be of importance elsewhere, as an [242] indictment for perjury would not lie under such an affidavit.

Swabey and Phillimore contra. There was no notary public resident within ten miles; and it is not an unfrequent practice in the execution of a commission of this description to substitute two witnesses for a notary public.

Per Curiam. I know how strict the Courts of common law are on indictments for perjury. Let a new commission issue, and the executors be resworn.

[243] WETDRILL v. WRIGHT AND OTHERS. Prerogative Court, Michaelmas Term, Dec. 7th, 1814.—The husband of a substituted residuary legatee entitled to an administration in preference to the husband of the sole executrix and residuary legatee for life, both parties being widowers.

Peter Bloy, of Walsingham, in Norfolk, died some years ago, having first made his will, in which he appointed his wife, Mary Bloy, sole executrix, and left her the residue of his property for life; but after her death appointed his daughter Elizabeth substituted residuary legatee. The widow proved the will in the archdeaconry court at Norwich, but in no other court; and afterwards died intestate—leaving several nieces and nephews, her next of kin.

William Wetdrill, the husband and administrator of Elizabeth, Peter Bloy's daughter, took out a decree against the nephews and nieces of the widow, citing them to shew cause why letters of administration, with the will annexed of Peter Bloy, should not be committed to him: an appearance was given for the parties cited; and an act on petition was entered into.

In this act it was alleged, on the behalf of Wetdrill, "That Peter Bloy had died, leaving goods, chattels, or credits, in divers dioceses or peculiar jurisdictions, within the province of Canterbury, sufficient to found the jurisdiction of that Court, having made his will in writing, and appointed his wife, Mary Bloy, sole executrix and residuary legatee; that Mary Bloy survived the deceased, obtained probate of the will in the archdeaconry [244] court at Norwich, and, in virtue thereof, paid all the debts and testamentary expences of the deceased, and is since dead intestate without

taking upon herself the probate of the will in this Court. And it was further alleged that Peter Bloy, by his will, directed his wife to leave off business at the Michaelmas after his death; and that all his monies should be put out to interest to Henry Lee Warren, and the interest thereof be paid to his said wife for her life; and after her death he directed the principal to be paid to his daughter, Elizabeth Wright, afterwards Elizabeth Wetdrill; that the deceased in her life-time sold divers goods and effects, and himself placed the monies arising from such sale in the hands of Henry Lee Warren, and Mary Bloy received the interest of this money as long as she lived; and that upon her death the said Elizabeth Wetdrill became absolutely entitled under the will to the principal monies; and that Wetdrill, as her legal representative, is now entitled to the same; and that the monies now due, principal and interest, amount to 895l. 0s. 9d., which is the whole of Peter Bloy's property now to be administered."

On the behalf of the nephews and nieces of Mary Bloy it was alleged, in opposition to this statement, "That Mary Bloy survived Elizabeth Wetdrill; and that the sum of 895l. 0s. 9d. above-mentioned not having been reduced into the possession of Elizabeth Wetdrill during her life-time, or into that of her husband William Wetdrill, doubts have arisen to whom the 895l. 0s. 9d. belongs, which question ought to be determined be-[245]-fore administration is granted as prayed by the adverse party—that this Court is not of competent jurisdiction to determine the same—that Mary Bloy hath left behind her divers goods and chattels; and that the parties in this cause are her nieces and two of her next of kin, and are ready and willing to take upon themselves letters of administration of her goods, chattels, and credits, and also letters of administration, with the will annexed, of the goods, &c. of Peter Bloy, and to distribute the effects of Mary Bloy and Peter Bloy according to law. Wherefore they prayed for letters of administration to them as next of kin to Mary Bloy, sole executrix and residuary legatee named in the will of the deceased according to the usual course and practice of the Court."

In reply to this it was stated, "That besides the 895l. 0s. 9d., the property of Peter Bloy in the hands of Henry Lee Warner, there is a further sum of 200l., part also of the property of Peter Bloy, to which William Wetdrill is also entitled, in the hands of Robert Sillet, the husband of one of the parties in this cause, secured by his bond, dated October 6, 1803, and interest on the bond for April 6, 1813, which sum is part of the monies placed at interest to Henry Lee Warner, pursuant to the will of Peter Bloy, to the interest of which Mary Bloy was entitled for her life, and after her decease the principal was to be paid to Elizabeth Wetdrill; which sum was, in October, 1803, taken by William Wetdrill out of the hands of Henry Lee Warner, lent to Robert Sillet; and Robert Sillet paid interest to William Wetdrill [246] thereon for the use of Mary Bloy as long as she lived, and after her death to his use till the 6th of April, 1813. When Robert Sillet, taking advantage of his having himself inserted the name of Mary Bloy as the obligee of the bond, though he well knew she had only a life interest in the money, refused to pay any further interest thereon." And moreover it was denied "That any legal doubts had arisen as to the title of William Wetdrill to the administration, because Elizabeth Wetdrill survived Peter Bloy; and, immediately on his death, the bequest became absolutely vested in him;" and it was alleged "That if administration, with the will annexed, should be granted to the adverse parties, several difficulties would arise in the recovery of the 200l. and interest secured by the afore-mentioned bond."

Swabey for William Wetdrill.

Phillimore contra. This is a question between the representative of the residuary legatee and the representative of the next of kin—in such a case the former is always preferred. Comyn's Dig. Administration (B. C.), *Sparke v. Denne*, Jones, 225.(a)

(a) The case between *Sparke* and *Thomas Denne* of the Inner Temple on an appeal to the Delegates was thus: John Denne made his will, and by it devised several legacies in money to several persons; and in fine devised the residue "of all my moveable goods and chattels" to his wife, and made his wife executrix, and having divers debts due on bond, died; and his wife, before taking out probate of the will, to wit on the same day, died also. After her death administration of the goods, with the will annexed, was given to the sister of the wife, who had married Sparke; and against this an appeal was brought by Thomas Denne, the brother of the said John Denne. The Commissioners' Delegates, at the sentence given in the cause, were

[247] *Judgment*—*Sir John Nicholl*. This question arises upon the grant of an administration of the goods of John Bloy left unadministered by his executrix.

The deceased left a widow and a daughter; he bequeathed his property to his wife, she paying to the daughter a certain sum, and after her death the whole to go to the daughter. The wife was executrix, and took probate of the will at Norwich. The daughter survived her father and married; but died before the widow. The widow is now dead. Administration *de bonis* is prayed on one side by the administrator of the widow; on the [248] other side by the husband of the daughter. It is admitted, and clear, that this is not a case within the statute; the grant is in the discretion of the Court. The general principle, both by the statute and practice, is to give the management of the property to the person who has the beneficial interest in it; it is not always granted to the majority of interests: but when one party has an interest, and another no interest whatever, in that case the Court will place the property in the hands of the person who has the exclusive interest. Here the only property left unadministered is that in which the widow had clearly only a life interest; whether she had more in any part of the property must depend upon the construction of the will, which the Court, under these circumstances, will not go into. Being a vested interest in the daughter, and she having married, and her husband having survived her, he has the same right that she would have had.

Wetdrill then having the sole interest, and the others having no interest at all, I shall grant the administration to him; and I do not apprehend that, in so doing, I am departing from the ancient practice: the question is not between the residuary legatee and the next of kin, as has been attempted to be maintained in argument; but between the representative of a person who had a life interest, and the representative of a person who had a substituted interest.

I shall grant it to the representative of the substituted interest.

[249] HARRISON AND OTHERS *v.* ALL PERSONS IN GENERAL. Prerogative Court, Hilary Term, Feb. 8th, 1815.

Per Curiam. The Court does sometimes grant to more creditors than one; but it prefers that one should be fixed upon.

For the credit of the Court I trust that improper contrivances will not be resorted to for the purpose of preventing the just administration of the estate: I must, therefore, intimate to practitioners that to follow all instructions they receive from their clients may not be creditable. The proceeding here is extraordinary—an appearance has been given for this party to pray an administration with the will annexed—the will now is brought in, and the same party appears under a protest. If he appears under a protest I must hear him; but I must look to practitioners to satisfy themselves as to the grounds of the steps which they take.

[250] CUNNINGHAM *v.* SEYMOUR. Prerogative Court, Hilary Term, Feb. 17th, 1815.—Disputed wills ought to be lodged in the registry of the Court for safe custody.

Per Curiam. Practitioners have no right to keep wills in their possession. I have, in several instances, stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it. The proper way is for the will to

the Bishop of Ely, Jones, Whitlock, Harvey, and Croke, justices, and there were no others there; and it was after several arguments of Drs. Eden, Duck, Crawley, Bramston, and Noy, that the sentence was that the said administration should be revoked, and a new administration granted to Denne with the aforesaid will annexed; and the reason was that, by the devise of “all my moveable goods and chattels,” debts which are *jura* were not devised; so that, in fact, there was nothing that was devised. Therefore, the administration was committed to the nearest of the friends of John Denne: but if all the goods, chattels, and debts had been devised, and no residue, then the administration belonged to the devisee, for he had all the estate, according to 22 Eliz. Dyer. And, upon this difference, the first administration was reversed, and the new administration granted; and it was *unâ voce* by the said commissioners, and they decreed that an obligation should be taken from Thomas Denne that he would pay all the legacies, and perform the aforesaid will, &c. William Jones, 225 (anno 6th Car.).

be brought into the registry for safe custody. Wherever a compulsory process is necessary for this purpose, the expense shall fall on the party occasioning it.

[251] SHERARD AND CLARKE v. SHERARD. Prerogative Court, Hilary Term, Feb. 19th, 1815.—Of the appointment of an executor, held not to be revoked by necessary implication.

The Reverend Philip Castel Sherard of Godmanchester, in the county of Huntingdon, died on the 29th of November, 1814. By his will, dated the 24th August, 1809, he made the following appointment of executors:—

“I nominate and appoint my three brothers George Sherard, Robert Sherard, and Caryer Sherard, joint executors of this my will; and I hereby give and bequeath to them, my said trustees and executors, the sum of 1000l. in case they shall take upon themselves the trusts hereby reposed in them.”

By a codicil of the 30th of August, 1809, written by himself on the back of the last sheet of the will, he thus alters the appointment of his executors—

“I hereby revoke the appointment of my brother, Robert Sherard, to be an executor and trustee, in the above written will; and appoint, in his stead, my wife, Sarah Haughton Sherard, with all the powers he would have had; and my will is, that of the 1000l. bequeathed to George Sherard, Robert Sherard, and Caryer Sherard, as executors and trustees to this my will, that he, Robert Sherard, receive 100l. only, and that the rest be divided between George Sherard and [252] Caryer Sherard for their trouble in seeing my will executed.”

By a second codicil, dated December 5, 1812, in his own hand-writing, on a separate sheet of paper, he made a further alteration, viz.—

“I, Philip Castel Sherard, of Upper Harley Street, made a will some time ago, in which I appointed my brothers George Sherard, Robert Sherard, and Caryer Sherard, trustees and executors, for the purpose of carrying that my will into execution. I do now appoint my friend Sir Simon Haughton Clarke, Baronet, a trustee and executor for the purpose of carrying my said will into execution, instead of my two brothers Robert Sherard and Caryer Sherard, as he is more conversant with my affairs than they are: and I invest him with all the powers and rights which I had, in the before mentioned will, invested Robert Sherard and Caryer Sherard with for the purpose of executing my will. And my intention is that my brother George should remain trustee and executor, and that Sir Simon Haughton Clarke be joined with him only; and I hereby revoke the appointment of Robert Sherard and Caryer Sherard as trustees and executors, but wish all the rest of my will to be put in execution and be considered as my last will and testament.”

The question before the Court was, whether the widow was to be considered as an executrix; and, consequently, whether probate was to be [253] decreed to her as well as to the Reverend George Sherard and Sir Simon Haughton Clarke, Bart.

Swabey and Phillimore for the Reverend G. Sherard and Sir S. H. Clarke.

The last codicil must be held to be a virtual revocation of the appointment of Mrs. Sherard to the executorship. It is clear from the context that the testator intended to confide the management of his property to no other person but the two executors named in that instrument: the words “and my intention is that my brother George should remain trustee and executor, and Sir Simon Haughton Clarke be joined with him only,” can only be interpreted as revoking, by necessary implication, as well the executors named as the executrix not named in the former testamentary papers.

Lushington and Cresswell contra. It is necessary that the contradiction should be direct to effect a revocation: under the first codicil the appointment of the widow is clear—an executorship is a beneficial office, and is so considered in law. If there be such a contradiction that the whole cannot subsist together, then the latter part may destroy the former; but if it be only doubtful, then that construction must be adopted which will give effect to the whole. *Ridout v. Pain* (3 Atk. 485), *Ulrick v. Lichfield* (2 Atk. 373), *Swinburne*, p. 1026. The taking away a beneficial right is odious; there cannot be a revocation of an executor by implication.

[254] Words only are relied upon—there is nothing to induce the Court to suppose that Mrs. Sherard was in his contemplation when he wrote the last codicil: such an interpretation has the most just and natural reference to the subject matter; the word only is used with reference to the two other brothers—if he had intended to have revoked a former appointment, he would have done it in a plain manner; if he had

forgotten that he had appointed his wife, he cannot be held to have revoked that which he did not remember.

Judgment—Sir John Nicholl. The testator, the Reverend Philip Castel Sherard, appointed his three brothers executors in his will; a week afterwards he made a codicil in which he revoked the appointment of his brother Robert, and substituted his wife in his stead: this codicil is solemn and formal; he signed it; and it is attested by three witnesses. On December 5, 1812, Sir Simon Clarke was substituted as executor for two brothers of the deceased; and it is said that he shall be joined with his brother George only. The question is, whether by this codicil the appointment of Mrs. Sherard is revoked also? She is expressly appointed by a very formal instrument; the revocation, therefore, must be either express or by necessary implication. It is not express—because there is no mention of it—it is, therefore, reduced to the consideration of whether it is revoked by necessary implication. Taking the whole of the words together, it does not appear to me that it is. The testator recites only his will (he does not [255] refer to the codicil by which he had appointed his wife) and continues, “I do now appoint my friend Sir Simon Haughton Clarke, Bart., a trustee and executor for the purpose of carrying my said will into execution, instead of my two brothers Robert Sherard and Caryer Sherard; as he is more conversant with my affairs than they are; and I invest him with all the powers and receipts which I had in the before-mentioned will invested Robert Sherard and Caryer Sherard with, for the purpose of executing my will, and my intention is that my brother George should remain trustee and executor, and that Sir Simon Haughton Clarke should be joined with him only; and I hereby revoke the appointment of Robert Sherard and Caryer Sherard as trustees and executors; but wish all the rest of my will to be put in execution, and to be considered as my last will and testament.”

He substitutes this gentleman instead of his brothers—if the word only was not inserted, there could be no possible doubt; but it does not seem to me that the word only revokes the appointment of his wife. The Court must endeavour to give effect to every word if possible; only one brother is left executor out of three—the word only seems to refer to this—such construction is fortified by what follows—if he had meant to have revoked his wife also, he would have so stated it in this part—when he expressly revokes the appointment of his brothers, and confirms the rest of his will, he confirms the appointment of his wife.

[256] It has been conjectured that he had forgotten the second codicil in which he substituted his wife for his brother—he might have had no access to his will, on which that codicil was endorsed at the time of making his second codicil—and this is possible from the expression “sometime ago.” If he did not recollect the appointment of his wife, it is clear he did not mean to revoke it.

Supposing that he did recollect her, it is most extraordinary that he did not expressly revoke the appointment if he wished it not to stand—the presumption in that case must be that he intended to have three executors. On the whole, there being no revocation of the appointment, either by express words, or, as it appears to me, by necessary implication, I am of opinion that Mrs. Sherard ought to be joined in the probate with the other two executors.

End of vol. ii. part 1.

[257] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS’ COMMONS; AND IN THE HIGH COURT OF DELEGATES.

FELLOWES, FALSELY CALLED STEWART v. STEWART (see page 238). Arches Court, Hilary Term, Feb. 23rd, 1815.—A marriage annulled on account of the insertion of a false name in the publication of banns.

Judgment—Sir John Nicholl. This is a suit promoted by Jane Fellowes against William Stewart to annul a marriage had on the 30th of October, 1811, by reason of a fraudulent and undue publication of banns.

The party applying for the sentence of nullity was, at the time of the marriage, a minor of the age of 18—her father was dead—her mother con-[258]-tinued unmarried, and the marriage was had without her consent—this, though it would not be a sufficient ground to set aside the marriage if the banns were duly published, is an ingredient in the case not improperly introduced to the notice of the Court as tending to shew fraud in the transaction.

The first publication was by the names of William Douglas Dundas Stewart; the two subsequent publications by the names of William Dundas Stewart only. It is alleged that this was a publication by false names through fraud: the publication must be in the true names of the parties; where the true names are not used, it is no notice at all to other parties; even either of the parties themselves may have an interest in the true names being used—the true names are, therefore, required. What are the true names may be matter of difficulty; it may be a question whether a name gained by repute may not be fairly used; but there is no such difficulty in the present case. What would be the effect of a slight variation, from error or accident, has perhaps not been settled by any direct decision; perhaps it would not vitiate the publication. In the present case the names were never assumed before; but were adopted to assist in practising a fraud against the other party.

This person was not a boy when his acquaintance commenced with Miss Fellowes, he was twenty-seven or twenty-eight years old; she was only sixteen or seventeen. It is proved that he was never known by any name but that of William Stewart—he asserted himself, upon this acquaintance, to be the presumptive heir of the Earl of Moray, and [259] the son of a man of large landed property in Scotland; whereas it is proved by the evidence of Lord Moray that there was no truth whatever in this representation: the fact turns out to be that he was the son of a man who kept a sort of vintner's cellar, where tobacco was sold, in some part of Edinburgh: his false representations were made in the presence of Miss Fellowes and her mother; and, in order to support the deception, he had the arms of the Moray family engraven on his seal—by these artifices, though the mother expressed her aversion to him in strong terms, he prevailed on this young woman to marry him, she being, as it appears from the evidence, rather captivated by the hope of a coronet.

Miss Jones proves that he desired her to have the banns published by the names of William Douglas Dundas Stewart, and that they were actually so published; she says that, to prevent mistakes, she, two or three times, asked him if the names were right, and he assured her that they were; and that this conversation passed when he was walking with her and Miss Fellowes. Miss Jones returned home shortly afterwards, and reduced the names into writing: previous to the second publication he called himself at the vestry room, and had the name of Douglas struck out—but for what reason does not appear: and on the second and third Sunday he had the banns published in the names of William Dundas Stewart.

What would be the case if this were mere error the Court is not called upon to enquire, it would be very reluctant to vitiate the marriage: [260] the insertion of a name may mislead as well as the omission of a name; here it must have been done for some purpose of deception, to give colour to his former fraud; it might tend fraudulently to confirm the idea of the connexion he had before set up. The publication was not in the true names, suppose any one present at the publication who knew William Stewart, the vintner's son—would he know William Dundas Stewart? Certainly not. It is not necessary to prove that any person was actually deceived; it is sufficient if any person might have been deceived; non constat that this very circumstance might not lull to rest all other enquiries—might not Miss Jones have been deceived by it? Suppose enquiries made of Still (a witness to whom his brother had been apprentice, and who had known him from his boyhood), who only knew him by the name of William, his answer would be that it was not the same person; the introduction of names of this sort might mislead; and it is obvious the party intended to commit fraud.

Upon the whole I am of opinion that this publication was not in the true names, and that it was a fraudulent publication; as such I pronounce the marriage to be a nullity.

Swabey prayed costs.

The Court having questioned the registrar as to the practice of giving costs, in cases of this description, said, I think, under the circumstances of this case, I am bound to give costs.

Costs given.

[261] TAYLOR AND OTHERS v. DIPLOCK. Prerogative Court, Easter Term, April 12th, 1815.—A husband appoints his wife executrix and residuary legatee; he and his wife are drowned at the same time; administration with the will annexed granted to the next of kin of the husband.

Job Taylor, a staff serjeant in the corps of Royal Artillery drivers, on his return from Portugal in the "Queen" transport, was, on the 14th of January, 1814, wrecked in Falmouth harbour, and drowned; his wife, who was also on board the transport, perished by the same calamity.

Job Taylor left a will, in which, after bequeathing several small legacies amongst his relations, he had constituted his wife sole executrix and residuary legatee: his property amounted to 4000*l*. A question arose whether the relations of the husband or the relations of the wife were entitled to this residue. James and Richard Taylor, the brothers, and Eleanor Baillie, the sister of the husband, on one side, and Sarah Diplock, mother of the wife, on the other, respectively prayed administration with the will annexed to be granted to them; and Sarah Diplock prayed also in the alternative, that if not granted to her, administration with the will annexed should be granted to John France, her nominee, limited to attend certain proceedings to be had in the Court of Chancery.

[262] The facts of the case were detailed in an act on petition, in support of which several affidavits were produced on both sides.

On behalf of the relations of the husband, Jeremiah Barham, Joseph Minshall, and John Daniells (three privates of the corps of Royal Artillery drivers, who were aboard the "Queen" transport when she was wrecked), made oath "that the 'Queen' transport ship arrived at Falmouth on or about the seventh day of the month of January, and remained there until the fourteenth day of the same month; early in the morning of which day a heavy gale of wind arose, and the said ship struck upon a rock, when these deponents who had been asleep below went up upon the deck; and this deponent, the said Jeremiah Barham, for himself saith that he was one of the first persons who so came upon deck, and soon after saw the said Job Taylor and Lucy Taylor, his wife, come up together upon deck, the said Job Taylor having a plaid cloak upon his arm: that the said Job Taylor soon after went down into the cabin, and returned on deck with another plaid cloak, which he threw over the said Lucy Taylor, who before had but little clothing on her: and all these deponents make oath that they saw the said Job Taylor and Lucy Taylor together upon the quarter deck of the ship some time after she struck upon the rock; and these deponents, the said Jeremiah Barham and John Daniells, heard the said Job Taylor offer a large sum of money to any person who would get [263] his wife on shore; and in about ten minutes or a quarter of an hour after the ship parted in the middle and filled with water, and many persons were then lost: but these deponents being engaged in seeking their own preservation, cannot say whether the said Job Taylor and Lucy Taylor were among the persons who were then lost, but have heard they were both drowned, with many others in the said ship."

Robert Howarth, serjeant, and John Ratcliffe, and Patrick Mulrannan (drivers in the corps of Royal Artillery), deposed "that they heard Taylor offer 2000*l*. to any one who would save his wife, but as no one made the attempt he went down into the cabin himself; that Lucy Taylor was of a timid disposition, and probably so terrified that she died before her husband could get near her."

On behalf of Mrs. Diplock (the mother of the wife), John Dicker, lieutenant in the Royal Artillery, deposed, "That Lucy Taylor was apparently of a strong robust constitution, in good health and very active; and that Job Taylor was rendered unfit for active service by a severe asthma, which frequently afflicted him to a severe degree."

James Roe, a private in the artillery, swore to the same effect, and "that Job Taylor, after having been on deck, went again into the said cabin, by which time the said vessel began to fill with water very rapidly, which this deponent could ascertain from the circumstance of the provisions laid in for the crew and passengers of the said vessel which were stowed in [264] the bottom of the said vessel being driven by the violence of the water up the gangway of the vessel; and, thereupon, immediately and whilst the said Job Taylor remained below, in the cabin, the vessel went in pieces, when this deponent, and the several persons near him, remained on the wrecks; and in about a quarter of an hour afterwards, he, this deponent, saw that part of the said vessel wherein was the said Job Taylor and the said Lucy Taylor fall into the water. And this deponent further saith that he, this deponent, was washed on shore upon the wreck of the said vessel, with about one hundred and one other persons; but that all the rest were drowned; and amongst those so drowned were the said Job Taylor, and Lucy Taylor, in manner aforesaid."

Jenner and Phillimore for the next of kin of the husband. The burthen is thrown on the adverse party to shew that there ever was a moment in which the property vested in the wife. The presumptions of law and fact are unfavourable to such a conclusion—in the absence of evidence a natural presumption arises from the very texture and constitution of the human frame; the delicate frame of the one is less calculated to withstand the shock and buffet of the waves than the more hardy and robust frame of the other: according also to general probabilities a female is naturally timid and less likely to be possessed of presence of mind in instant and unforeseen danger than a man, especially one whose occupation it had been to face danger and death in [265] every shape: this is no fanciful theory, it has found its way into that code of laws which had its foundation deep in the knowledge of human nature. In cases of this description the Roman law invariably founds its presumptions on the relative strength arising from the probabilities of age or strength of the two persons. “Si (a) maritus et uxor simul perierint, stipulatio de dote capitulo ‘si in matrimonio mulier decessisset’ habebit locum, si non probatur illa superstes viro fuisse:” and again, “Cum (b) pubere filio mater naufragio periit, cum explorari non possit uter prior extinctus sit—humanius est credere filium diutius vixisse.”

The evidence here fortifies the presumption of law. There is no circumstance from which any fair inference can be extracted that the wife survived. The husband's possession of the property is certain, there is no proof that the wife ever possessed it: our claim is founded on a known fact, theirs on an unknown fact; ours on an apparent, theirs on a non-apparent right: they have not satisfied the obligation imposed upon them, and shewn themselves the representatives of a person who ever possessed the property.

Adams and Dodson, *contra*. The rules of the civil law were founded on the time of life, and the strength of body, most likely [266] to encounter difficulty—they have no application here—the sex of the party was one circumstance; but, in the present case, the person of the weaker sex is proved to have been the strongest of the two. She was of a strong hale constitution, whereas her husband was an invalid soldier; the probabilities are strong that she was the survivor. *Gen. Stanwix's case* and *Wright v. Netherwood* (c) are in opposition to the doctrine laid down by the other side.

(a) Digest, lib. 34, t. 9, s. 3, De Commorientibus.

(b) Dig. lib. 34, t. 22, but if the son was under the age of puberty the presumption was inverted on the ground that the full grown woman was the more robust of the two. Si mulier cum filio impubere naufragio periit, priorem filium necatum esse intelligitur. Dig. lib. 34, tit. 5, 23.

(c) This case, more generally known in our courts under the denomination of *Wright v. Sarmuda* (Prerog. Easter Term, May 6, 1793), is reported in the notes of Evans's edition of Salkeld, 2 Salk. 593. Being in possession, however, of a very full note both of the argument and judgment, taken by one of the advocates who were present, and on whose accuracy great reliance may be placed, I have given it insertion here; and that the more readily, as the nature of the case and the ground of the decision have been frequently misapprehended.

Sir William Scott, counsel for Sarmuda. This is a cause brought by the next of kin against the executor of George Netherwood to obtain the judgment of the Court on a testamentary paper, under circumstances set forth in an allegation and the answers.

George Netherwood married Elizabeth Lomax on the 24th of June, 1783. On the 8th of Oct. he made a will charging his real estate with the payment of his debts and legacies if the personalty should be insufficient, giving some pecuniary and specific legacies, and leaving the residue to his wife by her former name of Elizabeth Lomax, spinster; he bequeathed to her also his real estate for her life—and appointed Sarmuda his executor in England, and other persons executors for his property in the West Indies. He had several children: on the 12th of March, 1789, his wife died, leaving three children by him. In Nov., 1789, he married Ann Lomax, the sister of his first wife; and had issue by her one son, born and baptized in Jamaica. In July, 1791, George Netherwood, his wife, and her son, and all his children by his first wife, embarked for England in a vessel which has not been heard of since, but is supposed to have foundered at sea, and they all perished. Probate of the will was granted to Sarmuda, the executor, who is now called upon to prove it in solemn form of law, or

[267] *Judgment*—*Sir John Nicholl*. This case is under singular circumstances ; it [268] arises upon the grant of an administration, with the will annexed of Job Taylor : and the question is, whether the administration is to be granted to [269] the next of kin of the testator, or to the next of kin of the residuary legatee.

to shew cause why the probate should not be revoked, and administration granted to the next of kin of the deceased as having died intestate. The facts stated in the allegation are admitted in the answers on which the cause now comes on. The property, by the inventory, appears to be about 8000*l.* ; the legacies given by the will amount to 288*l.* only. Under the circumstances stated we submit that the will is not revoked : the validity of the second marriage cannot now be questioned ; undoubtedly, by the general principles of the law, marriage, and the birth of a child is the revocation of a will ; on the ground that it is such an alteration of circumstances, that it is not to be presumed the testator adhered to a will made before it occurred ; but it is a presumptive revocation, and may be repelled by circumstances, if it is shewn to be the intention of the deceased that it should operate, it stands notwithstanding : therefore these cases are always open to the evidence of circumstances. There being a second marriage is of consequence, for when a married man makes his will, the wife dies, and he marries again—in case of such man having a family, there is not such a total change of circumstances as in the case of a bachelor.

Thompson v. Shephard, in *Ambler*. *Myall v. Duffield*, before Dr. Calvert.

Per Curiam. Those were cases entirely of circumstances.

Sir William Scott. But this is one also—great part of this will could not operate, the residue being given to the wife, and the legacies being but small : as it would dispose only of a small part of the property, it would not raise the presumption which would arise on the disposition of the whole or a large portion of the property. *Gray v. Altham*, Cockpit, 1752.

He could not be insensible of the existence of the will ; it must be presumed he knew its operation—small bequests only ; the bulk of his fortune is subject to the statute, and would be a provision for his wife and family.

Per Curiam. What do you say to the time of the death of the deceased and his children ? it would make a difference in case of intestacy as to the persons interested.

Sir William Scott. It would make a difference only as to the persons to be bound by the sentence, and they may take the judgment of the Court on the will.

Per Curiam. How was the case of *General Stanwix* determined ?

Sir William Scott. It was compromised at the recommendation of Lord Mansfield, who said there was no legal principle on which he could decide it.

Per Curiam. But how do you mean to proceed ? the parties here are the next of kin of the deceased on the one side, and the executor on the other.

Sir William Scott. They must resort to the Court of Chancery for directions in either case—the question is, only whether Sarmuda is to act as executor, and to pay the legacies.

Dr. Nicholl on the same side with Sir William Scott. All presumptive revocations are *stricti juris*—the circumstances to revoke must be such as are totally inconsistent with the idea of the intention that the will should stand : generally marriage and the birth of a child is a revocation, because the situation is so changed ; all the duties and relations are altered, it is laid down in all the cases there must be a total alteration of circumstances. If it would not make a material change of circumstances or disposition, which the deceased would probably make, then the presumptions are repelled—here he clearly intended to take so much as is left by legacy from his wife and children. The disposition is nearly the same as the will made.

Per Curiam. Do you mean to argue the question the same as if the child had survived ? might not the will revive ?

Dr. Nicholl. It might, but I must argue it so ; there is no fact on which to argue which survived ; the father might be presumed to do so as the stronger, the child as the younger. There have been cases in which the presumption has not been held to take place, because there has been no such change as to induce it. *Brown v. Thompson*, 1 Eq. Abr. 312. *Cubitt v. Brady*, *Calder v. Calder*, Prerog. Jan., 1793, this last was different in its circumstances, the will was wholly inconsistent with the relation of father and husband, he left the bulk of his fortune to his brother, there were declarations to support the presumptions, the residue was small, the will would involve the

The mother of the residuary legatee had origi-[270]-nally made a different prayer, viz. that this court should grant an administration for the purpose of substantiating proceedings in the Court of Chan-[271]-cery, and suspend its own proceedings till the Court of Chancery had decided the point: the Court would have been glad to have

family in great litigation, all the circumstances tended to support the presumptions. The effect here will be only to give the legacies which the deceased meant to give from his wife and children: to put his estate in the management of that person to whom he meant to give it, when he was a married man with children; then there is such alteration of circumstances as induces the presumption.

Per Curiam. The case of revival has not been considered; suppose a man makes a will, and marries, and has children, the wife and children die, how does the case stand? In the Roman law the *agnatio sui hæredis* revoked a will, but the death of such heir revived it. These cases are professed to have gone on the ground of the Roman law. I desire the counsel to consider this point against the next court.

May 13.—Sir William Scott. According to the Roman law *agnatione posthumi vel quasi posthumi rumpitur testamentum*—on the death of the child the will revived if quasi posthumus only, that is, though not strictly by the civil law, yet *dabatur possessio secundum tabulas* by the Prætorian law, as by a new designation of the will of the father; on the death of the real posthumous it did not; there the presumption could only be after the death of the testator; Voet, *Ad Dig.* 28. On the principles of the Roman law the father must be supposed to survive and the child to have died first.

Dr. Nicholl. All perished in the same ship; the inference of common sense is, that the husband survived the others, the child being only an infant of a year old. This was the presumption of the civil law. *D.* 34, 5, 22, and 23. Voet in loc. *D.* 23, 4, 26. Domat. in loc. Then the presumption being that the father and husband survived, the question is, whether his will is revoked? there is no case where it has been held revoked in the law of England, the law looks to the time of making, of consummation, it was good at the time of making. A presumptive revocation by the law of England is not so strong as the *ruptio testamenti* by the civil law. There it was completely a destruction, here it is only a presumption, which may be rebutted by any evidence. Being only a presumption, we must suppose the party departed from the intention, the removal of those causes would as completely revive it, and in a stronger manner; for it is confirmed by the act of the testator, at least negatively in not destroying it. By the Prætorian civil law the will revived on the death of the quasi posthumus; on the presumption of intention, the party not having destroyed it. *D.* 28, 3, 1. Domat. 3, 1, 5.

Dr. Battine' contrâ. An exception to the general rule of revocation in the case of a widower has been stated; but I do not know the case stated; the will is as much revoked by marriage and the birth of a child, as if it had not been made; it could not be the intention that it should exist in the change of circumstances, after the birth of many children; less so, when the party had contracted a marriage a second time. It has been compared to the case of a posthumous child who, not being provided for, would not affect a will; but that is only a partial change. We allow the general rule of the civil law as to the survival of the father; there is no admission of the fact here that the child died first; there is no proof of it; they all died by shipwreck, *agnatio posthumi, vel quasi agnatio posthumi*, destroyed the will. *D.* 28, 3, 2. *D.* 28, 3, 12. Legatees are let in merely on account of the presumption in favour of the *hæres scriptus* for whom the intention of the testator is to be presumed. The general presumption is, that a will is set aside by marriage and the birth of a child. The rule of the civil law is, that though the child die the will would not revive.

Dr. Swabey on the same side with Dr. Battine. It appears by the inventory that the estate is worth about 8000*l.*; the freehold, as far as we can guess from the arrears due, is 27*l.* per annum only—the will is executed in duplicate. Whether a question may arise hereafter, to whom the administration is due, on the question of survivorship, stands clear of the present question. The civil law has been accurately stated on the other side. Zouch, qu. 3. The law is, that the will is equally revoked whoever survived. By the death of the child it is that the will is not revived by the law of England; they assume this doctrine from the civil law; but I deny this. The general principle is, that marriage and the birth of a child revoke a will. There have been many decisions on the point; the principle on which they have been founded is

devolved its functions [272] in this instance on the Court of Chancery, but it had not the power to do so ; it is bound to proceed, the two jurisdictions might take a different view of [273] the question. That matter has not now been gone into ; the argument has been confined to which of the two parties is entitled to the administration.

the change of intention grounded on a total change of circumstances ; it has been said the change is not so great in the case of a widow as in that of a bachelor—*Salmon v. Sullivan*, before Dr. Hay, was cited by Dr. Calvert in *Myall v. Duffield*, as deciding equally the revocation in one case as the other. There is no case where the quantity of property affects the revocation. *Altham v. Grey* is mis-stated in Ambler, as appears from Sir George Hay's argument in *Shepherd v. Shepherd*, 5 T. R. , *Brown v. Thompson*, 1 Eq. Ab. 413. The general rule is, that it is a revocation, unless there is evidence to the contrary. In *Thompson v. Myall and Shepherd* (in the Prerog.) Dr. Calvert decided on the declarations and evidence of intention that the will should stand. From a note of Dr. Paul's it appears that in *Barrow v. Baxter* (Prerog. 1695) Baxter made a will in June, 1680, in which his sister and her husband were executors : it was contested by his widow, who set forth that on the 26th of June, 1686, he married her, and had issue a son, born twelve months afterwards, who lived three years, but died before his father ; these facts were admitted in the answers, setting forth also that the wife's fortune was secured to her by settlement. A plea was given in, stating misconduct of the wife, and ill treatment of the husband by her, there were depositions establishing this fact ; and one witness spoke to her insanity. The Court held the will to be revoked.

If the quantity of property disposed of is admitted to be of consequence, the decision must be a very uncertain criterion ; one judge may hold one quantity sufficient, and another may hold another. The second wife succeeded to the same place in the deceased's affections which the first had, why are we not to presume that there was an intention she should be provided for. A duplicate also was executed ; and this is material to shew that one will was with the testator which it was in his own power to revoke at any time. According to the civil law it was presumed that the father survived for a little time, when a will was held revived by the Prætorian law ; it was on the presumption of the revival of intention. This was the equitable rule, not the strict law founded on the presumption of intention, where there was no such intention the will was not supported as in case of the death of the real posthumous, where the father was dead before, is the exception ; there could be no intention ; the same rule applies here where the father survived so little time in such particular circumstances. I do not think the rule is derived from the civil law : the child was the only object there, the wife none ; the marriage was on a different footing : marriage is no revocation ; the birth of a child was an actual, not a presumptive, revocation.

Sir William Scott in reply. Zouch leaves every thing in doubt.

Per Curiam. That work was not designed as an authority for courts ; but as a disputation for the schools.

Sir William Scott. The rule of the civil law was, as has been laid down, the death of a quasi posthumous child set up a will again : it is not necessary to shew that the father lived a considerable time after. If it is established by evidence, on presumption that the father survived, it is sufficient ; it is not necessary to prove the intention, the rule of law takes place. In *Barrow v. Baxter* it does not appear that there were not other circumstances in the case ; there might be many ; it seems to have been a case of intention, it would certainly go some way to shew that the rule of the civil law is not adopted.

In *Salmon v. Sullivan* it is not stated that the party was a widower with children, if he was without children it is the same as if he was a bachelor.

In *Calder v. Calder* the court said all the circumstances were to be considered ; that the quantity of property given was of consequence, to see how far the wife and children were deprived of subsistence—it is extraordinary if marriage and the birth of a child do revoke any testamentary paper giving even a small legacy ; that no such case has been brought before the courts. Lord Mansfield in *Cubitt v. Brady* declared he knew none where there was not a total disposition. There are many small legacies to friends, as probable an intention of the deceased as a provision for his wife. The smallness of the property is a very material part of the evidence ; if it is such as he might naturally dispose of after marriage and the birth of children, the presumption

[274] The first and preliminary question is, on which side lies the presumption? on whom the burthen of proof? The administration prayed is not to [275] the wife, but to the husband—*primâ facie*, it belongs to the next of kin of the party deceased—to him and to his property the wife or next of kin has [276] a right to administer under the statute of administrations.

is weaker, and less evidence is sufficient to sustain the will. If the authority of the Roman law had been considered; the case of *Barrow v. Bazler* would have received a different decision. It is generally allowed that the doctrine is taken from the civil law, though we may not have adopted all the particular rules of that law—no part of it is more reasonable than the revival under these circumstances.

Dr. Nicholl, on the same side, in reply. I do not agree in this case that it is either an absolute revocation, as if the will had not been made; or an absolute taking effect, unless there is evidence of intention afterwards. I think as Lord Mansfield did in *Cubitt v. Brady*, that it is merely a presumption to be taken away by any evidence. It had been said the reason in *Brown v. Thompson* was that the provision made would go to the same person, the wife would take care of the children; the presumption here is that it was left to her to take care of them. It has been said the change of circumstances is the only principle; this is not so, but it is the intention to be inferred from such a change. Then if the situation of the deceased is such that but a little change of circumstances is effected by marriage and the birth of a child, and the intention might reasonably be to make the same disposition, then there is no presumption from intention. Here there is no material alteration in circumstances: he made his will when he married; when he died he was substantially in the same condition, the residue under this will was lapsed, and would be a provision for this wife and child. The residue is never held immaterial; there are very few legacies which the deceased clearly intended always to give, and it was always his intention to give the management of the estate to these executors.

Judgment—*Sir William Wynne*. George Netherwood executed a will in October, 1783, by which he gave 188l. in legacies, and left the residue to his wife by the name of Elizabeth Lomax, spinster, he left his real estate to his wife for life, and the remainder to a cousin, he appointed Mr. Sarmuda his executor in England, and other persons in the West Indies—the personal property by the inventory amounts to 8000l.; the real estate as far as appears is about 27l. per annum. The probate which had been granted to the executor is called in, and the executor is called upon by several cousin-germans to shew cause why the deceased shall not be pronounced to have died intestate. An allegation has been given, and answers taken to it: on them the cause is brought on. The facts of the case are, that after the execution of the will, i.e. in March, 1789, the wife died, leaving children, in November, 1789, he married Anne Lomax, her sister; this is not material after the death of the parties, and had issue one son. In 1791 they all embarked together, the husband, the wife, and her child, and the children of the first marriage, from Jamaica; and they have not been heard of since. The vessel is presumed to have foundered at sea, and all to have perished. It is contended by the next of kin that by marriage and the birth of the child this will is void by implication of law, while on the other side it is maintained that the circumstances of the case are sufficient to rebut the presumption.

It is said there is a duplicate, and that circumstance would be of consequence; if it appeared that the will was in England all the time the deceased was absent so that it was not in his power to resort to it, though it does not appear, the other might have been in his custody all the time. Therefore this is not in the consideration of the court. The office never asks for a duplicate. It has been argued for the executor that though a will made by a bachelor is void, yet if a will is made by a widower or married man having children, this would make a difference; and in support of this they have referred to the case in the margin of Ambler which seems a mistake, it is certainly so if this is the same case which was here before Dr. Lee, which I think it is not. I cannot see the principle. I take the principle to be change of circumstances founding the presumption of a change of intention. I do not see why he is not to be presumed to have the same intention for the second wife and her family as for the first. I do not see the principle on which to make any alteration: then there is no difference whether it be made by a widower or a bachelor.

The argument is by far more weighty which is founded on the operation and effect

But it is laid down in the books that in case of [277] there being a residuary legatee, the statute does not apply. The next of kin has the *primâ facie* right; but if there is a residuary legatee, he would be entitled; there is no such person here, for the party claims derivatively from the residuary legatee. The burthen of proof lies on him to shew that the deceased left a residuary legatee; the next of kin of the residuary legatee is to shew that the wife survived her husband. The same was the rule in the civil law, as has been satisfactorily stated in argument, the proof of the wife's surviving must [278] be shewn, otherwise the deceased left no residuary legatee.

If we resort to the probability of what the deceased would have done; can it be supposed that he would have allowed the whole of his property to have gone from his own brother and sister to his wife's relations? but the presumption of law is more worthy the consideration of the court; it is in favour of the parties on whom the law would throw the right. The civil law is in favour of the last possessor.

Thinking as I do that it is incumbent on the next of kin of the wife to prove her survivorship; how stands the case on the evidence? There is no evidence direct as to the point: some inferences have been deduced, it is stated in the first affidavit that the two bodies were found together; this tends to shew that they were in the same situation at the time of death; for it is improbable if one had been in the cabin and the other on the deck, that both should have been thrown up together; supposing them in the same situation, the ordinary presumption that the husband has more

of the will under the circumstances, the legacies to his friends are small in proportion to his fortune, by the death of his first wife the bequest of the residue lapsed: therefore the children by the second wife would have come in for an equal distributive share with those by the first. There is a declaration of Lord Mansfield in *Cubitt v. Brady* intimating an opinion that he went on the total deprivation of fortune to the children; if a small part is given, only legacies to friends, and no more, and an ample provision is left for his wife and children, I know of no instance where the will has been held revoked. I think that the principle does not militate against this.

Here the testator gave small legacies to his friends, and gave the bulk of his fortune to his wife; probably this was early after the marriage; probably most of the children were born after. The birth of a child only is not a revocation, he might mean to leave the children in her power. It is not improbable that the deceased might suffer the will to remain, notwithstanding the second marriage and the birth of the child, knowing the effect of it. Then I think there is strong ground to contend that if he died, the second wife and her child surviving him, that the case is not within the rule.

But in the case of *Barrow v. Baxter* it seems the court was of opinion that the death of the child subsequent to the will would not make any alteration; there having been a marriage and birth would make the revocation take effect, nothing after would alter it.

I think this is the same case as the *quæstio vexata* here, and at common law, of a man making a will, then a second will, and then cancelling the second. It would have been held here down to *Helyar v. Helyar*, before Sir George Lee in 1756, that the first will remained revoked. That case was appealed to the Delegates, but never came to a sentence. In the courts of common law, as in *Glazier v. Glazier*, it has been held that the first will would be re-established. In *Cubitt v. Brady*, Buller, Justice, said, implied revocations depend on circumstances at the death of the testator. Therefore I desired the fact to be considered of their having all perished in the same ship. In the Roman law there is no doubt by the latter Prætorian law which is to be considered as the amended law—*revocatio agnatione sui hæredis* would perfect the revocation; it was not implied that it should revive.

I desired the priority of the death of the parties to be considered. I always thought it the most rational presumption that all died together, and that none could transmit rights to another, which seems the opinion of Zouch.

Then what are the circumstances at his death? He had neither wife nor children; therefore there is nothing to raise the implication of revocation at that time. Under these circumstances, therefore, considering that great part of the property lapsed which would raise a great doubt whether the revocation was to take place, and taking into consideration the other circumstances that there was no wife or child at his death, I pronounce for the will.

strength and more fortitude would raise the inference that he had survived. The facts stated in the first affidavit seem to support this idea, viz. "That Job Taylor being on the upper deck, offered 2000l. reward to any one who would go below into the cabin, and endeavour to save his wife; that the water had at that time entered the cabin, in which Lucy Taylor was, to the height of several feet; and Job Taylor finding no one willing to make the attempt, went down himself into the [279] cabin, and there is every reason to believe that Lucy Taylor, who was of a timid disposition, was so terrified by her perilous situation (for the vessel had split in the middle) that she was in a dying state before her husband could get near her." An attempt has been made in the other affidavits at a different representation, but these affidavits ought to have been brought in originally; the Court is not quite clear that it did right in admitting them; because, before they were made, the persons making them had seen the other affidavits and heard the intimation of the court as to the gist of the case. These affidavits, however, do not satisfy my mind that the wife survived. The whole that Lieut. Dicker states is that the wife was active and bustling, and the husband was afflicted with an asthma; but he had not seen them since the September preceding. She might have been active and bustling; but, in a moment of danger, the timidity of her sex might overpower her; on the other hand, the husband might at times have suffered from an asthma, and yet in the moment of difficulty been able to exert himself with effect. None of the witnesses represent the husband at the moment to have been in a weak infirm state, none represent him as having lost his recollection.

Looking to their comparative strength, there is nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle of this description; still less is there any thing to prove the contrary. James Roe, in an affidavit brought in so late, in contradiction to the first, is in some degree in contradiction to all [280] the others. I cannot rely on the accuracy of this witness; he places the parties in a different situation from the rest: but even if he were correct, it would be merely founded on a slight presumption that the person in the cabin would die first. Three persons have sworn that they saw them both together.

Upon the whole I am not satisfied that proof is adduced that the wife survived: taking it to be that both died together, the administration is due to the representatives of the husband. I assume that they both perished at the same moment, and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife.

The proctor for Mrs. Diplock prayed that the sureties might be compelled to justify.

Jenner and Phillimore. This is contrary to all practice.

Per Curiam. Great caution should undoubtedly be used; but I believe the application is unprecedented. I wish the registrar to state whether he has known an instance of it.

The registrar (Mr. Gostling) said he had been registrar 40 years, and could remember no instance of it.

The application was rejected.

[281] CRESSWELL v. COSINS, BY HER GUARDIAN, FALSELY CALLING HERSELF CRESSWELL. Consistory Court of London, Easter Term, April 28th, 1815.—An additional article to a libel in a cause of nullity of marriage, by reason of minority, rejected.

John Cresswell was married on the 13th June, 1814, to Susannah Cosins, by a licence obtained upon his oath, in which both the parties were described as above the age of twenty-one years.

In Michaelmas term of the same year he took out a citation against his wife in a cause of nullity of marriage, by reason of minority; a libel was given in pleading the minority of his wife, and that the marriage was had without the consent of the mother, the father being dead. The present question arose upon an additional article to the libel, which was now offered to the court on behalf of the husband.

The article pleaded, "That at the time of the solemnization of the marriage Ann Cosins, the mother of Susannah Cosins, was totally unacquainted with John Cresswell, and had never spoken to him, or even seen him but once, when he passed by the window, and she the said Ann Cosins knew nothing of the marriage, till after the same had taken place, and that the said Susannah Cosins hath at [282] divers times subse-

quent to the said marriage declared in the presence and hearing of divers credible witnesses that her said mother knew nothing about the said pretended marriage until after it had taken place, and that the said Susannah Cosins never told her mother thereof, and that her reason was because she was so young that she thought her mother would not consent."

Lushington in objection to the allegation. This is not the best evidence; the mother is living, and to be examined; it may be pleaded and proved that she made this declaration at a time when we cannot bring witnesses to contradict it—the reason against admitting the wife as evidence against the husband is the influence which may have been used; it may go to bastardize the issue; the wife is not permitted to give any evidence which may tend to bastardize the issue. *Goodright v. Moss*, Cowper, p. 592. Peake lays it down in his book on evidence that no evidence of husband or wife is admissible which tends to affect the civil rights of either. In a case of this description, where the husband is relying on his own perjury to annul his marriage, the rules of evidence ought most strictly to be observed.

Swabey and Stoddart contra. The fourth article of the libel pleads that the marriage was had without the consent of the mother. This is an additional article that it was without her knowledge; it is relevant, therefore, and not a repleader.

The cases cited are good, for the purposes to which they apply; but they do not apply to this; [283] here we may ask for the answers of the woman, though we admit it is not commonly done: what weight her declarations might have, if they should not be confirmed by other evidence, would be matter for argument.

Judgment—Sir William Scott. Cases of nullity are properly described as cases in which the court gives a reluctant obedience to the provisions of the law. The first inclination of the court is to support the marriage, as far as it can indulge such an inclination; particularly where the marriage is had on the oath of the party himself who endeavours afterwards to set it aside; and particularly where the age of the party is such as not to make his misapprehension probable.

Here the libel was admitted without opposition. It pleads that the father died before the marriage, that there was no guardian, and that the man was an utter stranger to him.

I do not see how this article is relevant. The mother is to be produced as a witness; it is to be expected she will depose that she gave no consent; it is probable she will state the cause that no consent was required, or she did not know him; this is to be presumed. But it is now pleaded that the mother was totally unacquainted with the man, which I suppose means personally unacquainted. Consent may be given without this; it is usually given under other circumstances, but it is not required by law, or reason on which the law is founded, that there should be a personal knowledge: this, therefore, if proved, would not go [284] a great way. She pleads the mother did not know of the marriage till after it took place. I think this would probably come out on the examination as to consent. If the rest of the allegation be not admissible I shall not admit this part of it. It pleads the declaration of the woman that her mother did not know of the marriage. I think this is properly objected to; loose declarations in conversation by the wife are very different from admissions in her sworn answers; it may be the effect of collusion between the parties, to get rid of the marriage by means of loose declarations. The Court is open to the caution of not setting aside a marriage, for which purpose the parties may collude.

I think, therefore, that these declarations are slight in themselves, and that in this stage of the cause they are not admissible.

Allegation rejected.

[285] JONES, FALSELY CALLED ROBINSON v. ROBINSON. Consistory Court of London, Easter Term, May 25th, 1815.—Nullity of marriage by reason of minority established, the woman being a Jewess.

Judgment—Sir William Scott. In this case there is proof of those facts on which the Court usually grounds a sentence of nullity; it is shewn that the woman was born on the 25th of May, 1779, and married on the 12th of May, 1797, and therefore she was a minor. The marriage was by licence, without the knowledge and consent of the father. These circumstances are attended by others startling to the Court; the marriage had subsisted sixteen years, and children are born from it.

The question, however, is whether the general law of marriage applies to this case?

The general law of the marriage act makes the marriage by licence of minors, without consent, null. This clause is restrained, as to its effect, where the parties are Quakers or Jews; that is, where they are both so, they having rights of marriage of their own. The woman appears to be a Jewess, at least she is descended of Jewish parents; that she continues so is not proved: taking it to be so, she is not within the clause, which is as to the case of both parties.

The marriage was solemnized after the Christian form—whatever her persuasion was, she conformed [286] in this respect to the Christian religion; so she submits to the restrictions of that form, and is bound to the consequences if she departs from them.

I must pronounce this marriage to be null and void.

[287] **STALLWOOD v. TREDGER.** Arches Court, Easter Term, May 27th, 1815.—A church being under repair, and shut up, a publication of banns in the church of an adjoining parish held to be sufficient.

By letters of request from the Commissary Court of Surry.

While the church of St. Mary, Newington, was shut up, being unroofed and in part pulled down, the banns of marriage were published for three Sundays in the adjoining parish church of St. George's Southwark, between James Stallwood and Maria Tredger, both parishioners of St. Mary, Newington: and on the 13th of August, 1792, these parties were married on the site or ruins of the church of St. Mary, Newington.

The following entry of the publication of the banns was made in the register book:—

(A.)

Extracted from the register book for the publication of banns of marriage, according to act of Parliament of the twenty-sixth of King George the Second, kept for the parish of Saint Mary, Newington, in the county of Surry, commencing the twenty-[288] sixth day of April, in the year One thousand seven hundred and eighty-nine, and ending the seventh day of May, One thousand seven hundred and ninety-seven.

(The year 1792. Page 146.)

No. 709.

Banns of marriage between James Stallwood, batchelor, and Maria Tredger, spinster, both of this parish, were published on the three Sundays underwritten, that is to say,

On Sunday, the 29th day of July, 1792, by me, T. Wigzell.

On Sunday, the 5th day of August, 1792, by me, T. Wigzell.

On Sunday, the 12th day of August, 1792, by me, T. Wigzell.

The above is a true copy, or extract from the register book of the publication of banns, kept for the parish of St. Mary, Newington, in the county of Surry, having been carefully examined with the original, and found to agree therewith, the tenth day of March, in the year of our Lord One thousand eight hundred and fifteen, by me,

JOHN WILLIAMS.

On the 8th of May, 1815, a libel was given in by the husband in a suit of nullity of marriage, on account of the undue publication of banns.

Lushington and Cresswell for the husband. The words of the statute are imperative that the marriage shall be solemnized in one of the churches or chapels where the banns have been published, and in no other place whatsoever.

Arnold and Swabey contra.

Judgment—*Sir John Nicholl.* This is a suit for a nullity of marriage, brought by the husband against the wife.

Two persons legally competent to contract marriage, and willing to contract it in their own parish, make the proper application to the minister for that purpose. The parish church being under repair, [289] and in consequence no divine service performed in it, a publication of banns there was impossible; the purpose could not be answered; the publication was made in the church of an adjoining parish, but the marriage was solemnized in the church of the regular parish, it being sufficiently advanced in repair for that purpose.

The question is whether this marriage is valid or void.

It is a case of momentous importance, and a new case: no doubt it would have been a valid marriage before the marriage act; the question is, whether that act, in its sound interpretation, renders it a void marriage.

The clause of the marriage act recited does not expressly and in terms declare the marriage void; but it is contended that such must be the construction of it, with reference to the rest of the act.

I am not disposed to go to the extent of giving an opinion that under no circumstances would a marriage be void, if contrary to this provision, and had elsewhere than in the church in which the banns were published; for instance if the banns were bona fide and honestly published at York, and the parties were to come to London to be married, whether such a marriage would be void. I feel myself at liberty to take the question on narrow grounds, and on its own particular circumstances. The act was passed to prevent clandestine marriages, and the preamble to this section of it has been relied upon in proof of this: but this is any thing but a clandestine marriage; neither of [290] the parties are minors, there is no attempt at concealment, there existed no impediment to it; they apply to the minister, he publishes the banns in the best manner he was able, the marriage is solemnized, and twenty years afterwards the parties come to get this marriage set aside; probably an hundred marriages may have been celebrated in this parish in a similar manner; probably other marriages may have taken place under the same circumstances in other parts of the kingdom. This proceeding is of a most alarming and momentous nature, affecting in its consequences the comfort and situation in society of many individuals, and the rights of children emanating from such a state of things.

This is not a case within the spirit and meaning of the act; nothing but the most imperious demands of judicial interpretation of the act could induce me to hold this marriage invalid. It has been truly said that the court must interpret the laws, and not make them; that it must meet, and not create doubts; but in construing doubtful acts, it certainly is the duty of the court to suppress the evil and advance the remedy; the law does not require impossibilities of any party; nor is it to be presumed, that the legislature intends to introduce rules in contradiction to its general policy: it was impossible that the banns could be published in the church of St. Mary, Newington. There was no service in the church; and is it possible that, in this populous parish, the law should intend that there should be no marriages at all—either by licence or by banns? for, according to the interpret-[291]-ation contended for, parties could at this time be regularly married by neither, while the church was under repair. What then was to be done? That I think which has been done. The minister does all he can to comply with the letter and spirit of the law. There had been no service for two years in the church of St. Mary, Newington. It is provided by the act, that the banns as to extraparochial places shall be published in the church or chapel adjoining them; and under the particular situation of the church at this time St. Mary, Newington, is to be considered as an extraparochial place, and St. George's church would consequently become the proper place for the publication of banns. The marriage was entered in the banns' book of St. Mary's, signed as such, and an entry also made explanatory of the cause of the publication having taken place in St. George's church; the parties considered it throughout as a publication of banns in the church of St. Mary, Newington; if so, that church became the proper place for the solemnization of the marriage; for which it was not in an unfit state; though it was for the publication of banns as no persons resorted there.

Under all these circumstances, and taking the facts of the case as fully and fairly stated in the libel, I am of opinion that the marriage is not invalid; that neither the spirit nor the letter of the act are violated; there is nothing clandestine in the transaction; the parties did all in their power to comply with the requisites of the law, and the act itself I think has provided for such a case; the publication of banns must be considered legally as having [292] been in the parish church of St. Mary, Newington. Looking also at the alarming consequences, which would result from a contrary decision, I am confirmed in this opinion, and accordingly I reject the libel, and dismiss the parties from the suit.

Nov. 28, 1816.—This cause was carried by appeal to the High Court of Delegates, and finally heard at Serjeants' Inn, before Mr. Justice Bayley, Mr. Justice Dallas, Mr. Baron Richards, Dr. Adams, Dr. Burnaby, and Dr. Meyrick.

Mr. Serjt. Best, Dr. Arnold, Dr. Swabey, and Mr. Clarke were counsel in support of the sentence of the court below. Dr. Lushington, Dr. Cresswell, and Mr. Brougham contra.

The court directed the counsel against the sentence to begin; and, having heard Dr. Lushington only, affirmed the sentence of the Arches Court of Canterbury.

[293] THE OFFICE OF THE JUDGE PROMOTED BY CANNING v. SAWKINS. Consistory Court of London, Trinity Term, June 9th, 1816.—A parishioner suspended ab ingressu ecclesiæ for three weeks for brawling in the chancel of a church.

This was a suit promoted by William Canning, churchwarden, of the parish of Rickling, in the county of Essex, against James Sawkins, an inhabitant of the same parish, under the statute 5 & 6 Edward VI. for quarrelling, chiding, and brawling in the church.

The party proceeded against was charged with having on the 12th of April, 1815, at a meeting of the parishioners and inhabitants, held in the chancel of the parish church at Rickling, for the purpose of examining the accounts of the overseers and other business of the parish, with having addressed the churchwarden in the following words: "You are an old scoundrel, and the next time you come to church I will look you out; you are not fit to enter a church; I will thrash you with my stick; I will fight you for a guinea."

James Sawkins gave an affirmative issue to the articles exhibiting this charge.

Judgment—Sir William Scott suspended Sawkins for three weeks ab ingressu ecclesiæ, desired it to be notified in the church that he was so suspended, condemned him in the costs of suit, and monished him against such conduct in future.

[294] INGRAM v. STRONG and ROBERTS v. LAWRENCE. Prerogative Court, Trinity Term, June 10th, 1815.—A conditional will not converted into an absolute will, it being shewn that the condition had been satisfied.

Richard Travers, of Uploders, in the county of Dorset, died on the 28th of July, 1813, possessed of a freehold estate, valued at 40,000*l.* and personal property amounting to about 6000*l.*

The following instruments were propounded as his will:—

No. 1. A will dated January 8, 1804, in the hand-writing of the testator, and executed in the presence of three witnesses. It was of considerable length; it bequeathed all his freehold, leasehold, and copyhold estates, and all his personal estate and effects to his friends and relations, John Strong and Richard Roberts, upon trust, to sell all the estates and effects, and after discharging his debts, and funeral and other expenses, to apply the remainder to the payment of his legacies. These legacies, varying in amount, were to upwards of sixty of his relations and friends. It was declared also, that if the legacies bequeathed should be found to exceed his property, a proper [295]-tionable abatement should take place on each legacy; and, on the contrary, if it should exceed it to have the like proportion added to each legacy.

Mr. John Strong and Mr. Richard Roberts were appointed executors.

To this will there were added two codicils, one dated the 9th of January, 1813, the other 26th of June, 1806.

No. 3 was as follows:—

"Weymouth, July 31st, 1806.

"I, Richard Travers, of Uploders, in the county of Dorset, being of a sound mind and understanding, do this day, as above written, make this as my last will and testament (that is, in case my last will, before this wrote in my own hand, and witnessed by John Way and others, should be by any of my relations disputed), as follows, I give unto Captain Nicholas Ingram and Fanny Roberts of Brown's Farm, in trust for their sole disposal all my landed and personal property, of every kind and description whatsoever, goods, chattels, monies, with every other thing that I am possessed of, to my relations and friends, in such proportions as they shall think right, just, and proper. I give and bequeath to each of them five hundred pounds for their own private use, as a compensation for their trouble. I beg to observe that I am at this time of a perfect understanding and fully convinced that my two worthy friends will do great justice to this my last request, in the disposal [296] of my property and effects. As witness my hand, ' RICHD. TRAVERS.

"Published and declared in the presence of, and witnessed by us,

William Needell, John Hellier, Rachel Slade."

This will was folded up as a letter, and endorsed,

"Captain Ingram, Weymouth."

This is to be opened by Captain Ingram, but not by any one else.

No. 4 was to the following effect:—

Memorandum made this July 2, 1813; Admiral Ingram and Mrs. Roberts are desired to go by this paper as a direction for them in the will that I have placed in Admiral Ingram's hands.

John Strong,	£1,000
Saml. Strong,	1,000
Mrs. Davis's family,	1,000
Messrs. Burts,	1,000
Richd. Roberts children,	1,000
Robert Robert's children,	1,000
Mrs. Richards,	1,000
own Not Husband.	
Wm. Mrs. Roberts's child	1,000
The Bowring famy	1,000
Mrs. Cook, a hundred,	100
Rich ^d Gill,	500
Rob ^t Gill,	500
Messrs. Burts,	1,000
S. Honeybourn,	500
[297] S. Hyde,	500
Fanny Hansford,	500
Mary Gill,	500

£13,100

Henry Gibbs,	200
Capt. Lawrence,	500
John Hallett, the part of his mother and aunt,	500
Henry Gibb's unmarried sister,	100
The two who married Northover, each 25l.	50
Peggy Best,	200
Jenny Lawrences children equally,	200*
John Sutherlands two children, William and Mary,	500
This is for Admiral Ingram, to go by Sabines,	R. TRAVERS.

Jos. Way, Jun. 200 † in trust,
 Capt. Lawrence,
 Sir Evan Nepeans's,
 The Snaydons to be guarded against,†
 Henry Gibbs, Jun.

Lawrence family
 Capt. Lawrence
 Peggy Best, suppose 3 child^{ren}

Nancy Knight, no child^{ren}
 Jenny left two children
 Fanny Gibbs

Mary Sawkins.

[298] Further Legatees,
 John Budden, Uploders
 John Axe, Lodgers,
 Henry Gale, Upton,
 John Hallett, Shipton.

* This should be only £20.

† This should be in full.

No. 6 was an incomplete testamentary paper, entitled "An account of Richard Travers's relations," in which there are the names of several relations and other persons, with sums opposite their names, and at the bottom the following memorandum:—"These are the instructions given by Richard Travers to Giles Russell, to make his will by, to-morrow morning."

No. 5 was a fair copy of No. 6.

No. 1 and the two codicils annexed to it were propounded by Mr. Strong and Mr. Roberts; No. 3 and No. 4 by Admiral Ingram; and No. 5 and No. 6 by Captain

Lawrence. There were several other testamentary papers of an older date before the Court, which were not propounded.

Allegations were given in on behalf of the several parties contesting suit, and witnesses were examined upon them. There was full proof of the due execution of the will of Jan. 8, 1804, and of the two codicils annexed to it, of the testator's sanity on the 31st of July, 1806, the date of the conditional will, and of his dictation of No. 5, the last testamentary paper.

With respect to the other points of the cause; Thomas Marsh deposed, "That he went to see Mr. Travers on the 26th of July, 1813, that he found him confined to his bed, that while sitting by his bed-side, Admiral Ingram and Capt. Lawrence came to visit him; and after enquiring after [299] his health, Admiral Ingram almost instantly said, 'For God's sake do make a will, that the one in my hands may be done away with, and Mrs. Roberts and myself may not be left in so much trouble that we shall never get rid of as long as we live.' And Admiral Ingram then stated to all present that the deceased had by the will which he had made, and which was in his hands, given him and Mrs. Roberts the power to give away all his property as they liked. He then strongly and repeatedly urged the deceased to make another will, and used several arguments and persuasions to induce him so to do, and kept desiring 'that he would for God's sake make a will;' by which the deceased seemed very much agitated and disturbed; and answered that he would make a will, and would send for Mr. Russell (meaning his attorney) to do it; upon which the deponent offered to go for Mr. Russell for him, but the deceased declined his offer, and said that he would write a letter to him and send a boy with it, or to that effect: and a pause having then taken place, without a word being uttered by any one for a minute or two, and the said deceased seeming then to be very uneasy, and disturbed, and restless, and his face having flushed up as red as fire, he then said—'I want Betty, I want Betty' (meaning his maid-servant, Betty Bishop, then Betty Bagg), and appeared quite anxious to get rid of the conversation. And thereupon the said Admiral Ingram, Captain Lawrence, and the deponent left the room; he, the deponent, having told the said deceased (when he was about so to leave the room), that he would see him again to-[300]-morrow: and the deceased having answered, 'Do so.' And when the deponent had left the said deceased's room, he told the said Betty Bishop, then Betty Bagg (who was an old and confidential servant of the said deceased, and who had withdrawn and absented herself from the room whilst the aforesaid persons were so with the said deceased), that her master wanted her, upon which he hath no doubt but that she immediately went into the room to the deceased. That on the next day he repeated his visit to the deceased, and found him still confined to his bed and Mrs. Roberts sitting by his bed-side, and the deceased said, we are talking over things I wish you to hear; and then entered into a conversation as to the legacies he intended to leave his relations, and named many of them, and discussed the claims they had on him, and mentioned his intention to give other legacies, and took up a paper which was in his own hand-writing, and which was a list of such persons, and added some other names to them." And he says that he had engaged in this conversation with the deceased, "under the impression that he had no other will than that which Admiral Ingram had spoken of; but the deceased, at this particular period of the conversation, said, 'I have a will by me;' and taking up a folded paper in his hand from off the bed (consisting apparently of more than one sheet of paper) said, and here it is; if I die I shall not die without a will; but I want to alter some things in it, as some matters have occurred since that I wish to provide for, and I want to do something for my poor relations: and you see if [301] I could give Henry Gibbs and a few others, some of whom he named, the value of 100l. a-piece or so, what good it would do them."

Betty Bishop deposed to the visit of Admiral Ingram and Captain Lawrence on the 26th July, 1814; and said, "That after they were gone the deceased called to her, and asked her why she had not come before to cut off the tale of the Admiral (meaning the said Admiral Ingram), he has been bothering of me about making of my will; and the deceased seemed very cross and out of humour, and she answered, 'Dear sir, I did not know I must come when the gentlemen was here.' And the said deceased replied, 'You know it is my particular wish for you to be here:' and he then further said, 'I don't know what they see in me, they are so anxious about my making of my will.' And the respondent then further answered, and said, 'It is nothing but right,

sir; you should keep a will by you, you be'ent dead never the sooner, and I hope there's no likelihood of death now.' And he the said deceased then replied, 'I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations.' That the respondent, being much moved at such the deceased's conversation, went for a minute or two into the adjoining room, that he might not see her shed tears; and, on her then returning into the said deceased's room almost immediately afterwards, he said to her, 'Betty, I would have you kill a couple of chickens. I think to send up Gill this evening to desire that Mrs. Roberts (meaning the aforesaid Fanny Roberts) will come down to-morrow, and [302] to-morrow I think to write over to Mr. Russell, and to desire that he will come over and see what we can do;' meaning, as the respondent understood and believes, in respect to his, the deceased's, making such his intended alterations in his will."

Robert Gill deposed to the deceased giving him for the purpose of getting a will drawn up; to his requesting him to call on Mrs. Roberts on the evening of the 27th of July, desiring her to come to him the next morning, and assist him in making his will; to his sending for Mr. Russell, his attorney—to his vexation at not finding Mr. Russell, and to the deceased's requesting him on the following morning (the 28th), in the presence of Mrs. Roberts, to write down instructions for his will; to the deceased's dictation of these instructions, as contained in No. 6; to his reading them over to him, and to the deceased's directing him to transcribe them fair; and to his approval and subscription of the copy so transcribed, No. 5; and to the deceased's saying that "he hoped he should live till the next morning, that he might finish his will."

Jenner and Lushington for No. 6. This paper contains the whole will of the deceased, at the time it was written—it is complete as far as it goes; we propound it as containing the last intentions of the deceased, prevented from formal execution by the act of God. It is probable the deceased intended to have added the disposition of his real estate to the will the next day; but this does not vary the question; the paper, as far as it goes, is complete; it is substantive in itself, and fully entitled to probate.

[303] Adams and Cresswell for No. 3 and No. 4. The capacity of the deceased is not affected beyond lowness of spirits; we must assume that the instrument was executed in a perfectly sound mind; it was dictated with a view to disputes which might arise amongst his relations; whether the condition be fulfilled or not is immaterial: his relations have opposed the will, and there has been sufficient dispute about it to satisfy the condition at all events; but, taking it for the sake of argument, that the condition is got over, the deceased recognized this paper without any reference to the condition, when he alluded "to the will he had placed in Admiral Ingram's hands:" he evidently alludes to this, as making the will of 1806 complete in its dispositions. It should seem from the evidence of Mrs. Roberts and Mr. Marsh that there was a complete approbation of the will, without a reference to any condition. No. 3 and No. 4, make that disposition alone which the deceased intended to complete.

Swabey and Phillimore for the will of 1804, and the two codicils annexed to it.

June 21.—*Judgment*—*Sir John Nicholl*. The facts of this case lie within a narrow compass—and cannot be the subject of much controversy.

Mr. Richard Travers died in July, 1813. He had been in business at Bridport, in partnership with Mr. Roberts, and had amassed a considerable property both real and personal: but he had met with some risks in the course of his business, which [304] occasionally affected his mind with a lowness and depression of spirits; but there is nothing shewn which at any time amounted to actual insanity.

Several points are clear; his intention to die testate, for there are several testamentary papers before the Court of anterior date to the will of 1804: his intention to make a disposition of his property amongst his relations and friends on a very extensive scale: and also his intention that his real as well as his personal property should be subject to this distribution.

There are three parties before the Court propounding severally the following testamentary acts. A will and two codicils of 1804. A will of 1806 with a further paper of directions. A paper of instructions of July 28, 1814.

The first is propounded by the two executors named in it, Strong and Roberts, who were personal friends of the deceased. The factum of this will, and of the two codicils annexed to it, is not questioned; it is executed and attested in the usual way—it gives all his property, real and personal, in trust, to pay his debts and legacies;

and then proceeds to distribute his property, by legacies, amongst his relations and friends, to the amount of upwards of fifty; and afterwards directs that if the legacies exceed his property they shall be proportionably diminished; if they fall short of his property they shall be proportionably increased; and he appoints Roberts and Strong executors. Thus this will is a complete disposition of his whole property—real and personal: it is uncanceled; and must operate either in the whole or in part, un-[305]—less it is revoked by some subsequent act of legal validity.

In 1806 the deceased made another will which is also attested by three witnesses. This is propounded, together with another paper which I shall notice hereafter, by Admiral Ingram, one of the executors named in it. It gives all his property to Mrs. Ingram and Mrs. Roberts, to be at their sole disposal among his relations and friends. This is a strange disposition: and there is a very singular and unusual passage in it; viz. "I beg to observe that I am of perfect understanding." This was probably written when the deceased was in low spirits; and, from another passage in it, probably when he was under some irritation, and when he had heard that some of his relations, or his heir at law, had said that he was not capable of making a will, and that they should dispute his former will; but still there is no sufficient ground to impeach the sanity of the deceased at this time, so as to render invalid a will executed regularly, and attested by three witnesses; more especially as, in a subsequent part of his life when there can be no question of his sanity, he recognized this paper. There is, however, another important passage in this will which gives it a peculiar character. He states that he makes it "In case my last will before this, wrote with my own hand, and witnessed by John Way and others, should be by any of my relations disputed."

Perhaps the object of this clause, and indeed of the whole will, is rather to hold in terrorem to his relations, "If you dispute what is done, or are dis-[306]—satisfied, these friends shall have power to controul you, and divide my property among you in their discretion," trusting that they would dispose of the property in the manner mentioned in the other will; and it is not impossible that he meant it as an additional guard to the will of 1804. It has been contended that this clause does not render it a conditional will, and that he only meant to assign the reason for his new disposition; but this would be a forced and strained construction; the more obvious meaning is to impose a condition, and that it was only to be called into operation in case his relations disputed the will of 1804: I hold, therefore, that it is a conditional will, and necessary to be got rid of either by converting it into an absolute will by a subsequent act, or by satisfying the condition. A conditional will may be converted into an absolute one; and it is for the Court to consider whether the paper propounded with it, or any other paper, can produce that effect.

From 1806 till within a few days of his death he did nothing further towards any testamentary act, except that in December, 1811, he wrote the paper D, which is entitled "a memorandum for making my will." It contains a very detailed list of his relations and friends and their respective families, but no sums are annexed to their names; and it also contains some calculations of his property. Admiral Ingram's name occurs, not as an executor, but among the list of his friends. This paper too is rather contrary to the tendency of the conditional will, and implies rather that he himself [307] meant to do an act of distribution, and did not mean that Admiral Ingram and Mrs. Roberts should have the disposal of his fortune.

The deceased died on the 28th July, 1813. On the preceding Sunday (i.e. the 25th) he was visited by Mr. Roberts, and Mr. Strong, the two executors in his will of 1804; and there is no sufficient reason, in the judgment of the Court, to doubt that he continued his confidence in them till his death. He said nothing, however, to them about any intended alteration in his will, and probably had given up all thoughts of making a new will.

On the following day (the 26th) Admiral Ingram visited him—he, having had the conditional will of 1806 placed in his hands, was distressed, as he naturally might be, at the discretionary power vested in him; and, perceiving the deceased to be in a dangerous state, he pressed him to make a new will, and the deceased promised him so to do: but it certainly is highly probable that he would not have done it unless urged by his representations. It appears from the evidence of Mr. Marsh, who was present, and Betty Bishop, that the deceased was disturbed at being thus pressed; Marsh offered to go for his solicitor, but he declined it. On that evening, however,

the deceased sat down to draw a paper of instructions for Admiral Ingram and Mr. Roberts. Mr. Gill, a relation, who was much with the deceased, found him, on the evening of that day, with a table and writing materials before him. Probably he was engaged in writing No. 4; for he asked Gill if he knew any thing about the Lawrence family—he desired Gill to call upon Mrs. Roberts, who was [308] co-executor with Admiral Ingram, and to desire her to call the next day to assist him in making his will.

No. 4 is entitled memoranda made this 2d July, 1813.

Where he first stopped and signed, the name is again repeated.

The name, however, is signed, not as finishing it, but as authenticating it as far as it had gone.

The object when he wrote this paper was to remove the condition; he had not completed it; many persons are inserted without any sum annexed to them. It is incomplete and unfinished—if he had gone on with this plan, and had finished No. 4, as a complete body of directions, and afterwards done no further act, it might have been a question whether the conditional was not converted into an absolute disposition, and the will of 1806 completed and confirmed by such an act. Because when such new directions for an entire disposition of his property had been given, and that distribution was to be made by Mr. Ingram and Mrs. Roberts, whatever his original intention might have been, and however he might have allowed his executor to distribute his property if his relations disputed his will, yet now he had made a new distribution for himself, which superseded the former disposition made in 1804.

But No. 4, in my apprehension, can have no such effect, for he gives up this plan; he determines on making an entire new will; he makes out an entire new set of instructions; and there is not the least allusion to Admiral Ingram or Mrs. Roberts, when [309] the appointment of the executors is discussed. The court therefore must consider No. 4 as abandoned.

On the morning of the next day the deceased sent a note to Mr. Russell, expressly desiring him to come and make his will. About one o'clock he received a note from Mr. Russell stating that he could not come that day, but that he would be with him on the following morning.

Mr. Gill, who, as well as Mrs. Roberts, was with the deceased when this answer arrived, says the deceased was very uneasy when he found Mr. Russell could not come, and at the delay which would be thereby occasioned in the settlement of his affairs; and said he wished to have them settled, while Mrs. Roberts was with him for that purpose. And the deceased then said that the deponent should write down instructions for Mr. Giles Russell to make his will by; and then, addressing himself to the deponent, said to him, "Mr. Gill, you must write;" or words to that effect. And the deponent having then drawn the table, on which were pens, ink, and paper, near the foot of the bed, the deceased proceeded to give in the presence and hearing of this deponent instructions for his will by word of mouth to the said Mrs. Fanny Roberts from a paper which he held in his hand; and she, the said Mrs. Roberts, as the deceased gave the said instructions, repeated the same to the deponent, who, in the like order in which the said instructions were so given by the deceased and repeated by the said Mrs. Roberts, took the same down in writing. That he does not now remember the said Mrs. [310] Roberts having, at the time deposed of, asked the said deceased who was to be his executor, and the deceased answering that Captain Lawrence should be executor, or executor in trust as articulate; but he is quite certain that, at the time he was in manner hereinbefore described told or instructed to write down or insert the legacy of five hundred pounds to Captain Lawrence, he was at the same time told or instructed that the said Captain Lawrence was to be the executor in trust of the deceased's said intended will, as well by the deceased saying so in the deponent's presence and hearing, as by the said Mrs. Roberts repeating the same to the deponent; and he therefore wrote a memorandum to that effect in the same line, containing the said intended legacy of 500l. to Captain Lawrence. And he saith that he was interrupted in the writing the instructions by going to dinner with the said Mrs. Roberts, and by several gentlemen calling to enquire after the deceased: but the said Mrs. Roberts and the deponent went up again to the said deceased in his bed-room after dinner, and after the said gentlemen had left the house, to finish the writing the instructions for the deceased's will, which were proceeded with and finished by the deponent; and, when he had finished them, he read them all over to

the deceased in the presence of Mrs. Roberts, who expressed his full approbation of the same, and said it would do very well.

The account thus given by Mr. Gill is, in its general substance, confirmed by Mrs. Roberts, as far as she was present; and there is no reason to [311] doubt the truth and correctness of this relation, or the full testamentary capacity of the deceased; for though he was agitated, hurried, and irritated, he perfectly well knew what he was about, and dictated these long instructions: it is impossible then to doubt that this paper, as far as it goes, contains the last intentions of the deceased, or that when he dictated these legacies he intended the several persons named to take benefit to this extent: he confirmed these intentions by signing his name, which he was most anxious to do; he was fearful that he should not live to complete the act. It is true the deceased did not intend this paper to be his will, because he hoped to live to make a complete disposition of his property by Russell's assistance: but the act of God intervenes, and the will is prevented by the deceased's death from being drawn and completed. To contend that this paper cannot operate at all, and is not to have effect as far as it goes, would be to bring into discussion first principles, and to contend against the uniform decisions of this Court as far as its records are preserved and handed down to us.

The question is, whether it is to operate solely—and secondly, if not solely, in conjunction with which will? whether that of 1804 or that of 1806?

The court is of opinion that it is not to operate solely; because it was evidently his intention to have given further instructions; the instructions were incomplete. According to Fanny Roberts, the deceased only directed some things to be written down—her impression was that he meant to [312] give further instructions on the next morning; there are memorandums for enquiries to be made; there are no directions respecting the residue—nor whether the legacies were to be diminished or increased in case the property should be too little, or too much: there are no directions for the disposal of his real property, though it is obvious that he intended to render it subservient to the payment of his legacies; he was a good deal hurried also; and might overlook many persons, even with the assistance of the papers. There are persons benefited by the will of 1804, whom there is no reason to think he would pass over. In short, there is abundant reason to conclude that, though he signed this paper, it was not as a complete disposition of his property; but to give effect to it as far as it went.

Instructions of this sort, so far as respects the question, whether they are to operate as an entire revocation of a former will, or to be taken in conjunction with it, are very different from the case in which they are finished and delivered over to the drawer of the will, merely to prepare an instrument from them. It is a rule of the court that unfinished instructions, where there is a complete will, only revoke the complete will as far as they go; they are not a codicil to be taken in addition to the will: but revocative as far as they go, and to be taken in conjunction with the will. The two instruments are to be taken as containing together the will of the deceased. If this principle was rightly understood in other courts, there would seldom be much question about cumulative legacies; [313] for where a paper is codicillary, and two legacies are given to the same person, they are cumulative. Where instructions are pronounced for, as containing together a will, that is, where there is a complete will, and an instrument intended as the inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it. For these reasons the deceased, here intending an entire new will, and not having completed it, but having proceeded a certain length, I am of opinion that this paper cannot take effect alone, nor as a codicil: but must be pronounced for together with a former will.

The question then comes to this, which is the former will? There is no reference in the instructions to Admiral Ingram or Mrs. Roberts—she did not intend that they should have the disposition of his fortune, because he has disposed of it himself: the inference is that the deceased had wholly abandoned the conditional will, when he set about to make a new will. There is strong evidence, I think, that the deceased considered the will of 1804 as his operative will at that time, from what he said to Mr. Marsh on the 27th of July. He had been conversing with him for some time respecting the disposition of his property among his relations: and he says that "he had spoken to the deceased under the impression that he had no other will than that

which Admiral Ingram had spoken of at the time hereinbefore deposed of: but the deceased, at this period of the conversation, said, 'I have a will by me;' and, taking up a folded paper in his hand from off the bed in which he lay, consist-[314]-ing apparently of more than one sheet of paper, said, 'Here it is: if I die, I shall not die without a will; but I want to alter some things in it, as some matters have occurred since which I wish to provide for.'

This must have referred to the will of 1804. He had not Admiral Ingram's will in his possession: the will of 1804 was in his possession; it did consist of several sheets of paper; it was uncanceled; his declaration to Betty Bishop is to the same effect, when he told her after Admiral Ingram and Capt. Lawrence had left him on the 26th of July, "I don't know what they see in me that they are so anxious about my making my will." To which she answered, "It is nothing but right, sir; you should keep a will by you; you be'nt dead never the sooner, and I hope there is no likelihood of death now." To which he replied, "I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations."

This can only be construed as applying to the will of 1804. The term alteration would not apply to the will of 1806: the evidence of Gill to the other interrogatory agrees with this.

Here is a direct reference to the will of 1804, and the codicil. A recognition of it as the will which, by this paper, he wished to alter in favour of his poor relations. These considerations lead to the conclusion that he considered the will of 1804 as his subsisting will.

The remaining important point is, whether the condition of 1806 is satisfied? The condition in itself, as applied to a whole will, is extraordinary. It [315] does not depend on any particular event, as in case he should fall in action or the like, nor upon any event in his lifetime; but upon the conduct of some one out of a great number of persons after his death; and the peculiarity is that it is not to affect the interests of that individual, but the validity and effect of the whole will. As far as my observation goes, no case of this sort has ever occurred. Where a condition is to prevent parties from asserting their legal rights, the law does not favour them, even though they affect the individual only who breaks the condition. When a legacy is given on condition that the legatee shall not litigate the will, the cases cited by the counsel of litigation, where there has been *probabilis causa*, shew that it has been decided to mean only vexatious litigations. Here the person would not only forfeit his own rights, but those of many other persons; at the least, the case would require such a condition to be completely and absolutely satisfied. What has been done here? and how have these relations disputed it? Caveats have been entered; these might be for the purpose of protecting the will of 1804, instead of disputing it; but it is said the proctor on the other side declared he opposed all the papers; but this he retracted the next court; it was made in error, and in doing it he exceeded his proxy; the court cannot consider this act as such a disputing of the will of 1804 as satisfied the condition of the will of 1806, and destroyed the rights of all the legatees under the former will.

Upon the whole, I am of opinion that No. 5, as [316] far as it goes, must be carried into effect. That paper, however, is only revocatory *pro tanto*, and only to be taken in conjunction with the former will. I am of opinion also that the will of 1804, with its codicils, is to be considered as the former will with which No. 5 is to be taken in conjunction.

I pronounce, therefore, for the will and codicils propounded by Mr. Strong and Mr. Roberts, and for paper No. 5 propounded by Capt. Lawrence, as together containing the will of the deceased; and, as Capt. Lawrence is dead, I decree the probate to Mr. Strong and Mr. Roberts.

ATKINSON v. LADY ANNE BARNARD. Prerogative Court, Trinity Term, June 16th, 1815.—Residuary legatees, even where there is no prospect of any residue, entitled to an administration *de bonis*, in preference to legatees and annuitants.

Judgment—*Sir John Nicholl*. This is a question respecting the grant of an administration *de bonis* of Richard Atkinson: he died in 1785, having made a will in which he nominated four executors. Probate was taken by all of them—they are all since dead; and Mr. Muir, the surviving executor, died intestate, having left goods unadministered. The deceased also appointed several residuary legatees—eight or

nine. One of them, Mrs. Jane Atkinson, now applies for [317] an administration de bonis; and in the ordinary course she would be entitled: but the grant of it is opposed by Lady Anne Barnard and Mr. Michael Atkinson, who are not residuary legatees, but who are legatees and annuitants. Various circumstances have been gone into to shew that the estate would be more properly administered by these legatees than by the residuary legatee. It is said the Court has a discretionary power on this subject; and certainly the first thing here is to shew that the Court has exercised a discretionary choice in such a case.

Between the widow and a next of kin there are many instances where the Court has set aside the widow, though the ordinary generally gives it to the widow. So also between different next of kin and between several residuary legatees, where the parties stand upon an equality of right, the Court frequently exercises a discretion. But is there any case in which a residuary legatee has been set aside in favour of a mere legatee? If there is no precedent I should be unwilling to make one, unless under very extraordinary circumstances.

What is there here to induce me to take this novel step? What are the special grounds set forth? It is said the estate is insufficient; that there is no residue, and consequently that the residuary legatee can have no interest. If this ground is sufficient, the door will be opened to perpetual applications and endless litigation, which will bring with it great inconvenience from the delay which must arise in the grant of administrations. The residuary legatee is the testator's choice; [318] he is the next person in his election to the executors. The practice goes along with that preference. The case of *Thomas v. Butler* (1 Ventris, 217) is a strong confirmation of the modern rule. But in the present case this ground is done away by another consideration: here the residuary legatees are legatees also and annuitants under the will; it is impossible to say they have no interest in making the best of the estate; it happens also that there are eight other annuitants and legatees; who also are residuary legatees, and entitled to a preference over the mere legatee—they do not resist the grant to Mrs. Jane Atkinson; but Mr. Clayton is confided in by them; and I cannot consider that by not appearing they concur in the appointment to Mrs. Jane Atkinson.

It is objected that Mrs. Jane Atkinson resides at a distance, and is a spinster: but really these objections are ludicrous.

Another objection made is that the executors have misconducted themselves; that they have not paid the legacies, and that they have done this by the advice and under the management of Mr. Clayton their solicitor, and that Mr. Clayton is intended to be employed by Mrs. Jane Atkinson—he also is a mortgagee in possession of certain estates at Jamaica, and the brother-in-law of George Atkinson, one of the executors, who was acting trustee and executor under his guidance and direction; and that he never for twenty years made any settlement of his accounts. If the Court had [319] any choice, how could it be expected to govern itself by such collateral considerations? If the mal-administration of the executors is any ground, and the fact is denied before the Court can give credit to it, it must enter into an investigation and examination of all the parts of the transaction; and the Court must do this in common justice before it affixes a stigma on the conduct and memories of the executor: this cannot be the province of this Court, in an attempt so novel, which would go to set aside a residuary legatee who has not acted in unity or conjunction with either of the executors. Supposing, however, that Mr. Clayton will, in effect, have the management of the property, as may possibly be the case; certainly before I set aside Mrs. Jane Atkinson on that ground, and put the administration into another channel, I should be bound in justice to go into an examination of this whole transaction; and a suit in this Court merely to decide who is to administer would become as long as a suit in Chancery to settle all the intricate concerns of this estate. These accounts and intricate concerns can only be adjusted in a Court of Equity, indeed there they now are, and only wait till there is a representation which has been hitherto delayed by an opposition to the usual course of practice in this Court.

Lady Anne Barnard and Mr. Michael Atkinson, as legatees and annuitants, must have the means of calling Mr. Clayton to an account, without being possessed of the administration. The Court of Chancery is alone competent to settle this—it is said this could be done more advantageously by [320] the administrator; if so, it would be more disadvantageous to the other party, and this would depend on the question of mal-administration.

I see no ground for this step; Mrs. Jane Atkinson is entitled to this administration; if she employ an improper solicitor, she is accountable for it. I cannot presume that she will not do her duty: I cannot supersede her right. She is entitled to it by the uniform practice of the court; and to her I shall grant it.

Costs being prayed—

Per Curiam. The court certainly does not wish to countenance experiments against the usual practice—but I rather wish the parties would not press for costs in the present instance; it is a complicated property, and of great magnitude.

[321] *BAYARD, FALSELY CALLED MORPHEW v. MORPHEW*. Arches Court, Trinity Term, June 17th, 1815.—Nullity of marriage, by reason of a former marriage, established.

By letters of request from the Commissary of Surry.

Martha Bayard, widow, was on the 14th October, 1809, married by licence, granted under the seal of the Archbishop of Canterbury, to John Le Poer Morpew, in the parish-church of St. George's, Hanover square. In Easter Term, 1815, she instituted a suit against her reputed husband for nullity of marriage, on the ground that he had, on the 28th May, 1805, intermarried with Isabella Armstrong, who was still alive.

Judgment—Sir John Nicholl. This is a suit of nullity by reason of a former marriage; it has been objected that there should have been more evidence. The question for the court to consider is whether the evidence is sufficient. Both marriages were solemnized by the names of Charles Morpew. The party has other [322] names, Le Poer and John. This is of no further consequence than as it might affect the identity, of which, however, from the other evidence, there is no doubt.

Mr. Morpew is an officer in the Engineers. The first marriage is proved by the clergyman who married him, and who identifies his person, having seen him at Bow-street, on a charge of bigamy; on which occasion he acknowledged his marriage with Martha Bayard. He also proves that his former wife was then living; for he went with the Bow-street officer, and conversed with her, and was satisfied she was the person he had married; thus she is shewn to have been living in 1810. The second marriage is proved by the entry to have been in 1809, and by a person who prepared the settlement, and was present at the marriage, and signed the entry. He also proves a deed of separation with his first wife in 1810, after the second marriage; he therefore shews her to be living after the second marriage. The husband also acknowledged this by entering into the deed of separation.

The court is under the necessity of pronouncing this marriage to be void.

[323] *SUTTON v. DRAX*. Prerogative Court, Trinity Term, June 21st, 1815.—

A legatee entitled to have his expences paid, when he establishes a paper.

Per Curiam. Where a legatee propounds a paper and establishes it, thereby fulfilling the duty of the executor, the legatee is entitled to have his expences paid out of the estate of the deceased. This is the rule of the court.

PASKE v. OLLAT. Michaelmas Term, Nov. 15th, 1815.—Where a legatee is the writer of his own legacy, more than ordinary proof of the authenticity of the will is called for.

[Applied, *Bullin v. Barry*, 1837, 1 Curt. 619; *Barry v. Bullin*, 1838, 2 Moore, P. C. 482; *Browning v. Budd*, 1848, 6 Moore, P. C. 430. Discussed, *Von Stentz v. Comyn*, 1849, 2 Ir. Eq. R. 632. Approved, *Donnelly v. Broughton*, [1891] A. C. 442. Referred to, *Fulton v. Andrew*, 1875, L. R. 7 H. L. 461; *Weir v. Grace*, 1898, 1 Fraser, 261.]

Judgment—Sir John Nicholl. There is no difficulty whatever in the decision of this case; but a feature occurs in it of a nature that I cannot pass over without notice. The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely [324] jealous of a circumstance of this nature. By the Roman law (Dig. lib. 34, s. 8) Qui se scripsit hæredem could take no benefit under a will. By the law of England this is not the case; but the law of England requires, in all instances of the sort, that the proof should be clear and decisive; the balance must not be left in equilibrio; the proof must go not merely to the act of signing, but to the knowledge of the

contents of the paper. In ordinary cases this is not necessary; but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person; propriety and delicacy would infer that he should not conduct the transaction; and *a fortiori* in a case where he is the confidential attorney of the deceased; and where the benefit conferred is to a considerable amount.

The presumption and onus probandi are against the instrument: but, as the law does not render such an act invalid, the Court has only to require strict proof: and the onus of proof may be increased by circumstances; such as unbounded confidence in the drawer of the will; extreme debility in the testator; clandestinity; and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. In the absence however, of any circumstances of this sort, the demands of law may be more easily satisfied.

These are the principles and rules handed down [325] to me by my predecessors; and though I have no difficulty as to the proof in this case, yet the feature is of a sort that I was unwilling to pass over without notice. The execution here is attested by two witnesses, and a solicitor, who all depose without the slightest hesitation as to capacity—there's no concealment whatever: Mr. Golding openly, before the witnesses, refused to attest the will, because he was benefited under it. Every possible degree of caution was observed: the sister of Mr. Golding has also been examined; she proves a complete case, that she heard the instructions, that they originated with the deceased, and were a surprise upon the drawer of the will; that he proposed another solicitor; but the deceased refused to attend to this suggestion. A very careful reading over is proved.

Upon the whole of this case I have not the least doubt whatever of the perfect capacity and free-agency of the deceased; and I am bound, therefore, to pronounce for this will.

LANGMEAD v. LEWIS. Prerogative Court, Michaelmas Term, Nov. 22nd, 1815.—Papers which may be of a testamentary nature not to be withheld from the court.

[Applied, *Bagot v. Bagot*, 1878, 1 L. R. Ir. 308.]

An application was made to the Court to direct a monition against an attorney who refused to deliver a paper which was in his possession, and which it was supposed might be of a testamentary nature.

[326] This was objected to on the ground that it was a paper which had never been seen by the deceased.

Per Curiam. There is a possibility, nevertheless, that the paper may be of a testamentary nature; it may contain instructions drawn up in the lifetime of the deceased; it must be produced.

The monition was decreed.

[327] DRONEY, FALSELY CALLED ARCHER v. ARCHER. Consistory Court of London, Michaelmas Term, Dec. 12th, 1815.—The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Court of Chancery, annulled.

Anne Droney, the illegitimate daughter of John Droney and Hannah Burn, was married by licence to John William Archer, in the parish church of Sculcoates, on the 25th of June, 1808. The licence was obtained on the oath of John William Archer; and it stated that both the parties about to be married were of the age of twenty-one years and upwards.

In May, 1815, the woman instituted a cause of nullity of marriage, on the alleged ground of her having been a minor at the time the marriage was solemnized.

A libel was given in on her part, and several witnesses were examined in verification of it.

Lushington and Meyrick in support of the nullity.

Phillimore, contra, contended that the proof of the minority was not sufficient; and that the Court had a right to the strictest proof, when called upon to annul a marriage after a cohabitation of seven years.

[328] Judgment.—*Sir William Scott*. This is a proceeding by Anne Droney against John William Archer for a nullity of marriage under the marriage act.

It is a just observation that the Court has less dissatisfaction in applying the

provisions of this act in a case of this description, than in one where the party who institutes the suit has obtained the licence by his own perjury. The mother proves the birth and illegitimacy of Anne Droney. It has been held by (a) this Court, and the Court of King's Bench (*Priestley v. Hughes*, 11 East, 1), that the consent of a guardian, (c) [329] appointed by the High Court of Chancery is essential to the marriage of an illegitimate minor.

[330] The daughter is stated by the mother to have been born in Nov., 1790. That the child was taken by her sister to the church of the Holy Trinity in Hull, to be baptized six weeks after her birth. That she was not present: but John Droney the father was, and that he and the sister are both dead. An exhibit of the entry of the birth has been produced corresponding in point of date: but it certainly appears very incorrect. It has been contended in argument that the incorrectness is such as to invalidate the evidence of the time of the birth. Un-[331]-questionably it is evidence of great importance; the Court always expects it: it is a testimony of a

(a) The leading case on this point was that of *Horner v. Liddiard*, Consistory Court of London, Easter Term, 1799: it has been reported by Dr. Croke.

(c) The Court of Arches has in many instances sanctioned the principle of these decisions. Several cases to the same effect have also been determined in the other Ecclesiastical Courts.

The following case was decided on the 24th of November, 1814, in the Court of the Dean and Chapter of Westminster:—

Clarke, falsely called Hankin v. Hankin.—The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Court of Chancery, annulled.

John Hankin married Mary Clarke, the natural daughter of Mary Clarke and Thomas Buck, on the 24th of November, 1805, with the consent of her mother. She was a minor, rather more than twenty years of age. Her mother subsequently intermarried with her putative father. In 1814 Mary Clarke instituted a suit of nullity on account of her minority at the time the marriage was solemnized.

Her father and mother were both produced as witnesses, and gave evidence as to the illegitimacy of their child, and also to their both being present, and consenting to her marriage with Hankin.

Dr. Burnaby and Dr. Phillimore were counsel for Mary Clarke.

Hankin had neither proctor nor counsel: he appeared in Court himself, but gave no opposition to the sentence.

Judgment—*Dr. Swabey*. This is a suit for nullity of marriage, grounded on the minority of the wife. She was an illegitimate child, and married during her minority with the consent of her mother. The law applicable to this case is founded on a statute usually termed the marriage act, which is now a part of the matrimonial law of the kingdom. The interpretation put upon the eleventh clause of the marriage act has been to require the consent not only of the natural, but also of the lawful, guardians. The form of the affidavit, which leads marriage licences, I have reason to know was settled with great advisement, and the consideration of persons of the greatest eminence both in the civil and common law. This appears from a manuscript note of Sir Edward Simpson in my possession; and from that time it has been the practice of the Court of Chancery to appoint guardians to illegitimate minors for the purpose of consenting to their marriages.

The legal and judicial construction of this clause was first given by Sir W. Scott in the case of *Horner v. Liddiard*; and I agree in every ground which is laid down in that sentence and in the conclusion of it; especially in that part in which it states that the consent required as essentially necessary to the marriage of illegitimate children can only be given by guardians appointed by the High Court of Chancery.

I should have felt some difficulty here as counsel only appear on one side, if a case so exactly similar to this as that of *Horner v. Liddiard* is had not been fully discussed in solemn argument, and was in print, and accessible to every one.

No proctor either appears for Mr. Hankin, which is extremely unusual—indeed I do not remember a similar occurrence. The husband has offered no defensive matter, and the cause comes on entirely on the pleadings and proofs adduced by the wife, but it is so far satisfactory that it does not appear that, if Mr. Hankin had appeared by counsel and proctor, he could have repelled the legal effect of the proofs.

The illegitimacy is proved by the best evidence, that of the father and mother of

very high nature, but the cause may be supported by other evidence. The entry is "Anne, daughter of Thomas Drawnaw." The man's name was not Drawnaw or Thomas. It appears, however, that he was frequently called Drawnaw. The mistake of the christian name is less satisfactorily accounted for; we must recollect, however, that in populous towns many children are brought to be baptized together; some confusion occurs; and an error of this nature might arise, which perhaps in the case of the illegitimate child of an obscure person might not be attended to. With all its incorrectness, the entry does probably apply to this person: but, at all events, the mother, sister, and two other persons, speak with considerable confidence as to her age.

The marriage was in June, 1808—she could not then be more than 18; hardly so much. This case, therefore, turns on the fact whether there was any consent to the marriage. The records of the Court of Chancery have been examined with the usual care to ascertain whether any guardian was appointed; and, indeed, from the situation of the parents, it was not likely that any should have been. I think there is proof of the want of consent required by the act of Parliament, and that this marriage is invalid.

[332] RYAN v. RYAN. Prerogative Court, Hilary Term, Jan. 31st, 1816.—Administration granted to a second wife, the first having been divorced à vinculo by a royal ordinance in Denmark, the parties divorced being both Danish subjects.

Philip Ryan, an Irishman by birth, but for many years domiciled in Denmark, and a resident in the city of Copenhagen, died in London in June, 1808, leaving a widow and an infant daughter by her, and three daughters the offspring of a former marriage.

It appeared that on the 3rd of September, 1803, he had entered into a contract of separation with his first wife; and that on the 25th of March, 1807, his marriage was entirely dissolved, and permission given to the parties to marry again by an ordinance under the hand and seal of his Danish Majesty. On the 5th of June following he executed a contract of marriage with Elizabeth Ferrall, a native of St. Croix, and the daughter of an Irish physician domiciled at Copenhagen. This contract was subject to the confirmation which it afterwards received of the King of Denmark: and the marriage was subsequently had under the authority of a royal licence dispensing [333] with the publication of banns, and the solemnization of it in a church.

Philip Ryan died intestate (at least an instrument of a testamentary nature which he left behind him was admitted to be invalid), and shortly after his death, viz. on 28th June, 1808, the person to whom he was last married applied to the Prerogative Court of Canterbury in the character of his lawful widow and relict for letters of administration to his goods, chattels, &c. The three daughters of the former marriage, who were minors, appeared by James Ryan their uncle and guardian, and denied the interest of the widow.

The proceedings in the cause were delayed; first, by the war which broke out between Great Britain and Denmark, and afterwards by the absence of some of the parties beyond sea.

Adams and Lushington for Mrs. Ryan. The question is whether, because marriage is indissoluble by the law of England, it is also so by the law of Denmark. The act of the Danish king is of the same force as an act of Parliament in this country. He unites in his person both the legislative and the executive functions. It was shewn,

the illegitimate child. She was a minor just turned twenty at the time of her marriage. I chose rather to have other evidence respecting the search that had been made in the Court of Chancery as to the circumstance of the minor having had no guardian appointed by that Court, and rescinded the conclusion of the cause in order that the officer of the Court might make search there also.

Upon the whole the evidence fully satisfies the exigencies of the law as applied to the facts of the case. As well, therefore, upon the authority of that case solemnly argued and judicially determined, as upon the construction I myself should have put upon the clause in the act of parliament, I pronounce a declaratory sentence of nullity; and cannot deny to afford the party the remedy to which the law entitles her.

The Court afterwards told Hankin he might appeal if he was dissatisfied with the sentence; and recommended him, if he did, to apply to a proctor in order that he might take the proper steps correctly.

in *Harford v. Morris*, that the crown of Denmark had power to make any laws it pleased. The law of England looks only to the *lex loci contractus*.

No counsel appeared on the other side.

Judgment—Sir John Nicholl. I think this Court ought not to make any further difficulties in a case in which the widow and children of the deceased are parties; the interest [334] of the widow was denied—she has propounded it, and I think established it according to the law of Denmark; though there was a former marriage, it appears by the evidence of the Danish lawyers, that a divorce by the king of Denmark is a divorce à vinculo matrimonii, and that such a dissolution of an existing marriage is good.

Under the circumstances of this case I think the proofs sufficient, the parties being both domiciled in Denmark, and both contracted in that country—whether they would have been sufficient in a matrimonial cause it is not necessary to decide; but, on the mere question whether the widow shall take out the administration, *semper præsumentur pro matrimonio*; the parties, who opposed the widow at first, have now withdrawn their opposition. I pronounce for her interest, guarding myself against its operating in the same way in a matrimonial cause, where both the burthen and the nature of the proof is different—with these cautions and limitations I pronounce for the interest of the widow.

[335] CLARKE AND CLARKE v. DOUCE AND EAGLETON. Arches Court, Hilary Term, Feb. 3rd, 1816.—A suit for a legacy brought by legatees against an executor. The demand not substantiated.

Robert Clarke and Sarah his wife libelled Francis Hubble Douce and Benjamin Eagleton, the executors of the will of Samuel Hallett of West Malling in Kent, for withholding from them legacies bequeathed to them respectively by the deceased.

The libel pleaded that Samuel Hallett bequeathed to Francis Hubble Douce and Benjamin Eagleton the sum of 3300*l.*, among other things to pay the dividends of 400*l.*, residue of the said trust money, to his sister Sarah Clarke and her assigns, or to permit and suffer her or them to take the same for her and their use during her life.

That he also bequeathed to his brother-in-law Robert Clarke the sum of 100*l.* by a codicil to his will.

That the executors had often been applied to for payment of the above-mentioned legacies, but had refused to pay the same.

In reply to this libel the executors answered that “Samuel Hallett in his lifetime sold a freehold estate, in which Sarah Hallett, his then wife, and [336] now widow, had a claim of dower; that the deceased gave his bond to the purchaser of the said estate indemnifying him against such claim of dower; that after his death Sarah Hallett having at the instigation of Robert Clarke, claimed her dower in the said freehold estate, the purchaser thereof called on these respondents, as executors of the said deceased to indemnify him from such claim pursuant to the bond of the deceased; that the residue of the personal estate of the deceased not being sufficient to satisfy the bond, and the respondents being advised by Mr. Bell, an eminent chancery counsel, that the legatees and annuitants named in the said will should abate proportionally to make good the deficiency, it was then proposed and agreed by the respondents and the solicitor for the said Sarah Hallett that the estate should be valued by two surveyors; and in conformity with the said agreement the surveyors valued the estate clear of land-tax at 83*l.* per annum. The dower of Sarah Hallett therein, according to the custom of Kent, was 41*l.* 10*s.* That they then convened a meeting of the legatees and annuitants on the 19th of October, 1812, to acquaint them with the claim of dower so made by the deceased's widow, and the opinion of chancery counsel thereon, and of the aforesaid valuation; at which meeting Robert Clarke attended on the part of himself and his said wife, when the valuation aforesaid was approved of; and it was agreed by the deceased's widow, legatees, annuitants, and executors, the said Robert Clarke not opposing the same, that the interest of a sum of money equal to the dower of [337] the said Sarah Hallett therein should be paid to her for her life or widowhood, and that a sufficient principal sum to produce such interest should be invested in the 3 per cent. reduced annuities, in consequence of which she was to release her dower to the estate, and thereby enable the respondents to fulfil the bond given by the said deceased as aforesaid. That for such purpose it became necessary

to purchase 1383l. 6s. 8d. stock in the 3 per cent. reduced bank annuities to produce the sum of 41l. 10s. per annum. That, if the said claim of dower had not been made, the residue of the said deceased's personal estate would have amounted to 209l. ; and it required the further sum of 62l. to purchase the said 1383l. 6s. 8d. ; and which sum of stock these respondents accordingly purchased in their own names as executors for the sum of 830l. That a proportionable part of the said sum of 621l. 0s. 0d. was deducted from each annuity and legacy. That the amount of the principal money of such annuities and legacies being 4950l., a deduction after the rate of 12l. 11s. per cent. was made from them, which took from the principal money producing the annuity bequeathed to the said Sarah Clarke the sum of 50l. 4s. and from the legacy bequeathed to the said Robert Clarke the sum of 12l. 15s. That the said sum of 1383l. 6s. 8d. stock so remaining in the names of the executors, or so much of it as may be necessary to replace the sums respectively abated from the said legacies, will be to be sold out and the proceeds thereof distributed among the legatees and annuitants at the death of the said Mrs. Hallett [338] and these respondents further answer and say that a deed of trust was prepared by counsel for the legatees and annuitants to sign to testify their approbation of the investment of the said 1383l. 6s. 8d. in the 3 per cent. reduced annuities, and to declare the trusts thereof. That some of the legatees having consulted with Mr. Hart, an eminent counsel at the Chancery Bar, were advised that the said arrangement was perfectly correct and equitable. That a draft of the said deeds was submitted to Mr. Simmons of Rochester as solicitor for the said Robert Clarke and Sarah his wife, to peruse on their behalf, who approved thereof. And the same was ingrossed, and hath since been executed by the said Sarah Hallett, the deceased's widow, by these respondents and by all the legatees, and the annuitants under the will of the said deceased ; except the said Robert and Sarah Clarke who refused to execute the same, and except Thomas Sanders and Edward Eagleton who have not attained the age of twenty-one years. That all the other legatees and annuitants have been paid by these respondents their respective legacies and annuities (the aforesaid deduction being made therefrom) ; and these respondents have frequently and earnestly endeavoured to prevail on the said Robert Clarke and Sarah Clarke to take their annuity and legacy subject to the aforesaid deductions, but that they always refused to accept them."

No witnesses were examined on either side.

Judgment—*Sir John Nicholl.* This is a suit for a legacy brought by a legatee [339] against the executors under the will of William Hallett. A libel has been given in, and answers have been taken to that libel. No witnesses have been examined, but the answers have been read ; and it is only from the admissions contained in these answers that the Court can take the facts of the case. I cannot go out of them to hear the statement of other facts.

I think the parties have imposed an unpleasant task on their counsel to account for their coming into a Court at all ; for it does not appear that the executors have refused them payment of their legacies ; they seem to have done all that is proper.

The deceased by his will left 3500l. to his executors, in trust to pay certain annuities to Sarah Clarke. Probably there might be some doubt how far this Court could enforce the payment of such an annuity : but there is 100l. bequeathed to Mr. Clarke, on which there can be no doubt that this Court has jurisdiction. The legatees demand payment of the whole of their legacies. The executors state that the assets would have been sufficient to have paid the whole, if there had not been demands against the estate. The deceased had sold an estate, and given a bond of 1000l. to the purchaser to indemnify him against any claim his wife might have for dower. The wife had claimed dower, and the executors had been advised that she had a right to it. Instead of paying the penalty of the bond, the executors had set apart a sum to pay the wife an annuity in lieu of dower, which is admitted to be the best arrangement that could be made for the estate : [340] this, however, has created a deficiency in the estate of 12½ per cent. on the legacies for the present. The legatees plead that they have demanded their legacies, but have been refused : whereas the executors state in their answers that they have been offered their legacies over and over again, subject to the deductions to which I have alluded, and that they have refused to take them. I am at a loss to conceive why they should have sued for this legacy ? If the answers are not correct or redundant, they should have objected to them, or pleaded themselves ; they should not have brought the case before the Court upon them.

The Court must take the statement as true. The executors state that they have consulted with three different solicitors of the parties; and that no objection was made, no exception taken on their behalf to the proposed arrangement; and yet the executors are dragged before the Court in an extremely vexatious suit.

I must pronounce that the parties have failed in proof of the libel by demanding the whole legacy, as it is shewn that no more is now due than has been offered. I can only pronounce that the legacy is due subject to the deduction: and I think I do not do justice if I do not give the executors their costs; if costs were given out of the estate they would fall on the other legatees, as they would be further deducted from their legacies.

Costs given.

[341] AGG v. DAVIES, FALSELY CALLING HERSELF AGG. Arches Court, Hilary Term, Feb. 13th, 1816.—Nullity of marriage on account of the minority of the wife not established.

John Agg was married to Jane Davies at Swansea, on the 1st of February, 1806. The licence was obtained upon his affidavit, in which he stated no particulars as to the age of either party; but generally that there was no impediment to the marriage. In 1814 he instituted proceedings against her in a cause of nullity of marriage on account of her minority—his libel pleaded that she was born on the 17th of May, 1785; that she was baptized at home; that there was no entry of her baptism in the parish register—but that an entry was made in a Bible, which had been copied by her father from a smaller Bible in which the entry was originally made by a neighbour. The entry was as follows:—

“Jane Davies, the daughter of John Davies, was born on the 17th day of May, at seven o’clock in the morning, 1785.”

John Davies, the father of the party proceeded against, deposed, “That his daughter was born at Swansea in the year 1785. The month he does not recollect. He was at sea at the time she was born, but returned [342] to Swansea a few weeks afterwards. That before his return his child was half-baptized; and named at his house, as he believes, by the minister of St. Mary’s parish—he believes his child was never baptized fully according to the ceremonies of the Church of England. On his return to Swansea for a few weeks after his daughter’s birth he found an entry of such her birth was made in a small Bible of this deponent’s, which he was informed by his wife had been made immediately after the child’s birth by a neighbour of the name of Eleanor Jones, who has been dead several years; and about eighteen years ago the deceased purchased, at Truro, in Cornwall, a larger Bible, and also therein made entries of the births of all his children. He does not know whether there is an entry of the half-baptism of Jane Davies in the register book of baptisms for St. Mary’s parish.

“The entry was transcribed by him from the small Bible very soon after his return from Truro to Swansea; and was very carefully examined by him with the original entry in the smaller Bible, and agreed therewith: but where the smaller Bible is he does not know.

“That his daughter, Jane Davies, married John Agg in February, 1806, by virtue of a licence—that she was then a spinster and under age; that such marriage took place in the church of St. Mary, Swansea; but he was at that time at sea on a coasting voyage; and such marriage took place against the consent of this deponent, signified to John Agg the night before the deponent went on [343] such voyage; which consent he then refused to give in consequence of the disapprobation of the father of the said John Agg, as expressed in a letter for him to his son, which letter John Agg read to the deponent.

“That he knew John Agg was paying his addresses to his daughter; but he was not privy to, or consenting to the marriage. That he was first acquainted with the marriage at his return to Swansea from a coasting voyage, four or five weeks afterwards, by his wife; but he never after the said marriage declared whether it met with his approbation or had his consent then.”

Adams and Lushington for the husband.

Jenner and Dodson contra.

Judgment—*Sir John Nicholl.* This is a suit for nullity of marriage by reason of minority brought by the husband after a cohabitation of many years. It does not

appear whether there has been any issue; the minority was only of about three months. It is not pretended that there was any disparity of years, or any thing clandestine in the courtship of the parties. The father was asked to give his consent when going on a voyage; and now says he refused not from any dislike of the man, but because the friends of the man did not approve of the marriage.

The licence was obtained on the oath of the man now suing to set aside the marriage. He swore that he knew of no impediment to the marriage; he must therefore have sworn either that she was of age or that the consent of the father was obtained. [344] It must now be shewn by clear proof that the woman was a minor, and that there was no consent of the father. The marriage was solemnized without any clandestinity. The first cousin of the bride performed the part of the father in giving her away; and he attests the entry of the marriage.

It is usually said that the Court is only ministerial in such cases. When a man has contracted a marriage celebrated under a licence obtained by his own perjury, and comes to have that marriage set aside, even after several years' cohabitation, it appears at first sight quite revolting that a suit should be entertained, but it has been held, and properly held, that the public has an interest in having the situation of the parties ascertained, and that the Court has only to pronounce for the nullity: still the proof must be clear and almost irresistible.

How stand the proofs in this case? There is something of doubt and difficulty thrown on the proofs by the delay which has taken place in the cause. The appearance for the party cited was given on the first session of Easter Term, 1814; the libel was given on the first session of Michaelmas Term, 1814. No witness was examined for a year afterwards; a commission issued in January, 1815; witnesses were not examined till January, 1816. The marriage is proved to have been solemnized on the 1st of February, 1806, as pleaded—the entry in the register is proved by Rawlins, who gave her away; but to shew the marriage to be invalid, it is alleged that the woman was born on the 17th of May, 1785, thus wanting little more than three [345] months of being of age, and that there was no consent of her father. Agg. in the affidavit on which he obtained the licence, swore he knew of no impediment from consanguinity or otherwise to the marriage; and the inference from this must be that he understood her to be of age, or that her father was consenting. He must have been then satisfied that he was going to contract a legal marriage. The Court cannot presume him to have been ignorant of the law.

The first proof of the age is usually the entry of the baptism; though this is not absolute proof of the exact birth, yet, from the general use of infant baptism in this country, it is strong adminicular evidence in proof of minority; the register is a public record; it fixes necessarily the time when the entry was made, and is something to resort to by which parties are enabled to swear to the exact age. The absence of this proof is a most important defect, and it is not alleged that the parties are dissenters; the fact is pleaded in the libel that there was no entry; how is this proved? A witness searches the registers for 1785, and for some subsequent years. Does this prove no entry? It proves that there was none in 1785, or subsequently; but this does not prove there was no entry. This is consistent with the woman's having attained her majority; her baptism may be registered in 1784, and then the marriage would be valid. It would be most dangerous if the Court were to pronounce on such evidence; and where there has been a fact of marriage the presumption of law is strong in favour of the act; at any rate [346] it is necessary to shew that there is no entry of baptism before they attempt the subsidiary evidence. A family Bible is introduced, and there is an entry of the birth in it; it is not an original entry, but the copy of an original entry stated to have been made by the father. This is going a step further than I recollect to have been received; if it had been the practice of the father to enter the births at the time they occurred, and this had been that entry, it would be very important; but it was not made till many years afterwards. This Bible was not printed till 1793. If the entry was made in error, it not only proves nothing, but it may have laid the foundation of error in all the parole evidence which has been given in the cause.

It is pleaded, there was another small Bible, since lost, in which it was the custom of the father to make entries; to this the mother and sister of the woman depose, following the terms of the plea; but the father says the entry was made by Eleanor Jones, a neighbour, who is since dead. If, therefore, the original had been before the

Court, it was not made by one of the family ; and there would be no security against ignorance, error, or fraud. But, supposing the original to have been correctly made, what reliance has the Court on the exactness of the copy ? The man was of a low condition in life, the mate of a coasting vessel ; seamen are not accurate : the transcript was not made till many years afterwards ; in transcribing, a mistake in the year might easily be made either in the reading or the writ-[347]-ing. The very next entry has a mistake ; the year has been erased, and 1790 has been written over other figures, which shews how little reliance is to be placed on a transcript made by ignorant persons of this kind.

In a case of this description I am led to inquire whether there might not be some inducement to make the eldest daughter appear younger than she really is ; the credit of the wife might make it necessary : if there might be inducements, that circumstance alone would be sufficient not to allow the Court to rely on a mere entry of this sort. This book seems to make no evidence either in form or substance, as to the birth ; but it may have laid the foundation of error in all the parole evidence ; all the witnesses may have fixed the birth in 1785, from this entry.

Under this consideration the Court would require that witnesses, speaking at the distance of thirty years, should assign a reason for remembering the fact to have happened in that particular year. Many persons mistake the year in which they were born, and the year in which their children were born. This observation applies more strongly to the lower class of people ; they seem only to recollect a particular year by connecting it with some other event.

Mrs. Rawlins speaks of visiting the mother in the year in which the child was born, from having a son of her own born in the same year ; she deposes, after the lapse of thirty years, to the first or second of June being the day on which she went, which precision rather takes from her credit : [348] but how does she fix it to the year 1785, and not 1784 ? She does not say her own son was born in that year, for that she has recently examined the register of his birth, or any fact on which she founds it : no reason is given ; she may have taken the year from the entry in the book before the Court.

So the father and mother may be exact as to the month, but they give no reason for fixing the year ; if they had said they were married in 1784, or that they took their house in that year, and had lately referred to the lease of it, or some circumstance enabling them precisely to fix the date, it might be something to satisfy the Court ; but I am left in doubt—there is not that precise and satisfactory proof which convinces the Court that the minority of the woman is established.

But, then, another essential part of the case, viz. the want of consent, stands on the dry uncorroborated account of the father. The evidence given by the nephew is contradicted by his own act in giving the woman away. What says the father himself ? That his consent was asked, but he refused because the father of the man disapproved of the connexion ; the marriage was had when he was absent at sea. He admits that he knew of the courtship, he does not say he disapproved of the connexion ; it was only because the man's friends disapproved that he did not give his formal consent ; he does not order the man to break off the connexion ; he does not leave instructions with his wife to prevent the marriage ; it is quite consistent with this evidence that he might have told Agg if he could get the [349] consent of his friends, he would not object ; or he might have left authority to this effect with his wife ; and I think such a conditional consent would have been sufficient ; and I am warranted in supposing there was something of this kind from the conduct of all the parties. The marriage was not clandestinely had ; it was in their own parish church, her cousin gave her away, and there is every reason to infer it was validly contracted.

It would be extremely dangerous, on such evidence of the father's, to say the marriage should be dissolved. The father and mother may have their reasons for wishing it dissolved. The Court, in taking so important a step as this, must look to the possibility of improper views ; it must be upon its guard, especially from the want of the usual evidence. It usually has the father's evidence of want of consent, if produced, corroborated by other circumstances, such as his forbidding the courtship, his expressing surprise and regret at hearing of the marriage, and the like ; and what makes the omission more extraordinary in this case is that the mother has been produced, but has not been examined to the marriage and dissent of the father. This throws an additional cloud of suspicion over the case, and leaves it open to the sug-

gestion that there might have been a previous or conditional consent on the part of the father.

On both these points the evidence is not satisfactory to my mind ; the presumption is strong in [350] favour of the marriage. The man swore he knew of no impediment ; the parties act as if there was none ; they have cohabited for many years. I feel myself called upon to pronounce that the party has failed in proof of the libel, and I dismiss the suit.

[351] **SIKES AND BRODERICK v. SNAITH.** Prerogative Court, Hilary Term, Feb. 26th, 1816.—An allegation propounding instructions committed to writing during lifetime of the testator, but neither seen by him nor read over to him, admitted to proof.—Instructions committed to writing during the lifetime of the testator, but never seen by him, or read to him established as a will.

On the 14th of February, 1816, Westgarth Snaith, Esq., a banker in Mansion-house street, being very ill, sent for Mr. Walton, his solicitor, into his bed-room, and gave him detailed instructions for making his will. Mr. Walton retired into another room, where Mr. Joshua Watson, Mr. Snaith's brother-in-law, was ; and immediately, in his presence, committed to writing the heads or substance of the instructions which he had received, and then proceeded to draw up a will from them ; when he had finished it, he desired Mr. Watson to inform Mr. Snaith that the will was ready for execution, and to ask him whom he would have for witnesses besides himself. This message being communicated to Mr. Snaith, he desired that two of the clerks in his banking house, whom he named, should be called up for that purpose. They were accordingly sent for ; and Mr. Walton returned to the bed-room of Mr. Snaith with the intention of reading over the will to him, and seeing it signed and executed ; when he learnt that the testator had been seized with a violent fit of vomiting, which had reduced him to so languid [352] and insensible a state as to render him incapable of executing his will, or of doing any rational act. In this state Mr. Snaith continued till his death, which happened within a very few hours from that time.

The will drawn up by Mr. Walton was as follows :—

"This is the last will and testament of me, Westgarth Snaith, of Mansion-house street, London, banker. I give and bequeath to my dear wife Jane Snaith, for her own use and benefit, my carriage, carriage-horses, and harness ; and also, all the plate, linen, china, books, liquors (except wines), and spirits, in either of my houses in Mansion-house street, or Woodhouse, in the parish of Wanstead, Essex ; Together with the use, free of taxes and outgoings, for the period of two years from my decease, of my freehold and copyhold house, lands, and premises at Wanstead aforesaid (our residence), with the use of the live and dead stock there. And after the expiration of such two years, the same to be sold by my executors and trustees, and the net produce carried to the account of the residuum of my estate and effects. I give and bequeath to my nephew, Mr. Thomas Wilkinson, all the household goods and furniture in my house in Mansion-house street. I give and bequeath to my esteemed relatives and friends, Joshua Watson, of Clapton, in the parish of Hackney, Esquire, the Reverend [353] Thomas Sikes, of Guilsboro', in the county of Northampton, and William Brodrick, of Gower street, in the county of Middlesex, Esquire, the sum of three hundred pounds sterling, each of them. And I do hereby nominate and appoint them executors of this my will, and trustees for the purposes hereinafter mentioned. And as to all the rest and residue of my estate and effects whatsoever, whether freehold, copyhold, or personal, I give, devise and bequeath the same unto my said executors, the said Joshua Watson, Thomas Sikes, and William Brodrick, their heirs, executors, administrators, and assigns, In trust, to sell, dispose, collect, and receive, and to invest the net proceeds thereof in their names, upon government stocks and funds, and to pay the income and produce of one full third part of such my residuary estate to my said wife during her life. And to pay, transfer, and divide the principal thereof after the decease of my said wife to and equally between such of my children as shall live to attain the age of twenty-one years ; and the executors or administrators of such of them as shall live to attain that age, and die in the lifetime of their mother. And as to the remaining two-third parts of such my residuary estate, In trust to pay, transfer, and divide the same to and equally between such of my children as shall live to attain the age of twenty-one years, on [354] their respectively attaining that age ; and during such their minorities respectively, to pay to my said wife the income and produce of each child's share, she continuing to maintain and educate them. And in case of her

decease during any child's minority, In trust to pay and apply the income and produce of each minor child's share, or a competent part thereof, at the discretion of my said executors and trustees, for or towards her maintenance, board, and education; and to invest the surplus, if any, of such income and produce, to accumulate for her use till she attains the age of twenty-one years. In witness whereof I have hereunto set my hand and seal this fourteenth day of February, One thousand eight hundred and sixteen."

"Signed, sealed, published, and declared by the said testator Westgarth Snaith, as and for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses, the several interlineations and obliterations, opposite to which the initials of our names are set, being first made."

This paper was propounded in an allegation by the executors, and opposed by the widow of the deceased.

Jenner and Dodson for the will propounded.

[355] Swabey and Daubeney contra. In this case the instructions were not read over by Mr. Snaith, or ever seen by him: there has yet been no case in which the Court has pronounced for instructions which have been neither seen nor read over by the deceased.

Judgment—*Sir John Nicholl*. On the point of law that a paper can be pronounced for which had never been seen by the deceased, or read over to him, I have no doubt: this principle was recognized in the case of *Wood v. Wood* (1 Phill. Ecc., 357), in which all the necessary instructions having been given by the deceased, and reduced into writing in his lifetime, probate was given of so much of the paper as was shewn by evidence to be exactly conformable to the instructions. It is essential that it should be written in the lifetime; otherwise it would be a mere nuncupative will, and then of no effect under the statute. It has been argued that there are here mere heads of instructions committed to writing, and that neither will nor instructions have been read over to the deceased. I do not apprehend that the law requires either one or the other. The doctrine of this Court was laid down in *Bury v. Bury* (Prerog. Hilary Term, 1791), where instructions were established on satisfactory proof that they had been reduced into writing during the life of the deceased. In *Box v. Wetherby* (Prerog. 1804) [356] the Court said, "Reading over was only required to show that the paper was conformable to instructions. Here the evidence leaves no doubt as to the intentions."

In this case the drawer of the paper, from his sending to the deceased to know who were to be the witnesses, must have been satisfied that he had received his final instructions; two of the clerks out of the banking house were directed to be called up; the deceased, before they came, was seized with a fit of vomiting, from which he did not recover, and died within three hours.

This is a proper plea to go to proof in order to see how far the paper is drawn up in conformity with the instructions: it will then become a question of fact whether the will is made according to the directions given.

Easter Term, May 1.—The cause came on for hearing the evidence adduced in support of the allegation.

Judgment—*Sir John Nicholl*. The law was fully discussed on the admission of the allegation. I referred, on that occasion, to several cases. I have since taken an opportunity of looking into them; and I find a series of cases from *Gardner v. Smith* in 1727, in which the principle has been established that a paper, not written in the presence of, nor read over to or by the testator, may yet be established upon clear proof that it was written in his lifetime, and was [357] drawn up conformably to his instructions, the further completion being prevented by the intervention of incapacity; at the same time that the rule of law is clear, it is the duty of the Court to look cautiously into proof of the facts to ascertain that the paper was actually written in the lifetime of the party, and that it was drawn up by his directions. Now, therefore, I have only to enquire into the mere question of fact whether it is conformable to the intentions of the deceased. There is no doubt but that it was drawn up in his lifetime; no doubt of his capacity; no doubt of his volition; none of the general outline of his intention. The only doubt suggested is, whether there are not some minute and subordinate parts of the will not according to any directions. But if this were so, the Court would direct them to be struck out as not proved; from the evidence, however, there can be no doubt whatever as to those parts.

The deceased was dangerously ill ; his apothecary advised him to settle his affairs ; Mr. Watson, his brother-in-law, gave him the same advice. His solicitor was sent for, and left alone with him ; and instructions were given him for drawing the will. The subordinate parts, on which doubts were expressed on the admission of the allegation, are very fully explained by the evidence, especially in the answers to the interrogatories. Short memoranda or heads of the instructions were first taken down by the solicitor, and afterwards a will was drawn from them in a more formal shape. The will is merely an arrangement of his property between his widow and daughters ; something different from what [358] the law would have made, and suitable to the condition of all parties.

The conduct of the party at the time is a strong corroboration of his impression. Mr. Walton was actually proceeding into the room to have the will signed, when the deceased was seized with a vomiting fit, and never afterwards had capacity to complete it. If the deceased had doubted whether the attorney had completed his wishes, he would have asked questions to that effect : but he was quite prepared and ready to sign the instrument as soon as it could be brought to him. Nothing but the sudden seizure, or, as we term it, the act of God, prevented the execution : if the Court refused to pronounce for this will, it would defeat the final intentions of the deceased. Adhering, as I do, to the rule laid down in all the cases, that the Court must proceed with great caution, I have still no hesitation in pronouncing for the paper.

[359] THE OFFICE OF THE JUDGE PROMOTED BY BLACKMORE AND THORPE v. BRIDER. Arches Court, Easter Term, April 10th, 1816.—An incestuous marriage annulled, and penance enjoined the parties to it.

[Referred to, *Combe v. Edwards*, 1878, 3 P. D. 133 ; *Martin v. Mackonochie*, 1879, 4 Q. B. D. 747 ; *Mackonochie v. Lord Penzance*, 1881, 6 A. C. 455 ; *Rex v. Dibdin*, [1910] P. 69, 103.]

By letters of request from the Commissary of Chichester.

John Blackmore and James Thorpe, the churchwardens of Harting, in the county of Sussex, promoted a cause of office against William Brider for having married and cohabited with Mary Walton, the daughter of his former wife by a former husband. William Brider refusing to appear to the citation taken out against him, and served upon him, was pronounced contumacious, and in contempt ; and the decree was signified pursuant to the 53rd of George III. All the proceedings were had in pœnam ; fourteen articles [360] were exhibited against him by the churchwardens, and five witnesses were examined upon them.

Judgment—*Sir John Nicholl*. This is a suit promoted by the churchwardens of Harting against William Brider, for incest. It is a criminal suit ; and no appearance being given for the party accused, it is the duty of the Court to examine the evidence scrupulously ; but, having so examined the evidence, it appears to me that the proceedings have been regular, and the evidence is full.

The articles charge the man with cohabiting with the daughter of his former wife, and state that he has children by both of them. The suit is very properly brought by the churchwardens in order to put an end to this offensive scandal ; the evidence proves the continuance of it ; and that the parties have persisted in the cohabitation, though they have twice been driven out of the parish by the parish officers ; these proofs leave no judicial doubt as to the facts, and the law is clear. The important fact to be proved is, that the woman now cohabiting with Brider is the daughter of his former wife. The articles plead that his former wife had first married Thomas Waller ; and they exhibit the register of that marriage. Her birth and baptism are pleaded, and the register of them is exhibited. The death of Waller is then pleaded, and the marriage of his widow with Brider ; the register is exhibited, cohabitation is pleaded, and reputation and acknowledgment of each other as husband and wife till his death. It is next shewn [361] that Brider married Mary Waller, the daughter of his first wife, by Thomas Waller. The register of the marriage is exhibited ; and it is pleaded that they are now incestuously cohabiting.

Five witnesses have been examined, three of the family ; who prove all the necessary facts. The fourth was present at the second marriage, and proves that she was married to Brider ; the fifth speaks to the exhibits. Two brothers of the first wife prove her marriage to Thomas Waller ; they were not present. The witnesses present at that marriage are dead ; but the register is exhibited, and the brothers depose to

cohabitation. This marriage, however, is not so important; for incest would arise equally if the woman was the illegitimate daughter of the wife. They depose that Mary Waller was her daughter, and they say that their sister Anne Waller married Brider; that their sister died; that Brider having seduced her daughter, and she being pregnant, they left the parish, got married in another parish, and returned, avowed their marriage, cohabited together, and had children, and still continue to cohabit. This is the general history, and it is confirmed by the sister of Brider who was present at her brother's first marriage. The second marriage is proved by James Brider, who was present at it, and can identify the parties. The entries in the register are proved, and the identity is spoken to by three persons who were perfectly acquainted with the parties; so that all the facts are proved in such a manner that the Court can have no doubt of them. I must, therefore, pronounce the sentence of the [362] law; viz. that the marriage is null and void; and that the parties must do the usual penance, and pay the costs of the suit.

As to the time and circumstances of the penance I wish the precedent in the case of *Cleaver v. Woodridge* (Arches, 1789) to be followed.

The Court accordingly enjoined Brider to perform a public penance (*b*) in Harting church, on [363] Sunday, the 19th of May, next ensuing, during the time of divine service, in the forenoon of that day, and whilst the greater part of the congregation might be assembled to see and hear the same.

[364] GRIFFITHS AND TRINDER v. BENNETT AND TAYLOR. Prerogative Court, Easter Term, May 15th, 1816.—Executrixes pronounced contumacious for not bringing in an inventory.

Hannah Bennett and Elizabeth Taylor, the daughters and two of the residuary legatees of William Jones, instituted proceedings against their sisters, Mary Griffiths and Anne Trinder, the executrixes of their father's will, for an inventory.

The probate of the will had passed in August, 1815, and the inventory had been assigned since the first session of Hilary Term, 1816; and, not being brought in, an application was made to pronounce Hannah Bennett and Elizabeth Taylor contumacious.

Per Curiam. Parties must not hang back in cases of this description. I pronounce the executrixes contumacious.

(*b*) The following is the sentence signed by the judge in this case. We do pronounce, decree, and declare, that the aforesaid pretended marriage, or rather shew or effigy of marriage, so unduly had and solemnized, or rather profaned between them the said William Brider and Mary Walton, otherwise Waltham, otherwise Brider, to have been incestuous and unlawful; and that the same be dissolved as having been absolutely null and void from the beginning to all intents and purposes in law whatsoever; and that the said William Brider and Mary Walton, otherwise Waltham, otherwise Brider, ought to be strictly, and under pain of the law, admonished to separate from each other, and to abstain for the future from all pretended matrimonial, incestuous, and unlawful cohabitation with each other; and we do by these presents so admonish them to abstain therefrom. And we do also pronounce, decree, and declare, that the said William Brider ought, by law, to be canonically punished and corrected for his excess and temerity in the premises, and that he ought to be enjoined and compelled to perform public penance for the same. And we do enjoin and command him, the said William Brider, to perform such public penance in the parish church of Harting aforesaid, on Sunday, the nineteenth day of May next ensuing, during the time of divine service, in the forenoon of the same day, and whilst the greater part of the congregation shall be then assembled to see and hear the same; and that the said William Brider do certify us of the due and obedient performance of the said public penance on or before the fourth session of the present Easter Term, to wit, Thursday, the twenty-third day of the said month of May. And we do also pronounce, decree, and declare, that the said William Brider ought, by law, to be condemned in the lawful costs made and to be made in this cause on the part and behalf of the said John Blackmore and James Thorpe, the promoters, and compelled to the due payment thereof; and we do condemn him in such costs accordingly.

[365] MEDDOWCROFT v. GREGORY, FALSELY CALLED MEDDOWCROFT. Consistory Court, Trinity Term, July 12th, 1816.—The marriage of a minor annulled on account of an undue publication of banns.

[S. C. 2 Hagg. Con. 207; 161 E. R. 717 (with note).]

This suit was promoted by William Meddowcroft, of Liverpool, for the purpose of annulling the marriage of his son, William Meddowcroft, of Gray's Inn, with Mary Gregory, a widow, on account of an undue publication of banns.

William Meddowcroft the younger had been taken from his father at a very early age, and brought up by two uncles resident in London: one was dead, the other was a solicitor in Gray's Inn. When his school education was completed, he was articled to his uncle, and received into his office. While serving his clerkship, he boarded at the house of a Miss Lewis, in Devonshire Street, Queen Square, where he became acquainted with Mrs. Mary Gregory, a widow; and an attachment commenced between them which produced the marriage in question, on the 28th of February, 1815. William Meddowcroft was at this time between nineteen and twenty years of age, and Mary Gregory about thirty. The marriage took place in the parish church of St. James, Clerkenwell, after a publication of banns. But the banns were published [366] under the names of William Widowcroft and Mary Gregory, and on account of this misnomer the validity of the marriage was impugned. It appeared that the entry in the parish register was made in the right names of the parties; but, in a book kept by the parish clerk at his own house, in which he entered the names of the parties applying to have their banns published, the entry was in the names of William Widowcroft and Mary Gregory. In the regular banns book the name had obviously been altered from Widowcroft to Meddowcroft; this was clear from the different colour of the ink in which the alteration was made, and from an erasure which had been made by a knife. The parish clerk and Mrs. Alexander, who were present at the marriage, proved that when the parties were about to sign their names the mistake in the name was discovered in the banns book, and the clerk then altered it from Widowcroft to Meddowcroft.

James Meddowcroft, the uncle, deposed, "That in April or May, 1814, he received a letter from his nephew, stating that a mutual attachment had taken place between him and Mrs. Gregory, requesting his consent to the marriage, and asking for an increase of his allowance; to which the deponent answered by letter, that he was not at a proper age to talk on such a subject, and that if ever he married Mrs. Gregory, or mentioned the circumstance again, he would instantly turn him out of doors, and leave him to get his livelihood as he could; that he then went to Miss Lewis's boarding-house to inquire into the fact; and while he [367] was conversing with Miss Lewis, Mrs. Gregory having, as he believes, listened at the door, came in and said, she believed she was the subject of his conversation, and confessed that William Meddowcroft had formed an attachment for her, and that a marriage between them had been proposed; but that it was not intended to be without the privity and consent of the deponent, whose consent they hoped in due time to obtain: to which he replied that her own utter ruin and beggary would be the inevitable consequence of their marriage; for that he was determined to turn his nephew out of doors if ever it took place, and utterly to abandon him. That he went again at another time, accompanied by a friend, to Miss Lewis's, and that his friend then told Mrs. Gregory that she must be greatly in want of a husband to think of marrying such a boy as the deponent's nephew, who had not the means of purchasing a bed for them to lie on. Mary Gregory replied, that she did not understand from his nephew that the deponent was so peremptory and positive but that his consent might be obtained some time hence; whereupon the deponent repeated to her his fixed and determined resolution: as a proof of it he offered to send her a copy of the letter he had sent his nephew. Upon which Mary Gregory appeared to give up the marriage; but expressed a wish to see a copy of the letter, which he accordingly sent her; and in reply he received a letter from her in which she stated that, seeing the marriage was so much against the deponent's approbation and consent, she should give up the matter, and think no more of it: that he [368] considered he should never hear any more of this marriage; that he removed his nephew from Miss Lewis's, and it was not till November, 1815, that he was told by a friend that the marriage had actually taken place."

Swabey and Lushington for Mr. Meddowcroft. It is not necessary to shew that actual deceit was effected; it is sufficient if it were such a publication as would have

the effect of deceiving those who heard it. We contend that a publication is void where there is such a variation in the name as to conceal the identity; but that it is not void where it is not such as to affect the question of identity: therefore, it is not void where it is the mere omission of one among other Christian names, which is not commonly used. The difference here is material in this amount: to take a similar instance, Berrington and Merrington are names which would sound nearly similar yet, if one name was used for the other in a publication of banns, the parents would if present, be completely deceived. In *Mather v. Ney*, where the publication was in the name of Wright, instead of Ney, there was no fraud, but the marriage was held void.

Jenner and Dodson for Mrs. Gregory. It is of consequence that contracts actually made should not be annulled. The act does not expressly require that publication to be in the true names: but such has been the construction of it, and we must allow it to be sound. But the Court would not carry the restrictions further than the object of the act requires; fraud should be shewn: here [369] fraud is pleaded in the libel, but none is pretended to be proved. The uncle had heard that the marriage was intended, and broken off; could he have been deceived if he had heard the banns? the father was at a distance, and could not hear them. The order for the publication was received by the daughter of the parish clerk. If there was error, can it without fraud vitiate a marriage of this kind. The cases where marriages have been held void are those where there has been fraud, or the assumption of a name to which the party has not been entitled. *The King v. The Inhabitants of Billingham* (3 Maule & Selwyn, 250), and *The King v. The Inhabitants of Burton-on-Trent* (ib. 537), where fraud was allowed not to have been intended, were held good.

Swabey and Lushington in reply. Before the act a true publication was necessary; it was no publication if not true. Concealment is fraud; it does not appear to have been the mere mistake of the clerk's daughter. The main object of the act is notoriety; if that be defeated, that brings it within the rule laid down by Lord Ellenborough, who held a marriage good, the name (a wrong one) being used by which the party was known. If the clergyman made the mistake, the animus publicandi in him cannot be held sufficient: in the book it stood Widowcroft. The object of the parties throughout has been concealment.

Judgment—Sir William Scott. This is a proceeding by a father to dissolve the [370] marriage of his son, a minor, on the ground that it was without his consent, and without publication of banns. The act, though not in words, yet in fair construction, requires the publication to be in the true names.

The young man had two uncles in London, who acted with parental regard for him; they sent him first to a small school, thence to the Charter-House, and then put him under a solicitor. He went to lodge at a Mrs. Lewis's, where Mary Gregory came afterwards to lodge; an attachment took place between them, though certainly there was a considerable disparity in age; he was a minor, she above thirty. Whether there was any other disparity does not appear; nor what provision was intended for the young man. The difference of age is material; it was an unseasonable marriage for a young man in the course of education; his judgment must be immature, and it could not be prudent to form a matrimonial connexion. On disclosing his intention to one of his uncles, he expressed his entire disapprobation of it both to him and the lady, and he withdrew him to another house. The connexion, however, was kept up, and they afterwards married. It was not till some months afterwards that the uncle heard of it, who then expressed his anger at it. The fact of the marriage came out from the woman having communicated it to Mrs. Alexander, who was the only person invited to attend it, which she did.

Elizabeth Bradley, who keeps a perfumer's shop, says "she was employed to carry notice of the banns to St. John's, Clerkenwell: on consultation [371] with her friends, she thought it right they should be published where there was the least chance of his friends hearing them."

Concealment, therefore, was clearly intended: they consulted as to the most obscure church; where there was least likelihood that his friends should hear; the object then was that which it was the policy of the act to prevent. She gives notice of the names in her own writing to the clerk, who was not at home; and it is open to the observation—in how loose a manner a matter of such importance is conducted in the parishes in this town: they were received by the clerk's daughter and entered in

a book, whence they were transplanted into the regular banns book; in the first, the name of the man is written Widowcroft, in the second it is Meddowcroft. At the marriage it appears it was first altered to the right name. Thus it appears that the publication was in the name of Widowcroft. A question has been raised, how far a marriage might be affected where there is no fraud; if the name should be so distorted as to make quite a different sound: no case, however, has been cited on this point. Bradley, who delivered the banns, knows nothing but that they were given by Mrs. Gregory on a slip of paper. She had nothing to do with it but to convey it there; I must take the clerk's daughter to have received them as they were given.

The question is, whether any fraud was intended? It is said not; for that the banns were published in a parish where the man's friends would not probably attend: but that they would do all, [372] as might be expected, they could to conceal, yet not so as to invalidate the marriage. That it was in a church distant from his friends has no weight with me against the suggestion of fraud.

The objection would have been more material if fraud had been intended. I am of opinion that the alteration is material, and that it varies the substance of the name; the alteration of the initial letters makes more difference than of almost any other letters in the body of the name. It is only of late years that exactness has been applied to the spelling of names of families; formerly they were spelt in many different ways: but I think this alteration so material that it would deceive those who heard it. The uncle, who had advice before, might not be deceived; but the friends, who were not acquainted with the clandestine intention, might: and it was intended to elude the vigilance of parental authority; it was intended to be clandestine, and this is an auxiliary circumstance; it is to be considered as part of a plan. The man does not appear to have been consuant of it; at the marriage he discovered it, and desired it to be set right, and then the alteration was made.

On the whole, therefore, I am of opinion that it is a fraudulent publication, and effected for fraudulent purposes; that the name was altered to elude the knowledge of those interested in preventing the marriage; and I declare the marriage to be null and void.

[373] CLUTTON AND WALLER v. CHERRY. Arches Court, Michaelmas Term, Nov. 9th, 1816.—Not necessary in all cases that notice should be given of the specific purpose for which a parish vestry is convened.

By letters of request from the official of the Archdeaconry of Lewes.

William Clutton and Samuel Waller, the churchwardens of Cuckfield, in Sussex, libelled John Peter Cherry, a parishioner, for refusing to pay a church-rate.

The libel pleaded in substance, "That in the year 1802 directions were given by the Bishop of Chichester to William Clutton and Samuel Picknell, then churchwardens of Cuckfield, to repair and re-pew the parish church: and, at a public vestry called on the 29th of November in that year, it was resolved that the churchwardens should apply for a faculty for that purpose. That on the 19th of February, 1803, a faculty was obtained from the Consistorial Court of Chichester, by which the churchwardens were authorized and [374] empowered to repair the church, by erecting new pews instead of the old ones, which by length of time were become decayed and worn out.

"That from this period William Clutton has been continually re-elected to the office of churchwarden, for the purpose of better enabling him, in conjunction with the other churchwarden, to take the necessary steps for repairing the church. That, with a view to the convenience of the parish, it was judged expedient not to proceed to re-pew the whole church at once, but to complete the same by degrees, doing a small portion of the work in each successive year; and accordingly different rates, from time to time, were duly made and assessed: and by such means the sum of £1435, 9s. 6d. has been collected, and the sum of £1589, 14s. 8½d. expended, down to Easter, 1814, being about 6½d. in the pound upon each occupier; and the church has thereby been repaired and re-pewed without any material inconvenience or burthen to the parishioners: but that some repairs are still wanting, which may be completed in about two years.

"That a public vestry was held on the 11th of April, 1812, after the usual and customary notice, and it was ordered that a rate should be made for the repairs of the church and the pews; and this order was confirmed at a subsequent vestry duly held, according to notice legally given for that purpose, and the rate was confirmed by the surrogate of the official principal of the diocese.

"That John Peter Cherry was a parishioner, and assessed at the sum of £8, 1s. which he has refused to pay."

[375] In reply to this libel an allegation was given in on the part of John Peter Cherry, pleading that "neither of the said meetings of vestry were held in pursuance of legal notice, for that the only notice which preceded either of them, if any were in fact given, was in the following words: to wit, 'The chiefs of the parish are desired to meet in the vestry after service;' and the first of these meetings of vestry was held on Saturday, the 11th of April, 1812; and no other notice was given of a subsequent meeting of vestry, if such meeting was in fact held, or any notice given when the order of the said former meeting is alleged to have been confirmed. That the several notices were undue and illegal for the purpose for which such meetings were convened, and the rate or assessment made null and void."

To this plea a responsive allegation was given on the part of the churchwardens, stating, "That on Sunday, the 5th of April, 1812, the following notice was given in the parish church of Cuckfield:—'Notice is hereby given that a vestry will be held on Saturday next the 11th of April instant, at the hour of eleven in the forenoon, for making a rate to enable the churchwardens to complete the pewing and necessary repairs of the church.' And that the said notice was read and published by the clerk of the parish, in the parish church of Cuckfield, on the said day. That it has not been usual to make entries of vestries for holding vestries in the vestry book of the parish. That the form of the notice aforesaid was written out by Samuel Waller, then churchwarden, and was sent or [376] delivered by him to the clerk of the parish who published the same."

No witnesses were examined on the part of John Peter Cherry: but in answer to the fourth and fifth articles of the libel he deposed that "he has heard, and believes, that a public vestry may have been held on the 11th day of April, 1812, in the vestry room of the said parish of Cuckfield, but denies that the same was duly called or held; and he knows not, and is unable to form a belief or disbelief whether the usual and customary notice, or any notice of such meeting, was in fact given: and he knows not, but has heard and believes that it may have been resolved, agreed, and ordered at such meetings that a rate should be made for and towards the repairs of the church of the said parish, and the pews and seats therein: but he knows not, and is unable to form a belief, or disbelief, whether or not the said order was confirmed at a subsequent vestry, or that any such subsequent vestry was in fact held for that purpose; but, if there were, he denies that the same was duly held, according to notice legally given for that purpose. And this respondent, further answering, saith that he knows not, but has heard and believes that a pretended rate or assignment for and towards the repairs of the church of the said parish, and the pews and seats therein, was, in fact, but illegally made according to a pound rate, being the usual way of making rates in the said parish, but he denies that the charges of such repairs were necessary, the same having, as he has been informed and believes, been in great part improvident, and not requisite."

[377] The form of the rate commenced thus: "We, the churchwardens of the parish of Cuckfield, in the county of Sussex, and diocese of Chichester, whose names are hereunto subscribed, do this eleventh day of April, in the year of our Lord One thousand eight hundred and twelve, rate and tax all and every the inhabitants and parishioners of the said parish hereunder mentioned, for and towards the repairs of the church of the said parish, and the pews and seats therein, in the several sums following, &c."

Robert Sturt (who was parish clerk from July, 1811, till the end of 1812), deposed, "That he could not state whether any vestry relating to the repairing of the church was held on the 11th of April, 1812, nor whether the proceedings of that vestry were confirmed by a subsequent vestry, nor whether any such vestries were held in pursuance of notice legally and customarily given: that the usual mode of giving notice of vestries to be held for any particular purpose was for the deponent to deliver it during divine service, in pursuance of directions previously given to him by the churchwardens; so that if the business was only of ordinary occurrence and of trivial import, he was directed verbally 'to request the chiefs of the parish to meet at the poor-house as soon as divine service should be over:' which message or notice he accordingly delivered from his reading-desk: but, at other times, as he thinks, when business of more than ordinary importance was to be transacted, a written notice was

delivered to him by one of the churchwardens stating the time and place of the [378] intended meeting, and mostly, but not always, the purpose or business of such meeting, which notice he read, and afterwards either destroyed the same or returned it to the churchwardens. He thinks he most generally destroyed them: but no notice whatever was kept of them: and he cannot now recollect whether he gave any such notice for the vestry meeting of the 11th of April, 1812."

In reply to an interrogatory this witness swore, "That Mr. Medwin, an attorney of Horsham, and his son, called upon him when he was in jail at Horsham, the winter before last, accompanied by John Peter Cherry, and made enquiries of him respecting the notice in question, and the usual mode of his giving such notices; and he cannot recollect that he then declared to them that, except as to poor-rates, he never gave any notices of vestries in any other words than those of 'the chiefs of the parish are desired to meet in the vestry after service,' or that he was positive that in any notice which he ever gave a church-rate was not mentioned; he may have given notices respecting church-rates which he cannot recollect that he did; he did then declare that he had no recollection of having given any such notice, and he could not swear that he had given any such."

Samuel Picknell, vestry clerk for the last ten years, deposed, "That at a vestry held on the 6th of April, 1814, the accounts of William Clutton and Samuel Waller, the churchwardens, in relation to the rates were examined and approved of by the vicar and certain inhabitants then present, and that at a further [379] vestry on the 18th of April, 1814, the said accounts were further examined and approved of by other parishioners not present at the former meeting. That the deponent on the occasion of each of these vestries made an entry at the end of the accounts of such examination and approbation, which entries were severally signed by the persons present. He cannot say whether a vestry was called on the 11th of April, 1812, after any notice given; nor whether it was at such vestry resolved that a rate should be made for the repairs of the church, nor whether such order was confirmed at a subsequent meeting held according to notice legally given: as it was not usual then to make entries in the vestry book of any vestries held for the purpose of making rates; minutes were occasionally made of the proceedings of vestries for other purposes; but not for making rates; he is unable to say whether any notice was given, as no record was left of such notices. The churchwardens usually gave their own notices."

Jenner and Phillimore for the churchwardens. The vestry was duly called on the 11th of April, 1812, and the rate was ordered to be made; this was confirmed by two subsequent vestries, which expressed their approbation of the conduct of the churchwardens.

Swabey contra. A rate is to be made in vestry, called according to notice in the church that all may attend: in this case there is no proof of notice; therefore the rate cannot be considered as valid, for it is necessary in law if a vestry is held to make a church-[380]-rate that there should be specified notice of the purpose for which it is called.

Per Curiam. Can you support that position by authority?

Swabey. In Degge's Parson's Counsellor it is laid down that the rate is to be made upon notice.

Per Curiam. If a vestry is called, is not every parishioner bound to attend; or if he does not, is he not bound by the acts of those who do? it may be more convenient that the notice should be given in the manner you state; but if it is strictly necessary that it should be so given, I fear most rates in country parishes would be invalid. Here you stand on this point of law; you do not say the party was unequally assessed or otherwise. As to the fact, all that the witness states is, that at the end of three or four years he does not recollect the notice. If the vestry was held, is it not, at this distance of time, to be presumed that it was held by legal notice?

Lushington on the same side with Swabey. The churchwardens have no right to take a rate till it is distinctly proved that the inhabitants have not refused to concur in it; this is the law. This rate is illegal on the face of it: it is a rate made by the churchwardens, but not in vestry; signed only by the vicar and churchwardens, and the vicar has not been examined. A notice of the calling the vestry is absolutely necessary; it is a proceeding for taxation to which every parishioner has a right to assent or to dissent. The summoning "the chiefs of the parish" is no notice; they [381] have not proved this was not the nature of the summons; and it lies on them

to prove the notice, they might have called persons to negative the words in which it is asserted to have been given. None of the parish prove the libel of the churchwardens. It is the duty of the Court to look narrowly into rates; it is high time that these irregular practices should be corrected.

Jenner and Phillimore in reply. The circumstances proved are such as raise a strong presumption that a notice was regularly given; it lies on the party impugning the legality of it to prove that the notice was not given; if the notice summoned the "chiefs of the parish," there is nothing in such an expression which would make it illegal. Chiefs of the parish may mean those who were entitled to vote. Again, if the rate was illegally imposed in the first instance, it was made good by the vestries of the 6th and 18th of April, 1814, in both of which meetings the accounts of the churchwardens and their acts in the conduct of this business were canvassed and approved of. It is laid down by Prideaux (page 40) that "if the rate be illegally imposed without the parishioners' consent, yet if the rate be afterwards assented to, and confirmed by the majority of the parishioners; that will make it good." No objection is made to the rate on the ground of its being exorbitant or unnecessary. The churchwardens have, it must be admitted, for many years been engaged in a most meritorious work. The objection taken is [382] the more ungracious because it is taken by a parishioner who occupies one of the best pews in the church; but who attempts to avail himself of a legal subtlety to escape from contributing his share of payment to a work of which he himself has reaped the benefit.

Judgment—*Sir John Nicholl*. This is a suit brought by the churchwardens of Cuckfield, to recover a church-rate from John Peter Cherry, a parishioner.

It is pleaded that the church was out of repair; that the bishop inspected it, and directed it to be repaired; that the parishioners undertook the repairs, and a faculty was obtained in 1803; and as the expenses would be burthensome the repairs were done from year to year, to lessen the burthen: one of the churchwardens was continued in office to carry them on.

On the 11th of April, 1812, a rate was duly made at a vestry regularly held, which was confirmed by the ordinary. Cherry was assessed at 8l. 1s. 0d., which he refuses to pay. The defence set up by Cherry in plea is, not that the repairs were unnecessary; not that the money has been improperly expended; not that the rate has been unequally assessed; not that it was disapproved of by the parishioners; but that it was made at a vestry held without due notice, for that the chiefs of the parish were only desired to meet after service; that the first vestry was on Saturday, the 11th of April, and that the subsequent vestry, at which the rate is stated to have been confirmed, was [383] held without any other notice; and, consequently, that the rate is void. It alleges affirmatively that the notice was given, and that it was not a sufficient and legal notice. This allegation was given I presume for the purpose of being proved (for what other purpose is an allegation ever given?) yet not a witness has been examined on it. The counsel say they did not call for answers: this is strange: but if so, it must only have been because the allegations of the other side were sufficient answers. The answers, however, have not been read; and therefore the Court must presume that they do not prove the allegation.

In reply to an allegation of John Peter Cherry a further allegation exhibits a paper pleading it to be the draft of the original notice; this notice is not objectionable in point of form according to the highest notion of law. The parish clerk has been examined; he states that it is not usual to make entries in the vestry book of notices; in many parishes within my own knowledge it is not so; it would be more regular if it was; but the business in many parishes is carried on by persons ignorant of forms. In the vestry books there are entries expressive of approbation of the churchwardens' accounts which had been passed at two successive vestries; it appears that they were often considerably in advance for the repairs; that they were so when this rate was made, and that it was made by the majority of the parishioners.

These are the grounds on which the defendant has refused to pay this rate: he does not set up that the repairs were unnecessary; nor that the [384] churchwardens acted fraudulently, or even extravagantly. He does not deny that the parish was fairly assessed, or that the assessment was not made at a public vestry; he does not deny that some notice was given, *qui ponit fatetur*; but he has resisted payment, and involved the parish in this suit on a mere point of form, that it was not such a notice as the law holds necessary, or that there is not strict legal proof of there having been

a notice. Perhaps in this I am giving too much credit to the individual; even this was probably an afterthought; for about three years ago it appears that he and his attorney went to the parish-clerk, who was then in prison, and questioned him closely whether he could remember the particulars of this notice.

In the first place, I am yet to learn, and I have called upon the counsel for authority on this point, and they have not brought it, and it goes to the very foundation of their case, that notice must be given of the specific purpose for which a vestry is to be called; it may be fit and proper if any thing peculiar is to be done, and the parish are to be involved in expenditure, that the specific purpose should be stated; it may be highly proper; but a distinction is to be taken between what is highly proper, and strictly legal. I take the true principle to be that the parish ought not to be involved in expenditure without its privity, and that the parish ought to have the opportunity of seeing that the burthen is fairly laid. But here the faculty had already been obtained; the expence had been incurred; it is not pretended that there was any [385] difference in this rate from the one which had been made before for the same purpose; it was as much a matter of form and of course in the ordinary notice of business under the circumstances stated as could well be imagined. For such a purpose, I am not prepared to say that even such a notice as was given was necessary. I do not know that the form of the notice is objectionable in summoning "the chiefs of the parish" to meet. Who are the chiefs? they must be the persons who pay to the church-rate, in contradistinction to the inferior members of their families, or persons otherwise not rated. If so, I have no doubt that any person might have been present who was entitled to attend; therefore, I am not prepared to say under the circumstances of this case (to which the Court must be understood to limit its observations) that there was not a sufficiency of notice respecting the purposes and object of this vestry.

But, if a formal notice be necessary, as has been contended, has the Court any reason to doubt that such a notice was given? The answers of the party make it unnecessary to prove this; they admit that the vestry was held; the party states "he has heard and believes so," which is in fact an admission. The use of answers is to save the necessity of taking evidence; I must conclude that the vestry was held, and that some notice was given; for he will not venture to say he disbelieves that any notice was given: he believes a vestry was held, and that at that vestry a rate was made. It is very true that if nothing [386] was done at that vestry but what appears at the head of the rate, it would be necessary to prove other circumstances. But it is not unusual to resolve at a vestry that a rate shall be made by the churchwardens; not that the rate is then made. The instrument was not drawn up at the vestry; but only the resolution passed. I think it is in proof that this rate was made at the vestry of the 11th of April.

The point then is, whether there was sufficient notice? I think the fact of the vestry having been held, and proceeding to business furnishes a presumption that it was rightly called, and throws the burthen on the other party to shew that the notice was not given; this is the stronger when the person has not acted upon this, nor taken any objection to it at the time, or given any notice that he wished the subject to be discussed; he lies by for two or three years, and then calls upon the churchwardens to prove a sufficient notice by evidence. He avers a negative, and a negative capable of proof; but he examines, as I have already observed, no witnesses to prove it. At the end of three or four years can it be expected that the witnesses should recollect an exact notice? all they swear is that they cannot speak positively. A copy of the notice is produced; I am not to believe this is fabricated; and the vestry clerk says that it was his habit to send such notices, though he cannot recollect the precise notice. He apprehends he did send a written notice of that date, and that it was the practice of the churchwardens to direct him to send such notices. There is no evidence what-[387]-ever on the other side to shew there was no such notice. Even if there had been any informality, I cannot help agreeing with the counsel for the churchwardens that the facts which afterwards took place must be held to have confirmed the rate; for the parishioners pay it; they receive a report upon this rate, and they vote their thanks to the churchwardens for their conduct. I think this conduct would confirm the rate.

The Court has been cautioned against sanctioning the churchwardens in improper expenditure, and in raising money against the will of the parish. I agree with the

observation: but never was observation more inapplicable; never were persons who proceeded more properly and regularly than these churchwardens have done. The Court also is to be cautious not to suffer the whole business of the parish conducted, as it necessarily must be, by illiterate persons, and persons ignorant of business, to be set aside on the ground of high legal notions for which no authority has been produced, and by requiring strict proof of forms after the lapse of three years; this would be to throw every thing into confusion, and to encourage litigation.

I am of opinion that the libel is sufficiently proved, and I pronounce for the rate. It has been usual to give costs in these cases, unless there is strong ground to justify the defendant. It is also the duty of the Court to protect the parish officers from expence unless they have acted improperly, and to repress individuals from [388] disturbing the harmony of the parish and involving it in litigation. I think I should stop short of my duty if I did not condemn the party in costs.

Costs given.

[389] **LEITH v. CLIFF.** Consistory Court of London, Michaelmas Term, Nov. 29th, 1816.—In answer to a libel in a suit for subtraction of tithes it is not sufficient to state deductions generally; they must be specifically set forth.

In a suit brought by the Rev. Lockhart Leith, rector of South Ockenden, in the county of Essex, against John Cliff, a parishioner, and inhabitant of the said parish, for subtraction of tithes, the 27th article of the libel pleaded that, "John Cliff, from the year 1807, and until the present time, hath possessed and enjoyed a certain mill for grinding corn situate upon his said lands and premises in the said parish of South Ockenden, containing five pair of stones, and the same works by water and also by wind; and that in each year commencing at and from the 29th day of September, 1807, and until the 29th of September, 1813, the said mill hath produced to the said John Cliff after all expences and out-goings of every description were paid and satisfied the clear sum of 4000l., 3500l. or at least 3000l.; and the tithe thereof accordingly was and is due to the Rev. Lockhart Leith."

The answer of John Cliff to this article denied the statement in the same words in which it was given; and set forth generally that instead of a gain there was a loss from the mill.

[390] Arnold and Jenner in objection to the answers. The party must set forth the deductions he claims; it was so directed on a plea as to the net profit, when the answer generally denied it in *Lagden v. Robinson and Green* (Consist. London, July 10, 1807), where it was stated that there was no profit; but further answer being required as to deductions, they were afterwards set forth in plea, and tithe to the amount of 65l. was recovered.

Per Curiam. I have no doubt on this point; the party must set forth the deductions claimed.

[391] **BURNELL v. JENKINS.** Arches Court, Michaelmas Term, Dec. 2nd, 1816.—A rector held not to have been let, in the sense of the 2 & 3 Ed. 2, in the carrying away his tithes. Sentence of the Court of Llandaff reversed.

An appeal from the Consistory Court of Llandaff.

This was an appeal brought by Edward Burnell, of the parish of Newton Nottage, in the county of Glamorgan, against the Rev. Richard Jenkins, rector of that parish, in a suit for subtraction of tithes which had been decided in the Consistory Court of Llandaff, on the 22d of December, 1814.

It appeared from the proceedings that the appellant had a hay-field of four acres, called Shortland, out of which there had been for many years a gate into the public road: but in 1813 he removed this gate, and filled up the gateway with a wall, and determined to carry his hay through an adjoining field with which there was a communication by a gap; in pursuance of this intention, [392] when the hay was cut and made into grass cocks, the usual state for tithing, he gave notice to the collector of the tithes for the rector who had attended to tithe the hay that it was to be carried through the adjoining field. The rector refused to carry it by the new way, but insisted that it should go through the old gate, and sent two men to pull down the wall which had been erected in the place of the gate; this attempt was successfully resisted by the farmer, and the tithe-hay was left on the ground, where it rotted; it was for the subtraction of this tithe that the suit was brought; and the Court of

Llandaff decided in favour of the rector, and held that the tithe had been subtracted; and condemned the defendant in the costs of the suit.

It appeared in the course of this cause that the witnesses had not been examined upon the libel; but upon interrogatories or designations furnished to the examiner by the proctor: and that, in point of fact, they had never seen the libel they were adduced to prove.

The amount of the tithe claimed was one pound.

Swabey and Jenner for the rector insisted upon his right to take his tithes by the usual and accustomed way; and argued that the obstruction offered on the present occasion clearly amounted to a withholding of the tithes; and cited the 2 & 3 Ed. VI. c. 13.(a)

[393] Phillimore and Lushington for the appellant denied that the rector was let or hindered in the sense of the statute of Edward VI. or could insist upon any customary or fixed way by which he was to take away his tithes; the way by which he was to take them was that by which the farmer carried away the other nine-tenths of the crop; and this way the farmer might vary from time to time as might best suit his convenience; or the course of agriculture he might adopt with respect to his farm.

Judgment—*Sir John Nicholl*. This is a proceeding instituted in the Consistory Court of Llandaff by the Rev. Richard Jenkins, rector of Newton Nottage, against Edward Burnell, a farmer and parishioner, for the subtraction of tithes. The Court of Llandaff has pronounced [394] for the value of the tithes, viz. twenty shillings, and costs.

The case comes on here on the same evidence as in the Court below. There have certainly been irregularities in the proceedings of the inferior Court; but it was always laid down by my predecessors that this Court should endeavour, in the best way it could, to get at the substantial justice of the case, and not allow either party to be injured by the irregularities of the inferior jurisdiction.

The libel is in the usual general form; no allegation has been given by the defendant; but he has put in his answers, and on them witnesses have been examined; it is not uncommon in the country courts to consider answers as a responsive allegation, and to examine witnesses upon them. The judge had heard upon the admissibility of the answers, and each party seems to have fully understood the real point at issue between them.

The case does not turn on any question of right, or quantity, or value, or setting out of tithes; but the real question at issue is whether the rector was illegally prevented from carrying away the tithes, whether he was "let or stopped" in the sense of the statute of Edward VI.; if so, double value is to be recovered. The case turning upon this point, it certainly would have been more regular to have pleaded the facts specially, either in the original libel, or in additional articles after the answers were put in; but this is not done: a strange proceeding takes place called a designation of the witnesses: i.e. the proctors on each side set down [395] a full statement of what each witness can say, which is given to the examiner to examine by: this is a very irregular and dangerous practice. If a case depend on special facts, those facts

(a) And be it also enacted by the authority aforesaid, that at all times whatsoever, and as often as the said predial tithes shall be due, and at the tithing time of the same, it is to be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth, and severed from the nine parts, and the same quietly to take and carry away: and if any person carry away his corn or hay, or his other predial tithes, before the tithe thereof be set forth; or willingly withdraw his tithes of the same, or of such other things whereof predial tithes ought to be paid; or do stop or let the parson, vicar, or proprietor, owner or other their deputies or farmers, to view, take, and carry away their tithes as is aforesaid; by reason whereof the said tithe or tenth is lost, impaired, or hurt; that then upon due proof thereof, made before the spiritual judge, or any other judge, to whom heretofore he might have made complaint; the party so carrying away, withdrawing, letting, or stopping, shall pay the double value of the tenth, or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expenses of the suit in the same: the same to be recovered before the Ecclesiastical Judge, according to the king's ecclesiastical law.

should be specially pleaded ; the party may then object if they are irrelevant, and the witnesses may be cross-examined to them. It is only by this mode of proceeding that true justice can be got at, and evidence be obtained on which the Court can rely. Designations and evidence taken on them, as has been done here, are little more than *ex parte* affidavits.

In this particular case, however, there seems little doubt as to the facts upon the general result of the evidence : the Court can only take the case as it finds it ; and I shall now proceed to examine its merits.

The plaintiff is a clergyman, rector of Newton, and resides there ; the defendant is a farmer, who occupies two fields abutting on the road leading from Newton to Nottage, another village in the same parish, and at which he resides. One of these fields, that nearest to Newton, was, in the year 1813, a fallow ; the other, that nearest to Nottage, was mowed for hay. There had been gaps from each of these two fields into the road, and also from one field to the other. In the course of 1813 the farmer stopped up the gap from the hay-field into the road, walling up the principal part of it, about two-thirds ; and filling the rest with thorns. In this situation the hay was made in the field nearest Nottage, and the tithe was set out on the 20th of July : there being thus no road [396] to it but through the fallow-field ; and the gate in the fallow-field was nearest to the residence of the rector, and furthest from that of the farmer. A plan has been exhibited by which this is rendered clear. By the plan and other evidence it also appears that another gateway out of the hay-field into the road, and nearer to Newton, had been stopped up by a former tenant, seventeen or eighteen years before ; and a new opening or gateway was then made nearer to Nottage, and close by a house called Shortland Cot ; this latter opening was the gap already stated to have been partly walled up by Burnell ; what were his motives in doing this has not been shewn, it might be to save a gate, it might be less expensive in fencing ; the field being near the highway, it might be for more protection against trespass by cattle ; it might therefore be done for his more commodious and convenient occupation : there is nothing to shew that it was done maliciously and vexatiously ; it must have occasioned similar, nay greater, inconvenience to himself in carrying away his crops, than it did to the rector.

On the 20th of July the tithes were set out. Rees states he was present when the farmer shewed the tithing man the way he was to carry his tithe by the gap to the fallow-field, and so to the road ; the tithing man raised no objection, but said it was sufficient, and the parties separated in perfect good humour. The farmer had no reason to expect any dispute about the way : the matter was communicated to the rector, who considered he had a right, and insisted on the exercise of it ; and [397] determined to go through the gap by Shortland Cot, though the other was the nearest way. Williams, his own witness, states that he ordered him to take the tithe, and to enter the field at the old gap, two-thirds of which were walled up. He began, therefore, to pull down the stones ; the farmer came up and desired he would desist, and told him that he meant to carry his own hay by the other way ; the witness told this to the parson, who said he would go by the gap, and no other way ; he came to the spot, and the farmer shewed him the other way, and said he intended to take his own by that way. The witness thinks it would have been easier to go through the other gap than to pull down the stones. The rector said, " Damn you, you rascal, do you prevent me from taking my tithes ? " To this the farmer replied, " No ; " but shewed him the other way. The rector, however, persisted. On a question being put, why he was so ill-natured with his parishioners, he said he never was easy but when quarrelling with them.

This is the account given by the rector's own witness ; there is no reason to doubt his truth or accuracy ; his general credit is established by the rector's having produced him ; he is confirmed by Coleman, and by the history of the general *res gesta*. It has been endeavoured to shew that there was no sufficient gap by which it could be carried the other way : but this appears to have been an after-thought, and there is no proof of it ; the utmost that arises from the evidence on this point is, that the witnesses had not observed it. It is proved by others that it had been used before ; the farmer [398] carried his own crop that way ; it was not the ground of objection taken by the rector at the time : he does not say, I cannot go that way because it is an unfit road ; the fallow is heavy, and my horses are weak ; nothing of the sort is suggested, he stands on his own indisputable right to go through the gap by Shortland

Cot, and insists upon it that he has been "stopped and let." This is an extreme right; and to establish it, it must be made out that this was a stopping and letting within the meaning of the statute. It appears in evidence that there was another road by which he might have carried his tithe, and that a more convenient road, because equally good, and nearer; and he has expended several hundred pounds to establish this right—to go by a more inconvenient way. In support of the position of law I expected some authority in point to be adduced in which it was laid down that if a farmer had once made an opening, and tithes had been carried through it, he may not afterwards for his own convenience and occupation shut up that opening, even though he make another through which the rector can as conveniently carry his tithes. Cases have been cited from the common law in which prohibitions have been refused to shew that the Court may decide on the way by which the parson is to carry. This Court cannot decide on a strict question of the right of way: the only question I can decide is whether he was legally obstructed. It is laid down by Sir Simon Degge (part ii. c. 14) that if the owner of the [399] soil, after he has set out his tithe, shuts up the way, it is no good setting out: but here there is no shutting up of the way; the farmer did not refuse to allow the rector to carry away the tithes, this gap was stopped up before; there was another opening equally convenient, through which the rector was invited, and through which the farmer carried his own crop. How can any court of justice hold that by this the statute was violated? But it must not be understood by this that the farmer may stop a way convenient to the parson if he open another which is convenient to himself, but which may be very inconvenient to the parson, especially if it be done with a vexatious intention, such a proceeding may amount to an absolute obstruction, and to a fraudulent denial of tithe. I by no means lay down that the farmer may at his pleasure stop up a gap, and subject the clergyman to unreasonable inconvenience. This is not a case of that sort.

Again, if the rector could rest his case on an ancient right of way (how far such a case could be tried here collaterally I do not say), yet this opening was only made a few years before; it is shewn by several of the witnesses that there was an older way than this, which was stopped up by a former tenant.

The grounds on which the Chancellor of Llandaff decided this question are not set forth: but he called for information respecting a verdict on a trial between the same parties at the great sessions at Cardiff; one should have been led, therefore, to expect that that verdict would have been [400] the ground of his sentence: but it is exactly the contrary. The issue appears to have been substantially the same in both cases. Burnell brought an action for damages against the rector for not carrying away the tithes when they were set out. Jenkins pleaded not guilty, set up the obstruction of the legal road, and Burnell obtained a verdict. The ground must have been that there was no right of way, and that the rector was not obstructed. I am entirely of the same opinion; I think the rector was not let or hindered in carrying away his tithes, and that he had a fair and reasonable opportunity of carrying them away.

On these grounds I reverse the sentence. But certainly a further consideration remains, of importance to the justice of the case—that of costs. In these courts it has always been held that costs are a matter of discretion, not of capricious discretion, but according to the just consideration of all the circumstances. It is the duty of the Court on one hand to protect parties in the fair assertion of their just and legal rights; and on the other hand to check vexatious litigation. The Court of Appeal must endeavour to put parties in the situation in which they would have been if the court below had done right. It appears that the rector thought he had a legal right; though the case in some of its parts exhibits a lamentable instance of the effect of ungovernable passion: he did offer afterwards to refer the matter to the arbitration of two magistrates before the trial at Cardiff. This was refused, and perhaps properly, for I think it was hardly a fit case to refer to magistrates, because a [401] right was set up, and a question was made under the statute of Edward VI. But I cannot consider the defendant as not subject to some degree of reprehension. It is laid down that the rector may remove obstruction if it is thrown in his way: this may not be the most adviseable species of remedy; and the rector, if he resort to it, does it at his own risk of trespass, if he is wrong. Burnell did not warn the rector against the trespass, and reserve himself for his legal remedy, but prevented the pulling down of

his fence by force: if both had gone on, it might have led to further mischief, and ended in violence and riot, and possibly in bloodshed; but the rector, finding him resolved, sent his cart away. Burnell is also not averse to legal proceedings, for he brought a suit for the small damages which accrued, and put the rector to the expense of sixty pounds' costs, when the whole question might have been determined by the suit then going on in the Ecclesiastical Court. Another circumstance weighs still more with me; he not only refused to let the matter be settled, but when an arbitration was offered, he said he could not settle it without consulting the other parishioners. I do not mean to say that there may not be questions with the rector which the parishioners may agree to have tried by one of them, but I cannot make out that this is a case of that sort; this is not a general but a particular question. I think, therefore, there is some appearance of a combination among the parishioners.

What the Court of Llandaff ought to have done would have been to have dismissed the defendant, [402] but without costs, or with something merely *nomine expensarum*. But, on the other hand, the sentence having pronounced for the tithes, and condemned the defendant in costs, he was driven to the necessity either of appealing to this Court, or submitting to injustice. I think him on that ground entitled to his costs in this Court.

I therefore reverse the sentence, and dismiss the cause without costs in the court below; but I condemn the respondent in the costs of the appeal.

[403] DUNN v. DUNN. Peculiars Court of Canterbury, Easter Term, May 17th, 1817.—Adultery proved in a suit for separation *à mensâ et thoro*, but the conduct of the husband such as to bar him from a sentence in his favour.

[Reversed, 1818, 3 Phill. 6.]

John William Dunn instituted a suit against Eliza Papps Dunn, his wife, for a divorce *à mensâ et thoro*, by reason of adultery. It appeared that Mrs. Dunn eloped from her husband in October, 1815, with Mr. Knightley Musgrave Clay; that she was brought back by her mother, and reconciled to her husband on the 1st of November following; and that on the 4th of December in the same year she again eloped with Mr. Clay. There was sufficient proof of the adultery: but the point made in the case was that Mr. Dunn, by his negligence and connivance, had barred himself from any title to the remedy he claimed. Mr. Clay, who had been an officer in the same regiment (the 9th Dragoons) with Mr. Dunn, had been in habits of intimacy with him before his marriage, and after that event visited frequently at his house.

The fifth and sixth articles of the libel pleaded, "That on or about the 16th day of October, in the said year, 1815, the said John William Dunn went to London, accompanied by his wife, the said Eliza Papps Dunn, to the house of his father, Mr. [404] John Dunn; and soon after their arrival there the said Eliza Papps Dunn, in the absence of her said husband, quitted the said house in a hackney coach, and did not return thereto. That the said John William Dunn being greatly surprised and alarmed at the sudden disappearance of his said wife, made the most diligent search and enquiry for her, and at length found she had left London, but was unable to discover to what place she had gone. That in the beginning of the month of November following Dorothy Ann Papps, the mother of the said Eliza Papps Dunn, having received intelligence that the said Eliza Papps Dunn was residing at St. Omer's, in France, under an assumed name, proceeded thither, where she found the said Eliza Papps Dunn, and the said Knightley Musgrave Clay, living and cohabiting together as man and wife, and passing by the names of Mr. and Mrs. Brown. That they the said Knightley Musgrave Clay and Eliza Papps Dunn, during the time they so lived together as aforesaid, frequently slept in one and the same bed, whereby she the said Eliza Papps Dunn committed the crime of adultery. That the elopement of the said Eliza Papps Dunn, as before pleaded, was represented to the said John William Dunn, and especially by the said Dorothy Ann Papps, not to have arisen from any criminal connexion, but to have been occasioned by other circumstances. That the said John William Dunn, being deceived by such false representations, did, upon the entreaty of the said Dorothy Ann Papps, consent to meet her and the said Eliza Papps Dunn on their landing at Dover [405] from France, and accordingly met them there, on or about the 1st day of November, 1815. That upon such meeting taking place the said John William Dunn, being entirely ignorant of the adulterous intercourse which had taken place as before pleaded, was induced, at the earnest entreaties of the said Dorothy

Ann Papps and his said wife (who made the strongest protestations of innocence as to any adulterous intercourse, and expressed great contrition for her misconduct in quitting her said husband), to receive her back again ; and they then returned to his aforesaid house, at Ham Common."

Dorothy Ann Papps, the mother of Mrs. Dunn, deposed, "That she was at the house of John William Dunn, Esq., at Ham Common, on the 16th of October, 1815 ; that on the morning of that day John William Dunn and Eliza Papps Dunn left their house to visit Mr. John Dunn, his father, in Bedford-street, Covent Garden. About seven or eight o'clock the same evening J. W. Dunn returned, accompanied by his father, and informed the deponent that his wife had quitted his father's house to inquire the character of a servant, but had not returned by the time appointed for their leaving town ; and that he had been to every house where she visited in London, but could not find her. He was greatly agitated, and intimated to the deponent his apprehensions that she was gone off with Knightley Musgrave Clay. The deponent having never before heard any suspicion of an improper attachment between her daughter Dunn and Knightley Musgrave Clay, could not believe that there was [406] any foundation for these apprehensions, but thought that Eliza Papps Dunn must have been detained at some friend's house beyond the time for returning home ; and she therefore left Ham that evening and came to London in search of her, accompanied by Mr. Dunn. She called at the house of every friend where she thought it likely that her daughter might be found ; but could not, nor could her husband gain any intelligence of her, until about a week or ten days afterwards, when a letter was received from her, addressed to Diana Andrews, the nursery-maid, who had charge of the children at Ham Common. The purport of it was to make inquiries about the children, and to desire Diana Andrews to write to her thereon, and it stated that the said Diana Andrews might ascertain how to direct her letter to her by inquiring at Mr. Mereweather's in Marlborough-street. She accordingly went to Mr. Mereweather's ; and having understood that he was the friend of the said Mr. Clay, but a stranger to her daughter, the deponent asked him for Mr. Clay's address instead of for that of Mrs. Dunn. Mr. Mereweather informed her that the only address he had by which to write to Mr. Clay, was that of ' Mr. Brown, St. Omer's, France,' which he gave her on a piece of paper, but he did not say that Mr. Clay was passing under the name of Mr. Brown. The deponent communicated this address to Mr. Dunn, who, thinking it likely that some intelligence of his wife might be gained from Mr. Brown, requested the deponent to go to St. Omer's to him, which she consented to do, and immediately left town for that purpose. Mr. [407] Dunn accompanied her to Dover, where he remained, and she proceeded alone to St. Omer's. She arrived there about five o'clock in the evening, and stopped at an hotel, the name of which she has forgotten. She inquired at the hotel for Mr. Brown, and a servant shewed her to his lodgings. On inquiring for him there, the servant said he was at dinner ; but the deponent replied that she was a friend of his, and she followed the servant into the dining-room, and found Mr. Clay and Eliza Papps Dunn at dinner together. The deponent reproached them with their conduct, called the said Knightley Musgrave Clay a villain, and asked her daughter how she could think of leaving her husband and children. In reply to which Mr. Clay assured her that he meant to act honourably towards Mrs. Dunn, by getting a divorce, and then marrying her ; and Mrs. Dunn said nothing, but burst into tears. The deponent insisted upon her daughter returning to England with her, which she agreed to do ; and accordingly left the room with the deponent to pack up her things for that purpose. Mr. Clay expressed his intention to leave his said lodgings likewise ; and accordingly proceeded into the adjoining room, as he said, to pack up his effects. When they had finished packing up, they both accompanied the deponent to the hotel where she had first stopped ; where, the gates of the town having been by that time shut, they remained that night. The deponent and her daughter slept together, and on the following morning went together in a post-chaise to Calais, to which place they were accompanied by Mr. Clay, [408] who went alone in another post-chaise ; but, on their arrival at Calais, they left him, and the deponent and her daughter went alone together to Dover. The deponent was so well pleased at getting her daughter to return with her to England that she did not ask her any questions as to the circumstances under which she was living at St. Omer's. When she left Dover for St. Omer's, Mr. Dunn said he would remain there until her return ; but she did

not then represent to him that the elopement of her daughter had not arisen from any criminal connexion, but had been occasioned by other circumstances as articulate, as she was at that time ignorant of the circumstances under which such elopement had taken place; nor was it in consequence of any such representations of the deponent that the said J. W. Dunn remained at Dover; but he did so of his own accord, and he requested the deponent to go to France alone; and, if she succeeded in finding Mrs. Dunn, to return with her to him at Dover. The deponent and her daughter arrived at Dover on the 1st of November, 1815. As the boat in which they were approached the shore from the packet, she observed Mr. Dunn walking on the beach. The said Mrs. Dunn left the boat first, and immediately went up to her husband, and they walked away together. The deponent, with Major Grant, a friend of Mr. Dunn's, who happened to come to England in the same vessel, followed them to an inn at Dover, which she thinks is called *The Ship*, and arrived there about a quarter of an hour after they had entered the same together. On entering the inn [409] they met Mr. Dunn alone in the passage; and after some general conversation Major Grant withdrew, and Mr. Dunn then said, 'I am perfectly satisfied with what Eliza has told me, and shall ask you no questions; it has made me very happy;' or he expressed himself in words to that very effect, as near as the deponent, in the agitated state of mind in which she then was, can now recollect. The deponent is unable to depose whether or not, upon this occasion, the said J. W. Dunn was ignorant of any adulterous intercourse between his said wife and the aforesaid Knightley Musgrave Clay, or whether she made any protestations of her innocence thereof, and expressed great contrition for her misconduct in leaving her said husband; or whether it was in consequence of such protestations and contrition that he was induced to receive her back again as articulate; for, after expressing himself satisfied with his wife's explanation, the deponent thought it as unnecessary as unpleasant to touch upon such a subject; but she says that she did not entreat him so to receive her back again; for, however grateful she might feel towards him for such an act, and however desirous that it should take place, she should not have thought herself warranted in attempting to accomplish it by any entreaties of her's; nor should she have wished it to take place, unless at his own spontaneous desire. The deponent, and Mr. Dunn and his wife, left Dover as soon after their arrival there as the horses could be got ready, and returned to the house of the latter at Ham Common."

[410] Isabella Mary Dunn (the sister of the husband) swore, "That after the departure of Mr. Dunn and Mrs. Papps for France, she remained at his house at Ham Common for four or five days or a week; and about that time she received a letter from her brother to apprise her that he and his wife would be at home on the following day. The deponent had been previously desired by her father, in the event of Mrs. Dunn's returning home, to leave the house; and on receipt of the said letter she accordingly did so, and returned home to her father. She is, therefore, unable to depose what were the representations made to her brother on the subject of his wife's elopement by Mrs. Papps, or what were the protestations of innocence made to him by his wife, or what was the conduct adopted by him in consequence thereof, except that in the letter received by her (the deponent) he mentioned that his wife was innocent; and he afterwards assured the deponent that she was so; but in what terms she cannot now recollect, as the deponent said very little to him on the subject, and wished, from its unpleasantness, to drive it from her mind as well as from his as much as possible. She has since burnt the letter received from her brother: but she thinks she can recollect the contents, as they were very short. They were, 'Dear Isabella, I have found her, and she is innocent: we shall be home to-morrow.—Your's affectionately, J. W. Dunn;' or to that effect."

Lushington and Meyrick for Mr. Dunn.

Swabey and Jenner contra.

[411] *Judgment*—*Sir John Nicholl*. The marriage took place on May 15, 1813: the parties cohabited at different places, and had two children. The husband was an officer in the army: he had an intimate friend, Mr. Clay, an officer in the same regiment, who resided with his mother at Ham Common. The adultery is charged with him; and it is fully proved. Mrs. Dunn twice eloped with him.

But the material point is whether the husband is entitled to relief under the circumstances stated in the evidence. Adultery forgiven is no ground of separation—condonation bars sentence; but not necessarily where there is subsequent adultery,

though it will induce the Court to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to shew no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct; *volenti non fit injuria*; and Courts allowing such facility, instead of being the guardians of morality encourage corruption. On 16th Oct., 1815, the husband and wife went to town; she goes out on some pretence, and does not return; he goes back to Ham Common. It does not appear that he had then known of the adultery; but he intimated his apprehensions that his wife had gone off with Clay. Something, therefore, must have happened which he had observed to lead his mind to this suspicion. A week or ten days afterwards the nurse receives a letter from [412] her, telling her how she might learn where to address her by inquiring at a place named in London. The mother goes; finds the person mentioned, whose name was Mereweather. She asks for the address, not of Mrs. Dunn, but of Clay; it is given "to Mr. Brown, at St. Omer's." She communicates this to the husband. He desires her to go to St. Omer's; she goes; he goes to Dover, and waits there; the mother finds her daughter living with Clay; they then come to Calais; Clay remains there; the mother and daughter return; the husband receives her at Dover; he could not but know that she had been living in adultery with Clay. The mother says when she left the husband at Dover he said he would remain there, of his own accord, not at any suggestion of hers; he desired her to go, and if she found his wife to bring her to Dover. As the boat approached the shore, they saw him walking on the beach. The wife left the boat, went to the husband, and they walked away together: the mother and Major Grant followed them to the Ship Inn; they came a quarter of an hour after them; they met the husband in the passage; he addressed her, and said I am perfectly satisfied with what Eliza has told me; I shall ask you no questions; it has made me very happy. The mother does not know whether he was ignorant of the adultery, or that the wife made protestations of her innocence: for, after his professing himself satisfied, she thought it unnecessary to touch on the subject. The mother did not treat him to receive his wife. She should not have thought herself justified in using her en-[413]-deavours for that purpose, if it had not been his own spontaneous desire. Major Grant saw the mother and daughter with Clay at Calais; came with the mother and daughter. The husband was walking in agitation on the shore; his wife went to him, and they walked off together.

Here the husband is not receiving entreaties, contrition, or explanation; but his conduct is that of a husband affectionately receiving a virtuous wife; such would shew agitation when she approached; there is no mark of a husband sensible of injury. He asks no question of the mother, says not only that he is satisfied, but that he is made happy: there must have been some new arrangement mentioned to him which caused this. It has been pleaded that the mother having received intelligence, went to St. Omer's, and found her daughter and Clay cohabiting as Mr. and Mrs. Brown, as if it was a discovery of the mother's, whereas it appears that he was told the way to find her was to address Clay as Mr. Brown, at St. Omer's; that he was deceived by false representations, and on the entreaty of the mother received her. This is all false. That he was entirely ignorant of the adultery, though he knew she had eloped with Clay, had suspected her before; and she was found living with him. That she protested her innocence, and entreated him to receive her. If this had been proved, condonation under such circumstances would not bar subsequent adultery; but none of these allegations are proved.

The very circumstance of setting up a false case before the Court warrants every suspicion; there [414] is no trace of any contrition; of any injunction of the husband's in the way of caution against renewing the correspondence with Clay. He suggests and writes to his sister that she is innocent; it is impossible he could have believed her innocent; his sister did not; his father did not, for he required the sister to quit the house when she returned. Three days afterwards she told the servants she had been living at St. Omer's with Clay; she did not pretend innocence; she tells this, as it should appear, without any inducement. Clay returned to London; it does not appear what caution was used, except that her mother was living there; there must have been a communication and a plan laid; within five weeks Clay comes with a chaise to the neighbourhood, and they go off again; there is something clandestine; but it must be to deceive the mother; nothing appears that the husband did; he

might be furthering the plan and giving it all facility. They go off, intending to go to Scotland by water, then by land; they go to Lincoln, she scarcely conceals herself; she goes to Birmingham, where her husband had gone on military service; comes to London; writes letters. It does not appear that she had any interview with her husband, rather the contrary. She states that his father would throw her off if he took her again, not shewing any great apprehension of her husband.

There was a suit at common law, but no defence; no suit here for nearly six months; yet no appearance of any difficulty in finding her; no defence to the suit except by the counsel stating [415] as honourable men the difficulties which arise; the suit may be collusion.

The mother says her daughter told her at St. Omer's she should get a divorce, and Clay would marry her; it is not proved that this plan was communicated to the husband, and was what made him happy; but it renders the Court more jealous; whether this led to the intended journey to Scotland to get a divorce more easily; to the suit without defence. All this makes the Court jealous lest it should be made a party to a plan of the parties to get a divorce to marry the adulterer. But I do not decide on this ground but on the total failure of proof of the fifth and sixth articles, pleading the husband's ignorance of the adultery, the contrition of the wife, and the inducements used to persuade him to receive her.

On the whole I am so little satisfied; and the husband comes before the Court so little entitled to cast off his wife, that I shall leave him to the superior Court for his remedy, pronounce that he has failed in proof, and dismiss his wife from this suit.

[416] *METHUEN v. METHUEN*. Prerogative Court, Trinity Term, June 23rd, 1817.—A codicil virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument.

[Applied, *Busteed v. Eagar*, 1834, Milw. 349. Referred to, *Thorne v. Rooke*, 1840, 2 Curt. 799; *Henfrey v. Henfrey*, 1842, 4 Moore, P. C. 34. Applied, *Dempsey v. Lawson*, 1877, 2 P. D. 107; *O'Leary v. Douglass*, 1878, 3 L. R. Ir. 330; *Jenner v. Finch*, 1879, 5 P. D. 112; *Chichester v. Quatrefages*, [1895] P. 188.]

Paul Cobb Methuen, of Corsham Hall, in the county of Wilts, died on the 15th of September, 1816, leaving four sons and four daughters. Of the daughters two were single, and one was married to the Honourable General De Grey, and another to Lord Edward O'Bryen. The following testamentary papers were found:—

A will dated 12th of October, 1809.

A codicil dated 14th of April, 1812.

A codicil dated 10th of May, 1813.

A codicil dated 1st of April, 1815.

The only question in the case was as to the validity of the codicil of 10th of May, 1813. This codicil was propounded by the widow of the deceased who was the universal legatee for life named in it, and opposed by Mr. Paul Methuen, the eldest son of the deceased; and the [417] residuary legatee named in the will, who prayed probate of the will and the other codicils: the ground of opposition to the codicil in question was, that it had been virtually cancelled by a codicil of a subsequent date, viz. that of the 1st of April, 1815.

The two codicils were as follows:—

"A codicil to be annexed to the last will and testament of me, Paul Cobb Methuen, of Corsham House, in the county of Wilts, Esquire, which will bears date the twelfth day of October, one thousand eight hundred and nine.

"Whereas I, the said Paul Cobb Methuen, have, in and by my said will, with respect to the sum of fifteen thousand pounds, the money by my marriage settlement stipulated to be set apart as the portions of my younger children, directed that the same should be equally divided between such of my daughters as shall be living at my decease (except my eldest daughter now the wife of Lieutenant General De Grey), and I have also by my said will directed Frederic Lord Boston, and Sir Thomas Gooch, Baronet, trustees, in my said will named, to raise out of my personal estate and effects, after payment of my funeral expences, debts, and legacies, the sum of six thousand pounds, In trust to pay the same to all and every my daughter and daughters lawfully begotten or to be begotten (except my said eldest daughter Matilda De Grey) who shall [418] be living at the time of my decease or born afterwards in equal shares

if more than one; and if but one to such only daughter at the days and times therein-mentioned. And I did also in and by my said will further direct that the interest and dividends of the said sum of six thousand pounds should be by the trustees in my said will named applied for and towards the maintenance, education, and benefit of my said daughters until their respective portions became payable. Now in addition to and for a further provision for my daughters Gertrude Grace, Catherine Matilda, and Cecilia Penelope Methuen, and also for my said daughter Matilda De Grey, and likewise as and for a further provision for my dear wife Matilda Methuen, I do hereby further direct the said Frederic Lord Boston and Sir Thomas Gooch to raise out of my said personal estate and effects, after payment of my funeral expences, debts, legacies, the further sum of twelve thousand pounds of lawful money current in Great Britain, within eight months next after my decease, and to pay and apply the said sum of twelve thousand pounds unto my said wife, whose receipt shall be a discharge for the same; which said sum of twelve thousand pounds so to be further raised as aforesaid I do hereby give and bequeath unto my said wife, upon trust that my said dear wife do and shall place out the same at interest on government [419] or such other security or securities as she shall approve, and take and receive the interest and dividends thereof from time to time as the same shall become due and payable, to and for her own proper use and benefit. And upon this further trust and confidence that, immediately upon and after the decease of my said wife, the said principal sum of twelve thousand pounds, and all interest and dividends due thereon, shall be paid and applied unto and amongst all and every my said four daughters Gertrude Grace, Catherine Matilda, Cecilia Penelope Methuen, and Matilda De Grey, in such shares and proportions, and at such time and times, as she, my said wife, shall by any deed or deeds, writing or writings, to be by her duly executed and credibly attested, or by her last will and testament in writing, or any codicil or codicils thereto to be executed and attested as aforesaid, shall give, direct, and appoint the same. Provided nevertheless that the portion or portions so to be given, directed, and appointed by my said wife as aforesaid, shall be the sole property of my said several daughters, and independent of any of their husband or husbands, and her or their receipt or receipts alone shall be a sufficient discharge or discharges for the same; and also upon this further condition, that on the decease or deceases of all or any of my said daughters without leaving legal issue, then and immediately [420] after such her or their decease or deceases the share or shares of her or them as aforesaid shall be paid and applied unto my eldest son Paul Methuen, his executors, administrators and assigns; and in case all or any of my said four daughters shall happen to die before my said wife, then and in such case upon trust that the share of her or them so dying in the life-time of my said wife as aforesaid, shall devolve to and be paid and applied unto my said eldest son Paul Methuen, his executors, administrators and assigns. In witness whereof I have to this my codicil contained in two sheets of paper, set my hand and seal (that is to say, my seal to the ribbon which affixes the same together, and my hand at the bottom of the first sheet thereof, and my hand and seal to this second and last sheet thereof), this 10th day of May, in the year of our Lord one thousand eight hundred and thirteen.

“PAUL COBB METHUEN. L.S.

“Signed, sealed, published and declared, by the said Paul Cobb Methuen, as and for a codicil to his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses thereto in his presence, and in the presence of each other—

“John Merewether, attorney, Calne; Anthony Cooper, butler to testator;
William Eadie, footman to Mr. Paul Methuen.”

[421] “A codicil to be annexed to the last will and testament of me Paul Cobb Methuen, of Corsham House, in the county of Wilts, Esquire, which will bears date the twelfth day of October, one thousand eight hundred and nine.

“Whereas I, the said Paul Cobb Methuen, in and by my said will, with respect to the sum of fifteen thousand pounds, the money by my marriage settlement stipulated to be raised for the portions of my younger children, and disposed of by me as I should by deed or will direct or appoint, have directed and appointed that the same should be equally divided between such of my daughters (my son being otherwise provided for) as should be living at the time of my decease (except my eldest daughter Matilda, now the wife of Lieut. Gen. De Grey). And whereas I have by my said will also directed the Rt. Hon. Frederic Lord Boston and Sir Thomas Gooch, Bart.,

trustees in my said will named, to raise out of my personal estate and effects, after payment of my funeral expenses, debts, and legacies, the sum of six thousand pounds, in trust to pay the same to all and every my daughter and daughters, lawfully begotten, or to be begotten (except the said Matilda De Grey), who should be living at the time of my decease, or born afterwards, in equal shares (if more than one, and if but one to such only daughter), at the days and times therein [422] mentioned; and I did also in and by my said will further direct that the interest and dividends of the said sum of six thousand pounds should be by my trustees in my said will named applied for and towards the maintenance, education, and benefit, of my said daughters, until their respective portions should become payable. And whereas since making my said will, and by a certain indenture of demise bearing date the 31st day of March last, made or mentioned to be made between me the said Paul Cobb Methuen, of the first part; and one of my said daughters, namely, Gertude Grace Methuen, of the second part; the Rt. Hon. Edward O'Bryen, commonly called Lord Edward O'Bryen, of the third part; and Lord James O'Bryen, Giffin Wilson, Esq., the Rev. Thomas Anthony Methuen, and John Andrew Methuen, Esq., therein more particularly described, of the fourth part; in contemplation of a marriage intended to be shortly had and solemnized between the said Lord Edward O'Bryen and my said daughter the said Gertrude Grace Methuen secured and assured as and for a marriage-portion for my said daughter Gertrude Grace Methuen, the sum of ten thousand pounds of lawful money of Great Britain, to be paid Lord James O'Bryen, Giffin Wilson, Thomas Anthony Methuen, and John Andrew Methuen, their executors, administrators, and assigns, upon and under, [423] and subject to the several trusts, provisos, conditions, and agreements, as are mentioned, expressed, and declared in and by a certain indenture of settlement bearing even date with the said recited indenture of demise, and made or mentioned to be made between the said Lord Edward O'Bryen of the first part; I, the said Paul Cobb Methuen and my said daughter Gertrude Grace Methuen, of the second part; and the said Lord James O'Bryen, Giffin Wilson, Thomas Anthony Methuen, and John Andrew Methuen of the third part. Now I, the said Paul Cobb Methuen, in consideration of such provision so made to and for my said daughter Gertrude Grace Methuen, do hereby revoke, annul, and make void the said direction and appointment so by me before made in and by my said will or otherwise with respect to the said several sums of fifteen thousand pounds and six thousand pounds, so far only as respects my said daughter Gertrude Grace Methuen, and her said share or proportion of the same respectively, but not further or otherwise with respect to my said other daughters (except the said Matilda De Grey) and also except as to one thousand pounds, part of the said sum of six thousand pounds. And I the said Paul Cobb Methuen, do by this my said codicil request and direct the said Frederic Lord Boston, and Sir Thomas Gooch, Bart. to raise the sum of five thousand pounds [424] only, instead of six thousand pounds, in the manner directed by my said will as aforesaid, and to pay and apply the same in the manner also directed by my said will (except as to the said Matilda De Grey and Gertrude Grace Methuen). And I, the said Paul Cobb Methuen do also by this my said codicil, as a further provision for my said daughter Matilda De Grey, hereby further direct the said Frederic Lord Boston, and Sir Thomas Gooch, Bart. to raise out of my said personal estate and effects after payment of my funeral expenses, debts, and legacies, the further sum of three thousand pounds of lawful money of Great Britain, within eight months next after my decease, and pay and apply the same unto my said daughter Matilda De Grey, to and for her own proper use and benefit. And I, the said Paul Cobb Methuen, do by this my said codicil, as a further provision for my said dear wife Matilda Methuen, give and bequeath to her one annuity or yearly sum of six hundred pounds of lawful money of Great Britain, to be paid to her and her assigns by two equal half-yearly payments in the year, for and during the term of her natural life, to and for her and their own proper use and benefit, the first payment thereof to begin and be made immediately upon and at the expiration of six months next after my decease; and I do hereby charge and make liable all and singular my [425] estates both real and personal, with the payment of the said annuity so by me by this my codicil given and bequeathed to my said wife as aforesaid. In witness whereof I have to this my codicil contained in four sheets of paper set my hand and seal (that is to say) my hand to the three first sheets thereof, and my hand and seal to the last sheet thereof, this first day of April, One thousand eight hundred and fifteen.

“PAUL COBB METHUEN. L.S.

"Signed, sealed, published, and declared, by the said Paul Cobb Methuen, as and for a codicil to his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses, in his presence, and in the presence of each other,

"John Merewether, attorney, Calne, Wilts; Edward M'Kensie, butler to Mr. Methuen; John Pearce, footman to Mr. Methuen."

Mr. Merewether, the drawer of the codicil of the first of April, 1815, after detailing the circumstances which gave rise to that instrument, expressed his full conviction that the codicil was meant and intended by the deceased to take effect in the place and stead of his former codicil of the 10th of May, 1813; the provisions of which, in consequence of the marriage of his daughter Gertrude with Sir Edward O'Bryen, were embodied in the codicil of the 1st of April, 1815. He deposed, "That the said last-mentioned codicil was prepared by [426] him for that purpose; and he was quite confident that the deceased so understood it, not only from the disposition made in the same codicil being in conformity with the deceased's intention, but also from his declared approbation thereof when read over and explained to him, and the satisfaction he expressed at the manner in which the deponent had contrived to meet his wishes."

Adams and Phillimore in support of the codicil of the 10th May, 1813.

Swabey and Lushington contra.

Judgment—*Sir John Nicholl*. The question is, whether the codicil of the 1st of April, 1815, is to be considered as an addition to the codicil of May, 1813, or as a substitute for and consequently revocatory of, it. The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further; but the same rules do not apply in a case relating to the factum of a will which would apply if the inquiry were concerning the construction of it.

In the Court of Probate the whole question is one of intention: the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court. Suppose in a case of fraud, or in a case of error, the residuary clause is omitted, it may be inserted by the Court.

It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence. [427] On the face of the papers it rather appears as if the testator intended one for the other; it certainly is not absolutely impossible that the deceased might have intended to have increased the portions of his daughters, and the annuity of his wife; but circumstances render it highly improbable that he should so have intended. There is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever; the doubt, if any, is not from the intentions of the deceased, but from the mode Mr. Merewether has pursued in carrying them into effect; it is quite impossible there can be any mistake as to the widow. It is unnecessary to detail the evidence; there can be no doubt as to what the deceased intended, and what Mr. Merewether intended he should do. It would certainly have been better if Mr. Merewether had introduced an express revocation into the codicil; but, on account of an omission of that kind, is the Court to carry into effect that which is not the intention of the deceased? Other circumstances are strongly confirmatory of the intention; the personal property is not more than 3000*l.* or 4000*l.* Mrs. De Grey's legacy, therefore, must suffer defalcation; she would clearly have less than the other daughters, when the testator intended they should be equal. It is true that the deceased was expressly told that the former codicil was to be destroyed, and he did not destroy it; no immediate inquiry was made after it; there is reason to think it was not at that time [428] in London; it was found on his death in the drawer of his library table, in Wiltshire, while the other testamentary papers were in a separate trunk. The strong probability is that he never thought of the circumstance again; it is difficult to entertain any doubt as to the real intentions of the deceased. The papers themselves lay a strong ground, and Mr. Merewether corroborates them. I pronounce for the will, and the other three codicils: but this codicil is not to be included in the probate.

I direct the expenses of this proceeding to be paid out of the estate.

COLE v. REA. Prerogative Court, Michaelmas Term, Nov. 12th, 1817.—The duty of a next of kin to take out an administration.

Thomas Rea died intestate: six months after his death no administration was taken out to his effects, when a creditor applied for it. The next of kin then appeared,

and prayed that the administration might be granted to him in preference to the creditor.

The Court was moved that the creditor should be allowed his costs.

[429] *Judgment*—*Sir John Nicholl*. It was the duty of the next of kin to have taken out this representation earlier: the creditor has been compelled to take these steps to recover his debt; he is, I think, entitled to his expenses.

Costs given.

[430] LORD HERBERT v. THE DOWAGER PRINCESS OF BUTERA, FALSELY CALLING HERSELF LADY HERBERT. Arches Court, Michaelmas Term, Nov. 3rd, 1817.—A caveat entered against an inhibition: the inhibition refused.

[See further, 1819, 3 Phill. 59.]

A citation was taken out in the Consistory Court of London on the 11th of March, 1817, in a suit of restitution of conjugal rights, by Octavia, Dowager Princess of Butera (born Spinelli), asserting herself to be the wife of the Right Hon. Henry Robert Herbert, commonly called Lord Herbert.

On the 25th of April (the first session of Easter Term) the citation was returned; a citation, viis et modis was then decreed; and on the 2d of May (the second session of Easter Term) that citation was returned. On the 9th of May (the third session of Easter Term) Mr. Addams, proctor, exhibited a proxy for Lady Herbert.

On the 6th of June (first session of Trinity Term), in pain of the contumacy of Lord Herbert, the proctor for Lady Herbert brought in the affidavit of Christopher Flood, setting forth "that he was clerk to Mr. Greenwell, vestry clerk of St. Mary-le-bonne; and that, on referring to the books [431] of rates kept in and for that parish, it appeared that the house, No. 10 Upper Seymour Street, has, from the quarter commencing on the 1st of January, 1816, and up to the present time, been rated in the name of the Right Hon. Lord Herbert, and that the several rates have been paid by or on behalf of his lordship, and as and for his house or residence; and that it has been considered by the parish officers as his residence during that period."

The Court pronounced Lord Herbert contumacious, and in contempt for not appearing; and a decree was taken out against him to see proceedings. On the 13th of June (the second session of Trinity Term) the proctor for Lady Herbert returned the decree, and a decree was taken out to see proceedings, viis et modis. On the 20th of June (third session of Trinity Term) the decree was returned, and the certificate was continued. On the 27th of June (the fourth session of Trinity Term), in pain of contumacy, the proctor of Lady Herbert brought in a libel and exhibits, and the Court assigned to hear on admission the next court-day. On the 4th of July (the bye-day) the proctor for Lady Herbert prayed the libel to be admitted. Bedford appeared as proctor for Lord Herbert, but under protest to the jurisdiction. The Court, under the circumstances of the case, directed the admission of the libel to stand over till the next Court: but gave leave to Lady Herbert to produce and examine witnesses de bene esse, and decreed a requisition for the examination of witnesses and compulsories to appear before the com-[432]-missioners, and assigned the proctor for Lord Herbert to exhibit a proxy and extend his protest next court; on the same day Lady Herbert's proctor in pain produced a witness de bene esse, who was sworn. The proctor for Lord Herbert entered a protocol of appeal, and prayed an inhibition in the Court of Arches before a surrogate, which was decreed; but, on applying to have it sealed, it appeared that a caveat had been entered against it by Lady Herbert's proctor, who had been warned before a surrogate; the surrogate declined making any order, but referred the matter to the Judge. The præsertim of appeal, after the usual recital, stated that "he (the proctor for Lord Herbert) hath from the same and every one of them, and more especially from a certain pretended order or decree made and interposed by the said Judge, on the bye-day after Trinity Term, to wit, Friday the 4th day of July instant, whereby Bedford has appeared for the party cited, but under protestation, and Addams having prayed his libel and exhibits to be admitted; and the Judge under the circumstances of the case directed the admission thereof to stand over to next court. The said Judge did further give leave to Addams's party to examine witnesses thereon de bene esse, decree compulsories, &c. and afterwards on the same day did swear and admit a witness, notwithstanding no absolute appearance had been given on behalf of the party cited, and the protest under which his proctor had appeared had not been heard and over-ruled, or such jurisdiction judicially pro-

nounced for, and notwithstanding the said libel and exhibits had not [433] been admitted to proof, and suit contested between the parties."

The proctor for Lady Herbert transmitted the following statement to the Judge:—Addams, proctor for Lady Herbert, has entered a caveat against the inhibition passing the seal; and he contends that Bedford's party being pronounced, in contempt, is in the same state as if he had been excommunicated in facie ecclesiæ, and consequently is not entitled to be heard, even as to his protest, without appearing and tendering himself to take, and taking the oath to be obedient in future to the lawful commands of his ordinary, in order that, should his protest be over-ruled, he may be bound to appear absolutely; and paying the contumacy fees, and then being pronounced absolved from his contumacy and contempt. That this, therefore, being his state, he cannot claim the office of any ecclesiastical judge whatever; and that he is in no wise before the court below, so as to have any right of being heard there, much less to appeal. Further, that Bedford having appeared only under protest as to the rest of the cause, it is in pain of him and his party, and that he has nothing to do with it. If his protest is pronounced for, the whole falls to the ground; if not, he only suffers for his contumacy. Lastly, that the whole is so manifestly not an appealable matter, that the Judge will refuse his inhibition. The suit is for the restitution of conjugal rights, promoted by *Lady Herbert v. Lord Herbert*: the marriage took place in Sicily, and it is highly important to her not to lose the vacation in proving her libel, as well as lest the witnesses should die; and when Sir William Scott gave permission to examine the witnesses *de bene esse*, he observed that the opposition of Lord Herbert appeared to him to be merely for the purpose of vexation and delay.

The following directions were transmitted by the Judge to the registrar and the seal-keeper:—

"The statement made to me in this matter having been made by the proctor of the respondent, to which the proctor of the appellant has declined to write, the circumstances of the case are not before me in sufficient form to warrant me in deciding whether the inhibition shall or shall not issue; but, from what appears upon the face of the inhibition itself (assuming the extract sent me to be correct), and from a caveat having been entered against its issuing, I am of opinion that there is sufficient ground to induce me to direct that the proctor of the appellant shall observe the requisites of the 96th and 97th canons. When these requisites have been duly complied with, I will proceed, upon copies of the papers being sent me, further to examine the whole matter; the proctor of the appellant being at liberty to offer such observations in writing as he may think proper for the purpose of shewing that the order made by the Judge of the Consistory is a grievance to his party. It will be proper that the appellant's proctor should fully apprize his advocate when he applies to him for his signature to the inhibition that such application is made by the Judge's direction under the special circumstances of the case."

[435] The following statement was transmitted by Lord Herbert's proctor:—

"Mr. Bedford herewith sends to the registrar the papers required by the Judge, and begs leave to state that he declined writing in answer to Mr. Addams's statement, as he conceived the same to be irregular; and the measure of interposing a caveat against sealing an inhibition is, as he believes, unprecedented; but, under the liberty allowed by the Judge, he requests to observe that in this case there has been no personal service of any process. That the Consistory Court of London had decreed a monition to see proceedings by which the party was again called upon to appear; and, therefore, as he submits, was entitled to do so, and to shew cause why he did not appear to the original mandates, which would be the subject of his protest against the jurisdiction as at first. That his counsel have advised on facts stated to them that he has good grounds to assert that the Consistory Court of London has no jurisdiction in this case. And he submits that it is a grievance to exercise any act of jurisdiction whilst a protest against it is depending, and especially such as are set forth in the præsertim of his appeal, allowing the other party to examine all his witnesses *de bene esse* without precedent as far as he can learn in any case, and without even any allegation that any one of the witnesses is in such circumstances, the proof of which is usually required to found such permission, viz. in old age, in infirm health, or other circumstances which occasion the danger of losing his testimony; whereby, if the cause should [436] proceed, and issue be joined, the witnesses must probably be examined twice over. He takes leave further to state that the appeal

was interposed by direction of his counsel for the substantial interests of the party, and for no purpose whatever of vexation; and humbly submits that his appeal is matter of right."

July 21.—The order of the Judge. The dean of the Arches desires the registrar, or in his absence the seal-keeper, will acquaint the proctors in this case that, having considered the copies of the proceedings transmitted to him, together with the statements made by the proctors on both sides, he has directed the matter to stand over till the first day of the ensuing term, when he will hear advocates on the question whether the inhibition shall or shall not issue.

The judge moreover transmitted to the registrar the following memoranda:—

That no proxy was exhibited from Lord Herbert, or his contempt purged; and required his proctor to produce a precedent of an appeal being presented on behalf of a party so situated or from my order made *de bene esse*. He required from the proctor of Lady Herbert a precedent of a caveat having been entered or of an inhibition refused. He observed that he did not see any injury would arise to Lord Herbert as the inhibition might be granted before the first Consistory Court day; and if proceedings should in the mean time be taken by the proctor of Lady Herbert, they would still be subject to the effect of the inhi-[437]-bition if granted. That the 97th canon inferred discretion in the judge to grant or refuse his inhibition.

In the course of the long vacation the proctor for Lady Herbert extracted from the Consistory Court of London a commission to examine witnesses *de bene esse*.

Arnold and Swabey for Lord Herbert. The right of appeal is highly favoured and held sacred under all systems of jurisprudence; fit grounds are established against the abuse of it by the liability of the party to costs, and by calling for the signature of an advocate; it is so considered in Chancery.^(a) In our Courts the signature of an advocate is directed by the 96th canon. Whether there is any further discretion in the Court it [438] is not necessary to discuss: it is always considered with respect to laws not of recent enactment that the best interpretation is to be found in the practice; the practice has been constant; there is no precedent of a refusal; we are not aware of any caveat against the issue of an inhibition having been entered before this. The practice has been invariable that the signature of an advocate has been sufficient. The advocate may be mistaken; but the question whether it is appealable is one of the incidents to be decided at the conclusion of the cause by the Court of Appeal.

One objection taken on the other side is that the party has been pronounced in contempt, and is not entitled to be heard. Contumacy is of two kinds, actual and presumed. The one where the party before the Court refuses some order, the other where the party refuses or declines to appear. What is the legal effect of such contumacy? The Court proceeds in a regular and prescribed form; it proceeds in his absence, not by excluding him if he offers to appear; but by calling him again to see proceedings with an intimation that if he does not appear it will proceed without him; but then he is not to be excluded if he comes.

Another objection is that the party has not been purged of his contempt; according to the ancient practice, subsisting indeed till the late act (53 Geo. III. c. 127), where a person was pronounced contumacious, he was excommunicated; the legal disabilities of which were that no one could hold commerce with [439] him; and when he came before the Court it was necessary that he should be absolved, having not otherwise a

(a) The 96th canon is as follows:—Inhibitions not to be granted without the subscription of an advocate.

That the jurisdiction of bishops may be preserved (as near as may be) entire and free from prejudice; and that for the behoof of the subjects of this land better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations; it is ordained and provided that no inhibition shall be granted out of any Court belonging to the Archbishop of Canterbury, at the instance of any party, unless it be subscribed by an advocate practising in the said Courts, which the said advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause. The like course shall be used in granting forth an inhibition, at the instance of any party, by the bishop or chancellor against the arch-deacon, or any other person exercising ecclesiastical jurisdiction; and if in the Court or Consistory of any bishop, there be no advocate at all, then shall the subscription of a proctor practising in the same Court be held sufficient.

persona standi. Absolution applies to excommunication only. Contumacy is purged by appearance, and he is made subject to costs. In this case the party appeared under protest; he was not excluded, but received; and the Court assigned him to extend his protest. The citation was extracted on the 11th of March, in a process viis et modis. It was served on the Royal Exchange treating the party as if abroad; from the 11th of March to the 4th of July is no extraordinary delay for a person abroad. He comes then to shew there is no jurisdiction, which would shew that there has been no contempt. It is asked whether there is any instance of an appeal brought by a party pronounced contumacious? There is a difficulty to commence a search for precedents, unless it should have been made a prominent point in the case. One kind of case is, when the complaint has been against the excommunication itself, as in *Ackerly v. Oldham*, Deleg. 1811 (1 Phill. Ecc. 248). It is asked, Are there instances of an appeal from such a point as this? To this the answer is that there can be no instance of an appeal, because there is no instance of an order for an examination of witnesses de bene esse; in the Courts of Common Law no such proceeding is known; and in Courts of Equity the examination of witnesses de bene esse as here granted of all witnesses to be produced is, according to any search and enquiry we [440] have been able to make, unprecedented. These witnesses may be examined, if they are likely to die: but then if they live, they must be examined again. Affidavit also must be made of the age and infirmity of the witness in such a case. It is a grievance to do any act while the jurisdiction is disputed. In the Admiralty Court witnesses are sometimes examined de bene esse: but that is a Court of peculiar jurisdiction; and affidavits are always required that the parties so examined are going abroad. On this case also the jurisdiction is disputed by the protest, and it is a grievance to do any act whilst the jurisdiction is disputed. We demand this appeal as a matter of right, not of form.

Phillimore and Lushington for Lady Herbert. First. It is discretionary with the Court to grant or refuse the inhibition; this is to be inferred from the terms of the 97th canon,^(e) which seems [441] to distinguish between an appeal from a definitive sentence and from a grievance; and this is to be collected from the regulations laid down respecting the grant of inhibitions in the canon law and the books of practice. X. 2, 28, 37. Maranta, 6, 207, lib. 1.^(f) Gail. Obs. 144, 4, 5. Ayliffe, 297.^(g)

^(e) 97th canon. Inhibitions not to be granted until the appeal shall be exhibited to the judge.

It is further ordered and decreed that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid: and, moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (vouched by oath to be just and true) be exhibited to the judge, or his lawful surrogate, whereby he may be fully informed both of the quality of the crime and of the cause of the grievance, before granting forth of the said inhibition. And every appellant, or his lawful proctor, shall before the obtaining of any such inhibition, shew and exhibit to the judge, or his surrogate, in writing, a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the registrar in the country, or his deputy, tendering him his fee. And if any judge or registrar shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified, let him be suspended from the execution of his office for the space of three months: if any proctor, or other person whatsoever, by his appointment, shall offend in any of the premises, either by making or sending out any inhibition, contrary to the tenor of the said premises, let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring.

^(f) Secundum regulam principalem non procedere quando fuit iudici a quo inhibitum per superiorem: quia tunc non potest ulterius procedere in illâ causâ; quod tamen intellige quando inhibitio fuit legitime interposita, et cum causæ cognitione, et parte citatâ, nam quando est appellatum, in casu in quo non debuit appellari, vel quia causa est injusta, vel appellatio est frivola et frustatoria, tunc nunquam debet iudex ad quem, inhibere, nisi prius adhibeat causæ cognitionem super justitiam appellationis, alias inhibitio non valet. Marant. Spec. Aur. 6, act. 2, sec. 207.

^(g) In respect of an inhibition the judge ought to have a constat of the grievance,

Gregorius Tractat. de Appella-[442]-tionibus, lib. i. c. 10, lib. 2, c. 14, 2. Mandosius, De Inhibitionibus, qu. 25. Clarke, 323. Though we have found no precedent for a caveat against an inhibition, yet it is so strictly analogous to the course in all ecclesiastical proceedings, and to the practice of all Courts regulated by the canon law, that it cannot be objectionable.

Secondly. If it is discretionary, this is a case in which a Court would not grant an inhibition; these Courts are favourable to marriage. The danger of losing the evidence is obvious; and the examination of witnesses *de bene esse* cannot be an appealable act. Maranta Spec. 6, 206.(h)

Thirdly. The party is in contempt, and cannot appeal; his contumacy is not purged. Maranta, 6, 14. Oughton, 406. X. 2, tit. 28, 37. Gail. lib. 2, 14, 11. Mandosius, De In. lib. 33.

Arnold and Swabey in reply. The course of proceedings in these Courts in the absence of a party is not by examining witnesses *de bene esse*; but by taking a decree calling on him to see proceedings with intimation that otherwise the cause shall go on without him, and proceeding in it accordingly. Oughton, 295.

Judgment—Sir John Nicholl. This question is of a very unusual sort; whe-[443]-ther an inhibition on an alleged grievance shall issue in the ordinary mode; the inhibition was stopped early in the long vacation at the seal by a caveat. I considered that, as the first day of term in this Court occurred before the first sitting of the Consistorial Court, no injury could arise to the parties if I delayed to decide upon the point till I should be assisted by the learning, the arguments, and the information, of counsel.

However averse the Court may feel to any innovation in practice (for in modern times an inhibition has issued almost as matter of course), it by no means follows that, under particular circumstances, it may not be right and proper for the judge to consider and decide judicially whether he shall decree an inhibition; if there was not some such mode, great vexation and injustice might be done; many formalities of practice are not observed in ordinary cases, but they may be called for. The signature of an advocate to an inhibition may not be called for in ordinary cases; but it may be and it is specially required by the canon. What is expressly required by the canon is not repealed by disuse: the Court is to see whether it is necessary for the purposes of justice in the particular case.

The 96th and 97th canons apply directly to this question; by the 96th no inhibition can issue without the subscription of an advocate; by the 97th it must be exhibited to the judge. The reason pointed out for this is, "That he may be fully informed both of the quality of the crime, and of [444] the cause of the grievance, before the granting forth of the said inhibition."

The 96th is to preserve the jurisdiction unimpeached. To prevent frivolous suits, the subscription of an advocate is necessary, which applies to all cases civil and criminal, to appeals from a definitive sentence, and from a grievance.

Sacred as the right of appeal, and comfortable as the rule is, to all persons having to exercise jurisdiction, the law takes care it shall not injure either the jurisdiction or the suitor.

The 97th canon points out particular regulations for particular cases, as with respect to an interlocutory decree, or in causes of correction; and moreover it requires that the appeal should be exhibited to the judge.

The signature of the advocate is not sufficient; it must be exhibited in order that the judge may be informed of the quality of the crime, and the nature of the grievance. Surely then it is not without any discretion of the judge: it is not a mere right, how-

that he may know the truth thereof; for the causes of a grievance ought not only to be expressed in the instrument of the appeal, but also the truth of such grievance ought to be verified from the acts of the inferior judge, and from hence the judge *ad quem* ought to consider whether the cause be devolved or not: for as long as the cognizance continues before him, whether he ought to receive the appeal or not, and whether the cause be devolved or no, he ought not to inhibit the inferior judge. Ayliffe, Parer. p. 297.

(h) *Judex à quo potest pendente appellatione examinare testes senes, vel valetudinarios ad perpetuam rei memoriam, et non dicitur innovare.* Maranta Spec. Aur. 6, act. 2, 206.

Verus contumax non appellat. Marant. Spec. Aur. p. 6, sec. 14.

ever vexatious it may appear on the acts submitted to the Court. On sound considerations of justice the Judge must exercise his judgment, whether it is such a grievance as would justify him in tying up the hands of the Court, whence it is brought; though there may be but few cases, and those under extraordinary circumstances, in which the Court would refuse it. Though in ordinary practice no question is made on granting an inhibition, and reluctant as I must feel to withhold it, still I am of opinion that the Judge must [445] exercise his judgment on the point, and decide whether there is sufficient ground to issue his inhibition.

I come now to the consideration arising from the facts, as they appear on the acts of Court which have been exhibited: the nature of the act, complained of as a grievance, is to be collected from the acts of the court below. From those acts I collect the following circumstances:—In the first place, it occurred on the last sitting of Trinity Term before the long vacation in a suit brought by the wife against the husband; the cause stood on the admission of the libel and exhibits; and the certificate by ways and means was continued. I collect, also, that the suit was in *pœnam* against the husband; that he had been pronounced to be in contempt. No absolute appearance was given for him on that day; the act entered is as follows:—"Bedford appeared for the party cited; but under protest. Addams prayed the libel to be admitted. The Court, under the circumstances of the case, assigned the admission to stand over till the next court, but allowed Addams to examine witnesses *de bene esse*, and in pain admitted a witness to be produced."

The ground of Lord Herbert's appearance, therefore, was not to see proceedings, but solely to deny the jurisdiction of the Court, which was not determined as it is alleged in the *præsertim* of the appeal. His only purpose was to protest against that jurisdiction; denying that the Court could entertain the proceedings. By the acts of Court it appears that no proxy had been pro-[446]-duced: he was assigned to produce it at a future time; no notice of the contumacy had been taken; nor had the party appeared and purged himself from it, and expressed his readiness to pay the usual fees.

The Judge takes no absolute steps; he directs the libel to stand over, and the witnesses to be examined *de bene esse*, in order that their testimony may be used hereafter, if the cause will admit of it. The whole of this takes place on the last day of Trinity Term; and from the way in which the cause is set out the Court may fairly collect that the question at issue is respecting a foreign marriage. The Judge of the Consistory does not admit the libel; he merely admits the examination *de bene esse*. If there had been no interposition on that day the libel would have been admitted; and the wife's witnesses would have been examined during the vacation.

The question then is whether a proctor merely coming in on the last day, with a protest against the jurisdiction, without taking one step in the principal cause, is to call upon this Court to say that the Judge did wrong in directing the witnesses to be examined; those witnesses too being resident in a foreign country. This Court has the complete gravamen now before it; and if it were to issue its process to inhibit, it could not be more instructed as to the nature of the gravamen than it now is. Lord Herbert's only purpose was to try the jurisdiction; not to enter on the principal point in the cause: if so, no injury is done to him.

Whether being put into contempt precludes [447] questioning the jurisdiction I shall not now decide; but the question is, whether I shall stop all proceedings by this objection to the jurisdiction. The Court, I think, would have been justified in considering this as no appearance. Where a party denies the jurisdiction, he would not be allowed in the principal cause, in which he has never appeared, to appeal from a step in the principal cause.

I am inclined to hold that there is no gravamen from which the party had a right to appeal; it is less necessary, therefore, to decide whether a party in contempt can appear before he has purged his contempt: he was assigned to extend his protest against the jurisdiction, and it was in pain of his non-appearance that the witness was examined.

In the next place there is no proxy. It was the duty of those who communicated the proceedings to Lord Herbert to send over a proxy with them. What constat was there in the Court below, that the proctor was authorised to appear for Lord Herbert; that it was not a delay by another person.

I have considerable doubts whether the Judge was not at liberty to have proceeded as if no opposition had been given.

The Judge proceeded with all possible caution; he does not even admit the libel; he withholds the admission of it to give the party an opportunity of objecting to it; but he admits it *de bene esse*, in order to prevent injustice from the witnesses residing in a foreign country dying during the long vacation. Their evidence is to be admitted *de bene esse*, i.e. provisionally, and subject to all legal [448] objection; there would have been a great failure of justice if the Consistory Court had not done this; as there would be if this Court were now to grant the inhibition. If the party proceeded against can shew irregularities or nullities in the examination of the witnesses; if he can shew the libel to be inadmissible, it will be open to him to do it. Lord Herbert has all the advantages—he may object to the admission of the libel; to the jurisdiction; to all the proceedings.

It is still open to the Court hereafter to suppress the depositions; and if any opportunity of re-examining the witnesses occurs, they may be re-examined. If Lord Herbert had prayed that, without prejudice to his protest he might have interrogated the witnesses, he might have administered interrogatories to them.

From the nature of the cause every delay is injurious; the suit is brought by a foreigner; it respects a foreign marriage; and the Court is never to forget that it is a suit to establish a marriage.

Though I am extremely reluctant to stop the proceedings on an appeal, and to give a novel appearance to a case of practice; yet, under all the circumstances of this case, I am not, I think, departing from the principles of the Court if I refuse this inhibition.

[449] KINLESIDE v. HARRISON. Prerogative Court, Easter Term, April 23rd, 1818.

—The criteria by which the capacity of a testator is to be examined; especially where there is a mass of contradictory evidence; where the testator is far advanced in years, and where occasional incapacity from violent nervous attacks is admitted, the mere opinion of witnesses of little weight. Capacity established. Costs refused.

Judgment—*Sir John Nicholl*. The question in this case arises on several testamentary papers of Andrews Harrison, deceased; he died in the month of February, 1816. He made a will and several codicils: the will and the four first codicils are not opposed; the other codicils are contested. The latter codicils, which are contested, are set up on the one part by Mr. Kinleside, who is one of the executors and the residuary legatee named in the will; and they are opposed by Mr. Benjamin Harrison, whose appointment as an executor under the will and the benefits given to him in the will also, are revoked by these codicils.

To render the grounds of decision intelligible, it may be necessary to state the outline of the several testamentary dispositions. The will bears date in the month of June, 1808; it is very long and complicated; drawn up by a professional gentleman; it occupies twelve brief sheets of paper, [450] and was executed in the presence of three witnesses: it has in view two contingencies; one, the case of the testator dying before his brother, Mr. John Harrison; the other, the contingency of his surviving his brother. It gives a great variety of legacies to friends, to relations, and to servants; some of them pecuniary legacies, others of them stock legacies in the long annuities, and respecting a part there is a trust raised. The deceased had a small real estate consisting of Shawfield Lodge, at Widmore, near Bromley, in Kent; and he had also a very small property in Derbyshire. Shawfield Lodge is given to trustees for the brother, Mr. John Harrison, for life, with a power to dispose of it by will or deed; but in case he made no disposition of the property, then Shawfield Lodge, except Mrs. Jukes's house, which I shall have occasion to notice hereafter, is given to Mr. John Harrison. The small property in Derbyshire is given to Mr. Roe, and the residue of his personal estate is given to his brother, Mr. John Harrison; and in this event the executors appointed are Mr. John Harrison, Mr. William Stanley, and Mr. Paul Malin. Thus far the will looks to the event of his dying before his brother: it then goes on to provide for the other event, of his surviving his brother; and in that case, without revoking any of the previous legacies, gives a variety of additional legacies; among others, a legacy to Mr. Paul Malin of 18,000*l.*; raises a long and intricate trust for the children of Mr. Taylor; gives pecuniary legacies to the amount of 40,000*l.*; gives Shawfield Lodge to Mr. Ben-[451]-jamin Harrison, except Mrs. Jukes's house; her house, and fixtures, and furniture are given to trustees for her use during her life, and

then that house, and fixtures, and furniture are to go to Mr. Benjamin Harrison. The furniture and plate, and other articles at Shawfield, are given to Mr. Benjamin Harrison, and the residue is then given to Mr. Kinleside; and in this event the executors are Mr. Benjamin Harrison, Mr. William Kinleside, and Mr. Paul Malin, so that Mr. Malin was an executor in both events, but Mr. Harrison and Mr. Kinleside were only executors in the event of his surviving his brother. The deceased's brother, Mr. John Harrison, made a will at the same time, and upon similar principles, though not precisely the same in all respects, for several of the legacies are considerably different; but Mr. John Harrison had no real estate to dispose of; he does not make any disposition whatever in respect to Shawfield Lodge; he would take no legal estate in Shawfield Lodge, except in the event of surviving his brother, and then he would have a power of disposing of it. This is the substance of the will.

The first codicil is dated in June, 1809, and by that Mr. Benjamin Harrison is appointed an executor in both events, even if Mr. John Harrison should survive his brother.

The second codicil is dated in February, 1810; it gives some additional legacies; one of 300*l.* to Mr. Walmsley, 100*l.* to Mr. Roberts, and it recites that the deceased having, with his brother, given up a bond of 12,000*l.*, and a note of 1000*l.*, together with all the interest thereon, to Mr. Paul [452] Malin; it revokes the legacy of 18,000*l.* given to Mr. Paul Malin, and substitutes in the place of it a legacy of 5000*l.*; it also, in the case of his brother John dying first, gives the books and pictures at Shawfield to Mr. Benjamin Harrison, provided the residue amounts to 11,000*l.*, otherwise those books and pictures are to be a part of the residue to go to Mr. Kinleside.

The third codicil bears date in October, 1810; by that the furniture and books and pictures in Mrs. Jukes's house are given to her absolutely.

The fourth codicil bears date in September, 1811, and contains three additional legacies of 500*l.* each. The brother, Mr. John Harrison, made similar codicils to the two first of these four, but he made no codicils to correspond with the latter of these four. These are the uncontested dispositions.

The four contested codicils are to the following effect:—The first of them, which is marked with the letter F, is dated in August, 1812; it is written in the margin of the codicil of February, 1810, and is attested by Mr. Boodle and William Taylor, and by that the books and pictures at Shawfield Lodge, after the death of his brother John, are given to Mr. Trevillian; however, this codicil is embodied in the next, which the Court is going to state; it is marked with the letter G, and bears date the 2d of September, 1812, two days afterwards: it is attested by Mr. Boodle, William Taylor, and William Coleborn, and revokes the appointment of Mr. Benjamin Harrison as one of his executors, both in the event of his dying in the [453] lifetime of his brother, and in the event of his surviving his brother; and it appoints Mr. Kinleside an executor in both events: it revokes the bequest of the books and pictures to Mr. Benjamin Harrison, and gives them to his brother for life, and then to Mr. Trevillian.

The third codicil bears date the 21st of March, 1814, and is in the deceased's own handwriting, signed by him, but not attested by any witness: and it declares his wish to give Shawfield Lodge estate and premises to his residuary legatee, the Rev. William Kinleside, and revokes the legacy left to Mr. Paul Malin.

The last codicil, which is in duplicate, marked I and K, bears date the 27th of April, 1814, one of the duplicates, that marked I, being in the handwriting of the deceased himself, and attested by three witnesses; it revokes all the devises and bequests given to Mr. Benjamin Harrison and Mr. Paul Malin, and it revokes their appointment as executors; it revokes the bequest of the books and pictures to Mr. Trevillian, and gives all the property at Widmore, and all his plate, china, and also the books and pictures, live and dead stock whatsoever, to Mr. Kinleside; and it again appoints Mr. Kinleside the residuary legatee and devisee.

These are the contested instruments, and the dispositions contained in them. As all these instruments upon the face of them are regularly executed and attested, and are admitted to have been signed by the testator, and witnessed by the several persons whose names are subscribed to them, it may appear proper to examine, in the [454] first place, the grounds upon which the execution of them is to be impeached, before the Court can well estimate the weight and force of the evidence which is offered in support of the execution.

The grounds of opposition are of two sorts: the first, that the deceased laboured

under mental imbecility, so as to be utterly incapable of any testamentary act whatever; the second is (but which applies to the two codicils only), that they were obtained from the deceased, by fraud, and circumvention, and importunity.

The material parts of the plea, detailing these grounds of opposition, are to this effect. Mr. Benjamin Harrison in the fifth article of his allegation, states that about 1812 the mental faculties, and especially the memory, of Mr. Andrews Harrison had become weakened from his great age, and the general decay of nature, and, about the middle of that year, were so much impaired as to render him incapable of comprehending the state of his affairs, or of recollecting those about him, or of understanding what passed in conversation; that the deceased was, from that time to the time of his death, childish and incapable of the management of his affairs, and was so considered and treated by the said Sarah Jukes, and the other persons about him; and in consequence thereof, the servants and all others, from that time down to the time of his death, used to apply to Mr. Kinleside or Mrs. Jukes for orders. The deceased had lost the knowledge and recollection of his friends and acquaintance, and when any person called, it was necessary to explain who they were, otherwise [455] he could not recognise his most intimate friends; that he frequently got up in the middle of the night and lighted his candle, and would suffer it to burn out in the socket; that he would frequently make water in the fire in the presence of Mrs. Jukes, being utterly unconscious of the impropriety of so doing; that he was unimpressed by the death of his brother, which took place in November, 1813; that he took very little notice of it, and was in no degree moved or affected thereby; and then it goes on to state other circumstances, shewing entire incapacity in the deceased.

The second ground which is set forth in a subsequent article is that Mr. Kinleside, Mrs. Jukes, and Mr. Wells, repeatedly urged and pressed the deceased to give the Widmore estate to the Rev. William Kinleside, and particularly after the death of his brother John Harrison; that for that purpose a Mr. Latter drew up a codicil without any instructions from the deceased; that the deceased being pressed to make a copy, did so, after repeated attempts, and at different intervals, with the assistance of Mrs. Jukes, although he was incapable of understanding the meaning and import of it, and that, on the day of the execution, he was not of sound mind, nor capable of making a codicil. So that, according to this plea, here was entire incapacity in the first place; and, in the second place, here was importunity, by which this instrument was obtained from the deceased.

In answer to this it is pleaded, on the part of Mr. Kinleside, in support of the capacity, that the deceased had for many years been subject to [456] nervous attacks; that the effect of those attacks sometimes continued for a few minutes only, but at other times for some hours, and that, except when under the influence of such attacks, the deceased was at all times, in the years 1812, 1813, and 1814, and down to the time of his death, of sound mind, memory, and understanding, knew his friends, conversed with them, corresponded with Mr. Kinleside and other friends, every day read aloud to Mrs. Jukes the Psalms, and Scriptures, and Lessons of the Day, drew drafts, entered his accounts in a book, all which accounts are exhibited, played cards, and so on, and was fully capable of making the several instruments which are opposed.

These are the cases set up on both sides; and, in support of the different pleas, many witnesses have been examined, and their depositions contain one of the largest bodies of evidence that has ever been exhibited in these courts.

From what has been already stated, it is obvious that the leading point in the cause is the deceased's capacity. To all persons who are in any degree conversant with proceedings in this court, it is well known that, upon the point of capacity, evidence apparently the most contradictory frequently occurs; nor is the circumstance difficult to be accounted for, without imputing to either set of witnesses intentional falsehood; and certainly it is the duty of the Court to endeavour in candour to reconcile apparent contradictions, rather than to attribute perjury to those who are called upon to give evidence before it. In the first place, it may be observed that a large portion of evidence to [457] capacity is evidence of mere opinion; and upon matters of opinion mankind differ, even to a proverb. In the next place, there is no fixed standard by which each witness fixes and estimates his opinion of capacity; one person, seeing a testator in extreme age, or under extreme sickness, thinks that if he knows those about him, and can answer an ordinary question with respect to the state of his illness, or of his wants, such and similar matters render him capable of giving

effect to a disposition by will, however complicated it may be, by the mere formal execution of the instrument; while another person may be of opinion that though a testator is in the ordinary management of his own affairs, can hold reasonable conversation, can fully comprehend all the usual and simple transactions of life, yet if he is unable to take the active management of all his concerns, however complicated those concerns may be, or if he is liable to become confused by entering into intricate transactions, he is totally incapable, and cannot enter into a testamentary disposition, however plain and simple it may be. Now, where opinions are formed by such different standards, it is obvious that much variety must take place.

Differences will also arise from other causes: first, from the different abilities of witnesses to form such opinions; secondly, from their different opportunities of seeing the person; and, thirdly, from the different state and condition of the testator's mind at different times. It is certainly true that the study of the human mind is an abstruse science; the different lines and traits of the un-[458]-derstanding are matters which attract the notice and consideration of the intelligent; ignorant persons and enlightened persons will form very different opinions upon subjects of this kind: ignorant persons, servants, and those in their condition, who form their judgments in the conversation of the kitchen circle, are very apt to form erroneous opinions on matters of this sort; and this will be the case, even without throwing in the additional ingredient which takes place in those circles, the loose suspicions and prejudices by which their judgments are often biassed and carried out of their true course. In the next place, from the different opportunities persons have of judging they will form different opinions: persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It frequently happens that the most ignorant are the most confident. In this case we have an under gardener speaking of the deceased, who was always deaf, sometimes nervous, and whom he only sees in the garden, but seldom converses with him, yet venturing to swear (truly, I have no doubt in his own opinion), that he is quite certain the deceased was not capable of making a codicil during any part of a particular month, which happened three years before his examination. This kind of opinion is still more various where the testator's capacity is fluctuating, where he is sometimes better and sometimes worse; and this is generally the case [459] with persons labouring under old age, or other infirmities; it is so, even where there is no special attack occasionally operating; accidental cold, or other indisposition, often renders an old infirm person worse one day than another; after a good or bad night a person will be alert or dull; so after a night's sleep, a person may be active and capable of considerable exertion even in matters of business, who, in the afternoon, while the process of digestion is going on, shall appear drowsy and torpid, and not able to rouse himself into action. The humour of a testator will also sometimes make him apparently almost fatuous, or induce him to rouse himself into exertion, as the occasion is either interesting or disagreeable to his inclinations. Now, these different considerations (and they might be much more spread), while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to weigh such evidence with very great attention—to rely but little upon mere opinion—to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgment of others. These preliminary observations may, by being applied to the evidence, save the time and trouble of repeating them when the depositions come to be stated.

In this Court it has been usual, in such cases as the present, where there is a contrariety of evidence upon a variety of different transactions, to state the depositions pretty much at length, in order to shew more distinctly the grounds upon [460] which the court decides; but really, in the mass of evidence in this case, it is hardly possible to state any considerable part of it, which can bear any proportion at all to the whole. The utmost that the Court can do is to state such general outlines and leading features of the depositions as shall pretty much shew the complexion of the evidence. This I shall endeavour to do as much as possible in the terms used by the witnesses themselves, proposing, first, to consider the evidence as to capacity and its result, and then to examine the proofs of the factum and the charges of fraud which are imputed in the course of that evidence.

There are some facts, however, which, without reference to the evidence, may be

stated historically, they being assumed and admitted on both sides, and not liable to controversy. The deceased and his brother, Mr. John Harrison, had been in business together in London, from which, having made a fortune, they retired to Widmore, in the county of Kent. The deceased, who seems to have been at all times rather averse to the trouble of housekeeping, resided with the uncle of Mr. Wells, at Bickley; Mr. John Harrison living at that time in a small house in the neighbourhood. Mrs. Jukes, whose husband, I think, was cousin to the deceased, and had formerly lived at Bickley, upon the death of her husband, was invited by the deceased to return to that neighbourhood, and reside in a house he took for her residence. In the year 1809, the deceased left the house of Mr. Wells, and went to reside with Mrs. Jukes, where he continued till the time of his death. Soon after [461] his going to live at Widmore with Mrs. Jukes, the place was on sale, the deceased purchased it, and on a part of it he built Shawfield Lodge, which was intended for the joint residence of himself and his brother. His brother went to reside in it, but the deceased continued to reside with Mrs. Jukes. Mr. John Harrison inhabited Shawfield Lodge, down to the time of his death in 1813; he having, about two years before his death, through age and infirmity, been reduced to childishness and imbecillity, and during the period of that childishness and imbecillity the deceased managed the money concerns of his brother, Mr. John Harrison, and furnished money for his purposes; but the more immediate business of Mr. John Harrison, paying his bills, looking over his accounts, and other matters of that sort, was executed first by Mr. Paul Malin, and afterwards, from the beginning of 1813, by Mr. Kinleside. Mr. John Harrison made a will much to the effect of that of Mr. Andrews Harrison, leaving many legacies, but leaving the residue to his brother Mr. Andrews Harrison; and in November, 1813, Mr. Andrews Harrison took probate of that will with the other executors, and survived about two years and a quarter. Such is the outline of his history.

There are some other particulars which admit of no controversy; he was the elder of the two brothers, and he had attained the very unusual age of about ninety, so that he was from eighty-six to eighty-eight when these codicils were made: a great age, exceeding even the age when we are told that "the strength of man is but labour and sorrow." This raises some doubt of capacity, but only so [462] far as to excite the vigilance of the Court; for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind. Age is an uncertain criterion of mental powers; for those powers are often retained by persons even above that age in a greater degree of perfection than they are by others, twenty years less advanced in life, who may yet have no other apparent infirmities than those of age. The deceased must have had rather extraordinary faculties for his age, if we look to nothing but the will itself, which is not controverted; he was eighty-two then; it is a most complicated disposition of personal property; it is made by Mr. Boodle, who is a very cautious and respectable solicitor, and who would not interfere further than was necessary to carry into effect the intentions of the deceased; and yet we find that the deceased, at this very advanced age, with only this cautious assistant, is able to frame this very complicated will; of that will, however, these codicils contain very considerable alterations; and when a person in a very advanced stage of life makes considerable alterations in an instrument solemnly and cautiously made, the circumstance tends further to excite the jealousy and vigilance of the Court, and such an alteration claims still further attention, where the will itself is made in some degree as a sort of reciprocal will, in conjunction with a brother, with at least a full communication of their intentions, each providing for the event of surviving the other.

Now, though it is admitted that this circumstance imposed no legal obligation upon the survivor, of not making any alteration—that there [463] was no express condition of any kind between them; nor, as it will appear by the evidence, was there a distinct understanding to that effect; yet, though it imposed no moral obligation upon the survivor not to make any alterations, it would at least induce him to proceed with extreme unwillingness to alter those dispositions which had been settled between him and his brother, unless there should occur some rational cause for such alterations; but, beyond this length, I never could understand the reasoning, which was so much pressed at the bar, both upon the admission of the allegation, and afterwards, on the hearing of the cause, upon this point, and which seems to have made some impression upon the parties themselves, as well as upon some of the witnesses who have been examined. For, on the other hand, if there did, in the opinion of the testator, exist

a rational cause for making an alteration, he would not only consider that he had a moral right to do it, but he would have thought that his brother would have concurred as much in that opinion, as that he entertained it himself; for, as the witnesses state, they were most affectionate and confidential, and "had but one mind;" and, therefore, he would naturally conceive that his brother, if he knew the circumstances, would accompany him in the alteration upon those rational grounds which existed for the making of such alteration: for example, as occurs here; each had, in case of being the survivor, given to Mr. Paul Malin 18,000*l.*, they afterwards gave up to this young man a bond and note for 13,000*l.*; they then each of them [464] reduced his legacy to 5000*l.*, and each of them, in the reduction of that legacy (for it is so declared in the codicil itself) looked to the residue being at least 11,000*l.* Now, if after the death of either, or if after the incapacity of either, Mr. Paul Malin had, by a further bond, incurred a further debt of 5000*l.* in the life-time of the party, which debt was given up to Mr. Paul Malin, or was lost through his bankruptcy, by which he would in fact receive his 5000*l.*, and by which loss, if the legacy was also to take place, the residue might be reduced to 6000*l.* instead of 11,000*l.*, would not the survivor say it was neither my brother's intention nor my own that Mr. Paul Malin should have the sum of 5000*l.* in our life-time, and the residue be reduced to 6000*l.*; and, therefore, in rescinding and revoking the legacy, I am not only doing what I, the survivor, think just, but I am carrying into effect the intention of my deceased brother also. In an alteration of this sort, or any other alteration, he might conceive he had rational grounds for making it, and in which he might therefore conceive his brother would concur. I can see nothing which imposed on him a moral obligation, or made him unwilling to make the alteration. But at last this is a mere circumstance of inference and probability, bearing on the capacity; for if the capacity and volition are proved, the legal right to make the alteration is not at all denied.

Another fact not controverted is the occasional incapacity of the deceased, arising from certain nervous attacks coming on at different times, and [465] their effects of different durations; and during those attacks it is admitted the deceased was incapable of any rational act. This circumstance, however, bears upon the case in two opposite directions; it renders, in the first place, the capacity at least fluctuating, and imposes on the party setting up these instruments the obligation of proving that at other times the deceased was capable, and that these instruments were made during that capacity; but, on the other hand, if these attacks produced only a temporary incapacity, and the deceased was at other times in full possession of his mental powers, these occasional attacks account for the opinions of many of the persons who only saw the deceased occasionally, and take off, therefore, much of the effect and weight they attribute to the instances they adduce. This consideration also renders it the less necessary for the Court to enter into the particular instances of the deceased's not knowing persons, or beginning to undress himself in the day-time, or other circumstances of this sort; for, it is admitted, there were times in which the deceased was in a state in which he did not only not recollect, but could not be made to understand persons or things, the degree in which he was affected being different at different times. That the deceased was subject to considerable deafness is also admitted. This defect always makes a person appear to disadvantage in society; and to accidental observers, not being able to hear every thing that passes, he appears dull and stupid, and is in reality less excited and entertained in company than other persons; yet such a person may, [466] when he does hear, perfectly understand, and be able to converse quite rationally. The deceased was nervous and low spirited when any thing affected him. If then we picture to ourselves a person approaching to ninety years, deaf and nervous, walking in his garden or in his immediate neighbourhood, such a person meeting the observations of those who occasionally saw him would not make a very favourable impression as to his capacity; while it might be that, if he entered into conversation with them, he would shew that he was in possession of considerable mental powers. Some of his bodily powers were very good, except when under these attacks; his health was good, and he was so alert he could run up stairs, which he sometimes did, to avoid Mrs. Jukes's visitors, who he did not wish to see, being rather a shy man. His eye-sight was perfect, therefore his not knowing persons did not arise from any defect of sight; he read the newspaper, and the Psalms, and the Lessons of the Day without spectacles, and wrote a fair hand to the time of his death. Now these facts are so clear they cannot be controverted; and having stated them and the

way they bear upon the case, the Court will now proceed to a review of the evidence upon the great controverted point of the capacity of the deceased, or, as it is more technically described, his mind, memory, and understanding, and his competence to do any act requiring thought, judgment, or reflection.

In support of the plea alleging all these facts, thirteen witnesses have been examined; seven of those were either servants of Mr. John Harrison, [467] the brother, or persons in that condition of life, three others are gentlemen, acquaintances of the deceased, who visited him occasionally, and the remaining three were the maid-servants of Mrs. Jukes.

The first witness examined is Mr. William Tatton; he lived as butler to Mr. John Harrison for thirty-five years, and he deposes to incapacity pretty nearly in the terms of the plea, and in some instances perhaps beyond it, for he carries it further back; he says, "He does not entertain any doubt that the deceased's memory and mental faculties had become so weakened from great age, that in or about 1812 he was incapable of comprehending the state of his affairs; he could for the most part understand what passed in conversation at the time, but could not retain it, his memory was so exceedingly impaired at particular times; on occasions, which occurred frequently, he could not understand any thing, but was quite lost and childish, and nine times out of ten the deceased did not know any person unless he was told who it was, and excepting those who were constantly about him, and in attendance on him. He has seen him at Shawfield, when he would walk through the house and about the garden without speaking a word to any one; that when he did speak it was commonly not more than to ask, 'How is my brother?' he would burst out crying, as frequently as not, and appeared to be very gloomy and unhappy, but which the deponent supposed to proceed in a great measure from his seeing his brother in the state in which he was; that from the beginning or middle of 1812 the deceased was in [468] a very childish state, incapable of the management of his affairs, and from that time he continued to grow worse, down to the last time the deponent saw him, which was about a month after the death of Mr. John Harrison; there were intervals during which the deceased did know what he was doing, but they were of very short duration, and though he knew what he was about at the time, his recollection of the past was very deficient. The deponent was very little down at the house of Mrs. Jukes, where the deceased lived; he never went there except when sent on a message. In 1812 the deponent had the care of the domestic concerns at Shawfield; the deceased used to ask him for his book of weekly expences, which he would lock up, without looking at, and keep it for two or three days, till, as happened sometimes, Mrs. Jenkins, a neighbour, came to Shawfield, and she looked it over and told him it was all right, and then he returned it to the deponent." He says upon the ninth interrogatory, "That he never settled an account with the deceased: Mr. Kinleside always settled with the respondent during 1813, though he might have received money from him between Mr. Malin's accident and Mr. Kinleside's taking the management, which was the beginning of 1813, he believes he did receive either a draft or bank note from the deceased, but he does not remember having received either from him at any other time; there was no more business transacted between him and the deceased than that the deceased's man would tell the deceased that the respondent wanted money, and [469] when the deceased came up he would bring it." He says upon the second interrogatory, "That soon after the death of the testator the producent told the respondent that he meant to dispute some parts of the deceased's testamentary papers, and he asked the respondent if he remembered some general circumstances, and if he did he should call upon him. He has seen the producent twice since, who afterwards wrote to the respondent to request him to get the witnesses together at Bromley, on Monday last, and to get Fuzzey to Bromley on the Saturday before, and to get lodgings for the examiner;" and this witness, who is vouched, Fuzzey, says, on the second interrogatory, "That Tatton sent to him one day last year to come to his house to meet the producent, who then asked him some questions similar to those now put. He does not now remember very particularly what then passed, but he thought the business at an end, till one day last week, when Mr. Tatton desired him to meet the producent again at his house."

Certainly, in the judgment of this man, Tatton, the deceased was incapable of making his will, but there are some circumstances in his evidence which makes the Court rather hesitate in concurring in his opinion, however sincere he may be in giving

it. From his answer to the second interrogatory, which has just been stated, it appears that, soon after the death of the deceased, he was employed as a sort of agent, and that he is again employed for the purpose of collecting the witnesses together: this is very apt with persons in his condition in life to create a sort of [470] bias upon the judgment. He principally forms his opinion from seeing this old gentleman coming to Shawfield, much distressed at his brother's illness, walking through the rooms or about the gardens, and not conversing with him; the deceased seldom asking him any other questions than how his brother did, or for his book of accounts. He ventures, however, upon these means of knowledge, to depose to some of these points. He says he was seldom at Mrs. Jukes's, and never went there except when sent on a message; and yet he ventures to depose that the deceased, nine times out of ten, did not know any person unless he was told before hand who it was. Now, how Tatton could know this, who, perhaps, was not present once in twenty times, when any of the deceased's friends approached him, it is difficult to conjecture. Again, he says that the deceased asked for his book of weekly expences, which he would lock up without looking at, till he had an opportunity of consulting some other person upon the correctness of his book. Now, how should the witness know this; the deceased kept the book two or three days; it is proved that he transacted his business in his own room, at Mrs. Jukes's; and, therefore, the witness could not know whether he judged of the book from his own consideration, or the assistance of any other person. He says that he might receive one or two drafts in 1812, but that in 1813 he did no business with him; but it comes out in a further part of the interrogatories that when Tatton wanted money, he used to tell the deceased's servant that he wanted [471] money, and that the deceased when he came up to Shawfield would bring it. It so happens that in this very year, 1813, when the witness says he received no draft at all from the deceased, here are no less than sixteen drafts drawn in favour of Tatton; three only out of the sixteen are filled up by Mr. Kinleside, the others are filled up by the deceased, and they are all signed by him. In the year 1813 Mr. Kinleside was at Shawfield but a small portion of his time; the witnesses, Peebles, Hope, and others, state that he would come there and stay from Monday till Saturday; he was a clergyman, residing in Sussex, and having a living to take care of there, he would stay at Shawfield four or five days together, and then be absent three or four weeks. By his filling up the draft it should appear there was no clandestinity in his acts; and, therefore, it is extremely probable the other drafts in the hand-writing of the deceased were drawn by him without assistance for the purpose of supplying Tatton when he wanted money. Not only are the drafts filled up by the deceased himself, but the sums are entered with the greatest accuracy at the other end of the check; they are filled up in printed checks, thus, "John Harrison (mentioning that they were for his brother's account), for William Tatton. 50l. 25th February, 1813." In the checks there is a particular accuracy, for though printed with the word "London," yet in every one the deceased scratches out London and inserts Bromley. Here is at the conclusion of them a still more singular piece of accuracy; in all but the last they are signed "Andrews Harri-[472]-son, for John Harrison;" but the last of them is not so drawn, but is signed, "on the late John Harrison's account," varying the phrase. Now the fact is, that since the drawing of the preceding drafts Mr. John Harrison had died; this is a strong instance, if it comes from the deceased himself, not merely of memory and understanding, but of correct and minute attention and activity of faculties; and yet it is stated by several of the witnesses, that about and soon after the death of Mr. John Harrison, the deceased was apparently even much worse than usual. It is certainly true that little incidental facts of this kind often weigh much more in the proof of capacity than the opinion of a great number of witnesses, such as Tatton, forming their opinions on such ground as he had for his; it is indeed possible that Mr. Kinleside, or some other person, might be standing by, and might have dictated this and all the other drafts to the deceased, but of that there is no proof; they are in the hand-writing of the deceased, and the instruments are exhibited; but the Court will be better able to judge whether the deceased was capable of doing this without assistance when it comes to other parts of the evidence applying to circumstances of a similar sort.

The next witness to whom I shall refer is Browning, who is in the same situation in some degree as Tatton; he was footman to Mr. John Harrison from 1808 to the time of his death, and he gives his opinion of the incapacity of the deceased not quite

so early or so uniformly as his fellow witness, Tatton; for he states that, about the latter end of [473] 1812, or the spring of 1813, the deceased's memory began to fail him; he was subject to nervous complaints, which came upon him frequently, and upon those occasions he was altogether in a lost state, but independent of that complaint his memory had become impaired. The failure of memory became worse in 1813, and before the end of that year the deceased had become nearly, if not altogether, childish, and continued in that state till the month of March, 1814; he says that the deceased was not always in a state of forgetfulness, but there were times when he appeared sensible of what he was doing; he believes he was, about September, 1812, capable of the management of his affairs; that is a period which applies to the two first codicils; that he has no reason to believe he was treated by those about him then as a childish person. From the time Mr. Benjamin Harrison came to live at Widmore all orders were given by him, and after he removed, Mr. Kinleside was consulted, so that the deceased seldom gave any directions himself when he was competent to have so done. Before his brother's death he used frequently to go about the house and garden at Shawfield, looking about him, and appeared not to know what he was about; that he was roused by any one being with and talking to him, but when alone he drooped and lost himself very much; the deponent never was about the house where the deceased lived, except to take a message, and he never stayed there any time; he then goes on and gives an instance of meeting the deceased in the spring of the year 1814, about half a mile from [474] his own house, and the deceased not knowing him, but when he saw the witness in the evening he recollected him, and said, he wondered he did not know him when he met him, a circumstance to which the Court attaches very little importance, for it is, at most, only an instance of the deceased's not knowing a person, which, it is admitted, he was liable to, though it should seem rather, from what passed in the afternoon, as if this had been a mere accident. It also proves that the deceased did at this time walk half a mile from his house without being attended, and that he was not considered as in actual childishness, and under a total loss of his mental faculties.

The next witness is Curtis, who was coachman to Mr. John Harrison, and who is now an exciseman at Reading, and he says, "That he first observed the deceased's faculties to decay about twelve months before his brother's death; he was then growing very much lost; at times he was collected, at other times his memory was gone; about the middle of 1812 he grew worse; he does not know what could be the cause of his forgetfulness, except it were old age, as he believes it was; that about the time of his brother's death the deceased appeared very much lost, and was frequently walking in a lonely way, and talking in such a simple whining manner, as shewed he was quite lost, and could not collect his thoughts; he was not always so, but very frequently, and almost constantly about that time; he frequently burst into tears and appeared full of care, not taking notice of any one; the deponent has seen him undress himself in the [475] morning when he was sitting in his brother's house, and was very much agitated, all in a kind of tremble, and at such times altogether lost; this was owing, as the deponent believes, to a sort of fit, of a nervous kind, to which he was subject;" he mentions an instance in August, 1814, of the deceased's meeting him upon Widmore-green, just above Shawfield; the deponent made his obeisance to the deceased, and asked how he did, which he returned in a very polite manner, as though he had been a stranger, and a gentleman, evidently not knowing him. He says, upon the 17th interrogatory, "That the respondent, after the death of Mr. John Harrison, continued upon the premises, having very little to do till he was discharged by Mr. Kinleside, in May or June, 1814; he afterwards lived with Mr. Olmius, and went to Reading in November, 1815; he says that the respondent called on the deceased shortly before he went to Reading (that was in the latter end of 1815); he got latter, the deceased's servant, to ask the deceased to lend him ten pounds towards the expence of his moving to Reading; a few days afterwards Mr. Kinleside gave the respondent twenty pounds, as from the deceased; a day or two afterwards the respondent called to thank the deceased, Mr. Kinleside having told him that it was a gift from the deceased; the deceased told the respondent he was very welcome to it, and hoped it would do him good; the deceased seemed pretty well, and was then, as he believes, of a sound mind." What then is the fair result of this man's deposition? In chief he certainly deposes pretty strongly [476] to his opinion of a fluctuating capacity at least, particularly about the time of the brother's death; but here, so late as November, 1815, this

witness, by his own conduct, appears to have considered the deceased as in possession of his faculties, for he applies to him to borrow money, and he goes to return him thanks for the present which he has made. What does the deceased's conduct imply upon this occasion? why to this old servant of his brother's, who it appears, on his own evidence, had been very attentive to his brother in his last illness, instead of lending him the money, he makes him a present of twenty pounds to place him in his new situation at Reading; and when Curtis comes to return thanks for the gift, he recollects the transaction, tells him he is very welcome to it, and hopes it will do him good; and, as Curtis admits, he was of sound mind, in November, 1815, which is a year and a half nearly after this testamentary instrument was executed. The impression, therefore, of this deposition, taking the whole together, is rather favourable than adverse to general capacity.

The two next witnesses are Peebles and Hope, the gardener and under gardener, and they give an unfavourable opinion of the deceased's capacity, as far as their opportunities enabled them to judge of it, but they also assign partly the reasons upon which they found their opinion. Peebles says that the faculties of the deceased began to decay about Christmas, 1812; the deceased at that time came into the garden, as he did every year, to distribute Christmas-boxes, and though he gave the de-[477]-ponent his Christmas-box, he appeared to have forgotten who the deponent was, for he called him Curtis, which was the coachman's name, and asked him what fruit he was gathering; that at times, when walking about the garden, he remarked upon the weather being hot or cold, or something of that kind; that he saw and conversed with the deceased so little that he can hardly depose to his state of mind; he verily believes that in April, 1814, the deceased was not of sound or disposing mind, memory, or understanding, or capable of understanding the nature of his affairs or of his testamentary arrangements. Hope deposes much to the same effect, and says, upon the 11th article, he is quite certain the deceased was not, during any part of April, 1814, of sound disposing mind, memory, or understanding.

Now these witnesses do not weigh very much with me, for where they rely on facts, the Court is enabled to judge for itself: the circumstance of his calling Peebles, Curtis, may have an effect upon an ignorant person, but no intelligent person will rely on such a circumstance; even the counsel gave it up, and thought it too trivial to argue, and without entering into an analysis of it—it is quite common to the most ordinary observer, it occurs every day; instances more striking than this have occurred to my observation during the progress of this cause: this is absence of mind, but absent persons have their memory as perfect as persons not liable to such blunders. As to asking him what fruit he was gathering, that might be a mere joke, of which it is proved he was fond, making an observation to [478] the gardener, what fruit are you gathering? Taking the whole evidence together, it bears strongly in favour of memory and understanding, for he recollects the season of the year; he goes to give the Christmas-boxes, he gives the usual amount, he pays them himself, and he enters them in his account book, because upon the very day after Christmas-day, December the 26th, 1812, are entered the sums which he paid to the different servants of John Harrison, and the sums which he paid to the different servants of Mrs. Jukes upon that day; and, therefore, taking the whole of this evidence together, it as strongly marks capacity as those little instances which make an impression on the witnesses bear the other way.

Another witness, a gardener, Simmons, deposes to having met the deceased twice in 1814, in May and June, and twice in 1815, in July and August, and he says that the deceased did not know him, and that Mrs. Jukes could not make him understand who he was. These occurrences are accounted for by the occasional attacks to which he was liable.

The only remaining witness of this class is Fuzzey, and the account which he gives of the deceased is this: "He had lived as coachman with John Harrison for some years; he then became a farmer and corn-chandler in the neighbourhood, and he served the deceased with corn: he mentions that the deceased had a mare, that she took to kicking in the gig when Mr. Malin was driving her, and Mr. Malin had the misfortune to break his leg; the deceased had had the mare for some years, she was his riding mare as long as he was [479] able to ride; after this accident he gave her to the deponent—this was about the latter end of 1812." That was after the time when they date the incapacity. Now, in respect to the mare, he says, upon the

nineteenth interrogatory, mentioning the circumstances that passed on the occasion, "That the deceased said that he would not keep, or use, the mare any more, as she had kicked in the chaise. He asked the respondent what she was worth, who said fifteen pounds. He replied, She is not worth half that; do you think she is worth a guinea? The respondent laughed, and said Yes, sir. The deceased then said, Do you give Curtis a guinea, and take away the mare." Curtis speaks, upon the nineteenth interrogatory, much to the same effect, "That when the deceased gave the mare to Fuzzey he was very jokey; he told Fuzzey he had rather he had the mare than any one else, and asked him what he could afford to give for her, if he thought she was worth seven pounds; Fuzzey, said, Yes, she was. Well then, said the deceased, give Curtis a guinea, and take away the mare; he remembers the deceased saying that he did not mind the mare being worked at the farm, but he could not let her go to posting work, as she had been a good mare, and he liked her." Now, this is the latter end, as I stated, of 1812, and it proves any thing but incapacity; here is mind and memory, and a knowledge of human nature; here is a favourite old riding mare; he will not keep her because she has done mischief; he will not sell her to posting, he will not sell her to Fuzzey, as he might think himself at liberty to sell her again, or expose her [480] to ill usage, but he gives her to the old coachman to be used on the farm, only requiring him to give a fee of a guinea to Curtis; and he is very jocose upon the occasion: certainly this does not shew any loss of faculties. But Fuzzey goes on and says, "That about nine months afterwards he took the mare to Shawfield with some corn, and that the deceased acted in a very strange manner: he says that he was not then paid as he commonly was;" here then was an instance of the deceased's incapacity at that time; he says, "That he went about three weeks afterwards to be paid; the deceased did not appear to take such notice of him as usual; when the deceased did understand, he went and fetched the money in bank notes, which he counted over twice, and then gave the deponent one note too much;" and he enters into some particular conversation as to that head, as an instance of more doubtful capacity; that at first he did not know Fuzzey; when he did he went and fetched the money, and paid him a pound too much. That might happen from accident, or from a want of mind; it shews a fluctuating state of mind. He says, "That sometimes the deceased appeared to have his recollection about him a good deal better than at other times, for he very well remembers that the deceased has more than once written a receipt for him to sign, and he has written it very correctly, and the deceased seemed to recognize him when he came, and then again at other times there was no making him understand who he was, or what he came for; it was about the time of his brother's death that the deponent particularly ob[481]-served that the deceased's memory failed him." But surely no intelligent person, who has been a careful observer of life, and I am sure no person who has been accustomed to proceedings in this Court will be at a loss to account for these fluctuations in an old man, that sometimes he is intelligent, and sometimes not; more especially where he is liable to special and particular attacks. He says, "That he remembers that the deceased appeared worse about, and for some time, perhaps nine or ten months after, his brother's death; the deponent remembers that once or twice during that time Mr. Kinleside paid the deponent, saying, that the governor was very poorly; and after that, the two last times that ever the deceased had corn, he paid the deponent himself by draft on his bankers, which he wrote himself, for his eye-sight was very good, and he wrote a clear strong hand, but some one, generally Mr. Kinleside, looked over the bill and draft to see that all was correct." He throws in here that Mr. Kinleside or some one stood by to see that all was correct, but he does not attempt to say that Mr. Kinleside interposed, or that there was any necessity for the deceased's receiving assistance; that all was not done by the deceased himself, certainly, without any assistance. Here then comes out from this very witness direct proof that the deceased could conduct transactions of business correctly; that he could receive his bills for corn; that he could pay them by drafts upon his bankers, which he wrote himself; and that he went through the whole of the business correctly, without assistance. This witness is confirmed in [482] this respect by others, though being produced in opposition to capacity, confirmation might not be necessary, but he is confirmed by a fellow-servant, Alexander, and also by the Rev. Mr. Walmesley, both of whom were present when some of these payments were made to Fuzzey. He is also confirmed by the draughts on the bankers, for here they

are all filled up by the deceased, and here is the counter entry by the deceased in his own hand-writing; here are Fuzzey's bills and receipts, endorsed by the deceased himself, docketed on the back with the name of the person to whom paid, when paid, and the amount of the bill. They occur in January, March, June, and October, 1813, and February, May, and subsequent months in 1814, and therefore they occur at the periods most important to examine into as to the capacity of the deceased; here are also corresponding entries of the several payments made to Fuzzey in the deceased's own private book of accounts of his cash and expenditure, and the result therefore, of this evidence, in my judgment, proves a case quite different from that which was intended to be set up.

The next class of witnesses are three of the deceased's friends, who made occasional visits to him. The first of these is Mr. Matthew Harrison, the brother of the party in the cause, and he states in his deposition that he was acquainted with the deceased from his childhood, and he visited him on the 5th day of December, 1813; that he had seen him three or four times in the preceding twelve months; that on the 5th of December the deceased did not know him, and Mrs. Jukes was under the [483] necessity of addressing the deceased, which she did, nearly in the following terms:—"Governor, don't you know that this is Mr. Matthew Harrison, and don't you know that he has a wife and children, and don't you ask after his wife and children?" and that the deceased muttered something which the deponent did not distinctly hear, but which he understood to be, "I hope they are well," or to that effect: he said that Mrs. Jukes, again addressing the deceased, said, "I am sure you will be glad to hear that Mr. and Mrs. Ben Harrison and all the children are well at Guy's," upon which the deceased replied, "I am glad to hear it," in a muttering tone; the deponent staid with him about half an hour, but did not attempt to enter into conversation with the deceased; he was not in a state of mind to converse on any subject; that after the deponent's name had been mentioned, the deceased could not distinguish him from any other person, and did not, during the visit, recognise him as he had formerly done, and he well remembers that during one half the visit he was in a sleeping state. Then he says, that he has not the least doubt that the deceased was of unsound mind, memory, and understanding, and that he was incapable, at that time, of making his will, or of doing any other act of a testamentary nature, or any act whatever requiring thought, judgment, and reflection; and I have no doubt this is Mr. Matthew Harrison's sincere opinion, and possibly it might be a correct opinion, that the deceased was not, during this half hour, capable of doing any act requiring thought, judgment, and reflection, because unques-[484]-tionably he was sometimes in a state of incapacity. It has, however, been pointed out to the notice of the Court, that upon this very 5th of December, the deceased writes a very rational and proper answer to a letter which he had received from Mr. Boodle; the letter is exhibited: "Widmore, 5th of Dec., 1813, Dear Sir, the day you have fixed to be here with Mr. Stanley will be most convenient to me, and I hope Mr. Kinleside will be able to settle for the probate of the will. I remain, dear Sir, your's sincerely, Andrews Harrison." It is addressed to "Edward Boodle, Esq., Brook-street, London," and it is fairly written and properly addressed, and certainly, in this letter, there is no mark whatever of unsound understanding, or of want of thought and recollection, or of loss of memory; and when the Court recollects the object of this letter was to make an appointment with Mr. Boodle, for the purpose of making an alteration in the deceased's will, to the exclusion of Mr. Matthew Harrison's brother, the suggestion made by the counsel does not seem very improbable that the deceased did feel unwilling to enter into familiar conversation with Mr. Matthew Harrison on this day, and that he would turn rather a deaf ear to this suggestion of Mrs. Jukes's, of enquiring after Mrs. Harrison and the children at Guy's, for he was a sincere moral man, and at the very time when he proposed utterly to exclude Mr. Benjamin Harrison from his testamentary bounty, he would not enter into conversation with the brother, or make inquiries after him. The other observation made by the counsel is still less matter of conjec-[485]-ture; it is a matter of necessary inference: Mr. Matthew Harrison had seen the deceased three or four times during the preceding twelve months; now, when he only deposes to incapacity on the 5th of December, 1813, and he is specifically called on for that purpose, I think it is a just inference, that upon the other occasions when he saw the deceased in that year, he did not observe any symptoms of incapacity. The excuse offered in answer is that, being the

brother of the party, they did not choose to produce Mr. Matthew Harrison to the general incapacity; that might be something of a reason for not producing him at all; and in the allegation there does appear to be something of an unwillingness to vouch him by name, because in that article they do not plead it was Matthew Harrison who visited the deceased on the 5th day of December, but an old and intimate friend of the deceased: but why, having produced him to incapacity on this day, and he having had other opportunities of seeing the deceased in 1812 and 1813, they should not have examined him to incapacity at the former periods in 1813, can be accounted for only by this, that he could not, with truth, depose that he did observe any symptom of incapacity. Taking his evidence, however, at the utmost, he only speaks to incapacity on this particular day during half an hour.

Mr. Gordon, another friend, who, I presume, was the deceased's successor in business, together with Mr. Stanley, is the next witness; his evidence goes no further than this; he says, "He used to [486] visit the deceased once a year; his last visit was in June, 1813; his memory had evidently become weakened from his great age, and, as the deponent believed, from a decay in nature, in the year 1812," which he afterwards corrects to 1813. The deponent introduced the subject of Mr. Benjamin Harrison having left Widmore, and that the deceased appeared very indifferent about it; he says, that in June, 1813, the decay of his memory and faculties had evidently increased, his mind wandered, he appeared lost at times in conversation: the deponent was with him seven or eight hours, and had a fair opportunity of observing his state; he does not remember any particular instances from which he made such observations respecting the deceased's faculties and memory, except as to his not being able to comprehend who some persons were of whom the deponent and Mrs. Jukes were talking." He says upon the 5th interrogatory, that the deceased was for many years subject to nervous attacks; that he saw the deceased once in 1812, and once in 1813. Upon the 10th interrogatory, he says he does entertain considerable doubt of the deceased's being capable of the management of his affairs in 1813. He says upon the 2nd interrogatory, "That meeting Mr. Matthew Harrison, soon after the deceased's death, he expressed a hope that his brother, the producent, was benefited by deceased's will, who replied, no, that a codicil had been made, whereby what was left to him had been taken away. The respondent said he feared there had been some iniquitous proceed-[487]ing, for he knew well what a regard the deceased and his brother had for the producent, and said, if his evidence was of use, he was welcome to call for it." He says upon the 26th interrogatory, "He never heard any thing upon the subject of the deceased being displeased with the producent, except that there was a coolness between them, and that Mr. Kinleside was at the bottom of it, and had made some representations to the deceased to the prejudice of the producent." Now, this gentleman ventures not only to indulge a suspicion of "iniquitous proceedings," but to suggest this suspicion to Mr. Matthew Harrison, the brother of Mr. Benjamin Harrison, upon no better grounds than the deceased's great regard for Mr. Benjamin Harrison; and yet this witness admits himself that he introduced Mr. Benjamin Harrison's name in conversation to the deceased, and that he appeared rather indifferent about it; he admits a coolness between the deceased and Mr. Benjamin Harrison; and he admits that he did not know that Mr. Benjamin Harrison had ever called upon the deceased after the month of June, 1812. I have not the least suspicion that Mr. Gordon has given any thing more than his sincere opinion; but when a witness volunteers his evidence under prepossessions taken up on such foundations as these, the Court cannot give any very great weight to the force and effect of his mere opinion as to the state of the deceased.

Mr. Stanley had more opportunities of observing the deceased, and his is material evidence. He states that he had known the deceased from his [488] childhood; his father was in partnership with him; he visited him in the month of September, 1812; he remembers being at Widmore a few days after the codicil of the 2d of September was executed, and that he dined with the deceased and his brother; that in the course of the evening the deceased shewed a want of recollection, and apparently a partial decay of his mental faculties, particularly of his memory, which at intervals he appeared to have lost: several instances of it occurred in the course of the evening; in one instance he asked the witness how old his father was, though he had been dead sixteen years; another time he asked him about himself, inquiring how Mr. Stanley was, evidently forgetting the deponent, who sat next to him. On being

corrected by the deponent the deceased's recollection returned, and he said, 'Oh, ah, to be sure,' just as if he had awoke from a dream. He says that he was not with the deceased sufficiently often to enable him to form a correct opinion as to whether the deceased was or was not generally capable of comprehending the state of his affairs; but he did observe, generally, from his manner, conduct, and conversation, that he was a good deal broken, and that his mind was going. The deponent did not see him again till after the death of his brother, when he went to Widmore to be present at the opening of the will, and to attend the funeral, and he saw the deceased three or four different days about that time; he does not remember particular instances of decay of faculties, or loss of memory, except as he is about to depose [489] in answer to the next article; and yet he says the deceased appeared to him to be much in the same state as he was before; he was again with the deceased on the days of which he will more particularly depose, at which times the deceased was evidently worse. Those particular transactions it will be necessary for the Court to examine presently. He says, "That he was again with the deceased in September, 1814, when the deceased did not know him; but, after Mrs. Jukes had explained who he was, by saying 'Governor, don't you know your old friend, Mr. Stanley?' the deceased said, 'Oh dear, is that Mr. Stanley? oh, yes, certainly I do,' and the deceased did then appear to recognize him." He says, on the 5th interrogatory, that on one of the days to which he has deposed on his examination in chief, he remembers being present with the deceased, dining with him, when he was attacked with a sort of fit, which lasted only a few minutes; he revived quickly, and he concludes with saying, "That he last saw him in September, 1815; that he was then no better; he believes the deceased was not, from September, 1812, capable of comprehending the state of his affairs, or of managing the same." Now these terms, capable of comprehending the state of his affairs, or of managing the same, are still more wide and vague, and still afford a looser standard of capacity even than the usual terms which are made use of: they may stand at very wide distances indeed, but he does not, at the utmost, go beyond a fluctuating, doubtful capacity, and his conduct shews he did not conceive the de-[490]-ceased reduced to utter childishness and incapacity; he says, on a further interrogatory, the 34th, "That the deceased was a co-executor with the respondent of his late brother, Mr. John Harrison. Mr. Boodle did attend the deceased at Widmore, in December, 1813, when he was sworn to his brother's will; the respondent does not recollect that Mr. Boodle did express any doubts of the deceased's capacity; the respondent and the deceased did meet some time in January, 1814, for the purpose of discharging several of the legacies bequeathed by his brother's will, and for the payment of some tradesmen's bills; the deceased did sign several drafts on the bankers for paying off those demands; he did all that he had to do correctly, which was merely to sign his name; he could do any thing of that kind very well; he could do what he was told to do, but he was not, as the respondent believes, of sound mind." It is a little extraordinary that he should transact all this business with a person who he thinks was not of sound mind; but the deceased shews no want of accuracy; every thing he does, he does correctly and properly, without observation, without assistance; he signs twenty drafts at least upon that morning, with Mr. Stanley, for the payment of the debts of his brother; and he does not merely sign his name, but it is "Andrews Harrison, executor to John Harrison," that is the way in which every one of these drafts is signed; he does not forget himself and not know what he is about, and Mr. Stanley does not suggest it was necessary to instruct him how he was to sign his name, and this [491] is done twenty times together. Mr. Stanley, however, is of opinion, but it is mere opinion, that he could not do any thing more, and that he was still of unsound mind, possibly founding that opinion on some circumstances which happened afterwards in December and March, which I shall presently notice. Mr. Stanley settled his executorship accounts with the deceased, for in page 71 of the book I find this entry, "September the 28th, 1814. To cash of Stanley, £267, 10s. 2d November, 1814. To balance of account of executors of J. H. £224, 9s." So that these sums must have been paid over to the deceased, and he regularly enters them in his book of accounts. Mr. Stanley again visits the deceased in September, 1815, and all he says then is that he was no worse. On the death of the deceased, he is sworn as one of his executors by error, and was going to take probate of these codicils; nay, he becomes a party in this cause, and makes an affidavit as to scripts, and annexes these codicils as a part of the true will of the deceased. The counsel say, as an

apology, that he was incautious in this respect; now, really, the Court cannot impute to him incaution, or that he had so slight a regard to the solemnity of an oath. I rather think he was sincere on both occasions, and that he swore to what he thought was true at the time of applying for probate, and at the time of the affidavit; he had no idea at these times that the deceased was in such a state of incapacity as that instruments attested by respectable witnesses, were not the legal acts of the deceased. It is true, [492] different impressions have arisen since in his mind, not perhaps confining himself to his own recollection of the facts within his knowledge, but by allowing his mind, as human infirmity is apt to do, to have an impression made on it by what he is told by others.

The three remaining witnesses are the three maid-servants of Mrs. Jukes, residing constantly in the same house with the deceased; those witnesses, therefore, had very good opportunities of judging of the capacity of the deceased, as far as such persons are capable of judging correctly; more especially Alexander, who was Mrs. Jukes's lady's maid; and the counsel on both sides have relied on her evidence, as having been fairly given. She is produced by Mr. Benjamin Harrison, and there is no particular reason to believe that she is biased in favour of Mr. Kinleside; indeed, I am to recollect that Mr. Kinleside's situation having been such that his duty called on him to settle the accounts of Mr. John Harrison, and being his residuary legatee, having an interest to look accurately into those accounts, and other business of this sort, it is not difficult to account for his not being very popular in those two mansions among this class of persons; but Alexander appears to have given her evidence with great fairness. Her account deserves to be stated with some particularity; she says, "She has lived with Mrs. Jukes twenty-three years; that for five or six years before his death the deceased was subject to a kind of fit, though of what particular description it was, or [493] what it should properly be called, she does not know; when so attacked, the deceased would turn pale, and tremble very much; he was apparently giddy, and at times quite insensible; now and then, for some days after being so attacked, he did not know what he was about, but at all times, when free from these attacks, he had his recollection about him, and was quite rational and sensible; how frequently these fits came upon him she cannot recollect, but the attacks were more frequent about the time of his brother's death; she says that if any thing worried or agitated him, he was more liable than at other times; sometimes he had not a fit for several weeks together, at others more frequently, up to the last year of his life, when they increased upon him; he was worse about the time of his brother's death, and a good deal less collected than before or after; she says that the deceased at times lost the recollection of his friends and acquaintance, which was not owing to his loss of eye-sight, for within a month of his death he read a newspaper quite distinctly, and without difficulty, aloud and without spectacles; she says that sometimes she has thought that the deceased pretended not to know, and would not recollect people when he really did know them, she is fully persuaded that such was the case; at other times he certainly did not know them; that the deceased did commonly pay what few bills he had himself, they were only for hay and corn, and such like; he kept his money up stairs, and when she took the bills to him, he used to exa-[494]-mine them to see that they were right, and then went and fetched the money and paid the people himself; the last bill he paid, which was Fuzzey's for corn, the deponent remembers his saying, he did not think he had money enough; Mrs. Jukes offered to lend him some; the deceased said no, he would go and see what he had, and finding he had enough, he came into the kitchen and paid Fuzzey. This was a few months before he died; she believes that excepting the particular times she has deposed to the deceased never was entirely incapable, and then he would not be himself again for sometimes three or four days afterwards, at others he got over them much sooner." She mentions another particular instance, "That she remembers within six months of his death, when she took her book of house-expenses to her mistress to settle with her, as she did once a week, and Mrs. Jukes had cast it up herself, she gave it to the deceased to cast for her, and he did so, and pointed out to the deponent a mistake she had made, and jokingly said she wanted to cheat her mistress; that though at times he was quite lost, yet his faculties had not failed him for a continuance." She also negatives the circumstance of his having lost his sense of delicacy and decency; she explains the reason of a person being put to sleep in his room; which fact, however, of a person being put to sleep in his room did not happen till a great many months

after these codicils were made. These are a few of the passages of this witness's deposition, and they sufficiently shew the general [495] tenor of it. She is confirmed by the other female servants, Brown, the cook, and Stilwell, the housekeeper, who, though they had not the same opportunity of judging of the deceased's capacity as the last witness, yet as far as they had they describe his capacity like Alexander; and that, except when under the influence of these fits, he was in the full possession of his capacity.

These are all the witnesses produced by Mr. Benjamin Harrison; but there is one other witness who must not be passed over, William Taylor; he was footman to Mrs. Jukes, and he had as good opportunities of judging as his fellow witnesses, Mrs. Alexander, and Brown, and Stilwell, but he gives a very different account of the state and condition of the deceased; it is stated in his evidence upon interrogatories, "He was footman to Mrs. Jukes from September, 1811, to August, 1815; he now keeps a public-house at Wherwell; he says the deceased lived in the same house with Mrs. Jukes during the whole time he was in her service;" he says upon the 2nd interrogatory, "That early in the summer of 1812, he observed an alteration in the state of the deceased's mind and memory; it was about the time that Mr. Malin's difficulties occurred, which affected him very much, and he appeared to lose his memory, and his intellects grew weak; that he was entirely incapable of recollecting those people who came to the house, unless told who they were; that the deceased was incapable of understanding what passed; that he required to be reminded what was to be done; that he was quite forgetful and [496] childish; the deceased did not know what he was doing when he signed the codicil of 31st August and 2d September, 1812; the respondent put his name as a witness to those codicils, because he was desired to do so; that long before the brother's death his memory failed him so that he could not play at cards, he thinks it was about the time of making the codicils;" he goes on to state upon the eleventh interrogatory, "That the deceased, for nearly two years prior to April, 1814, which is the date of the last codicil, was incapable of giving directions to the servants of the family, and that the deceased was, from that time down to the time when the respondent quitted Mrs. Jukes's service, treated as a person who had become quite childish and incapable of the management of his affairs;" upon the twelfth interrogatory he deposes, "That it was necessary for the last three years for Mrs. Jukes or some one to inform the deceased who the different persons were who called, it was always done." These are some passages of his cross-examination; they are sufficient to shew that he deposes to a state of entire childishness, quite up to Mr. Harrison's plea; this is certainly strong evidence, if it could be safely relied upon. The witness Alexander, upon her first interrogatory, says, "That the first person that said any thing to her about being examined was William Taylor; that he came down to Widmore soon after the deceased was dead; that he soon after came down again; that the respondent found he had been with Mr. Benjamin Harrison; that he asked her a great many questions: the respond-[497]-ent said she could not remember many things that he spoke of, and he told her her memory was very bad; he said a great deal about the deceased's faculties, and about the deceased's behaviour." Here then we find this witness immediately upon the death of the testator quite active; he goes down to Widmore, he then goes to Mr. Benjamin Harrison; he goes down to Widmore again; he has a good deal of conversation with this material witness about the deceased, and about his faculties, and because Mrs. Alexander cannot recollect such facts as he thinks proper to suggest, he charges her with her memory being very bad; it must have had a tendency at least, whatever the intention might have been, of exciting and tutoring this witness; his account of the state of the deceased is quite irreconcilable with the account of Mrs. Alexander, and those to whom the Court has adverted, and the Court must soon advert to others; he has not the same apology as the gardener and others who saw him only occasionally; this witness was constantly in the house with him; acceding as I do to many of the observations made on his testimony by the counsel for Mr. Kinleside, I would further observe that though he is produced by Mr. Kinleside, he is rather, I think, in this part of his evidence, to be considered as the witness of Mr. Benjamin Harrison. Mr. Kinleside was under the necessity of producing him as an attesting witness to these codicils; he is only produced to the factum of these codicils, the factum of which, though he attested them, he has thought proper to deny; he is not only interrogated to the factum of these codicils, but he is [498] interrogated to the whole case intended to be set up after-

wards by Mr. Benjamin Harrison, and from his early communication with the party, from the tenor of the interrogatories, from the allegation which was afterwards given in (to parts of which no other witness than this witness has attempted to depose); I am led to infer that the principal grounds of opposition to this case are founded upon information conveyed by this witness to Mr. Harrison, who we find so very active immediately after the death of the testator, and when these facts are deposed to, by being brought out upon leading interrogatories addressed to him, it being known beforehand what the witness could say, and those interrogatories not addressed to him for the purpose of extracting evidence from him which the party was unacquainted with, he is to be considered, I think, as Mr. Benjamin Harrison's witness, but without the adverse party having had the advantage of his being produced to those facts on Mr. Benjamin Harrison's allegation, and therefore he is a witness whom there was no opportunity of cross-examining, and in that point of view the Court is bound, I think, to make very considerable deduction from the evidence he has given, and when his description of the general state of the deceased is inconsistent with the other witnesses, who had the same opportunities of seeing the deceased, when it is at variance with Mr. Boodle himself as to the capacity upon the execution of this codicil, and upon some other parts of Mr. Boodle's evidence, and when he is directly at issue with some other respectable wit-^[499]nesses in the cause, he is a witness on whom the Court cannot rely; whether his evidence has arisen from some prepossession or bias in his mind or some defect of intellect, or from whatever cause, without imputing to him an intention of really perjuring himself, I am not going too far in saying I cannot rely on any fact stated by him, where he is not corroborated by some other evidence.

There are several circumstances pleaded as inferring incapacity, which are either wholly disproved, or so explained as to change their character; his losing his delicacy, his getting up in the night, and his undressing himself in the day, but there are circumstances pleaded in the tenth article of the allegation, which it becomes my duty to examine, because it is certainly a very important part of the case, and that is, as to three interviews, which were had with the deceased by Mr. Boodle and two other persons, in the month of December, 1813, and one in March, 1814, upon which occasion the deceased was judged by all the persons present to be in a state unfit to proceed to a testamentary act: the account given by Mr. Boodle of these meetings is to this effect; upon the fifth and subsequent interrogatories, that, "On the 7th of December he went to Widmore, to the deceased's house, accompanied by Mr. Stanley; they there met Mr. Wells and Mrs. Jukes; the respondent had determined to proceed cautiously, in consequence of a certain degree of want of recollection, which he thought he had observed in the deceased upon one or more of the occasions on which he had seen him shortly before, ^[500] on the subject of his late brother's affairs." Mr. Boodle had been several times with the deceased, just at the time of his brother's death, when it is admitted he was in a worse state than usual, but the utmost Mr. Boodle says here is, that he thought he had observed a certain degree of want of recollection in the deceased upon one or more of the occasions on which he had seen him; he says, "That after explaining to those present the course he intended to pursue in taking the deceased's instructions for some intended alterations in his will, the deponent took down from him, in the presence of Mr. Wells and Mr. Stanley, the testator's own ideas of the property which he possessed, the dispositions he had made of it by his will and codicils as they then stood, and the alterations which he wished to make, but it being apparent to them all three that the deceased's mind and memory were by no means in such a state as to enable him to make a clear and consistent disposition of his property, it was agreed by all that it would be proper to postpone the business, and an appointment was made for the following Tuesday. At this meeting the deceased certainly gave such evident proofs of a want of recollection, that the respondent had no doubt of his being in a state unfit to make any alteration in the existing testamentary disposition of his property," he says, "That he was with the deceased upon the occasion now deposed of, not less than two hours;" here it is obvious that Mr. Boodle considered that the whole of the will and codicils was to be revised, that alterations were to be made in every part of them, and the deceased ^[501] is left to find his way through them, and propose his alterations as he can. This might be quite proper and cautious; I am merely noticing the fact. He says, "That on the 10th of December Mr. Kinleside called upon him at his house in Brook Street, and said, that now finding by a comparison of Mr. Andrews and Mr. John

Harrison's wills, that they had been made in perfect unison, and with a mutual understanding between themselves, he thought that no alteration could properly take place, the respondent told him plainly, that was his opinion too ; but it must be what Mr. Andrews Harrison himself should determine." Here Mr. Boodle's own opinion plainly is, that no alterations ought to be made in the will, but certainly he is not impressed with the permanency of the incapacity of Mr. Andrews Harrison at this time, for he says, that it must be what Mr. Andrews Harrison himself should determine.

Mr. Stanley states, upon the 32nd interrogatory, that " Mr. Boodle did express to the respondent on his return home, that he felt himself peculiarly situated with reference to the deceased, knowing, as he did, that the wills of the two brothers had been made by them with a distinct understanding that no alteration should be made by the survivor, upon which point the deceased and his brother had been very anxious for many years ; and the circumstance of the deceased's wishing, immediately after his brother's death, to make such alterations, excited in his mind a suspicion of the deceased's capacity, and of the possible influence of those about the deceased, and that he had therefore felt [502] himself called upon to be very cautious in the steps which he took." This is the account which Mr. Stanley gives of the conversation between himself and Mr. Boodle ; but I think this is manifestly stated more strongly than Mr. Boodle himself meant to state it, or than he has stated it in his deposition in several respects, but more particularly in respect to this distinct understanding between the brothers, that no alteration should be made by the survivor, it only shews how cautious the Court should be upon all occasions in receiving evidence of mere declarations passing in conversation, which are so easily misapprehended, and which are so very liable, unintentionally, to be exaggerated and distorted from their true bearings ; for Mr. Boodle, on the third interrogatory thus states himself, " He does not remember any desire being expressed by both, of carrying each others wishes into effect ; though it might be implied by their giving instructions jointly, as they did, and certainly a strong inclination was manifest in each to satisfy the other ; he does not remember any wish being expressed that the ultimate arrangements existing at the death of either should not be varied by the survivor : " surely then the inference drawn from their giving instructions together, and these affectionate brothers feeling a strong inclination to make their dispositions satisfactory to each other, is something far short of what Mr. Stanley apprehended, namely, that there was a distinct understanding between them that the survivor should not make any alterations whatever ; Mr. Boodle never so understood it, for he makes two alterations [503] in the lifetime of the brother, and when the brother did not make corresponding alterations, and they were pro tanto alterations when the brother was in a state of incapacity, and he makes two others when the brother was in a state not competent to do any testamentary act ; but still it is quite clear Mr. Boodle goes down with an impression that no alteration ought to be made, and with an impression that the deceased's capacity might be in a doubtful state, and that there might be some influence exercised by those about the deceased. He says, " He went again to the deceased's house on the 14th of December with Mr. Stanley, and he read over with Mr. Andrews Harrison the whole of his existing will of 1808, and the several codicils thereto, taking down the deceased's own ideas of the alterations he was to make ; and the various instances of want of memory which occurred in the course of taking them down, proved to their mutual conviction that, although much better in that respect than at their last meeting, he was still unfit to make any consistent disposition of his property. He states further that, on the 19th of March following, he received a letter from the deceased, desiring him to come to Widmore on the following Monday, for the purpose of making a codicil to his will : the respondent wrote to the deceased that he proposed attending him ; circumstances preventing his going there upon the Monday (both the letters are exhibited in this case), he went there on Tuesday the 22d of March, and endeavoured again to take instructions from the deceased, for [504] the proposed alterations in his will, taking down a list of names of legatees under his existing will, specifying such as the deceased conceived to be dead, and afterwards endeavouring to learn from him what legacies he then meant to leave ; but after two hours' close attention to all he said, and taking down his intentions as far as they could be at all made out, his instructions were so incoherent and so inconsistent with his former deliberate and well considered intentions, that not

only Mr. Stanley and the respondent, but even Mrs. Jukes, who had shewn great anxiety to have some of his intentions carried into effect, agreed that he was by no means in a state of mind, memory, or understanding, competent to make any new disposition of his property; the respondent therefore returned to London, under an engagement to come again to Widmore whenever Mrs. Jukes should find him to be in a disposing state of mind and intellect; he states further, "That he remembers, that on the second visit Mr. Wells did express an opinion that it was unnecessary to go through the will as it confused the deceased, and he wished to confine the deceased more immediately to the devise of the real estate, to which suggestion the respondent did not feel himself at liberty to agree: upon the last of the three interviews of which he has herein deposed, the deceased had his existing will before him, which he read himself, making his own remarks on each particular legacy and appointment as he proceeded; the observations which he so made being taken down in writing by the respondent." Upon the tenth interrogatory he says, "The [505] deceased was composed, he shewed no irritation, except that whenever the name of Mr. Benjamin Harrison was mentioned or occurred, he spoke with more quickness than belonged to him." To the 11th interrogatory he says, "That from the observation he made, he considered and still does consider, that it was not so much a decay of understanding as of memory which the deceased manifested;" he says "That the deceased was quite rational, but where memory was concerned very deficient. The respondent cannot take upon himself to say the deceased was permanently incapable." Upon the 12th interrogatory he says, "It was apparent to him, that the deceased's mind was upon all three occasions of which he has deposed, strongly impressed with a feeling against Mr. Benjamin Harrison, and he shewed a great anxiety to make alterations of those bequests which related to him, in some degree also towards Mr. Paul Malin; when the respondent was with the deceased in 1812 the deceased expressed great concern at Mr. Benjamin Harrison having declined to be his executor; but he did not then shew any such feeling of irritation as existed subsequently, and how that had arisen the respondent does not know."

At present I am only considering how this evidence bears on the question of capacity: how it is to bear either on volition, or on fraud, or circumvention, belongs to another part of the case. Mr. Boodle goes down with strong prepossessions against any alterations being made, and with unfavourable impressions in other respects as to [506] the state of the deceased: on the two first occasions he thought the deceased wished to make an entire new will, and the deceased attempted to go through the whole of this long and complicated disposition contained in his will and codicils: on the third interview also, though the deceased had mentioned in his note, which is not exhibited, "I wish to make a codicil," yet the same course is still pursued of going through the whole of the testamentary dispositions; the deceased becomes confused, and though, as Mr. Boodle says, he was quite rational, yet he shewed strong marks of want of memory; and, therefore, Mr. Boodle declined proceeding. He and Mr. Wells differ in their opinion in respect to the course which ought to have taken place on this occasion; the Court is not called on to decide that point between them: in Mr. Boodle's view of the subject, and as things appeared to him, knowing only so much as he did of the state of mind of the deceased, the course he pursued might be quite correct; at all events his conduct was perfectly cautious; and, without doubt, was highly honourable. The Court is only considering how these transactions ought to bear out the general capacity of the deceased, and really, under such circumstances as have occurred, the deceased becoming confused, and shewing marks of defective recollection, a person of his great age, subject to nervous fits, which were liable to be brought on while his mind was anxious and agitated, these transactions, though they are extremely important in considering a question of general capacity, are, in my judgment, by no means con-[507]-clusive; at other times, and under different circumstances, and the deceased attempting a less extensive arrangement, he might not be confused, but might recollect all circumstances connected with, and necessary to give effect to testamentary acts of a less complex sort; for, as Mr. Boodle observes, his understanding was not defective; he is quite rational, it is only defect of recollection that is imputed to him, and Mr. Boodle does not venture to say he was impressed with an idea of his being permanently incapable; on the contrary, at the last interview he proposes attending again if it should be necessary.

It is proper now to compare this with the other evidence, to see whether at these interviews the deceased was in his general and ordinary state, or whether he was seen under circumstances of disadvantage and confusion, and defective recollection, which did not exist at other times : for this purpose it may be right now to advert to some of the evidence produced by Mr. Kinleside in support of the general capacity ; for hitherto the Court has only examined the evidence produced by Mr. Benjamin Harrison in support of his case.

Mrs. Jukes, the old lady in whose house the deceased lived for so many years, has been examined : she had undoubtedly the very best opportunities of observing the state of the deceased's mind, being constantly in his society ; at the same time she is very old, she is eighty years of age at the time of the examination, and is certainly subject to some lapses of memory : she has undergone one of the longest examinations ever taken in this Court, first [508] on a very long allegation, and then on upwards of forty interrogatories : but I see no reason to suppose she does not relate what she recollects truly and with integrity, and her account is this : "She was acquainted with the deceased for nearly sixty years ; he came to reside with her about the year 1789, and continued to reside with her till his death ; for several years before his death he was subject to a nervous attack, which was sometimes like a fit : she remembers that the deceased was first attacked with the nervous complaint, of which she is now deposing, several years before his death, in a slight degree, they then lasted only for a little while ; their effect was to confuse him, and he did not know where he was or what he was about ; sometimes they would go off in a little while, at other times the nervous affection would continue upon him for some days : as he advanced in years the attacks came on more violently, and assumed a different appearance, being more like fits, but they were uncertain both as to their recurrence and duration ; if anything happened to agitate him, it would bring on the nervous attack, but generally they came on without previous notice or warning. Within the last two years, the last of all more particularly, the attacks were more violent, and more frequent too, than they had been before, but she thinks, that when they became more violent they were sooner over ; that at all times during 1812, 1813, and 1814, and almost to the very time of his death, the deceased retained his mental faculties, and excepting those times when he was suffering under the attacks [509] to which she has deposed, or the effects of such attacks, he was of perfectly sound mind and understanding ; his memory was so far affected by the repeated nervous attacks, that he did not remember persons whom he was not accustomed to see, till he was told who they were : otherwise his knowledge and recollection of persons, particularly those about him, were good ; he was so deaf that, the deponent's voice being weak, she could not converse much with him, but whenever he did join in conversation, he conversed very rationally and sensibly, and with great good humour, for he was a very sensible man, and remarkably cheerful, though very calm. It was his constant habit to read to her the psalms of the day, and lessons, unless prevented by visitors or illness ; now and then he was fond of a little fun ; if he came to any passage that reflected upon women, he would be humorous upon it ; he was capable of comprehending the state of his affairs, and fully capable of managing them to the last, always paying his own bills, and regularly entering in his account book all the payments he made ; but he did this principally in his own room, though he made no secret about anything ; the deceased used to assist the deponent in keeping her accounts, in which he now and then discovered a mistake, and that he was always capable, except when under the influence of his nervous complaint, of settling any accounts whatever without assistance, or of doing any act requiring thought, judgment, and reflection ; that neither she herself, nor any other person, thought of treating him otherwise than as a [510] person who was very capable ; he would have been offended, and properly so, if they had done otherwise." This is the substance of the old lady's account ; and it very much corresponds with the account of the maid-servant Alexander ; and is confirmed by other respectable witnesses.

The next person to whom I shall advert, who is considered on both sides an important witness, is a medical attendant and friend of the deceased, Mr. Roberts ; he states, "That he attended the deceased during the year 1812, sometimes as often as three or four times a week ; he continued to visit him pretty regularly down to the month of October, 1814 ; he was then absent till the beginning of December, when his visits were renewed, and continued till the end of the year 1815 ; the deceased

was at all times very friendly with the deponent, who, independent of professional attendance, was living in habits of friendship with him, and from the frequency and length of his visits, he acquired an accurate knowledge of the state of the deceased's body and mind; that in consequence of a peculiar habit of body, he was liable to an occasional interruption of his mental faculties; the attack came on without previous notice, and at no particular or stated periods; he has seen the deceased frequently when under the influence of such attacks, the effect of which was to produce a total suspension of his mental powers; excepting upon these occasions the deceased was at all times in the years 1812, 1813, and 1814, and as long as he continued to see him, of sound mind, memory, and understanding, and had apparently [511] a perfect knowledge and recollection of his friends and acquaintance; he was capable of understanding what passed in conversation, and did at all times converse with the deponent and others in his presence, in a very rational manner." An hypothesis has been attempted to be constructed upon the evidence of this witness, that these fits had no effect upon the deceased's mind except when they were visibly present, producing this total sort of suspension of faculty, but that neither before nor after; and that therefore, unless the mental powers of the deceased were wholly suspended, the deceased was in his ordinary state. Now I cannot but think that what I have just stated from this evidence is the sound result of Mr. Robert's evidence; and that he by no means intends to give any other opinion; and if he did, it would be at variance with all the other evidence in the cause. No doubt his faculties were affected at the approach of a fit, and perhaps still more after it was over; sometimes it did not come to a fit, and yet he was affected, it being kept off by the medicine; he took valerian; and it continued for some time in a greater or less degree. The witness goes on to say, "He was fond at times of an innocent joke; he says also, he has gone into the room occasionally in the morning when the deceased was reading in the Bible or Prayer-book, and he did not leave off reading immediately, but read aloud to the end of the chapter, or some verse where he could conveniently stop." All these facts speak for themselves. There is another part of his evidence, however, which is deserving of still [512] more attention; for it relates to the deceased's capacity for business. He says "that every year the deceased was in the habit of desiring the deponent to send in his account to the close of the year; the deponent accordingly did so, charging to the deceased the medicine which he had supplied; and within a few days after the deponent always received from the deceased an envelope addressed by him containing the account which had been rendered, at the foot of which the deceased had added such a sum as he thought proper for the deponent's visits, which were never charged in the account. The two sums were cast up by the deceased, always making an even sum; for which amount he enclosed sometimes bank-notes, at other times a draft on his bankers, filled up and signed by him. The deceased either delivered it to the deponent if he happened to call, on which occasions he verbally requested the deponent to send him a stamped receipt at his leisure; if he did not see the deponent, the envelope was left at the deponent's house." He goes on to state, "That excepting when suffering from the nervous attacks, the deponent never witnessed in the deceased a want of thought, judgment, or reflection." He states another particular circumstance, "That he remembers having played at whist with the deceased on the 29th of September, 1814," that is long after the last codicil; "that he played with him both before and after that time; but that is the only date to which he can depose. He played on that occasion against the deceased, and for money; the deceased had a perfect recollection of every [513] point of the game, and played remarkably well; and he concludes by stating that during the last six or eight months before his death the deceased's mind appeared to be less firm than it had been, and it appeared to have given way."

Now, in regard to what this witness says respecting the payment of his bills, the books of account have been referred to, and some observations have been made upon them in the argument. No. 117 is the bill which the deceased paid Mr. Roberts in January, 1813, and the account given by this witness of the mode of payment is to be recollected. The bill is paid in January, and here is a receipt to the bill, dated January 14th. "Bromley, January 14th, 1813.—Received of Andrews Harrison, Esquire, the sum of thirty-five pounds, by payment of Mr. Paul Malin, for medicines and attendance to the 31st of December, 1813, for self and partner.—William Roberts." And it is inferred from the circumstances of its being stated in the receipt to have

been paid by the hands of Mr. Paul Malin, that it was not the deceased that settled this account, but that it was Mr. Paul Malin. Now Mr. Malin at that time kept the deceased's cash. Mr. Roberts says that he sometimes received payment in bank notes, and sometimes in a draft upon the banker. Of course, if the deceased drew a draft, it would be a draft on Mr. Malin; probably he might be directed to pay it in money. It is charged in Mr. Malin's account of January, 1814; it certainly therefore was paid by him; and as Mr. Malin had got into difficulties, the deceased might desire it should be inserted in [514] the receipt, "paid by the hands of Mr. Malin;" but I think there is nothing which proves the bill was not settled by the deceased himself in the manner stated by the witness. In the first place, here is a sum added at the bottom for attendances; the bill is £29, 14s. 9d.; here is £5, 5s. 3d. added, making 35l.; the bill is endorsed "Roberts and Ilott, 12th January, 1813, 35l." In the deceased's own hand-writing in the account-book, upon the 12th of January, 1813, is the entry for the 35l. paid to Roberts and Ilott; in Mr. Malin's account current, here is upon the 12th of January, 1813, 35l. to Roberts and Ilott. Now, all these entries being upon the 12th of January, I am led to conclude that the transaction between the deceased and Mr. Roberts was conducted upon that day, and that he then gave a draft to Mr. Roberts upon Mr. Malin; for Mr. Malin's receipt is not dated till two days afterwards; it is dated January the 14th; and therefore that perfectly accords with the drafts being drawn on January the 12th. Mr. Malin in his account enters it on that day; the receipt is not given till the 14th, which is the date when the draft was presented for payment, or when Mr. Malin was directed to call on him and pay him. But this is not the only transaction of the kind; here is a similar one in the next year, and which is a still more important period of time. January, 1814, here is Mr. Roberts's bill for that year £27, 12s. 10d.; the deceased in his own hand-writing thus adds to it £5, 7s. 2d., the two making together the even sum of 33l.; here is Mr. Roberts's receipt for this sum; here is on the back [515] of the receipt, in the deceased's own hand-writing, "Roberts and Ilott, 15th January, 1814, 33l.;" and in the deceased's cash-book here is "by Roberts and Ilott, 33l.;" but here is still more, for here is the draft drawn and filled up by the deceased himself upon his new bankers, Martin, Stone, and Company, for this 33l.; here is the corresponding part of the check filled up by him for this sum of money, so that here are these transactions of business completed in all their parts, and at most important periods of time proved by the clearest evidence, by the oral testimony of Mr. Roberts, without adverting to the exhibits, and by the exhibits brought in and admitted to be in the deceased's hand-writing. Now, that a man who can do all this, and yet from imbecility of mind can do no testamentary act, however cautiously conducted, and however free from suspicion of fraud, is, I think, quite untenable.

The next witness is Mr. Wells. He was an intimate friend of the deceased, and the account which he gives of him is to this effect; that he was intimately acquainted with the deceased many years; who had a key of deponent's shrubbery, and used very frequently to walk therein; he frequently also came to deponent's house, and after the death of Mr. John Harrison the deponent frequently dined with the deceased at Shawfield, and the deceased also dined with the deponent at Bickley, which intercourse continued till the deceased's death, but was less frequent during the last six or twelve months of his life. The deceased's mental faculties were then on the decline, and during that [516] period the presence of the deponent brought back to the deceased's recollection those happy periods of his life when the deponent's father and uncle were living, and the deceased used to lament that those days were gone, and was affected by it. The deceased for many years was subject to nervous attacks, which were attended with a temporary loss of memory; sometimes the attacks lasted only for a few minutes, at other times they continued longer, and except when suffering under those attacks, he believed him to be of perfectly sound mind, memory, and understanding, as perfectly as any man of his age whom the deponent ever saw; he had a perfect knowledge and recollection of his friends and acquaintance, and of those about him. About the time of Mr. Malin's failure the deceased sent for the deponent to speak to him upon the subject of his affairs, when he found that the deceased fully comprehended the state of them, and from what then passed he has no doubt he was fully capable of managing them; he shewed to the deponent the cash-account of Mr. Malin, which the deceased appeared to have balanced very regularly. He had no

doubt the deceased was capable of settling bills, keeping his accounts, and managing his own affairs, without any assistance, or doing any act requiring thought, judgment, and reflection. He has been present when Mrs. Jukes has unnecessarily interfered to explain what she supposed the deceased not to have heard, and the deceased shewed some impatience at her interference. He goes on to state, "That the deponent was requested by the deceased to be present [517] at the opening of his brother's will; he then met the deceased for the first time after his brother's death; on seeing the deponent the deceased held up his hands, and expressed the greatest concern at the loss of his brother; he seemed to be in great distress, and said that he had lost his all."

The case set up is that the deceased was so reduced to a state of second childhood that he was perfectly unimpressed by the death of his brother, whereas it appears, from this and a great deal of other evidence, that the deceased was most exceedingly oppressed and distressed by the death of his brother, and felt it most deeply. As to his playing at cards before the funeral, which was dwelt on at the bar, I confess, considering his state at the time, his deafness, and so on, and that cards were his usual amusement, it does not shew any want of memory, or any want of capacity, that he should wish, or that his friends should press him to play at cards at that time; it was a mere substitute for conversation, to which he was almost obliged to resort. As to his capacity for playing at cards, Mr. Wells says, "He did not consider him incompetent till within the last six months of his life, during which time he did not play with him; and therefore he cannot depose to his competency or incompetency; but he played with him within the last twelve months of his life, when it was the observation of the deponent's nephew, as well as himself, that the deceased played remarkably well: whether they then played for money or not he does not particularly remember, but he [518] believes they did, and certainly the deceased was then fully competent to play for money."

In addition to this there is the evidence of the Rev. Mr. Walmsley, who was acquainted for thirty years with the deceased. He lived on terms of intimacy with him down to the time of his death. He saw him frequently while he resided at Chislehurst, which was till 1805, when he removed to London, and used, though more seldom, to see the deceased afterwards; and during the years 1812, 1813, 1814, and 1815, he, upon the average, visited the deceased once a month: when so visiting, he almost always slept one night at Widmore; he had therefore frequent and very full opportunities of judging of the capacity of the deceased, a person quite as capable of judging, perhaps, as the witness William Taylor; but he relates facts which give the Court an opportunity of judging for itself. He says, "That the deceased occasionally, when the deponent was obliged to be in London early in the morning, sent him in his own carriage, and upon such occasion, the deponent having mentioned such his intention to the deceased when he arrived at Widmore in the morning or before dinner, the deceased recollected it, and at the usual time in the evening—perhaps about eight or nine o'clock—he of his own accord gave orders to his coachman to be ready the next morning to take the deponent to London at the time required" (now that shews understanding and forethought on the part of the deceased); "and the deceased was very exact and particular in the directions which [519] he so gave. The last time this occurred was, according to the best of his recollection and belief, within the last six months of his life." (This is the person whom Taylor would represent as utterly incapable of giving any order whatever to any servant.) He says, "That the deceased was subject to nervous attacks, which were attended with a total abstraction of thought and suspension of his mental faculties; the attacks he witnessed never lasted longer than from ten to twenty minutes, and when they subsided the deceased's faculties and recollection returned, and within an hour afterwards he was entirely himself again; that, excepting when under the influence of one of those attacks, the deceased was at all times, during the years 1812, 1813, and 1814, of sound mind, memory, and understanding; but he thinks that the deceased's faculties were not so strong during the last year of his life as they had been before, but he does not think they were materially impaired; that he had a perfect knowledge and recollection of his friends and acquaintance and of those about him, except when under the influence of the before-mentioned attacks, during the last year of his life; not many months before his death, the deceased, having seen the deponent from a window which looked down the road, as he approached the house, came out to receive him, and began

immediately to converse in his accustomed good-humoured and jocular manner; the deponent has gone into the room and found the deceased reading the Psalms and scripture lessons for the day, and he has heard him make remarks upon them [520] which were both pertinent and sensible." He is stated by some of the witnesses to have read remarkably well, which could hardly be the case with a man who was reduced to childhood; and Stillwell says he was accustomed to look out the Psalms of the day himself without assistance. Mr. Walmsley goes on to say that within the last year or two of the deceased's life he has been present when his coachman came in to settle his account with the deceased; the deceased looked over the articles, cast up the account, and paid it, without any assistance, and, as far as the deponent observed, without difficulty. He states that upon another occasion a farmer, Fuzzey, brought his bill for corn; the farmer was called into the parlour, and the deponent is pretty certain that the deceased paid him at the time without assistance. He says that the deceased was certainly, in the deponent's opinion, at all times when not under the influence of fits, fully capable of settling all such accounts and paying his bills without any assistance whatever, and was fully capable of doing any act requiring thought, judgment, or reflection.

It might be unnecessary to add to this, but even the witnesses produced on the conditit on their first examination, Mr. Ilott and Dr. Smith, confirm it. Mr. Ilott was acquainted with the deceased for eleven years, and he says that during the last three or four years he attended the deceased almost entirely, and was in the habit of calling on him every second day; so that he had very frequent opportunities of seeing him; and [521] he says, on the second interrogatory, "That there was occasionally an absence of memory in the deceased, but that in general the deceased's memory and understanding were unimpaired during the two years before May, 1814." He says to the third interrogatory, "The deceased did not uniformly converse so as to satisfy the respondent that he was in complete possession of his mental faculties; there were times when he did not recollect the respondent—about five or six in number." So that in the course of three or four years' calling upon the deceased, three or four times a week, there were four or five times—that is, not once in fifty times—in which the deceased did not recollect the deponent, which perfectly accords with Mr. Roberts's account of those attacks. He says on the sixth interrogatory, "That he has heard it said that the deceased had become imbecile, and was incapable of managing his affairs, for some years before his death; but the respondent paid no attention to such report, because he knew the contrary to be the fact."

The Rev. Dr. Smith, who is the clergyman of the parish, who has known the deceased for above thirty years, says, "He was not in the habit of visiting the deceased for the last four or five years, previous to his death, but he called upon him occasionally. He remembers after the 27th of April, 1814, meeting the deceased at dinner at producent's, they played at whist together in the evening; the respondent and the deceased were partners, they played two rubbers, and the deceased played as good a game as ever; he was as [522] perfectly in his senses as any man; this was about a year, he says, before his death;" that was long after the last of these codicils. Dr. Smith plays with him, Mr. Roberts plays against him; Mr. Wells and his nephew are by-standers, seeing him play at whist, and think him a remarkably good player, and to suppose a man under these circumstances is so reduced to childhood, so lost to every thing he does, as not to be capable to do any testamentary act whatever, is really a situation we cannot very well consider as existing.

Now these are the leading features of the depositions of the witnesses, and the result is quite obvious; they disprove the case set up of total incapacity. But to rebut the averment which was made, that the deceased was unable to manage his own affairs, and to pay his own bills, and to settle any accounts; his own papers have been exhibited in the cause, and some of them (perhaps sufficient) have been already adverted to by the Court. Now here, in the first place, is the fact that the deceased did manage his own affairs; that no other person is proved to have assumed that authority over them for him. Mr. Malin first, and Mr. Kinleside afterwards, did overlook his brother's, Mr. John Harrison's, accounts, the deceased only supplying money; but the deceased, down to a very late period of his life, kept his own private accounts, paid his own bills, drew his own drafts; no evidence is produced to prove he did not do all these things himself; he might occasionally have a draft filled up by a friend who was with him, Mr. Kinleside or any other person; but nothing

further [523] is proved. Here is in several instances proof coming out incidentally, that he did the whole himself, without assistance.

It was quite unnecessary, in my judgment, to examine further witnesses upon this point: the documents being in the hand-writing of the deceased, they are his accounts; and it lay on the other side to shew they were not kept by him, but by another person for him. One small part of the account-book, and one small part only, during the latter part of the year 1812, has been attacked in argument. As to many of the objections, the Court was satisfied, at the time, that they were unfounded; some indeed were given up, others were adhered to; but upon looking carefully into the accounts since, as far as a person not conversant with these matters may venture to trust himself, I think most or all of the objections are of little weight or erroneous. There are a few false castings up, and who does not make blunders of this kind? there are two entries of the same thing, one of which is afterwards erased; that has occurred in former years; things are entered on one side that should be on the other, but again that species of mistake occurs in former years. There are great errors in page 49. Here is a deficiency of cash, 149l., I think, in the year 1810, and in the year 1809 a deficiency of cash, making a difference of 125l. Who does not occasionally omit entries of expenditure? but this is in 1809, when his capacity is unimpeached: there is in 1810 a deficiency of 105l. 6s. 7d.; little omissions of that kind occur in the former part of his life.

[524] The great circumstance relied on in the argument was that there is quite a change in the principle of keeping the account, occurring about the middle of 1812, which can only be accounted for by the deceased's being incapable on account of Mr. Malin no longer assisting him in keeping his accounts: it is stated that one side of the account contains all his sources of income; and the other all his expenditure; and that he has entered sources of income twice over. Now, the objection is not quite correct in point of fact; in his private accounts the mode in which he carries them on is this: he brings forward his balance from the last year, and he includes in it, not merely cash in his own possession, but cash in his banker's hands also; and he debits his private account with the aggregate conjointly, and then he goes on to debit the cash with the dividends his bankers from time to time receive. In this year, till September 17th, it goes on in that mode, but then he adopts a different mode, and from thence to the end of the year, and the beginning of the following year, when he transfers his account to the new bankers, he proceeds in a different way, for he debits cash, with monies paid by, or received from, Mr. Malin: but he does not debit it with the dividends Mr. Malin receives, but finally with the balance paid to the new bankers by Mr. Malin. Is there nothing to account for this but the incapacity of the deceased? This was the time that Mr. Malin had fallen into his difficulties; when the deceased did not know what money he should get from him. It begins on the 17th Sept.: the monthly account [525] for September is in a different hand-writing, and then from that time to the time of appointing his new bankers, he only debits cash, as I have already stated, with the sums which Mr. Malin had actually paid for him. It was a mistake of the counsel to suppose that he debited the things twice over; the dividends are not debited—indeed the dividends on the April payments, 117l., were not debited at all; the dividends due at Michaelmas on long annuities, the dividends due at Christmas, on the 3 per cents. are not debited in the cash account, but only what Mr. Malin pays for him; and the money which he finally pays over to the bankers: he, therefore, does not do it twice over, and I think, considering the difficulties into which Mr. Malin had fallen, the deceased, instead of considering his money as cash, as the dividends should arise, was right in only considering it in the way I have already stated; if the deceased was in error in this respect, it is an error not very unnatural, and which persons, I hope, in their senses may fall into: for it appears to me the proper course for a man under those circumstances to have adopted. I will not debit the account with the sum in my banker's hands, which I may not receive on account of his difficulties; but I will debit the account with the money as it is received from him. It was said he does not balance his account at the end of the year. No, he did not, because, at the end of the year, Mr. Malin had not settled his account with him. He renders the account for January, and pays over the balance to Martin, Stone, and Co.; but when [526] he settles his final account with Mr. Malin, and the balance is paid over to the new bankers, he debits his cash account with that balance, and he goes on from that time to the time of his death in the same way; in

addition to this balance, the dividends as they are from time to time received, first, his own dividends, and afterwards the dividends of the residue of his brother. Perhaps after this observation it will be quite unnecessary to advert to trivial circumstances; but there are many minute circumstances in these accounts which impress one with exactly the same sort of conviction, that the deceased completely understood them. In the January account there are two balances paid to Martin, Stone, and Martin, one on the 15th of January, 113l. 14s. 8d.; the other on the 28th of January, 305l. 18s. 6d., making together 419l. 13s. 2d.; the deceased, in transferring this into his private cash account from Malin's account, does not enter them separately, as a mere copyist would do, but he enters the 419l. 13s. 2d. in one sum, as commencing the new account with his bankers, and then, from time to time, he enters his dividends.

Now these accounts, with the bills regularly paid and indorsed, these drafts drawn, these counter checks registered and marked with the date and sum for which they were drawn, the corresponding entries in the book of expenditure, prove mind and understanding, and thought, judgment, and reflection very strongly, and in a person of his great age of a most extraordinary and unusual degree.

[527] The instrumentary evidence does not conclude here; there are several letters written by the deceased himself, some at very important periods, which have been exhibited, and one or two of them have been already noticed. I will only mention the others, because they are not liable to the insinuations made against the accounts. Here is a letter of the 10th of February, 1814, addressed to Mr. Kinleside; and, therefore, it could not have been written with his assistance: "Dear Kinleside,—I have received yours this morning. Mrs. Jukes continues much the same. I shall send the carriage for you to Sutton, and hope you will bring Mr. Perry with you. I have not time to add more.—Yours, most affectionately, Andrews Harrison." Addressed to "The Reverend Mr. Kinleside, Angmering Parsonage, near Arundel, Sussex," and with a post-mark upon it. No person could write a more proper letter.

"Widmore, 12th February, 1814.

"Dear Sir,—Mrs. Jukes has received your letter this morning, but being confined to her bed with a bilious fever"—(and, therefore, she could not assist in this letter)—"cannot have the pleasure of receiving her"—(meaning Mrs. Kinleside, I presume)—"at the time proposed, but hope to have the satisfaction of seeing you at that time, as my affairs require your assistance. You may depend on the sending the chariot as usual to Sutton.—I am most sincerely your's, Andrews Harrison." Addressed like the former.

Another letter, dated 3rd of March, 1814, coming nearer to the time of this latter codicil, is also [528] addressed to Mr. Kinleside—"Bromley, 3rd March, 1814. Dear Sir,—Joseph shall be with you at Sutton, with the horses only, on Monday, and I shall be happy to see you with Mrs. Kinleside, when I hope you, with Mr. Stanley, will be able to settle the executorship business. We have not yet fixed on the time for removing to the other house." It is proved that it was intended by him to go to Shawfield, but that intention was afterwards given up. "We have not yet fixed on the time for removing to the other house, but shall wait till we have the pleasure of seeing you, and hope you will meet with a supply for Sunday"—a supply for his church he means.

Another letter of the same date is to Mr. Roe, who resided at Worksop, in Nottinghamshire, and was a devisee of the property the deceased had in that quarter of the kingdom—"Bromley, 3rd of March, 1814. Dear Sir,—I am much obliged to your father for his kind present of forest mutton, which was received safe, and at the same time informed me of his enjoying good health, which I sincerely hope may long continue, as well as that of your mother's and brother's, to whom I send my kind compliments. I have lately suffered in a most severe loss by the death of my brother, whom I sincerely loved, and shall ever regret." This is a gentleman who is so great a child that he has forgot his brother is dead, and has no impression of the loss he has sustained. "I observe that you have felt the late inclement season. I never remember such a fall of snow, and the frost has continued to this day. My best [529] wishes for the happiness of yourself and family.—I remain yours, most sincerely, Andrews Harrison."

Another letter on the 23rd of January, 1815, is addressed also to Mr. Richard Roe. "Dear Sir,—I am very much obliged to your father for the very fine mutton which

he has been so kind to present me with, which arrived safe on Tuesday last. I beg you and father, with all the family, will accept of my sincere and most friendly wishes that you may long enjoy many happy returns of this season.—I am, dear Sir, your sincere friend and humble servant, Andrews Harrison.”

These are the documentary parts of the evidence ; and what is the result to be drawn from them in respect to general capacity ? Why, that the deceased was very far advanced in life, was subject to occasional nervous attacks, which might lead ignorant or prejudiced observers to mistake or distort his condition to that of general incapacity, which might mislead occasional visitors, or those who had only a few opportunities of seeing the testator, to the same conclusion ; which might expose the deceased, when he was agitated, and anxious and nervous, and attempted some complicated business, to become confused, and his memory to fail him ; but in his general and ordinary state, it is proved to my satisfaction that he possessed his mental faculties in an extraordinary degree considering his great age, and that he had a testamentary capacity quite equal to a testamentary act of no very complicated nature.

Still the infirmities of great old age, the deceased [530] being subject to these attacks, and these codicils altering a will very deliberately made, it is necessary, where undue incitement and circumvention are imputed, to look with vigilance into the acts themselves.

The two first codicils, that of the 31st of August and the 2nd of September, 1812, may be considered together as in truth constituting one instrument, and the principal witness to this is the cautious and respectable witness, Mr. Edward Boodle ; and the account which he gives is this : “ That he attended the deceased by appointment on the 31st of August, 1812 ; he cannot, from recollection, depose with certainty who were present ; he believes Mr. Trevillian was present ; the deponent remembers generally that the deceased told him he wished to make a codicil to his will ; he stated also that there were some pictures and books, which he had received from a relation of Mr. Trevillian, and which he felt himself under a promise or obligation to leave to Mr. Trevillian.” It is to be observed that Mr. Boodle states this merely from recollection of what passed in conversation between him and the deceased ; it is no part of the written documents or instructions ; probably he understood the deceased rather too strongly ; the deceased could not have understood that there was any old promise or any moral obligation existing, as to those books and pictures to give them to Mr. Trevillian, for he had disposed of them in different ways before : he gives them now to his brother for life, then as part of his residue, then to Mr. Benjamin Harrison, with Shawfield, unless the [531] residue is under a certain sum, and if the residue does not exceed that sum, then they are to compose part of the residue. At this time, when he was angry with Mr. Benjamin Harrison, he might feel no great disinclination to separate them from the Shawfield property, and, seeing Mr. Trevillian there, and having received the books and pictures from a relation of his wife, he might say, I ought to give them to Mr. Trevillian : he does not afterwards adhere to that ; but this is not extraordinary either if he should afterwards become reconciled to Mr. Benjamin Harrison, or if he should determine on giving the Shawfield property to Mr. Kinleside, again meaning to let the books and pictures go with the house. Mr. Boodle says, “ That the instructions for the codicil were given to the deponent by the deceased himself, by word of mouth, without the interference of any other person, and taken down in writing in the margin of the drafts of the two former codicils. The deponent arranged with the deceased the day on which he would attend him with the codicil for execution, and, as the deceased expressed some anxiety about it, the deponent named the earliest day ; and being anxious about the alteration in regard to the pictures and books, the deponent did not consider it at the time so much a codicil to be regularly executed, as a clear expression of what the deceased then intended, and to be effectual, in case any thing should happen before the deponent could return with the codicil he was about to prepare.” He states, “ That he brought distinctly to the deceased’s recollection what he had [532] done in regard to those pictures and books, as well by his will as by his codicil, and having obtained from him a clear and unequivocal expression of his wish, he wrote in the margin of the codicil he was about to alter the disposition which he wished to make of the books and pictures, expressing in it not only the person to whom he did leave them, but the two persons to whom he then said he did not mean to leave them, though he had left them to the one by his will, as part of his residuary personal estate, and to the other by a codicil in express terms.”

Nothing could be more cautious and proper than the conduct of Mr. Boodle upon this occasion. The servant Taylor is then called in, and this small codicil in the margin of the other is signed by the deceased, and attested by Mr. Boodle and Taylor. He says, "That on the 2nd of September, 1812, he went again to the deceased at Widmore, pursuant to appointment, and he took with him the codicil which had been drawn out, and was prepared for execution, which he read over to the deceased, who pointed out an omission in regard to the appointment of the Rev. William Kinleside as one of his executors, for which he had given instructions to deponent on the former day: the deponent had then taken it down in writing in the margin of one of the draft codicils; but which not being before the person who drew the codicil at the time he so prepared it, that part was omitted. The deponent accordingly, by the deceased's desire, introduced the words 'constituting the Rev. William Kinleside executor agreeably to the deceased's request [533] and former's instructions: 'this being done, and the codicil having been carefully read over and fully explained to the deceased, with reference to his former testamentary dispositions, which were then before them, and the deceased being entirely satisfied with it, and having expressed his approbation of it, the witnesses were then sent for." Taylor and Coleborn came in—the instrument is executed and attested: and Mr. Boodle adds, "That had any thing remarkable occurred before, or in the course of the execution, or afterwards, on that occasion, it would have made an impression on his mind." He then goes on to state very fully his opinion of the deceased's capacity at this time; and he adds, "The deponent was particularly careful to ascertain the state of the deceased's mind and memory; he gave his reasons for every thing he did, and he was, in every respect, in a very fit state of mind to make any alteration whatever in the testamentary disposition of his property: the only particular thing which was apparent in the deceased was a certain degree of irritation on his mind at Mr. Benjamin Harrison having refused to act as his executor." The credit and the accuracy of Mr. Boodle has not been in the slightest degree questioned in this case: indeed, the counsel for Mr. Benjamin Harrison have gone so far as to say that every syllable which he has stated is perfectly correct and accurate. The Court is disposed so far to agree with them, as to think that his evidence has been given with most perfect integrity of mind, and intended to be most perfectly correct; at the same time to mere parol conversation, in the [534] course of this transaction, Mr. Boodle may be, like all other human beings, liable to some inaccuracy of recollection.

The two men called in, Taylor and Coleborn, who attest this act, depose to their belief of the deceased's incapacity—that he called Coleborn, Welsh, and asked if he was to sign "Governor;" circumstances which are not of the least weight against those facts spoken to by Mr. Boodle. Taylor, indeed, does not rely solely upon what passed upon this occasion, but he speaks from his general incapacity, as well as from what passed upon the occasion; and the argument has been pushed to the length of contending that Taylor might be right, and that Mr. Boodle might be wrong, for that, from the middle of the year 1812, the deceased had a latent defect of memory, which rendered him incapable of any testamentary act. The Court would rather have expected to have heard some precedent or authority for such a position: that because the memory of a person may in some respects be defective, therefore it is not a testamentary memory. We very well know that memory is excessively different in different persons—nothing is more various—its powers are very different in the same person at different times, and more particularly at different periods of life; in old age it is much less retentive, and more liable to confusion. Lord Coke says a man ought to have a "disposing memory," so as to have an ability to make a disposition with understanding and reason: so says Swinburne—"If a man in his old age becomes a very child again, and is so for-[535]-getful that he has forgotten his own name, he cannot make a will; but the infirmities of old age, which do not take away the use of reason, do not hinder them in that condition from making a will." Latent insanity we can understand, but latent defect of memory, shewing itself only occasionally, when, from bodily attacks or from confusion, arising from long and complicated transactions, a man may become defective in his memory—and rendered absolutely and permanently intestable, is a position for which I know of no authority. Mr. Boodle, it is true, certainly does not upon this occasion go through the whole items of all the will and codicils as a preliminary, in order to ascertain whether or not some latent defect of memory and confusion might not be discoverable, but he brings to the recollection of

the deceased every thing connected with the particular disposition he has made, and the memory is so far found to be perfect, that Mr. Boodle is quite satisfied as to the capacity upon that occasion. The Court has something better—the Court has the instrument itself before it, dictated by the directions of the deceased himself, for Mr. Boodle says he received no assistance whatever—it was his own instructions from his own mouth; and in that instrument it is recited, “That whereas Benjamin Harrison, of Guy’s Hospital, Esq., having declared his intention not to act as an executor of my will, I do therefore hereby revoke the appointment of him as one of my executors, not only in the event of my dying in the life-time of my brother, John Harrison, but also in the event [536] of my surviving my said brother; and I do hereby appoint the Rev. William Kinleside to be an executor of my will, as well in the former as in the latter event;” and then he goes on to recite that whereas by his codicil he had given the books and pictures, in case of surviving his brother, unto the said Benjamin Harrison, his executors, administrators, and assigns; he revokes that, and now gives them to Mr. Trevillian, &c.; he recollects then the grounds of the alterations—delusion of mind is in no degree suggested or imputed—it is quite disavowed—the fact itself is proved, and has not been controverted. Mr. Benjamin Harrison did declare he would not act as executor with Mr. Kinleside; he desired this intention to be communicated to the deceased; the deceased’s papers entrusted to his custody are returned to him; he had removed from Widmore, and never after September, 1812, kept up the least intercourse with the deceased; then the facts being so, and the instructions, from the evidence of Mr. Boodle, coming thus voluntarily from the deceased himself, and stating these facts to maintain that there is any latent want of disposing memory, or any thing that can justify Taylor’s opinion of the incapacity at this time, I can hardly think could have been meant to be seriously contended by the advocates of Mr. Benjamin Harrison. But here is not only memory, but an activity of memory quite extraordinary. Under the will Mr. Kinleside was only an executor in the event of his surviving his brother; Mr. Harrison was so in both events; he gave instructions not only to revoke Mr. Harrison [537] in both events, but to appoint Mr. Kinleside in both events. Mr. Boodle’s clerk omitted that provision, the omission escaped Mr. Boodle himself: but the deceased, on the codicil being read over to him, observes it; it is rectified and interlined in the instrument. Under these circumstances I can have no doubt in pronouncing for these two codicils.

In respect to the other codicils they stand on different evidence, and are contested upon additional grounds: those two other codicils may in effect be considered as constituting one instrument, that of the 21st of March, 1814, being included in that of the 27th of April following; and as to this latter codicil, holding that the deceased’s permanent incapacity is not proved, and the instrument itself, one duplicate of it at least, being in the deceased’s own hand-writing, the three attesting witnesses, and a fourth person who was present, speaking to the reading over, the execution, and the capacity at the time, there would be *prima facie* proof it was the free act of a capable testator. But the act may be impeached by proving it was obtained by fraudulent incitement and undue solicitation practised on a weak and unresisting capacity; and therefore this is the point on which the Court is called to examine this part of the case; and it necessarily opens to some other parts of the evidence, namely, that which sets forth the previous intentions of the deceased, the grounds of change of disposition as to Mr. Malin and Mr. Harrison, and the manner in which this codicil was executed. The deceased’s regard for Mr. Benjamin Harrison is men-[538]-tioned in the will itself, and the other testamentary instruments fully establish it; though of the same name, Mr. Benjamin Harrison appears not to have been related to the deceased. His connexion appears to have grown principally out of some transactions and services which he had rendered to the brother John Harrison; but he at length became an object of the increasing kindness and testamentary bounty of both brothers. He came to reside at Widmore for the purpose of being near them; and in the year 1808 he was the devisee of Shawfield Lodge under the contingencies already stated. Under a former instrument it appears from the evidence of Mr. Boodle that the Shawfield Lodge estate would have gone to Mr. Kinleside as the residuary legatee; but this regard to Mr. Benjamin Harrison operates both ways, if there was no breach of this regard, it would operate strongly against the change of disposition; but on the other hand, if there was not only a quarrel, but a total discontinuance of all intercourse, the former regard and intended kindness would tend to render the subsequent sense of unkindness and

ingratitude deeper, and constantly rankling in the mind of the deceased ; that a breach did take place between them, that Mr. Benjamin Harrison declared he would not act as executor with Mr. Kinleside ; that in consequence of such declaration the deceased made the codicil I have already pronounced for, is fully established ; and in making that codicil there is not the slightest appearance of fraud, circumvention, or undue incitement, because it is not suggested, even in the plea, to have taken place till after the [539] death of the brother. The cause of the breach originates in the difficulties of Mr. Malin, who had already received 13,000*l.* of these brothers, and who owed the deceased about 5000*l.*, besides some other sums, on account of business and interest, because I observe in Mr. Malin's account of Benjamin and John Harrison, there was a considerable balance in the month of December, 1812, and that does not appear upon the evidence to have been paid over to the deceased. Now these difficulties, which took place sometime about the summer of 1812, appear to have occasioned to the deceased great anxiety of mind ; that is a part of the case of the opposer of the codicil. He does not consult Mr. Benjamin Harrison upon them, or if he did, he was not satisfied with the advice that he received ; for he consults his friend, Mr. Wells, upon the occasion, and Mr. Wells states, "That the deceased was accustomed to apply to him for friendly advice in any circumstances of difficulty ; and that in June, 1812, the deceased applied to the deponent on the subject of the affairs of Mr. Paul Malin, a young man to whom the deceased had advanced large sums of money, and who had then stopped payment. The deceased was in great distress of mind ; and the deponent upon that occasion recommended him to send for his relation, the Rev. William Kinleside, a clergyman residing in Sussex, of whom the deponent had always heard the deceased speak in terms of the greatest affection, and who, being, as the deponent believed, the adopted heir of the deceased and of his brother, was, in the opinion of the deponent, the most proper [540] person to be consulted by the deceased, under the circumstances in which he was placed. The deceased acceding to that opinion, the deponent, by his desire, wrote to Mr. Kinleside, who came accordingly. The deponent acquainted Mr. Benjamin Harrison with his having so written to Mr. Kinleside ; from that time the deponent had no communication with the deceased upon the subject of his affairs, till after the death of his brother." He states on his second examination on the fourteenth article, "That the deponent never did attempt to influence the deceased against the said Benjamin Harrison, or in favour of the said Mr. Kinleside, or ever say one word to the deceased to induce him to make any alteration whatever in his testamentary dispositions in respect to the Widmore estate or any other part of his property. There are two occasions in which he remembers to have spoken to the deceased of Mr. Kinleside in favourable terms ; one was after Mr. Benjamin Harrison had declared his determination not to act as the deceased's executor with Mr. Kinleside, on which occasion the deceased applied to the deponent to be an executor in his stead ; and, in resisting the persevering application of the deceased to that effect, the deponent told the deceased that he could not have better executors than Mr. Stanley and Mr. Kinleside, and he believes he did then speak of Mr. Kinleside as a man of honour and a gentleman ; the other occasion was soon after the failure of Mr. Malin, as it was in consequence of Mr. Kinleside's having come up at the request of the deceased to investigate his accounts. The de-[541]-ponent, in giving his opinion to the deceased of the conduct of Mr. Benjamin Harrison at a meeting which he had had with Mr. Kinleside, in the presence of the deceased and the deponent, when much irritating language was used, he spoke of the conduct of Mr. Kinleside as having been perfectly that of a gentleman ; and he spoke also in terms of disapprobation of the language used by Mr. Benjamin Harrison ; but he did not then or at any time say any thing to the deceased to the prejudice of the character of Mr. Benjamin Harrison to influence the deceased to do any testamentary act whatever that would be either unfavourable to Mr. Benjamin Harrison, or favourable to Mr. Kinleside."

Now, the conduct and credit of this witness have been very freely canvassed in the course of the discussion. He is charged in plea with having, together with Mrs. Jukes and Mr. Kinleside, urged and excited the deceased ; of that charge at the period of time which the Court is now examining, namely, in 1812 and the beginning of 1813, there is not a suggestion ; for even Taylor does not suggest it till after December, 1813. The plea itself, as I have stated, does not charge it till after the death of Mr. John Harrison. What then is the character of Mr. Wells, and his conduct upon

this occasion? He is a gentleman of fortune, residing close to the deceased; he has not the slightest pecuniary interest in any of these transactions, or in the event of this suit. The deceased had resided for many years as an inmate in the house of his uncle and of his father; there must have been [542] a sort of filial regard, a sort of hereditary friendship between this gentleman and the deceased, something of more than an ordinary sort; it was not discontinued; the strictness of intimacy between them is kept up to the end of his life. The deceased having a key of the shrubbery, often calls on Mr. Wells; Mr. Wells calls on the deceased, and they often dined together. Mr. Wells is not a boy; he is described as fifty-six years of age. Now what is so natural as that the deceased, when in difficulty, should resort to Mr. Wells for his friendly advice, and that Mr. Wells should give it him with sincerity, and with a degree of filial respect and attachment. What is the advice he does give him upon this occasion? He does not obtrude into the deceased's concerns; he rather avoids it, and declines it; he desires him to send for Mr. Kinleside. Now it does not appear that there existed at this time any particular intimacy between Mr. Wells and Mr. Kinleside. Mr. Kinleside was the most proper person to be sent for; he was not only a relation for whom the deceased had expressed at all times the greatest regard, but he was the residuary legatee; and, therefore, whatever losses might arise to the deceased from Mr. Malin's difficulties, would ultimately fall on Mr. Kinleside, as the residuary legatee. Much indeed is said of fraudulent excitement and solicitation, but I have looked through this voluminous evidence in vain for the proof of it. Here is no clandestinity in any part of this transaction. Mr. Wells informs Mr. Benjamin Harrison that, by the desire of the deceased, he had written to Mr. Kinleside; [543] this is followed by an interview between all the parties: Mr. Kinleside was apprehensive of loss, and might make offensive or unfounded charges against Mr. Benjamin Harrison; but it is done openly, he is present, and he has an opportunity of defending and justifying himself in the presence of the deceased and Mr. Wells: Mr. Wells was a disinterested by-stander; he was a friend of the deceased, and meant to give him an honest opinion: which was right and which was wrong the Court has no sufficient means of judging. Mr. Benjamin Harrison might be very injuriously charged; he might be very justly indignant against Mr. Kinleside; he might think the opinion of Mr. Wells perfectly erroneous; all the Court knows is that Mr. Benjamin Harrison was a good deal irritated on the occasion, and seems to have used pretty strong language; but he not only used pretty strong language, but took pretty strong measures; he determines he will not act with Mr. Kinleside; he desires his determination to be communicated to the deceased; he delivers up the deceased's papers, which he afterwards confesses [to Fuzzey he was very foolish in doing. All this induced the deceased to revoke his appointment of executor, and to appoint Mr. Kinleside in his place; and it induced him also to revoke the bequest of the books and pictures, and to give them to Mr. Trevillian. When people are angry, whether with or without cause, they will allow their passions to suggest fraud or dishonourable conduct against others; but such charges must be supported by proof of the fact; the Court cannot without evi-] [544] dence presume that fraud was committed. I see no appearance of fraud at this time in Mr. Wells's conduct, as far as I have hitherto examined it. I see nothing but what was perfectly honourable and disinterested, and what his friendship and regard for the deceased imposed on him as a duty. In the month of September, while the deceased is revoking the appointment of Mr. Benjamin Harrison from the office of executor, he declares what are his views in respect to Mr. Malin, and this does not rest upon any loose recollection of what passed in conversation between the deceased and Mr. Boodle, but it was at that time reduced into writing in the margin of the exhibit No. 3, where there is an entry made in Mr. Boodle's hand-writing: "31st August, 1812, Mr. Harrison having lent to Mr. Malin 4500l. on bond, and 500l. on note, means to give him up both bond and note, and then to revoke this legacy of 5000l." And here is a memorandum at the end of the draft of the codicil to this effect, from Mr. Boodle to the deceased: "I have not revoked the legacy of 5000l. to Mr. Malin, and Mr. Andrews Harrison should not deliver up his bond and note, unless he means him to run the chance of having 10,000l. instead of 5000l., as Mr. John Harrison, if he survives his brother, bequeaths to Mr. Malin 5000l." Then here it is quite clear that it was not the intention of the deceased to give Mr. Malin both the legacy of 5000l. under his codicil, and the benefit of his bond and note, but that one was to be set off against the other.

It is however contended, in respect to Mr. Ben-[545]-jamin Harrison, that if the deceased had intended to revoke the benefits to him under the will, he would have done it when he executed this codicil revoking the executorship, and that his doing it afterwards can only be accounted for by some fraudulent excitement practised upon him, and the taking advantage of his vacant faculties, and his loss of memory; but to this inference the Court cannot proceed upon the evidence before it, and looking at the probability arising out of the facts, it was natural enough that the deceased, a person of calm and moral mind, should at first act with considerable forbearance towards a person for whom he had for a long time entertained great regard and confidence, it was necessary to provide for the executorship more immediately; but he might naturally think he would give Mr. Benjamin Harrison more time to reflect, and consequently make advances towards a reconciliation, more especially as his brother was then living, and might survive him. It is not quite correctly stated that he only felt regret at Mr. Benjamin Harrison having refused to act as executor with Mr. Kinleside; for Mr. Boodle's words are that "he observed a certain degree of irritation in his mind at Mr. Benjamin Harrison having refused to act as his executor;" and without presuming fraud, I think there are sufficient circumstances to account for that irritation afterwards increasing. In the month of January following, Mr. Malin becomes bankrupt. I understand the loss, therefore, which might be only apprehended in September was then realized, whether to the exact amount of 5000*l.*, [546] or more or less, does not appear; whether he received any dividend on the bond and note, whether there was a balance of account of Andrews and John Harrison, whether the interest was paid, I do not ascertain, nor is it, perhaps, very material; but here is this fact, that a loss did occur by the bankruptcy. Mr. Walmsley states that "he cannot depose particularly as to the time, but believes it was subsequent to 1812; whether it was in the latter end of that year, or in the course of the following year, he does not remember. He having gone down to Widmore to visit the deceased, found him in a state of considerable irritation against Mr. Benjamin Harrison, of whose conduct he spoke in terms of great displeasure, but to the particular expressions which the deceased used, or to the cause of his irritation and displeasure, he cannot depose, further than that the deceased alluded to the conduct of Mr. Benjamin Harrison in not having apprized him of the proceedings of Mr. Malin, and protected him from the loss which the deceased had sustained by Mr. Harrison's connivance or neglect." Now, as the deceased was at this time in a state of considerable irritation, the supposed cause of it is the loss that had been sustained; probably it took place about the beginning of the year 1813. The deponent adds, "He did occasionally hear the deceased speak of Benjamin Harrison afterwards, but never in kind terms."

Now, whether the deceased originally formed a right or a wrong judgment in imputing to Mr. Benjamin Harrison neglect or connivance, is not a question for the Court to determine; such was his [547] impression. Here is no loss of memory in regard to it; and an increase of irritation is not extraordinary or improbable.

Mr. Boodle states, "That shortly before the death of Mr. John Harrison," which was in the latter end of 1813, "the deceased expressed to the respondent, who was then at Widmore on other business, a wish to alter his will; but it was thought by Mr. Wells, a neighbour and friend of the deceased's, Mr. Kinleside, and the respondent, that, considering the circumstances under which this will had been made, and the state in which his brother then was, which was that of total incapacity, it would not be a proper proceeding, and it was then abandoned." The wish and intention therefore to alter this will is here observed to be going on; it shews itself shortly before the death of the brother. Mr. Boodle, it seems, had an opinion that no alteration ought to take place; and at that time, to a certain degree, he might be right. Mr. John Harrison was not in a condition to make a corresponding alteration, and if he should survive the deceased, not only his residue, but the residue of Andrews Harrison's property, would pass under the will of John Harrison; Andrews Harrison, therefore, could not alter his will without in some degree defeating his brother's disposition of the residue, and he had no power over his brother's residue unless in the case of surviving him: it seemed therefore by no means improper or unnatural, as John Harrison was approaching his dissolution, that these gentlemen should advise, and the deceased acquiesce in abandoning the matter, or at least in postponing it; but the de-[548]-ceased of his brother no sooner takes place than we find Mr. Andrews Harrison again

expressing his wish to proceed to the alteration of his will, and taking measures for that purpose.

Mr. Wells states, upon his first examination, That soon after the event of the brother's death, the deceased, in conversation with him, expressed his dissatisfaction and regret at the disposition he had made of some parts of his property, but more particularly in regard to Shawfield Lodge and estate, which had been his brother's residence; the deceased was evidently uneasy at the contents of his will as it then stood; he expressed his wish to have it altered, and repeated his distress of mind on different days. In the beginning of the month of December, 1813, as he now best recollects, the deponent, by the desire of the deceased, met Mr. Boodle, the deceased's solicitor, at the house of Mrs. Jukes. Upon that occasion Mr. Boodle's conduct is detailed; and then the meetings took place upon the 7th and the 14th of December, which I have already examined. The deceased upon those occasions endeavoured to do too much; he had undergone much agitation and distress of mind during the illness and after the death of his brother; he was worse at that time, the thing is attempted without success, and remains undone; but, as to the deceased's wish and desire to revoke the benefits to Mr. Benjamin Harrison and Mr. Paul Malin, nothing could be more clear than upon both the occasions of those meetings in December; all the witnesses, and all the memorandums then made, manifestly declare that to have [549] been his wish. Indeed, the objection is of another sort; not the want of volition, but too great volition, too much irritation on the occasion; how produced? By fraud. Where is the proof of this fraud? Even Taylor does not speak of any thing till after these two first meetings had taken place. Mr. Kinleside, on the 10th of December, when he calls on Mr. Boodle, rather seems averse to any alteration taking place; and it is not clear by the evidence, I rather think it is otherwise, that he was present at the meeting on the 14th of December. No person present at either of the meetings attempts to excite the deceased on the occasion. Whatever irritation therefore existed in the mind of the deceased, existed without any proof of circumvention; and it is not very extraordinary at that period of time: for, what were the circumstances? John Harrison had lately died, to whom the deceased was most affectionately attached. He, as well as the deceased himself, was the intended benefactor of Mr. Benjamin Harrison. Mr. Benjamin Harrison was the executor of Mr. John Harrison; he does not act as his executor; he does not call on the deceased; he does not, as far as appears, write a letter of condolence to the deceased on the occasion, or take the least notice of the event of the death of Mr. John Harrison. The apology offered by counsel is that he might not choose to expose himself to the insults of Mr. Kinleside or Mrs. Jukes. In the first place, with respect to Mr. Kinleside, he was much more absent at that time than present; and as to the danger of Mr. Harrison being insulted by this old lady of eighty years [550] of age, it was not a very formidable danger, nor justly apprehended; for when Mr. Andrews Harrison calls, Mrs. Jukes, with great kindness, says, "I am sure, sir, you will be glad to hear that Mr. and Mrs. Benjamin Harrison and all the children are well, at Guys." The deceased naturally enough, considering what was passing in his mind, and if he did retain his memory and capacity, merely muttered, "I am glad to hear it;" or something to that effect, in a tone and manner not distinctly to be heard.

In March following the deceased himself appears to be active again, and writes to Mr. Boodle to come and make a codicil for him; it does not appear that Mr. Kinleside was even at that time at Widmore. Mr. Boodle writes a letter as to an intelligent agent, proposing to be with him on the 21st of March; by accident he is prevented attending on that day, but the deceased appears to have expected him, and seems to have prepared himself for what should have taken place; for it is on the 21st of March a codicil is written, and it is very fairly written, in his own handwriting: "It is my wish that Shawfield Lodge estate and premises should go to my residuary legatee, the Rev. William Kinleside, and that I revoke my legacy left to Paul Malin.—Andrews Harrison. Widmore, 21st March, 1814." On that day Mr. Boodle, however, was under the necessity of putting off his visit to the 22d, when he and Mr. Stanley did attend, and perhaps the very disappointment might have had some effect on the deceased's mind; but on the [551] 22d of March, nothing can be more decided than the deceased's desire to exclude Mr. Harrison and Mr. Malin, and to give Shawfield to Mr. Kinleside; it being the first part, and the middle part, and the last part of that paper and memorandum which Mr. Boodle drew

up upon the occasion. The deceased was too confused, in Mr. Boodle's opinion, to induce him to make a codicil; but, as to all this being a fraud on the deceased, the very circumstance of sending for Mr. Boodle on these three occasions, the 7th of December, 1813; the 14th of December, 1813; and the 22d of March, 1814, goes very strongly to repel the insinuation.

Thus far, considering these circumstances, that Mr. Benjamin Harrison had wholly withdrawn himself from the deceased, and never called on him, it does not require the gratuitous assumption of fraudulent excitement in order to account for this increased irritation against him; but it requires some proof of the solicitation and importunity charged, and this brings me necessarily to consider that part of the evidence, for it is only about this period, namely, in the beginning, and in the spring of 1814, that there is the slightest attempt to support the charge by any thing like evidence.

I may, perhaps, preliminarily observe that importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free [552] act of a capable testator, in order to invalidate an instrument.

Now, the charges themselves pretty well, I think, answer each other; for, if the deceased was thus anxious even to irritation, to deprive Mr. Benjamin Harrison of these testamentary benefits, where could be the necessity for all this urging and importunity? The two grounds are hardly consistent with each other. As against Mr. Wells, it is Taylor alone who suggests it; he pretends indeed that the deceased being very deaf he could not avoid hearing what passed as he went to and fro along the passage. I think, on the 8th interrogatory, he states that early in 1814, before the month of March, the respondent heard Mr. Wells, and he mentions Mr. Kinleside also, continually persuading the deceased to take away the Widmore estate from Mr. Benjamin Harrison, and leave it to Mr. Kinleside.

Though the deceased was very deaf, though the house is described as very small, he is the single witness who overhears any thing of this kind. The other witnesses, the maid-servants, hear nothing of the sort, so far as respects Mr. Wells; and Mr. Wells has most decidedly and positively denied the charge upon his oath. Now, upon the evidence of Taylor, I do not think the fact of urging the deceased, as charged against Mr. Wells, in any degree proved, and therefore it is unnecessary to consider what would be its legal effect. Alexander is a witness entitled to more attention; she does overhear Mr. Kinleside and Mrs. Jukes say [553] that to which she deposes, but nothing concerning Mr. Wells; at the same time, without deducting from her veracity, yet considering how likely any conversations are to be misapprehended, considering how much more likely pieces and patches of conversations are to be misapprehended, the witness not being present, and hearing the preceding and following parts, the Court must attend to evidence of this sort with considerable caution; more especially when it is to conversation with a person who is liable occasionally to interruption and confusion of faculties, and Alexander had been talked to and urged a good deal by Taylor, who had related to her many things she did not recollect, and who said her memory was very bad, and therefore without meaning to say any thing beyond the truth, she might have confounded what she heard from Taylor, with what she heard herself, wishing not wilfully to forget any thing.

But, taking it at the utmost stretch, what does it amount to? Her account is this, "She never heard Mr. Wells say any thing to the deceased upon the subject; she knows that he was there very often; he used very frequently to call on the deceased, though not more at one time than another; but she never heard him say any thing about his will, or the Widmore estate to the deceased: she has heard both Mrs. Jukes and Mr. Kinleside conversing with the deceased about his will, and about the said estate; she remembers that, for some time before the last codicil was made, which was in the month of April, 1814, she heard Mrs. Jukes tell the deceased that he ought to alter [554] his will; the only persons the deponent heard mentioned by her were Mr. Malin and Mr. Benjamin Harrison, and she told the deceased that he ought to alter his will, because if it was not altered Mr. Malin would have that money again, which he ought not, for he had acted very improperly, or something to that purpose. The deponent never heard her say who ought to have any thing; and she does not know that she ever heard Mrs. Jukes say any thing to the deceased about Shawfield or the Widmore estate, she cannot recollect it if she did; the principal thing she said

was about Mr. Malin, who, she said, would have the money if the will was not altered, and that he ought not to have it." Here then is no fraud and no falsehood in all this; it is correctly true; it is no more than what the deceased himself had expressed to Mr. Boodle, in September, 1812; the deceased himself then thought that Mr. Malin ought not to have the 5000l. he owed him and also the legacy of 5000l.; even supposing therefore that nothing had preceded what this witness overheard, that the deceased had been talking with Mrs. Jukes, and that she merely re-echoed his opinion, was this any thing like fraudulent excitement to remind him that such a thing should be done? Looking at these facts, it does not appear to me to amount to that which can affect the instruments.

The witness then goes on; as to Mr. Kinleside she says, "She has often heard the deceased and Mr. Kinleside in conversation together upon the subject of the Widmore estate; they used to go together into the deceased's room, up stairs, where [555] they were for a long time together frequently; the deponent does not think she ever heard any thing that passed when they were there; but she remembers hearing them talking when they came out of the room upon the landing-place, and in the passage she recollects the deceased's saying to Mr. Kinleside, the house is yours; No, sir, said Mr. Kinleside, the house is not mine; the house is Mr. Benjamin Harrison's. The deceased said he meant the house to be his; that Mr. Benjamin Harrison had offended him. Mr. Kinleside said, the house could not be his, as it was not left to him. The deponent cannot remember the exact words, but it was to that effect; for the deceased and Mr. Kinleside being both deaf, they were both of them obliged to speak loud, and the deponent sitting in her own room heard very distinctly what was said." Again, taking all this at the very worst, after these two persons had been, as the witness says, for a long time together in the deceased's room, looking over this long will, when they come out, they are talking together on the landing-place loud enough to be heard all over this small house. What is the whole that happens? The deceased appears to have got into some confusion, as he did after the transaction with Mr. Boodle; he says the house is yours; Mr. Kinleside explains it, and says, the house is not mine, the house is Mr. Benjamin Harrison's; the testator says Mr. Benjamin Harrison has offended him, and he means to give it to Mr. Kinleside. It is as little like urging on one side, and unwillingness on the other, as can be stated. She goes on further, "She several [556] times heard the deceased say that Mr. Benjamin Harrison had offended him, and she also heard the said Mr. Kinleside say several times to the deceased that the house was Mr. Benjamin Harrison's; it cannot be mine; it is Mr. Benjamin Harrison's; you have left it to him. And the deceased said he did not mean Mr. Benjamin Harrison to have it; he meant him, Mr. Kinleside, to have it." This is all open to the same observation.

Now, as to the suggesting of the codicil, she says, "She does remember hearing Mr. Kinleside tell the deceased that he could not go through his will, and that he had better make a codicil. She well remembers that when they were talking about the estate, by which she supposed them to mean the Widmore estate, Mr. Kinleside did tell the deceased that he could not have it unless it was left to him. The deceased said he did mean him to have it. Mr. Kinleside then said that there was no occasion for a fresh will; that only a codicil was wanting; that a will was too much for him to go through; and that a codicil would do as well, or to that effect. She says that she never heard Mr. Kinleside press the deceased not to employ Mr. Boodle, or observe that he was too particular, or say any thing to the deceased about Mr. Boodle. She well remembers that the deceased was very angry with Mr. Benjamin Harrison; he was very much disturbed at his sending home some papers, as she believes, and refusing to act for him; he cried so much about it that the deponent was distressed to see him; that she frequently heard him talking about taking away the estate from Mr. [557] Benjamin Harrison; he was quite bent upon it." Taking the whole of this account, and considering it judicially and impartially, it seems to tend rather more to the support than to the defeazance of these codicils: the Court is not called upon to decide upon nice points of delicacy in the conduct of parties, but to consider their legal effect, not whether Mr. Kinleside ought to have practised more forbearance and self-denial, and that he ought not to have put the deceased into the way of carrying his wishes into effect, because those wishes tended to his own benefit; but what I am to consider is, whether he was guilty of such fraudulent importunity on the deceased as can defeat the effect of a codicil which is in other respects proved, and render it not the act of the deceased.

The deceased upon this evidence, instead of being urged to take away the property from Mr. Benjamin Harrison, and give it to Mr. Kinleside, Mrs. Alexander says "he was quite bent upon it," and the utmost is that Mr. Kinleside sets him right when, he says he is to have the house, and explains to him that the best mode of carrying his intention into effect, is not by making a new will, but by confining himself to a codicil, he having on former occasions been found to have failed in making these new dispositions which were proposed. I think that is the utmost extent to which I can carry this evidence.

Mr. Wells, to whom as much credit appears to be due as to any witness in the cause, the Court making allowances for the slight inaccuracies which belong to all human testimony, however fairly it is [558] given, carries on this transaction, and says, "That after the 22d of March the deceased appeared to be disquieted and unhappy; and he particularly recollects that one morning, within a few days after he was walking with the deceased in the grounds of Shawfield Lodge, the deceased expressed his unhappiness that, according to the then state of his will, that property would go to Mr. Benjamin Harrison, which he particularly wished to leave to Mr. Kinleside. That shortly afterwards the deceased shewed to the deponent a paper-writing, drawn up and prepared for execution, as a codicil to his will, and which he stated to have been drawn up at his request by a legal friend of Mr. Kinleside's, who, as the deponent has since understood, is a Mr. Holmes of Arundel." It is not wholly immaterial as referrible to another part of the evidence, that the deceased at that time did not mention by whom this paper was prepared, all he said was that it was by a legal friend of Mr. Kinleside's; but whether that legal friend might reside in London, or in Sussex, the deceased does not appear at that time to have mentioned; he might have supposed it was in London. He says, "That the deceased expressed a wish to execute the codicil, and desired the deponent to call upon a Mr. Latter, a solicitor residing at Bromley, upon the subject. The deponent accordingly did so, and consulted with him upon it. The deponent never had the paper in his possession, and knew not of its existence till it was shewn to him by the deceased. The deponent mentioned to Mr. Latter, [559] at the time he delivered the deceased's request for him to attend, what the deceased had communicated to him respecting the preparing of such codicil, and asked Mr. Latter whether it was an irregular mode of proceeding. Mr. Latter said it was more regular for the person who had prepared an instrument to be present, but not absolutely necessary; and he then recommended that it should be copied by the deceased; and that the witnesses, besides himself, should be Dr. Smith, the clergyman of the parish, and the apothecary who was in the habit of attending the deceased. The deponent mentioned to Mr. Latter likewise the circumstances attending the visits of Mr. Boodle to the deceased. He then communicated to the deceased what had so passed between himself and Mr. Latter, and the suggestion of Mr. Latter, that the paper should be copied by him, to which the deceased acceded." He goes on, and states, "That a few days afterwards he, at the earnest desire of the deceased, went to the house of Mrs. Jukes," where the execution took place.

Now certainly in this account there does occur a circumstance in the preparation of this instrument, that always excites the jealousy and vigilance of the Court, and it has been much pressed in argument; the codicil is prepared through the agency of the party benefited, and without the professional person who prepares it having had access to the deceased for the purpose of taking his instructions: but the Court must take care not to convert a circumstance, which is only a reason for vigilance and caution, into an actual defeazance [560] of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which accompany it: the thing frequently happens, and without exciting much, though upon all occasions, a certain portion of caution.

It was observed in respect to this part of the transaction that Mr. Boodle was not employed. Now, after the three unsuccessful attempts which had taken place, and the course which Mr. Boodle thought it necessary to pursue upon those occasions, it is by no means unnatural or improbable that the deceased himself might wish that another mode might be tried, or at least that he might readily acquiesce in it, and adopt it, when it was proposed to him. Mr. Wells states, in his second examination, "That, according to the best of his recollection, the deceased did express his displeasure at Mr. Boodle's having refused to prepare the codicil, as well as his grief that

it had not been done;" and here is the deceased's own declaration to Mr. Wells, that it had been drawn up at his request by a legal friend of Mr. Kinleside. If Mr. Kinleside had brought this codicil to the deceased so prepared, and had got it executed in his own presence, calling in some servants, or other ignorant persons to attest the mere formal execution of the instrument, it would have been very alarming indeed. Such a mode of proceeding would have savoured pretty strongly of fraudulent circumvention; but the course taken is extremely different. It is charged indeed in the plea, "That Mr. Kinle-[561]-side, having taken up his residence at Shawfield, endeavoured to persuade the deceased," and so on. The fact is, he does not take up his residence there till after the execution of this codicil, namely, in the month of May, and then not at his own suggestion, but at the request and solicitation of the deceased and Mr. Walmsley, who thought it would be for the comfort of the deceased; but Mr. Kinleside leaves the codicil in the hands of the testator; he returns to Sussex; and the deceased is left to execute it or not as he thinks proper. The deceased, being thus left to himself, with the codicil in his possession, naturally enough consults his friend Mr. Wells on the mode of proceeding; states that he wishes to proceed to the execution of it; and the mode is adopted which is set forth in the deposition of Mr. Wells. The deceased's manner of going through the several steps towards the execution is strongly indicative of mind, memory, and understanding; he conducts those steps himself; and as to tutoring an old man who had lost his understanding and memory, to go through the whole of this in the way I am about to state, it is not only unsupported by any proof, but it appears to me quite an extravagant supposition.

The deceased was recommended by Mr. Latter to make a copy of the codicil; and he does accordingly make a copy, which is the best possible evidence that he understood and approved the contents of that instrument, supposing he had any degree of capacity at this time. Here Taylor again is called in, and he suggests that the copy was made by the intervention of Mrs. Jukes's [562] assistance; he states, "That he very well remembers that he saw the deceased on two or three different days in April, 1814, copying from a paper before him; what it was he did not see; he knows that the deceased had great difficulty in copying it, for the respondent was called upon by Mrs. Jukes to administer valerian to him, while about it: and in going in and out of the room he saw Mrs. Jukes assisting the deceased, taking care that he had not too much ink in his pen, and pointing to the lines from which he was copying. The respondent thinks that the deceased could not by any means have written the paper without assistance." Such is the opinion of Taylor: his opinion is that the deceased was utterly incapable, from the middle of the year 1812; so that as to these facts, the Court cannot very safely rely on his testimony: but supposing he were correct in this statement, what does it amount to but this, that this old lady looked to see that he had not too much ink in his pen, and that she pointed out the lines from which he was copying? Now the story itself, I think, of the necessity of this assistance, is not very probable, when we recollect that the deceased was able to write these different letters of the 3d of March, 1814, and in January, 1815; and keeps his books of account, and endorses his bills during the whole year: it is not likely that Taylor has formed a just opinion; but if he did receive assistance to this extent, it would not go to invalidate the knowledge of the deceased of the contents of the instrument, or his capacity to judge [563] of the nature of the contents. But here again Mrs. Jukes solemnly deposes she knew nothing about the copying of this codicil; and bad as her memory is, she thinks it impossible but she must have recollected so striking a circumstance if it ever happened.

The fact, however, is that one copy of the codicil is in the deceased's own handwriting: the deceased himself applies to two of the witnesses. Mr. Latter is desired to attend by Mr. Wells: and who are the witnesses called in? Not ignorant persons—not persons to witness a mere formal execution—not persons likely to be parties in a fraud, or to have a fraud imposed on them, but persons as competent to detect a fraud as could be selected—all long acquainted with the deceased—the minister of the parish, the medical attendant of the deceased, and a neighbouring solicitor, who is ordered to attend to judge of the proper form to be gone through; and they are put upon their guard to satisfy themselves of his volition and competency to do the act, and are satisfied on the occasion.

It only therefore remains that I should state the evidence to these points. Mr. Ilott says, "That a few days, perhaps three or four, before the 27th of April, the

deceased called upon him, and said that in a few days he should want his assistance to see him sign a paper." He states the object of it; nothing further passed then. "On the following Monday, the 25th of April, the deceased's servant came to the deponent, requesting, in his master's name, that the deponent would meet Dr. Smith and Mr. [564] Latter at the deceased's house at twelve o'clock on the following Wednesday." So that it is the deceased himself that engages Mr. Ilott for the purpose of attending, three or four days before the execution takes place. He then goes on to state the circumstances of the execution. "At the appointed time he went to the deceased's house, and found there Dr. Smith, Mr. Latter, and Mr. Wells. When he entered, the deceased shook hands with him and said he was very glad to see him. Mr. Latter asked the deceased to state for what purpose they were assembled, to which the deceased replied that he wished to make some alterations in his will, for they had robbed him of thousands. Mr. Latter asked him whom he meant, and he said, Paul Malin and Benjamin Harrison. There were two papers lying on the table, one of which the deceased took into his hand; the deceased then gave one of the papers to Mr. Latter, who was requested to read it aloud, which he did slowly and distinctly; that he stopped occasionally, when the deceased expressed his approbation; and when read through, the deceased expressed his approbation of the whole; he then executed it, and the witnesses signed their names. When the business was finished, the deceased thanked them, and said, Now I am happy; and he appeared well pleased and satisfied."

Dr. Smith says that on Monday, the 25th of April, 1814, the deponent called with the churchwardens of Bromley, and when they had settled their business, the churchwardens took their leave, and the deponent was about to do the same, when [565] the deceased stopped him and said, "I shall be glad to see you here some day this week that is convenient to you." Here again is spontaneous acting from the deceased shewing understanding and foresight—not the least appearance of any loss or defect of memory: indeed this circumstance is in some degree confirmed by the entry in his book of accounts, for here are two guineas entered this day, as paid to Dr. Smith for Easter offerings. He goes on to state, "The deceased said to him, I have been very ill used, Dr. Smith, and I want to make an alteration in my will, for I intend to take the administration of my affairs out of the hands of my executors, and give it to others; the deceased then also mentioned the names of his executors, Mr. Paul Malin and Mr. Benjamin Harrison, saying, they shall have nothing to do with my affairs, and indeed the will was not my will, for it was done by the persuasion of my brother, but now he is gone, I intend to make my own will: no day was fixed for the deponent to come, but the deceased said, I will let you know in time, and they then parted." Here he tells the witness the purpose for which he wants him—that it was to alter the will: he mentions the nature of the alteration, and whom he meant to remove; it was to remove Mr. Paul Malin and Mr. Benjamin Harrison; and it might be true, in some degree, that it was to gratify his brother that he was induced to make the former disposition: but, however, we must not rely too much either as to the sincerity of the statement, or the accuracy of recollection of the person relating the conversation. Dr. Smith goes [566] on to state, "That on the following Wednesday, by appointment, he went and found the deceased and Mrs. Jukes in the parlour together alone: they talked upon indifferent subjects for a short time, when Mr. Latter, Mr. Ilott, and Mr. Wells, having arrived, Mrs. Jukes left the room, and the deponent then said to the deceased, Pray, sir, what might you be wanting with us? he replied, I want to make an alteration in my will; he added that he had lost thousands, and he intended that his executors should have nothing to do with the administration of his will; whether he mentioned their names or not, the deponent does not remember with certainty: the deponent asked who he intended to make his executor. The deceased, taking some papers out of a drawer, said, I mean to appoint this, pointing to the name of Mr. Kinleside;" perfectly, therefore, recollecting the appointment he had made with this gentleman—the object of it, and the alterations he was now proposing to make, and his reason for so doing. The witness then speaks of the reading over, and asking the deceased's approbation of the codicil, he says, "He proposed that the codicil should be read over to the deceased, and one copy was handed to Mr. Latter, and another to the deceased for that purpose: when Mr. Latter had got a little way in reading it, the deponent stopped him, by asking the deceased if he heard it; the deceased said, Yes, sir, I hear very well. Mr. Latter then proceeded, stopping

occasionally to ask the deceased his approbation, who said each time, that is right, and gave his consent to every part. The deponent remembers that the [567] deceased had in his own copy made a reiteration of two or three short words, which being pointed out to him, he himself took a pen and crossed them out ;” and they are very short words, merely from mistaking the catch-word, he has inserted “*me, in, or by,*” twice over ; indeed, the date is inserted in his hand-writing, and as none of the witnesses mention that to have passed during the time they were present, it is another mark of the deceased’s memory and recollection that he filled it up before their arrival, in order to prepare the instrument for execution.

Dr. Smith then states the execution and the attestation ; and he adds, “That the deceased said when he had done, Now I am easy and satisfied.”

Mr. Latter gives the same account ; he confirms Mr. Wells’s application to him, his recommending the deceased to make a copy of the codicil, and also his making an appointment for the execution, his afterwards attending the deceased, shaking hands with him, and a little common conversation when Mrs. Jukes left the room ; and that the deceased then began by saying, “The reason for my sending for you, gentlemen, is to witness an alteration I wish to make in my will.” Some papers were then lying on the table—he said, “I have written this from a copy which a lawyer in London wrote for me to sign.” I have already noticed that if the witness is accurate as to this expression of the deceased, the deceased might not know it was drawn at Arundel, for it is subsequent to this time that Mr. Wells is apprised of that fact. “Dr. Smith then asked him what was the main point of [568] the intended alteration ? the deceased, holding one of the papers, being one part of the intended codicil, in his hand, said, pointing to some lines in it, I wish to exclude these persons from my will : the deponent asked what persons ; he said, Paul Malin and Benjamin Harrison : Dr. Smith asked, in that case who do you wish to be your heir ? he answered the Rev. William Kinleside, pointing at the same time lower down the paper.” Now here is no symptom of want of memory, or want of understanding or disposing mind, or any importunity used on the occasion. The witness then speaks to the paper being read, the deceased’s approbation of it, clause by clause, his little alterations, and the attestation of it ; and he concludes with these words, “That the deceased thanked them several times for the trouble they had taken, and said he should now be satisfied and easy, as he had signed Mr. Boodle’s paper.”

Now this has been noticed, but really it is quite a trivial circumstance ; it might be a misapprehension of the witness, for he had been informed by Mr. Wells that Mr. Boodle had been present on former occasions ; or it might be a lapse of memory in the deceased making use of one name for another ; for it was natural enough Mr. Boodle’s name should be in the mind of the deceased on this occasion after the former transactions ; but suppose his mind began to falter or wander, it was at the conclusion of the transaction, and would not affect the validity of it : indeed it does not create any doubt in the mind of the witness himself ; for he goes on to de-[569]pose in the strongest terms to the capacity of the deceased : He says, “He was more than usually careful to ascertain the state of the deceased’s faculties, and his capacity to make the codicil, having heard it said that he was at times weak in his intellects ; and that he can and does, without the least hesitation or doubt, depose that the deceased was, at and during the whole time that he was with him, which was for the space of about an hour, in full and entire possession of his mental faculties ; he was of sound mind, and in every respect perfectly capable of making and executing a codicil, or of doing any act of that nature ; he knew as well what he was about as any person present, as the deponent verily believes.”

Mr. Ilott deposes to the capacity in these terms : “The deponent has seen the deceased on some occasions when his memory failed, but on this day there was not the least appearance of any thing of the kind ; on the contrary, he enjoyed the full possession of his mental faculties, and the deponent did not, and does not, entertain the least doubt of his being in a fit state to execute a will or codicil.”

Dr. Smith also deposes in terms no less strong : “That during the whole time, the deceased was, as the deponent verily believes, as perfectly in his senses as any man living ; he was certainly of sound and disposing mind, memory, and understanding ; well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of making and executing a codicil to his will.”

In a transaction so conducted by intelligent wit-[570]nesses put upon their guard

to observe carefully the state and condition of the deceased, the terms in which they express their opinion as to the capacity is not wholly immaterial, and they speak in the firmest manner to their opinion; but the Court relies much more on the facts which they state than upon any opinion which they can give, and which prove to me most fully that the deceased acted freely and spontaneously on the occasion—that he conducted the whole transaction rationally; that he well understood what he was doing; that he fully remembered the grounds on which he acted; and that he had a perfect and disposing mind. Mr. Wells was present upon the occasion, and fully confirms the subscribing witnesses: he was present as a friend, and at the earnest request of the deceased himself; but he takes no part whatever in conducting the business, all that is left to the deceased. Now, if what the under gardener states be correctly true, “That in ten minutes after the gentlemen were gone he saw the deceased crying, muttering to himself, and shaking his hands backwards and forwards, and that he seemed very much distressed;” or what Peebles says, “That in the evening he saw the deceased at the door of the hot-house in the garden which he opened, and asked him if he wanted any thing, for he appeared to be looking about him rather oddly, and did not speak to him; but came into the hot-house and put his hands together as if in distress, and said, oh, that man, that man! almost crying at the time, and appearing to be very much disturbed.” If this be true, it is of [571] very little weight as to the validity of the instrument which was thus executed. The exertion and anxiety of going through such a transaction as this after the former failure, would be likely to leave him in a very nervous state, and the irritation he felt at what he considered (I am not saying rightly or wrongly) the ingratitude of Mr. Benjamin Harrison was very likely to lead him to give loose to these expressions, and to make this exclamation; but Mr. Wells says, “On subsequent occasions he recognized the act, that while he was walking in Shawfield Garden, the deceased expressed his satisfaction that that house and those premises would come to Mr. Kinleside. He believes that the deceased frequently expressed himself to the same effect; and that from the time of the execution he was generally as happy and comfortable as he had before been disquieted and wretched.”

The deceased lived nearly two years afterwards in the management of his own concerns, keeping his own accounts occasionally, and writing letters, receiving and conversing with his friends, and playing his rubbers at whist with them as well as ever.

Upon the whole then of the circumstances of this case, I must proceed to pronounce for the validity of these codicils, and which I pronounce with a firm moral conviction on my mind that the Court will be giving effect to the wishes and intentions of a capable testator.

There is one point however that still remains, which has been a good deal pressed in argument, [572] and upon which alone I have entertained considerable doubts; and upon that point I confess I have entertained considerable doubts. It is the question of costs.

It is the duty of the Court to repress vexatious litigation as well as malicious charges; and if satisfied that those grounds for costs exist in this case, the Court will be bound not to shrink from the discharge of its duty. Mr. Benjamin Harrison was irritated at those imputations that had been made against him in respect to Mr. Malin's affairs; he was perhaps disappointed at the revocation of the benefits intended him under the will; his mind was therefore prepared to receive, and I do think that he has lent rather too ready an ear to stories brought to him of the deceased's incapacity, of false and fraudulent excitements, and of iniquitous proceedings. But though he was incautious in allowing himself to give way to such suspicions, yet it must be recollected that these transactions took place after he had left Widmore, and as the law terms it, “behind his back;” and it must more especially be recollected that, upon three different interviews a most respectable solicitor, the confidential solicitor of the deceased, was of opinion that the deceased was not at those times possessed of a testamentary capacity; and when it is still further recollected that it is through the agency of the person benefited that the instrument is drawn up by his own solicitor, who had not access to the deceased for the purpose of taking the instructions: under all these circumstances it is rather too much, I think, for the Court to [573] conclude that Mr. Benjamin Harrison may not sincerely have believed the truth of the case which he set up in his allegation.

It was pressed upon the Court that the line of argument assumed by counsel rather

tended to shew a continuance of that same sort of feeling on the part of Mr. Benjamin Harrison; this, I must say, would be a very dangerous ground for costs. The interests of justice are involved in the free discussion of cases at the bar; this would be much checked if such a circumstance were made the foundation of costs. The Court highly applauds and strongly recommends the observance of a liberal and honourable forbearance, even towards adverse parties, and still more towards respectable witnesses who may be under the necessity, and as matter of duty, are bound to give evidence; but the Court can at the same time with truth and great satisfaction declare that in no tribunal is that liberal forbearance more attended to than in these Courts; it is due to the learned advocates in this case, more particularly pointed at, to say that the attack did not appear to be wantonly made, nor were the observations pushed beyond the fair limits of free discussion. The pressure of the case required them to endeavour to take off the effect and weight of the evidence of this witness, in order to set up the credit of that witness on whom the Court has repeatedly declared it cannot place any reliance; and this gentleman himself, I am sure, is too liberal and enlightened to feel permanently hurt at any thing which took place in the cause. At all events, it is my duty to repeat, there is nothing [574] in my judgment which attaches any sort of dishonourable reflection upon his character or conduct in these transactions, or upon the perfect integrity with which he has given evidence in the cause; but taking all the circumstances together into my consideration, I do not think this is a case in which I am called upon to give costs.

[575] *DENNY v. BARTON AND RASHLEIGH*. Prerogative Court, Easter Term, May 1st, 1818.—A letter established as a codicil to a will of a date subsequent to the letter.

[Referred to, *Dempsey v. Lawson*, 1877, 2 P. D. 107.]

William Harris, of New Alresford, in Hampshire, died in May, 1817, possessed of about 24,000*l.* personal property, leaving a will dated 13th of March, 1812, and a codicil of the 26th of October, 1815. Probate of both these instruments was granted in common form in July, 1817, to Charles Barton and Jonathan Rashleigh, two of the executors named in them.

A second codicil was now propounded in an allegation by Louisa Denny, a natural daughter of the deceased—the codicil was in the shape of a letter dated in June, 1808, and addressed and endorsed as follows:—“To Joseph Leacock, Esq., not to be opened until after the death of William Harris, Esq.” Joseph Leacock was a nephew of the deceased’s, and the residuary legatee and one of the executors under the will which had been proved; but he was in the West Indies at the time of his uncle’s death; and had died before he had arrived in England—in the will there was a clause revocatory of all former wills.

The letter was as follows:—

“My dear Joe,—I find I am not long for this world; and shall, therefore, disclose to you a secret which is known to very few, though Mrs. Harris is acquainted with it. I have a natural daughter, [576] by the name of Louisa Denny, who is now a teacher at a lady’s boarding school, at Hampstead: the name of the governess who keeps the school is Scriven. I have bred up this girl with care and attention, and have given her a good education. I have not mentioned her in my will, because the world should not know of my indiscretion; but I desire you (to whom I have left all my property) to pay within six months after my decease, to this young lady, one thousand pounds sterling, or allow her an annuity of fifty pounds per annum, from the day of my death. I further desire you will pay to her mother, whose name is Sarah Whitear, living in East street, in the town of Alresford, with her mother as a mantua-maker, an annuity of twenty-five pounds per annum, from the day of my decease, in quarterly payments. I have always found you to be a good lad; and I trust, as a man of honour, you will attend and follow the directions I have here given you, in the same manner as though contained in my will. My friend, Captain Sealy, who lives at No. 19 Guildford street, will give you further information respecting Louisa. God bless you, my dear Joe.—I am your sincere friend and affectionate uncle,

“P.S.—I have a little money in the three per cent. consolidated funds which will enable you to discharge the above legacy and annuity.

“June, 1808.”

Phillimore and Dodson in opposition to the codicil.

Swabey and Lushington in support of it.

[577] *Judgment—Sir John Nicholl.* There is no doubt in this case. The codicil is in the form of a letter; but it is quite clear that the deceased intended it to be a confidential trust to his nephew not to be communicated till after his death. It was intended to operate independently of his will. I should not consider it irrevocable; but I think a will with a common revocatory clause would not revoke this paper. There have been a variety of instances in which papers of this sort have been admitted to probate. It was found uncancelled and unrevoked; and it has only been in consequence of the nephew's death that it has been necessary to bring it before the Court.

I am clearly of opinion that it can operate; and that it was not intended to be revoked, notwithstanding the revocatory clause in the will, and, therefore, I admit the allegation.

[578] ABBOTT v. ABBOTT. Prerogative Court, Easter Term, May 27th, 1818.—Where there has been an administration pendente minore ætate, and the minor coming of age takes upon herself the administration, she is obliged to give security to the same amount that the administrator did in the first instance.

Judgment—Sir John Nicholl. This is a point of some importance both with respect to our practice and to the public. Richard Abbott died in February, 1816. On the 30th of March, 1816, his widow took out administration in the ordinary course, stating the effects to be under 5000l. She and her father were securities. Several actions were brought by creditors against her, and verdicts obtained. On the 22nd of April, 1817, she brings in the administration, declaring she was a minor when it was granted, and that she still continues a minor; and her father takes it out during her minority for her use and benefit, swearing the property to be under 3000l. How this could be I cannot understand: but the widow comes of age, and a citation is taken out against her by a creditor; and she is called upon to exhibit inventories. Inventories are exhibited which make the property about 5100l. The widow now prays administration, taking the oath that the effects are under 100l. It is quite clear that the amount of goods at present does not affect the stamp duties; by the last act of parliament the second administration is taken [579] on the same stamp with the first; therefore, this is so far immaterial to the parties.

It is objected on the part of Mr. Abbott that the security is not sufficient in 100l.; that in effect it is the continuation of the same administration. In ordinary cases there is no priority between two administrators. In the case of a temporary administration the first administrator is the representative of the regular administrator; he is only his attorney and agent: the bond then must be in a different form from that in which the administratrix comes in her own right to all the goods and chattels of the deceased.

It is alleged that the widow could not now maintain an action against the other who may be termed the temporary administrator. She takes it on the original stamp; and the only question is one of security whether she should not take it to the whole amount. The administrator may not have administered rightly; and how are the creditors to call him to account, or he them through her? The creditors are primarily interested in the bond; they are to be paid before legatees or next of kin; it is of high importance to them that the security should be good and ample.

On the part of the widow it is alleged that the deceased was a tavern keeper: that he left property to the amount of 5000l., and debts to the amount of 16,000l.: that all the effects were duly administered by her and her father respectively, except 50l. 2s. 11d.; and she prays administration under 100l. She and her father, I have no doubt, understand each other well as to this insolvent estate.

[580] Lord Mansfield said (*Archbishop of Canterbury v. House, Cowper, 145*), "That no next of kin ever struggled for the administration of an insolvent estate with an honest view."

Perhaps we might apply the words of Lord Mansfield to the present case: when the property amounts to 5000l., and the debts to 16,000l., why is this widow so anxious for the administration? What purpose she can have I know not; she can hardly have an honest purpose. The Court cannot investigate these accounts: cannot say whether she has given an improper preference; cannot examine whether they are fraudulent or fair. What is the Court to do? the practice I understand has varied, and

the question only is as to the security. I can see no reason why, if the widow is so anxious about the administration, she should not renew the securities: the terms of the bond are well and truly to administer. And this being the nature of the bond, can the Court take a less security than for the whole of the goods and chattels of the deceased at the time of his death. Instead of allowing the administration to go to a creditor, she and her father are trying, by every possible means, to get the administration into their own hands. The Court is bound to go as far as it can to afford protection to all who may be interested; the creditors must be primarily concerned. Let the point, however, stand over to ascertain whether there is any established practice to prevent what I incline to do, that is, to make her find security to the full value.

[581] If any new circumstances should occur either to the counsel or the practitioner, I shall be happy to receive any communications from them.

The Court took time to deliberate.

June 3.—The Court decreed the administration to Mrs. Abbott on her giving security in 6000*l.*, and the sureties justifying.

[582] MORGAN v. HOPKINS. Arches Court, Easter Term, May 30th, 1818.—A party not to be pronounced in contempt at the same time that his answers are held to be insufficient.

An appeal from the Consistory Court of Llandaff.

This was a suit for subtraction of tithes, brought originally by David Hopkins, the lessee of the tithes of the parish of St. Lythans, in the county of Glamorgan, against Morgan Morgan, for the subtraction of tithes. A libel having been brought in, and a negative issue given to it, the answers of the defendant were taken, these answers were objected to because they set forth a modus for the farm, but did not state the amount of it; and a decree was made for further answers. The Court assigned Hopkins to specify his objections to the answers; the objections were stated in a responsive allegation. Further answers were brought in, in which the defendant admitted that he had not set forth the articles for which the modus was payable, nor the time at which it was due, but that he had answered to the libel as far as he was required by law.

The proctor for the party promoting the suit prayed the Court to pronounce the answers insufficient, because they had not fully set forth the [583] modus; and that they might be rejected, and the defendant pronounced contumacious for not giving sufficient answers as decreed; and in conformity with this prayer the Court pronounced the answers insufficient, and the party contumacious and in contempt.

From this sentence the appeal was interposed.

Jenner and Phillimore for the appellant.

Swabey in support of the sentence of the Court below.

Whether the Court below was right in the latter part of its sentence is for the judgment of this Court: but the answers are certainly insufficient. The object of answers is to relieve the party from the necessity of proof: they should therefore clearly set forth the amount and value of the tithes, that the party may know what is demanded.

Judgment—*Sir John Nicholl.* In considering the proceedings of the inferior jurisdictions this Court endeavours to look to the justice of the case, and is not strict as to the proceedings. But there are some irregularities, such as appear in this case, which the Court cannot overlook. Irregularities exist in many of the inferior Courts: but they are conspicuous in the Court from which this appeal is brought; there the proceedings are not carried on upon the same principles which guide us in Doctors' Commons.

The libel and schedule are regular and correct in point of form—the libel pleads the right to tithes—the schedule sets forth the titheable matter—the answers state that there is an exception on [584] account of a modus for some parts of the farm, and on account of a composition for others; and then state the value of each article, and the quantity. The error in the Court below arises from a perfect confusion between the answers and the plea. The answers are taken from the party proceeded against to save the expense of witnesses: in many cases, especially in tithe cases, the facts are exclusively within his knowledge—there can be no other mode of proof—if the defendant has not answered to the quantity and the value, the answers are defective, and

he cannot screen himself under the suggestion of a *modus*—this *modus* is no excuse for not setting forth the quantity and the value.

This is the great mistake in these proceedings—the whole nature of the answers is mistaken—the answers should not have been objected to; they are quite full. The Court would have been bound to have decided on these answers, if they had not gone on to state a *modus*. The answers are good against the party: but could not be good to establish by them a *modus* which has now been pleaded. The error is, they have mistaken the answers for the plea, and examined upon them—great confusion of ecclesiastical proceedings in the country arises from solicitors acting as proctors, and knowing nothing of the ecclesiastical law: when they come before the Superior Court, they must be set right, and not allowed to proceed. This point being brought to the view of the Court, on an appeal, I must notice it. If the cause had gone on, and come to a hearing on the merits, I should [585] not have turned the party round upon this irregularity, but have endeavoured to get at the justice of the case: but, coming before me on this point, I cannot assimilate our practice to that which is clearly faulty. The objection would be good against an allegation; and the Court would reject it for the reasons stated. It is objected that it is necessary to admit them in order that the party may traverse: but how is it possible to traverse answers? The assignation is for further answers: but this appears to have been waived, for there is a subsequent assignation upon him to state his objections in writing—the mode in which this has been done is by an allegation, which is extraordinary. I believe the ancient practice was to give acts on petition exceptive to answers, but never an allegation. A decree in this case was made for answers, which were given; they were objected to, and an assignation was made to hear on them. The Court decreed these in this instance to be insufficient; and at once pronounced the party to be in contumacy and contempt, and decreed him to be signified—this is a strange proceeding. I should like the counsel to have stated where is the contempt. It is impossible for a moment to consider these proceedings as such as can be affirmed and justified.

I have no doubt in pronouncing for the appeal: my only difficulty is as to costs. The error seems to have arisen from the course of proceedings in the Court below. If all these suits for small tithes are to be sent here by letters of request, it will be burthensome to this Court, and burthensome to the inhabitants of the diocese.

[586] I shall reserve the question of costs till the decision of the cause, when I shall be able to ascertain which is the litigious party.

I shall pronounce for the appeal, reverse the sentence, and retain the principal cause.

REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOSEPH PHILLIMORE, LL.D., Advocate in Doctors' Commons, Chancellor of the Diocese of Oxford, and Regius Professor of Civil Law in the University of Oxford. Vol. III. Containing Cases from Trinity Term, 1818, to Michaelmas Term, 1821, inclusive. London, 1827.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

SATTERTHWAITE v. SATTERTHWAITE. Prerogative Court, Trinity Term, June 10th, 1818.—Probate granted in 1808, of an imperfect codicil, revoked.

John Satterthwaite, of Lancaster, died in 1808, leaving a widow, a son who had just attained his majority, and several children who were minors—his will bore date 20th of May, 1797; and a codicil in the hand-writing of the deceased was found in an iron bookcase where he usually kept his papers of moment and concern, of which the following is a copy:—

"Whereas, I the above named John Satterthwaite have, by my above written will and testament, bearing date the twentieth day of May, one thousand seven hundred [2] and ninety-seven, constituted and appointed my brother-in-law Joseph Rawlins one of the trustees and executors of my said will, and he being about to go to the West Indies. Now I do by this writing, which I order to be received and taken as a codicil to my said last will and testament, declare that the said Joseph Rawlins shall not be a trustee or an executor of my said will, but that of in the county of shall be a trustee and executor in the room and place of the said Joseph Rawlins, and that the said shall have and be seized of all the estates, trusts, powers, and authorities as trustee and executor thereof, as if he had been originally named therein, instead of the said Joseph Rawlins; and the authority of the said Joseph Rawlins shall from hence be at an end.

"I also order and direct that all sums of money already charged, or hereafter to be charged in my own hand-writing in my ledger to the debit of any of my children, shall be considered an advancement to them respectively, and shall be deducted from their portions respectively. I hereby confirm my said will in all other respects, and direct this codicil to be taken as part thereof. As witness my hand and seal the day of , in the year one thousand eight hundred and

"Signed, sealed, published, and declared, [3] by the said John Satterthwaite, as a codicil to his said will, in the presence of us,

"JOHN SATTERTHWAITE."

On the 21st of April, 1808, probate both of the will of the 20th May, 1797, and of this testamentary paper, was granted by the Consistory Court at Lancaster, to the executors named in the will, upon affidavit made by one person to the hand-writing of the codicil; and the original papers were deposited in the registry of that Court. On the 21st of April probate was granted to the same executor by the Prerogative

Court of Canterbury, upon an office copy being exhibited of the will and codicil, and of the affidavit of hand-writing deposited in the registry at Lancaster.

On the 4th of January, 1817, a citation issued from the Prerogative Court of Canterbury, at the instance of Rawlins Satterthwaite the son, and one of the residuary legatees of the deceased, against the executors calling upon them to bring in the probate, heretofore granted under the authority of this court, and to prove the codicil by witnesses in solemn form of law, or to shew cause why probate of the will should not be granted to them without the codicil.

The probate was brought in, and the codicil was propounded by the executors, and extracts from the deceased's ledger were exhibited, to shew that he had made advances to his eldest son, which it was contended might be considered as deductions from his share of his father's estate.

Swabey and Gostling in support of the codicil.

[4] Phillimore and Lushington contra.

Judgment—*Sir John Nicholl*. The party is called upon to prove a codicil in solemn form of law—he has propounded, and undertaken to prove it; a question has been made whether the party proceeding has not barred himself by his long acquiescence from objecting to the validity of the paper; but if he had any ground of this kind to bring forward, he should have appeared under protest.

The case comes on upon the answers of the party, which deny all the facts pleaded in the allegation in support of the paper. It is true there may be difficulties—whose fault is this, but that of the party who has taken the probate without propounding the instrument? If evidence has been lost, it is owing to his own mode of proceeding. All that I can decide upon the answers is that it is an imperfect paper; its leading object seems to have been the appointment of an executor and a trustee; another object was that of directing certain monies advanced to his children to be taken as a part of their respective portions; there is an attestation clause, but there are no witnesses to it. It is impossible to hold this to be any thing but an imperfect paper; it is alleged that it was found within the will—that fact is denied. I think upon the face of the instrument it was never intended to be executed, it is only a draft of something which was intended to be copied over on the will itself; the expressions—I the above named, the above written will—most manifestly shew it to have been a [5] mere draft; he does not fill up the blanks or date it, or copy it on the will; it was not his intention to execute this paper, he had subscribed it either inadvertently, or else to authenticate his approbation of it as a draft; this may be conjectural, but the law presumes it. The party setting it up must satisfy the Court that it was the intention of the deceased that it should operate in its present shape: it would require very strong evidence to satisfy me of this; neither its substance nor its form was complete. The presumption is that it was an abandoned paper—the answers, so far from admitting any intention in its favour, state that the deceased had abandoned it, and explain that it was written under feelings of irritation which were afterwards removed.

Under these circumstances the case is beyond all doubt, and I pronounce against the paper.

[6] *DUNN v. DUNN*. High Court of Delegates, Trinity Term, June 18th, 1818.—The conduct of a husband not such as to bar his right to be divorced from his wife on account of her adultery.

(An appeal from the Arches Court of Canterbury.)

The Judges who sat under this commission were, Mr. Justice Abbott, Mr. Justice Burrough, Mr. Baron Garrow, Dr. Arnold, Dr. Coote, Dr. Parson, and Dr. Jesse Adams.

The cause was heard on the same evidence as had been adduced in the Court below. Dr. Swabey, Dr. Dodson, and Mr. Peake for Mrs. Dunn.

We do not deny so much the evidence of the adultery: but we contend that the husband is to [7] make proof of it in such manner as not at the same time to implicate himself. He is not to have his remedy unless he comes into Court with clean hands; the pleadings lead to the consideration of the conduct of the husband; it amounts to a condonation of the adultery; he receives his wife at Dover with facility, there was no inquiry into her conduct, his behaviour has a tendency to encourage the adultery which it has been contended took place. It has been said the husband has forgiven

upon contrition, but where is the proof of any contrition? his conduct leads to encourage a repetition of the crime; if the injury done to the complainant is owing to his own conduct, he is not entitled to his remedy. It would encourage immorality were it otherwise, and this was the ground of the judgment of the Court below.

Mr. Warren *contra*. The arguments on the other side seem to infer a connivance of the husband; if the Court is satisfied that there was such, he is not entitled to his divorce; we contend, however, that there is no proof of connivance, though there may be proof of abundance of folly on the part of the husband; there is no previous connivance, the elopement does not appear occasioned by his act or negligence. I rely on Mrs. Papp's evidence to the sixth article.

Grant says, she desired him not to tell her husband that Clay was with her at Calais; this is important, as shewing that there was no connivance: we contend this is what she told her husband. Suppose she said she had never been with Clay; [8] there was no reason in desiring Grant not to tell it. The mother never speaks to him on the subject afterwards; he stops her; it is plain it was not the conversation of contrition; it must have been that she was not with Clay. She writes to her sister that she was innocent; if she represented herself as innocent, there was no case for contrition. The mother tells nothing to the husband.

Per Curiam. Mr. Baron Garrow. For the best reason, because the husband stops her.

Per Curiam. Mr. Justice Abbott. Suppose the adultery proved, and that it was easily forgiven, shew the legal consequence.

Mr. Warren. I will put first an extreme case; a young man and woman married; adultery committed and forgiven; that there is adultery again; he is entitled to his remedy. Condonation, if there is subsequent adultery, is no bar; to bar they must shew connivance; a man may forgive his wife without satisfactory reason if he pleases: but such a man is entitled to his divorce, if his wife commits subsequent adultery. I see folly here, but no connivance; conduct depends on a man's understanding, and on various circumstances.

Per Curiam. Mr. Baron Garrow. She curses her paramour, and blesses her husband, to whom she then means to return. Having found an easy reception before, she expects it again, but soon repents; and the messengers cross between her husband and her paramour.

[9] Mr. Warren. This is inconsistent with her husband's having led her into adultery; there is nothing on which they can build connivance, but on the facility of forgiveness; there is no counterplea; there is nothing which would lead the husband particularly to plead his own conduct. If they could shew conversation by which she pleaded her having children, and promising better conduct; he would still be in a situation to demand a divorce on subsequent adultery after condonation.

Dr. Jenner on the same side. It cannot be argued that condonation is a licence to commit adultery; but it will be argued that the facility of the husband in the first instance has led to the wife's second guilt. I do not know that it is any where exactly laid down, what conduct shall be shewn on the part of the husband, to entitle him to a divorce on a second adultery. Here they had not long been married; there were two children; the presumption is that they lived on terms of affection; nothing of connivance or inattention in the first elopement; it is unfortunate that the mother of the wife was the only witness to her conduct.

If there was any evidence of negligent conduct of the husband after condonation, the case would be different. (a) Sanchez, lib. 10, disput. 5, No. 19, [10] 20. (b) What was the conduct of the husband on hearing of the second elopement? He turned pale immediately—then he did not expect it.

(a) *Ultimus casus est quando conjux innocens alteri condonat adulterium, et sic reconciliantur. Cum enim divortium sit in favorem innocentis, potest innocens cedere jure suo, delictumque condonare, et sic cessabit jus divortii: hæc autem remissio est duplex quædam expressa, quando scilicet verbis expressis innocens conjux adulteram sibi reconciliat condonans delictum, &c. alia autem est remissio tacita, &c.* Sanchez, lib. 10, d. 5, 19, 20.

(b) *Id tamen observandum est, si reconciliatione factâ conjux ille reconciliatus in adulterium relabatur, posse non obstante priori illâ reconciliatione, de novo eo adulterio illum accusari, et ratione illius celebrari divortium.* Sanchez, lib. 10, d. 5, 20.

The doctrine is that the husband, having occasioned the adultery of his wife by his own conduct, shall not complain of it: here it must be held that facility of condonation is a bar, as occasioning adultery.

No rule for the condonation of the husband is laid down by law.

Dr. Swabey in reply. His mode of reception after her elopement was an encouragement to adultery, and his excessive fondness and fatuity. *Fatius est qui meretricem retinet*. The law does not administer justice in such cases. The law books look with great jealousy to condonation. We prove that the husband's conduct constructively produced the adultery.

The Judges Delegate pronounced for the appeal, and reversed the sentence of the Court below.

[11] **HAWKINS AND COLEMAN v. COMPEIGNE.** Arches Court, Trinity Term, June 18th, 1818.—By the general law, there can be no personal property in pews. Sentence of the Court at Winchester reversed.

(An appeal from the Consistory Court of Winchester.)

This suit was brought by the chapel-warden of the Chapel of the Holy and Undivided Trinity in Gosport, against David Compeigne, for refusing to pay a church-rate upon two pews, in the chapel of which he was then a part proprietor. The Court below pronounced the rate to be due, and from that sentence an appeal was interposed.

The libel pleaded that the Chapel of the Holy and Undivided Trinity of Gosport, within the parish of Alverstoke, was built and consecrated in 1696. That the pews in the chapel are the personal property of various persons residing in the town of Gosport, and in other places—that no inhabitants of Gosport, except such of them as are owners of pews, or some parts thereof, have any pecuniary interest or property in the said chapel—that from [12] the foundation of the chapel to the present time the repairs of the said chapel and walls, and of the chapel-yard, the providing books and surplices, and all other disbursements for the said chapel, have been uniformly provided for, and paid by, rates made on such inhabitants of Gosport, or persons residing in other places exclusively, as were owners of pews or property in the said chapel in proportion to the value of their said pews and property, a value agreed upon shortly after the building of the chapel. That Charles Hawkins and Thomas Woodward, the churchwardens from Easter 1815 to Easter 1816, of the said chapel, were obliged to lay out considerable sums of money in and about the repairs of the said chapel, and for other things and matters relating to the office of churchwardens of the said chapel. That a vestry was held in the chapel, on Sunday the 7th of January, 1816, in pursuance of notice given in the said chapel on that day, and also on the preceding Sunday, that a vestry would be held in the chapel on Sunday, the 7th of January, for the purpose of making a rate to defray outstanding bills and other necessary disbursements for the chapel, by the majority of persons attending the said vestry. It was resolved that a rate of two shillings in the pound on the owners of pews in the said chapel be made for the purpose of defraying outstanding bills and such other necessary disbursements as may be wanting for the chapel. That a rate, according to this resolution of the vestry, was duly made on the proprietors of the pews in the chapel after the rate of two shillings in the [13] pound, according to the value of such pews which they held, occupied, or enjoyed in the said chapel.

Secondly. That David Compeigne, at the time of making the rate, was proprietor of two pews within the chapel, one of the value of 18l. for which he was rightly and equally assessed in the rate aforesaid, at the sum of 1l. 16s.; the other of the value of 20l. 10s., for which he was rightly and equally rated and assessed, at the rate aforesaid, at the sum of 2l. 1s.

Adams and Burnaby against the rate. The suit is to compel the payment of money by legal process. The rate is two shillings in the pound, in relation to the value put upon the pews soon after 1696, when the chapel was built. It is instituted by persons in the character of chapelwardens, against a person called a pew-owner. When payment is demanded, he who demands, and he on whom the demand is made, must stand in the relation in which by law the one is entitled to demand, and the other is bound to pay. What the chapelwardens and pew-owners are, nothing special is shewn; therefore, the demand must rest on the general law. By the general law the disposal of pews is in the ordinary—the exceptions are where there is a faculty

by which the ordinary has already acted, or usage which presumes a faculty, and the authority of the ordinary. Nothing here is pleaded of prescription, nor could there be, for the chapel is too modern; there is nothing to take it out of the disposal of the ordinary. It is pleaded that the chapel was duly consecrated in 1696; that the pews belong to certain persons inhabitants of [14] Gosport and elsewhere; and that the expenses have always been paid by a rate on the pewholders, according to the value of the pews settled soon after the building of the chapel. What is there in this to make any difference as to repairs for all other places of divine worship? The payment by the pew-holders must have been voluntary: they do not plead that any person refusing has ever been compelled to pay. This case differs from all cases of legal obligation; the burthen of repairing places of public worship lies on the parishioners generally—here it is stated not to lie on the parishioners at all, but on the pew-holders residing in Gosport and elsewhere: they may reside any where all over the kingdom. The chapelwardens are not parish officers who are under the general law to levy rates; no special right is shewn; it differs from the general law also as to the mode of contribution. A rate is a tax levied by the parishioners themselves in vestry, such the Ecclesiastical Court has jurisdiction to enforce; this is levied on a person who resides out of the chapelry. There is a difference also from the ordinary practice in the mode of contribution; a rate is generally on the land and houses in a parish, or on a person in respect of his land or taxes—here they plead that the pews are the personal property of the holders. What species of property can there be by law in a pew? Such a rate could not be enforced by the Ecclesiastical Court, even if the rates were made at a meeting of the pew-holders. If the bishop might order the repairs to be legally done by monition, it could only be binding on persons legally obliged to repair. The question now is, [15] whether the Ecclesiastical Court can enforce the payment of money in this form—this we deny.

Perhaps the more correct way would have been for our party to have appeared under protest in the Court below, but we contend the libel must be rejected.

Swabe and Jenner contra. The rate is confirmed by the Chancellor—it states the uniform custom from the erection and consecration of the chapel, and the rate was made at a vestry held in the chapel by a majority of those attending; all that has been contended for is true as to chapels and parochial chapels—but the repairs of chapels are provided for on consecration by contribution, which is good by usage; we plead usage here, which, though not authorized by the general law, may be supported by exceptions to the general and usual course—but if the assessment is duly made by the persons assembled who are interested, it is sufficient.

The expense has uniformly been provided since the building of the chapel, and that will support an assessment on such property.

Judgment—*Sir John Nicholl*. The party is cited for the subtraction of chapel-rate—a libel has been admitted in the Court below, and the question is whether that libel states such a case as would entitle the promoters of the suit to recover—it rests on the general law, for it pleads nothing special. The first article is the material part: and the question is, does this state a case which can be enforced in the Ecclesiastical [16] Court, and by the general law? By the general law repairs are to be done by the landowners of the parish or chapelry. If special circumstances must be pleaded, there are none here; the nature of the chapel is not stated. It is not ancient; for it was built and consecrated in 1696. What the endowment was, on what conditions it was built and consecrated, who were the trustees, are not set forth. The libel rests upon the law—it pleads that the pews were the personal property of inhabitants of Gosport and other places; and that no persons, except the proprietors, have a pecuniary interest in the pews. This is contrary to the general law—there can be no property in pews—they are erected for the use of the parishioners. The ordinary may grant a pew to a particular person while he resides within the parish; or there may be a prescription by which a faculty is presumed; but as to personal property in a pew, the law knows of no such thing—they plead usage, but do not allege it to be ancient, or that the pews have been so repaired from time immemorial; for they set forth when the chapel was built—they might state the conditions of the consecration; how and when the usage was established; otherwise I must consider it as a voluntary contribution.

While the matter appears quite anomalous, and contrary to the general ecclesiastical law of the country, how far a Court of Law or Equity might support the application

if there is any trust, it is not for me to say. But for an Ecclesiastical Court to support the contribution, it must be shewn to have been legally laid. I know of no authority [17] but that of Parliament which can authorize a levy different from that which the general law allows.

How the chapelwardens are constituted does not appear, or how the vestry is constituted or of whom. The law knows no vestry, but of the parishioners—here they may be all foreigners. I doubt whether any authority could establish such an institution, except Parliament. If it is to be considered as a mere private agreement, they must go to other authority than this to enforce it.

I think they have not set up a case which this Court can enforce. I shall reverse the sentence of the Court below, and reject the libel.

[18] ANDREWS v. LITTON. Arches Court, Michaelmas Term, Nov. 11th, 1818.—Sentence of an inferior Court in a tithe-cause reversed.

(An appeal from the Consistory Court of Salisbury.)

Judgment—*Sir John Nicholl*. This was originally a suit for subtraction of tithes commenced in November, 1815. A libel and schedule were brought in—answers were given to the libel, and a sum paid into Court—three witnesses were examined on the libel: and, on the 16th of May, 1817, sentence was given; from that sentence this appeal is interposed.

It certainly has happened here, as it frequently does in appeals from the country courts, that this Court has much to lament the slowness and the irregularity of the proceedings. Nothing is put in issue but the quantity and the value of the tithes—the sum paid into Court varies a little (the difference is 2l. 9s. 4d.) from the sum decreed, but there has been a long suit and great expense—it has been three years in travelling through the two Courts—it is not necessary to enter into the details [19] of the delay which has taken place in the Court below. I cannot remedy that—but even here it has not been expedited as much as could be wished. The process was brought in in January, and we do not proceed to the hearing of this short cause till November. Something of an explanation is offered that the party had it in contemplation to introduce fresh matter into these proceedings, which does not surprise me.

The irregularities of the Court below are very striking. This Court unwillingly notices them; its object is to extract substantial justice from the proceedings; but it cannot sanction the neglect of principles essential to the administration of justice: here the irregularities are greater than ordinarily occur.

The libel and the schedule are in the usual form—the latter consists of only three articles. Without noticing the want of correct specification, it will be sufficient to consider the substance of the schedule, and of the answers to it.

The first article of the schedule charges the subtraction of the tithe of sainfoin for two years, one crop cut for hay, the other for seed, and states the value to be two pounds, or at least one pound. The defendant in his answers admits that he had these crops—that the tithe of one was worth four shillings—of the other seven shillings—making together eleven shillings—but he adds that nothing is due, for that he set out the tithe in kind.

The Court properly enough pronounced for the eleven shillings, not considering the setting out of the tithe as legally established; for when a defend-[20]-ant has in his answers admitted quantity and value, he must plead and prove setting out, if he means to rely upon it as matter of defence.

The second article charges the agistment of sheep, stating that the defendant had eight acres of land, in which he fed one hundred and eighty sheep, and claiming one pound, or at least ten shillings for the agistment.

It might have been sufficient if the defendant in his answers had admitted the highest sum, but he liberally admits considerably more, and pays more into Court. The Court pronounced for the sum admitted in the answers, which, though not very formal, is at least substantial justice, and does not require to be disturbed.

The third article is for the tithe of calves, and is of the same character: the schedule charges less than the answers admit to be due, and the judge pronounced for the amount admitted in the answers; the same observations apply to it. But at the end of the sentence another item is added, which was neither pleaded in the libel, nor admitted in the answers, nor proved in the cause. It is for the agistment tithes of one hundred and eighty sheep in the year 1815, and the sum decreed is 1l. 8s. 4d. The only trace to be found of this matter is one of the witnesses mentioning that one

hundred and eighty sheep were allowed to eat off some roughage; but this is no part of the tithe sued for, and where this value is ascertained the Court is unable to discover. I am in duty bound to reverse this part of the sentence.

It is a matter of no small difficulty to adjust the [21] whole case satisfactorily. The money paid into Court was not in the shape of a formal tender; nor accompanied with an offer of the costs then incurred. The plaintiff has been assigned to declare whether he would accept or refuse the tender, the answers admit more to be due than the money paid into Court; yet the money paid into Court exceeds the amount demanded in the libel: these are strange irregularities.

Upon the whole I shall reverse the sentence; pronounce 11l. 10s. 7½d. to be due to the vicar for tithes—allow him 10l. nomine expensarum, which will, I think, cover the expenses up to the time when the money was paid into Court. And as the money so paid in exceeded the sum demanded, I shall leave each party to pay his own costs from that time.

[22] MANSFIELD v. SHAW. Prerogative Court, Michaelmas Term, Nov. 23rd, 1818.—

The executor under a former will has a right to put the executor of a latter will upon solemn proof of that instrument, and to interrogate his witnesses: but if he goes beyond this without being able to prove his case, he becomes liable to costs.

Judgment—*Sir John Nicholl*. The evidence leaves no possible doubt as to the case, and the question is narrowed to the consideration of costs, and on this point I have no doubt from the conduct of the party, and the complexion of the cause.

Immediately on the death of the deceased the adverse party, though he knew of the existence and validity of the latter will—obtains probate of the former will—takes the executor's oath—gets possession of the house and property, and has continued in it ever since. The probate was very soon called in; if he had made candid enquiries, and candidly considered, he could have entertained no doubt.

The law gave him the right to call upon the executor to propound his will “in solemn form of law,” and to interrogate the witnesses: but he [23] went further and pleaded what he must have known he could not prove.

There was no “just cause of litigation” to go to the extent he has gone. I think I must in justice give those costs against him, which have arisen from the admission of his allegation.

THOMAS v. WALL AND OTHERS. Prerogative Court, Michaelmas Term, Nov. 23rd, 1818.—A codicil unsigned and having an attestation clause unattested by witnesses, admitted, to probate.

Isaac Padman died on the 30th of August, 1818, leaving a formal will, dated 29th July, 1816, and a testamentary paper signed, and having an attestation clause to which there were no witnesses. The will was not disputed—the testamentary paper was propounded as a codicil under the circumstances set forth in the following judgment.

Judgment—*Sir John Nicholl*. The will is in the handwriting of the deceased—it is dated, executed, and attested, by three witnesses—the codicil is also in his handwriting, but it is not signed, nor attested, it is propounded by Mr. Thomas, and opposed by the executors. The allegation states, “That after the deceased had executed his will, the Rev. Thomas Hampaye, one of the persons he had named executor, told him that [24] he wished to decline acting, and that the deceased, in consequence, was desirous of annulling his appointment as executor of his will, and substituting another in his stead; and also wishing to make other alterations in his will; sometime in the year 1817, the time more particularly the party propounded cannot set forth, did draw and write the codicil exhibited in this cause, and placed the same, together with his will, in the envelope in which he had before placed the will alone, and altered the endorsement by crossing with his own hand the names and words ‘Rev. Mr. Hampaye,’ and ‘November,’ and inserting over the same the names and words on ‘the Rev. Mr. Thomas,’ and ‘July;’ and then deposited the codicil enclosed in the envelope in an escrutoire in his bedroom.”

The codicil is fairly written—it is all in the deceased's handwriting; strong reasons are given for the change of the executor—it was deposited with his will, and endorsed; there is no doubt, I think, but that the deceased intended it should operate; certainly, on the face of it, it is an imperfect paper, but the presumption against it is slight; therefore, slight, circumstances will remove it.

The second article pleads that on the 24th of August last, being six days before his death, Mr. John Davis, one of the executors named in the will, called on the deceased, and was introduced into his bedchamber; that the deceased was then lying on his bed, in a very weak and enervated state; that he requested his wife, who was then in the room, to take out his will from the cabinet in the said room, [25] who then immediately produced to Mr. Davis from such cabinet the packet containing the will and codicil; and Mr. Davis, at the request of the deceased, then read the said will and codicil all over to him audibly and distinctly in the presence of his wife; and then asked him "if he thought there could be any cavil;" who replied, he thought not if the codicil were signed, whereupon the deceased, who was then very ill and could not sit up without pain and difficulty, his disorder being an enlargement of the kidneys, said if he got better he would write it all over again; on which Mr. Davis advised him to do nothing with his will in his then state, he being then, as he had been and continued to be, in the most acute pain from his disease; and that the deceased's wife then, at his request, replaced the papers in the cabinet, and the deceased soon after such conversation fell into a doze. The third article pleads that from this time the deceased grew gradually worse till his death, and was continually, when awake, in the most excruciating pain, and incapable of conversing for a few minutes, without experiencing the utmost bodily suffering; and, in consequence of pain and the effects of opium, his mental energy was destroyed, and in this state he continued till his death.

If these facts should be proved, the presumption of law will be completely repelled. There is an anxiety in the deceased that the codicil should operate, but he was in too much pain to attempt to sign it; he attempts to write it over again; these are strong marks of his adherence to it.

[26] If these circumstances are fully proved, there can be no doubt.

The allegation was admitted.(a)

HOOTON AND DICKENS v. HEAD. Prerogative Court, Hilary Term, Jan. 23rd, 1819.

—A former will not revived by the cancellation of a will of a subsequent date.

Judgment—Sir John Nicholl. On the facts of the case there is no contrariety of evidence; the deceased died a bachelor; he had made several wills, and it was his habit, when he made a new will, to cancel the former one. On the eighteenth of November, 1816, he called at the house of Mr. Day, his solicitor, who was not at home; but Mr. Moore, the confidential clerk, attended upon him and undertook his business under circumstances which he states in the following manner:—"Mr. Day being in London, the testator communicated to the deponent his wishes and intentions respecting some alterations he proposed to make in his will; the deponent thereupon (having access to all the said Mr. Day's papers) produced the deceased's then existing will to him, which, to the best of his recollection and belief, bore date [27] some time in the year 1815, and which had been formed by the said Mr. Day of the three first sheets of a former will, executed by the said John Head the testator, sometime in the year 1809, and of the three sheets in his, the said Mr. Day's, own hand-writing in continuation; the deponent then read the said will all over to the said testator; and as the said John Head, the testator, explained to the deponent as he read the same, the alterations he was desirous of making in his said will (one of which he well remembers was to alter the bequest of one moiety of the clear residue of his the testator's personal estate, which by his then existing will he had given his sister Ann Hooton, wife of the said Daniel Hooton, a life interest in only, and the principal immediately after her decease, equally between all the children of his said sister Ann Hooton, except her sons John Head Hooton and William Hooton, so as to give the said moiety, or said clear residue of the testator's said personal estate, to his sister Ann Hooton, and her husband Daniel Hooton, absolutely) he made such alterations with a pencil in two of the latter sheets of the then existing will, as he read the same to the testator, and received instructions from him for that purpose so as to make the same agree with the wishes and intentions of the testator; for the aforesaid three first sheets of the then existing will, not requiring any alterations to be made therein, as

(a) The facts stated in the allegation being known to be correct, no further opposition was made by the executor; and the codicil was admitted to probate on the 9th of December, 1818,

the testator was not desirous of making any alteration in the devises to which the same related, he the deponent took the three first sheets of the [28] then existing will, as a part of the will which he then formed for the testator, agreeably to his wishes and directions; and then having made the several alterations in ink which he had previously made only with a pencil in the two sheets of the then existing will, agreeably to the testator's intentions, and having caused the sixth or concluding sheet of the will, which he was then forming in manner aforesaid, to be written by James Day (another clerk in the office), whilst he was engaged in writing the aforesaid alterations in ink, in the two sheets of the former will, he the deponent then, in the presence of the testator, cut off the names of the subscribing witnesses appearing, as well in the margin of the three first sheets of the former will, as also in the margin of the two latter sheets thereof, which were as aforesaid in Mr. William Day's own handwriting, but did not cut off the testator's name from the three first sheets as the same now appear cut off from the same, and as is pleaded in the said first article of the said allegation; for the testator's name had already been cut off therefrom, at the time when Mr. William Day had, as is predeposed, taken the three first sheets from a former will executed in 1809, to make the same serve as a part of the will, which the deponent altered in manner hereinbefore set forth, on the 18th Nov., 1816; and which the said testator had executed in the year 1815, as he the deponent also believes; and the deponent further saith that, having in manner hereinbefore mentioned formed a temporary [29] will for John Head the testator; for it had been settled and agreed upon between the testator and the deponent that a fair copy was to be made thereof by the following Wednesday, being the 20th day of the said month of November, and that the deponent was to attend him the testator therewith on that day to see him execute the same. He the deponent then read the said paper writings to the testator, who perfectly well knew and understood the same, and approved thereof; and in order that he might not be without a will during the time required to get the same engrossed as aforesaid fair for execution (viz. till the Wednesday following) he expressed a desire to execute the same; and the deponent having thereupon called in his fellow subscribed witnesses to the said will, Mr. James Day and Mr. George Palmer Edis, who were then also clerks in the said Mr. William Day's office, to attend and see the testator execute the said intended temporary will; and they having accordingly come for that purpose into that office, where the testator and the deponent then were, he, John Head the testator, then in the presence of them the said James Day, George Palmer Edis, and the deponent, traced over his name with a dry pen, which had been set and subscribed at the foot or the bottom of each of the said five first sheets, now forming a part of the will propounded in this cause, previously to the same being applied to such use (for the same had been so subscribed by the testator, at the time they were made a part of his former will in the year 1815, as the deponent verily believes, and hath not the [30] least doubt), and he then, that is say, on the 18th Nov., 1816, also set and subscribed his name 'John Head' at the conclusion of the clause written on the back of the fourth sheet of the will; and also at the conclusion of the last sheet of the said will, in manner and form as now appears therein, and when he had so done, he sealed, published, and declared the paper writings contained in the said six sheets of paper, as and for his last will and testament; and requested them, the said Mr. James Day, Mr. Edis, and the deponent, who were present during the transaction, to be witnesses to the execution thereof in the usual manner and form, for which purpose the deponent made use of or dictated the words commonly used on such occasions, and the testator either repeated or adopted the same; and then the said Mr. James Day, Mr. Edis, and he this deponent respectively set and subscribed their names to each sheet of the said will, and also on the back of the fourth sheet thereof, where there was a clause subscribed by the said testator as aforesaid, as witnesses to the execution of the said will soon after which being done, the testator went away, leaving the will with the deponent, for him to get a fair copy thereof made for him to execute on the Wednesday then next following, when the deponent was to have attended him therewith for that purpose."

Thus Moore states a temporary will was formed in order that the deceased might not be without a will till a more formal will was executed; it was rather an executed draft from which a will was to be prepared than a will. On the 22nd of Novem-[31]-ber, he met Mr. Day at Kimbolton Market, who appointed him to come

to him on the next day. On the 23rd he made a will including the usual revocatory clause; there were some slight alterations, but generally the bulk of the will was the same.

Mr. Day is not certain that he carried the will of the 18th with him, but he does not venture to state that he called it to the mind of the deceased as an existing will. A month afterwards the deceased sends for Day, and executes a codicil by which he revoked a legacy of 200l., and his furniture to Mrs. Potter his housekeeper, who had offended him, and left her only 100l. The deceased twice sent for his will, which Day had taken away with him, but did not obtain it; he then got a Mr. Harrison to write a paper revoking the 100l. legacy to Mrs. Potter; he being jealous of Day for not having pursued his direction respecting Mrs. Potter. The deceased agreed to send for the doctor; he executed two codicils which he sealed up; and being anxious to prevent Day from carrying them away with him, he locked them up in an iron chest. The deceased felt dissatisfaction at the disposition of his property, and on the 29th of December, 1817, he put his will and the codicils into the fire intentionally and deliberately. The will of the 18th of November remained in possession of Mr. Day.

The question for the Court is whether, upon the destruction of this second will, the first was revived or revoked; this description of question has frequently arisen and been repeatedly agitated. In some cases it has been contended that the former [32] will is so far revoked as to require some act of revival; in others that the mere preservation is sufficient to revive it. In *Glazier v. Glazier* (Burrows, p. 2512) both instruments were in possession of the deceased; though the dicta thrown out are adverse to the necessity of an act of revival.

The clear result of all the cases, the common sense of them, is that it must be ascertained whether it was or was not the intention of the deceased that the will should stand; and in a late case (vol. i. p. 375), *Moore v. De La Torre*, the Delegates seem to have come to the conclusion that it was to be considered as a question of intention.

In the present case it is unnecessary to decide in the absence of circumstances on which side the presumption lies; it is unnecessary to consider the balance of presumption which might turn the scale, because there is no doubt from the circumstances.

This was not considered as a formal will, but as a draft; and as such would be done away when the will made from it was executed. When he destroyed the latter will, it is not probable that he meant to revive the other, any more than that it is probable that a person, by destroying a will, means to revive the draft. To suppose that he meant to revive the legacy to Mrs. Potter would be to go in the teeth of all the evidence. Assuming it to be a formal regular will, yet it being the practice of the office to cancel wills when a later one was made, the deceased naturally would suppose it cancelled; it seems never to have been in his contemplation since he executed [33] it; it was never brought to his notice; if the evidence of it is correct, he said he had no other will; when he destroys his will there is no declaration that he had a formal will; all his declarations at the last were that if he did not make a new will, he would have none. His declarations also were that his property would go away amongst all his relations; unless we are to discredit two witnesses, he repeatedly declared that his mind was easy, that now he had no will. He could, therefore, have had no intention whatever, when he destroyed one, of reviving the other; and I think I am bound to pronounce against the will, and for an intestacy.

The costs of both sides were directed to be paid out of the estate.

IN THE GOODS OF JENKINS, Deceased. Prerogative Court, Hilary Term, Feb. 1st, 1819.—Administration granted to a creditor revoked he having settled his own debt and gone away.

[Followed, *In the Goods of Bradshaw*, 1887, 13 P. D. 18. *In the Goods of Covell*, 1889, 15 P. D. 8.]

Per Curiam. A creditor having obtained an administration, and completely settled his own debt, goes away; he does not fall within the late act; and I see no other remedy than that the administration should be revoked, and the executor should retract his renunciation and be allowed to take probate of the will; otherwise great loss might

accrue, and injustice might be done. The Court has greater authority over an administration with the will annexed, granted to a creditor, than over an administration under the statute.

[34] *LADY HERBERT v. LORD HERBERT.* Consistory Court of London, Hilary Term, February 3rd, 1819.—Depositions taken under a requisition in a foreign country objected to because they had not been secretly taken. Objection overruled.

On the 5th of December, 1817, a requisition issued from the Consistory Court of London, addressed to His Britannic Majesty's Consul General in Sicily, and to the judges and magistrates, civil and ecclesiastical, in the city of Palermo, or in any other place or town in Sicily, requesting them jointly or severally to take the depositions of the witnesses, produced on a libel given in by Lady Herbert, in a suit brought by her against her husband for the restitution of conjugal rights. The examination having been completed, the requisition was returned: but an objection was now taken to that return; because, as it was alleged, the depositions of the witnesses had not been taken secretly, but in the presence of Don Camillo Gallo, acting as the substitute for Lady Herbert's proctor.

Arnold and Swabey for Lord Herbert, contended that all the proceedings had under the commission were invalid, and that the depositions must be quashed.

Phillimore and Lushington contra.

Judgment—*Sir William Scott.* [35] The present question arises upon an objection made to the return of a commission to examine witnesses in Sicily, touching the marriage of Lord Herbert with the Princess of Butera. The commission issued from this Court; and was directed to the English consul in Sicily, and to the civil and ecclesiastical judges in that country: it was accepted by one of the judges at Palermo, and His Britannic Majesty's Consul General.

It is objected that many irregularities took place which are not pressed upon the consideration of the Court. One, however, is, viz. that the commission was not executed according to its own proper form and directions, and that it is clear that it ought to have been executed according to its own form as delegated, and not according to considerations arising out of the law of the country in which it was executed; the evidence was to be secretly taken; but that it was not so; for the substituted agent of the Princess of Butera was present, which was a violation of the secrecy enjoined. On this ground the commission is said to be vitiated, and it is prayed that the return should be quashed. Undoubtedly, if the Court had reason to believe that this error had led to important consequences in polluting the evidence, it would, however unwillingly, after the length of time this cause has lasted and the several obstructions that have been given to it, resort to the measure of sending out a new commission: but if there should be reason to believe that the irregularities arose from mistake, and from the misapprehension of a word which might easily be mistaken, and that the judges had in all other respects acted duly, I think [36] I should depart from my duty if I did not allow the evidence to be inspected before I pronounced against it.

The commission went out with an order that the witnesses should be examined secretly, such is the form and rule of the canon law, by the judge in the presence of a notary public. Our own municipal law holds a different practice; it is to be observed, however, that the secrecy enjoined by the civil and canon laws is varied by the local regulations of different countries: it is not interpreted exactly the same in any one country as in another. In this country it is not the practice for the judge in person to take the examination of witnesses; but it is confided to an examiner who examines secretly. In the present case the office of examiner has been performed in a more dignified manner by one of the chief magistrates of the country, and one of the representative functionaries of the English government: there is therefore some security here that all has been rightly done. I must admit that, supposing the word secretly to have been rightly understood, the witnesses ought to have been examined according to the authority given by those who delegated it; but I accede to the observation that secret is an ambiguous word, and I do not wonder that it led to a mistake which it may be proper to guard against in other requisitions sent out to foreign countries. There are different degrees of secrecy: a tribunal is secret where it is held *januis clausis*; another species of secrecy is where none but the

judges and parties only are present; another where the judges only are present. I do not wonder when [37] this commission came into a country where they are used to examine witnesses *januis clausis*, where they exclude a public and general auditory, taking the evidence with the judge, notary and representative of the parties only present, that they might easily think they had done right in taking the depositions as they have done; it is natural they should so explain the word *secret*; there is no reason to consider it as an intentional perversion. In these commissions, which go to foreign countries, I think it may be hereafter necessary and proper to throw in some words which may prevent such a misconception as naturally seems to arise from our own practice. Arising, as it does in this instance, from natural misapprehension, it does not impress this Court with any suspicion: it is clearly an impression existing on the minds of all parties. Don Martini, the substitute for Lord Herbert, complains that he alone was not admitted: the notion is merely taken up by counsel here, that he objected on any other ground. Where all parties act under this natural mistake, it is not necessary that I should consider the evidence as unduly taken and vitiated, before we examine that evidence.

I think I have great securities in the character of the persons who presided at these examinations; and from the nature of the suit which goes rather to the adjudication of a point of law, than of a question of fact.

Looking to all these considerations, I cannot say that the depositions must be quashed as unfairly taken: I think this evidence may serve as the basis of a sound judgment.

[38] *BRISCO v. BRISCO*. Arches Court, Hilary Term, February 4th, 1819.—Court of Appeal, on an appeal from a grievance, cannot enforce the payment of costs incurred in the inferior court.

An appeal from the Consistory Court of London.

Upon an appeal from the rejection of several articles in an excepted allegation. Application was made to the Court to enforce the payment of the costs which had been incurred in the Court below.

Per Curiam. Is there any instance of this? This is only an appeal from a grievance. I doubt whether the Court can take any such step; it is the fault of the party in allowing the exceptive allegation to be given in before the expenses were paid. The case may stand over for precedents: but, as it now strikes me, the Court would not be warranted in acceding to this application, particularly before the process has been brought into this Court.

[39] *JOHNSTON v. PARKER, FALSELY CALLED JOHNSTON*. Consistory Court, Hilary Term, February 4th, 1819.—A marriage solemnized by licence in 1796 declared null and void.

This suit was instituted by Henry Erskine Johnston, to obtain a sentence declaratory of the nullity of a marriage solemnized between him and Nanette Parker by licence on the 19th of June, 1796.

Nanette Parker was not sixteen years of age: but her father was present at the marriage and consenting to it. Henry Erskine Johnston obtained the licence on making oath that he was of the age of 21 years and upwards. He now, however, adduced evidence that he was at that time a minor, and that his father did not consent to the marriage. The exhibit originally annexed to the libel stated his birth to have taken place at Edinburgh, on the 5th of August, 1774; this exhibit, however, was withdrawn upon application to the Court on account of a clerical error, and in the place of it another substituted, which placed his birth on the 5th of August, 1775. The disannexed exhibit had been ordered by the judge to remain in the registry till the final hearing of the cause.

[40] The father of Henry Erskine Johnston was examined; and deposed to his son's birth in accordance with the last exhibit, and fortified his recollection by a reference to an entry in a family Bible.

Jenner in support of the marriage. The marriage in this case has subsisted for 22 years; there have been issue of it seven children, three of whom are now living. These children may have contracted marriages with other persons with their father's consent, all which marriages would now be null and void. The licence was obtained by the parties now suing for the nullity. The want of the father's consent must be

admitted to be proved: but there is no sufficient evidence of the minority of the husband at the time of marriage; it would not be assisted by the entry in the family Bible, as the father had ten children, and the entry was not made at the time of the birth of this child. In *Sayer v. Davies* such evidence was held insufficient.

Swabey and Lushington in support of the nullity. It is the duty of the court to carry into effect the provisions of the statute; and it is essential to the public to know the relative situation of the parties: length of cohabitation, therefore, and the birth of children, afford no bar to the sentence of the Court. The Court has frequently pronounced a sentence of nullity on less evidence than is adduced in this case.

Judgment—*Sir William Scott*. This is a proceeding to dissolve a marriage which [41] took place between Henry Erskine Johnston and Nanette Parker in June, 1796. There have been several children, three of whom are now living. These circumstances, however, would not prevent the Court from dissolving this marriage, though the consequence may operate with great severity on the issue. The words of the Act of Parliament are positive and peremptory, and the Court is under the necessity of enforcing it; it is better at any time to stop as soon as possible, lest the continuance should involve the interest of a greater number of persons, for there is no time in which it will not affect the interests of parties: the length of cohabitation, however, forms a strong call on the circumspection of the Court to see that the evidence is complete. The reason why it has not been attempted to invalidate this marriage before does not appear; there may have been a cohabitation up to the date of this suit. Of the history of the parties I know nothing—possibly there may be reasons to induce a desire of setting aside this marriage: but they ought to be strong ones.

The evidence should be full and conclusive. The want of consent is admitted to be fully proved; the marriage is also fully proved to have taken place at the time stated, viz. June 19, 1796: the only question is, whether the party at that time was of sufficient age? The invalidity must arise from being under the age of twenty-one; there is evidence which I should think sufficient in an ordinary case. The father, mother, and aunt depose to the birth of the child: persons pretty far advanced in life: and though the memory of persons at that time of [42] life is subject to infirmity, and they have ten children, the history they give is distinct. The husband himself, when he obtained his licence, deposed that he was twenty-one years of age and upwards. I observe him spoken of by his father as a youth of honourable disposition; and I am willing to suppose that he took this oath under the idea that he was of the age he describes himself to be. There is likewise annexed to the libel a certificate signed by the father: this was associated to the libel for a great length of time, not contradicted till the May following, and then begged to be withdrawn, on account of a mistake. This application was not allowed, and to this moment no explanation has been given why 1774 was substituted for 1775. A family Bible has been referred to. I will not say in all cases that such a Bible should be produced, when I see the mistakes, the extreme mistakes, in the other instrument. I shall not immediately proceed to sentence in this case: but shall expect the Bible to be produced, properly verified; and the mistake of the dates to be fully explained.

The Court rescinded the conclusion of the cause to admit the production of the family Bible.

The Court pronounced for the nullity.

[43] HAYES, FALSELY CALLED WATTS v. WATTS. Arches Court, Easter Term, May 20th, 1819.—A marriage pronounced null after a cohabitation of eighteen years.

By letters of request from the Commissary Court at Winchester.

Judgment—*Sir John Nicholl*. This is a suit of nullity of marriage, brought by Mary Hayes against John Watts. The circumstances are peculiar; the marriage was not clandestinely had: but it is admitted that the woman was a minor, and married with the consent of her mother, who was supposed at the time to be a widow. But the father in fact was then living, and is still living; and he only could legally give consent, without which the marriage is null and void.

Eighteen years after the solemnization of the marriage, without any alleged impropriety, it is sought to be set aside, not at the suit of the husband as more

frequently happens, but at the suit of the wife. It does not appear whether there is any issue.

[44] Eight witnesses have been examined on the libel, and they leave no doubt. The father has been examined, and the sister of the wife. The entry of the baptism was in 1780; the father was then a shipwright at Deptford, and the daughter was baptized there; in 1781, the father went to America, leaving his wife and child here; he returned to England in 1795, and soon afterwards again went back to America. During his first absence, he was supposed to be dead, and his wife married again. It is clearly proved that the father never heard of his daughter's marriage.

The marriage took place in May 29, 1820, the woman being rather under twenty. The mother gave her consent—no false suggestions or fraud are set up: but the want of the consent of the father is proved; and, though the parties did intend to contract a valid marriage, yet either of them has a right to the benefit of a declaratory sentence. No such sentence is necessary: but it is a matter of convenience to the parties that it should be given; and it is a duty this Court owes to the public to declare the situation of the parties.

[45] SULLIVAN v. OLDACRE, FALSELY CALLED SULLIVAN. Arches Court, Trinity Term, June 16th, 1819.—Publication of the banns of an illegitimate child, by the surname of the mother as well as by that of the father, held to be valid.

[For further proceedings see 2 Add. 299.]

An appeal from the Consistory Court of London.

This suit was instituted by the Right Honourable John Sullivan, for the purpose of annulling a marriage which had been solemnized between his son John Augustus Sullivan, a minor, and Maria, daughter of Thomas Oldacre, the huntsman of the Berkley hounds. The judge of the Consistory Court pronounced for the validity of the marriage; and the cause was now brought on in the Court of Arches, on the same evidence with which it had been instructed in the Court below.

It appeared that John Augustus Sullivan had been left by his father at his seat called Riching's Lodge, in Buckinghamshire, to pass the period which was to elapse between his quitting Eton school, and his admission to the University of Oxford, under the care and superintendence of a private tutor. During this interval, the young man, without the knowledge of his parents, but with the privity to a certain extent at least of his private tutor, cultivated an acquaintance which had commenced in the preceding hunting season with Maria Oldacre, [46] who resided with her father at Gerrard's Cross, which in the course of a few months led to the marriage in question. The marriage took place in St. Olave's church, in the borough of Southwark, on the 15th of July, 1816; the husband being then rather more than three months under the age of eighteen, the wife being within three months of twenty-one years of age. None of the relations or friends of the husband were present at, or apprized of, the marriage; at the time of the solemnization the officiating minister questioned the parties as to the correctness of the proceeding; and in the course of the ceremony he stopped to interrogate them whether they were both of age, and resident within St. Olave's parish, on which a reply was instantly given by the mother of Maria Oldacre, who said, "Every thing is right; she is my daughter, and we live in the parish in Tooley-street." It appeared also in evidence that an attempt had been made to get the banns published in St. Andrew's, Holborn, which did not succeed.

The grounds on which the validity of the marriage was impeached were set forth in the following manner in the eighth article of the libel:—"That the said Thomas Oldacre, and Amelia his wife, used various means to effect a marriage, without the knowledge of the party proponent, between the said John Augustus Sullivan, and their said daughter. That the said John Augustus Sullivan being prevailed upon by the artifices and misrepresentations of the said Thomas Oldacre, otherwise Oldaker, and Amelia his wife, to consent to such marriage; banns of marriage were published in [47] the parish church of Saint Olave, Southwark, in the county of Surrey, for three Sundays, to wit, Sunday the thirtieth day of June, and Sunday the seventh, and Sunday the fourteenth days of July, in the present year, 1816, between him, the said John Augustus Sullivan, and the aforesaid Maria Oldacre, otherwise Oldaker, describing them respectively as John Augustus Sullivan, a bachelor, and Maria Holmes Oldaker, spinster, both of the said parish of Saint Olave, Southwark. And the party proponent doth allege and propound that Maria Oldacre, otherwise Oldaker, the party

cited in this cause, was falsely described in the said banns of marriage by the name of Marie Holmes Oldacre aforesaid. That the said name of Holmes was not her baptismal name, nor her name of repute, for that she was not baptized by such name of Holmes, nor was she at any time called or known by such name, nor did she ever use the name of Holmes in any way whatever: but, at all times prior to her pretended marriage with the said John Augustus Sullivan, was known and called by the names of Mary or Maria Oldacre, otherwise Oldaker only, and by no other name or names; and the said name of Holmes was unduly used in the publication of the said banns of marriage for the purpose of fraud, deception, and concealment, and to prevent the real names and condition, and situation of the parties respectively, coming to the knowledge of those who heard the banns published, and of the said Right Honourable John Sullivan, and others interested therein, and likewise to conceal the same from the priest or [48] minister by whom the marriage should be afterwards solemnized."

To this it was replied that the name of Holmes was not used for the purposes of fraud, but from caution, and the desire of having the banns correctly published; for that being born before the marriage of her parents (which she was proved to have been), and, consequently, illegitimate, she had taken the surname of her mother, as well as that of her father, to prevent the possibility of mistake as to her real name. The charges of artifice and misrepresentation were denied; and letters were produced from John Augustus Sullivan, written to his wife subsequent to the marriage, couched in the language of ardent affection and attachment.

Stoddart, Jenner, and Dodson in support of the marriage. The argument must be reduced to a dry legal question of due or undue publication of banns, and this is confined solely to the name of the woman; if concealment had been intended, and from the family of the man, the probability is that the alteration would have been in the name of the man.

The act requires the publication to be as it has been held in the true names: here there was a publication, and by the true names. The objection is, that another was added. The decided cases on this subject divide themselves into three classes, viz.

1. Where the name is totally different.
2. Where part of a name is omitted.
3. Where part of a name is inserted.

Of the first class are *Early v. Stevens*, in 1785; [49] *Copps v. Follon*, *Longley v. Gordon*, *Frankland v. Nicholson*, *Mather v. Ney*, *Wakefield v. Mackay*, *Wilson v. Brockley*, *Mayhew v. Mayhew*, *The King v. The Inhabitants of Billingham*; in all these there was a total difference of the name, and they cannot be made to apply. In the second class is the case of *Ponget v. Tomkins*, where the omission had the effect of a total alteration, and where there were strong circumstances of fraud, on which the case was determined.

In the third class many cases have been argued on the admission of the plea, though they have not gone to proof, *Heffer v. Heffer*, *Tree v. Quin*, *Dobbin v. Corneek*. The libels were admitted: but the Court reserved its determination till it should see what of fraud was proved. In *Fellowes v. Stewart* the marriage was annulled expressly on the ground of fraud. There must be either a total destruction of notoriety, so that persons knowing the party would not recognize her at all, or a fraudulent alteration of the name. Here Maria Holmes Oldacre is used for Maria Oldacre: this is not an addition which would conceal the party; there was no fraud in the use of it, and a reasonable explanation is given. We contend that the publication was good, that the true name was used, and that the addition of that of Holmes is sufficiently accounted for.

Swabey and Phillimore contra. The intent of publication is notoriety. Here there is concealment, which under the circumstances of the case is fraud: they resorted first to St. Andrew's, Holborn, and then to St. Olave's, [50] Southwark, in neither of which parishes they resided, or were known; this resort to different parishes has been held in various cases an ingredient of fraud, as in *Meadowcroft v. Gregory*, and *Pouget v. Tomkins*. Add to this the false answers of the mother at the time of the marriage, and her positive assurance to the officiating minister that the parties were both of age, and resided within his parish; then the disparity of age and condition lead to the same conclusion. The case of *Fellowes v. Stewart* applies closely.

In *Ponget v. Tomkins* the Court held the attempt to procure a publication of banns, which failed, to be the strongest evidence of a fraudulent publication (vol. 1, p. 505).

We contend that the publication was not in the true name ; that fraudulent circumstances have been proved ; and that this is precisely the description of marriage which it was the object of the act to prevent.

Stoddart and Jenner in reply. The marriage act has rendered banns necessary which were part of the regular ceremony. To invalidate them it must be shewn that there was no publication, such as would have been irregular before. In *Fellows v. Stewart* there was fraud in the very assertion of the names : by that the man endeavoured to impose upon the other party, and to obtain an advantage to himself. Where there is a total variation of the name, it is not necessary to consider fraud ; for there is then no publication of banns : it is only where a name is inserted or omitted that fraud can be examined into. In *Pouget [51] v. Tomkins* there was an omission, and fraud applying to it : the name of Holmes was not used most conspicuously. The evidence of residence in another parish is not to be received. As to the objection that this is such a marriage as the act was intended to prevent, it is not so. The act was against clandestine marriages ; no marriage can be considered as clandestine where there is a publication of banns. It must be shewn that this is not a publication before the question can be so argued ; nor can the conduct of the mother at the marriage affect the validity of the publication of the banns.

Judgment—*Sir John Nicholl.* This case comes in the form of an appeal from the Consistory Court of London, where it was a suit of nullity of marriage. Both parties are minors ; the suit is brought by the father of the young man as his guardian. The woman at first appeared by her father acting as her guardian : but she has in the course of the proceedings become a major, and acts for herself. The usual proceedings were had in the Court below. A libel was given in, and twenty witnesses were examined on it ; this was answered by an allegation on which seven witnesses were examined. The judge pronounced that the father had failed in the proof of his libel, and dismissed the suit, thereby pronouncing the marriage valid. I am to decide the case on the same facts which were brought to the view of the Court below.

The decision of every Court of competent jurisdiction carries with it a presumption in its favour ; [52] and it is hardly necessary to add that the personal character of the judge who decided this, as far as it can weigh, gives peculiar weight to the decision. But it is the duty of every Court to form its own judgment with as little prepossession as possible ; if I see reason to differ, it is my duty to reverse the sentence : and, in that case, it would be necessary to enter fully into the circumstances of fact and law, in order that the reasons of the difference might be clearly understood. If, on the other hand, on mature and deliberate consideration of the arguments, I see no reason to differ ; then it is not only unnecessary, but there are peculiar reasons of delicacy why I should not enter into the less material circumstances, but should confine my observations to the real point.

On the facts of the case there is no conflicting evidence. The true question is whether the banns were unduly published : that is the only point of nullity arising out of the proofs.

The citation is somewhat complex : it is to answer in a cause of nullity by reason of minority and undue publication of banns. In a marriage by banns, minority has nothing to do in the citation, as a primary and direct cause of nullity. It might properly enough have found its place in the libel as a collateral circumstance : but undue publication of banns is the real essence of the suit.

Again, it is pleaded that Oldacre and his wife used arts to induce the marriage : if this be true it is no cause of nullity, though it may throw light on the publication of banns. Concealment of the marriage by the parents of one of the parties from the parents [53] of the other is not fraud. The law lays no obligation on the party to discover it ; it may be unseemly and dishonourable ; it may give a character to the publication, if it be doubtful whether it be a due or undue publication : but it goes no further ; averments of artifices and misrepresentations are no ground of nullity, if the banns are duly published. This Court does not lay it down that, under no circumstances, there can be fraudulent artifice which may make a marriage void ; but it must be such as to take away consent, so that the party contracting did not understand the contract. If he did contract, and is capable of consent, as a minor of eighteen is, the marriage is valid, though there may be some contrivance as to the circumstances ; consent is of the essence of marriage, "*consensus non concubitus facit matrimonium.*" In the libel it is stated that he was prevailed upon to consent ; the evidence gives no

countenance to the allegation of artifice being used against him. The courtship was carried on in the presence of his tutor: the young man was active himself in the transaction, and ardent in his addresses.

The real merits of the question lie then in what is stated in the latter part of this article of the libel.

It is pleaded that the woman's name was Maria Oldacre, and that she is falsely described in the banns as Maria Holmes Oldacre, which was not her name by baptism, use, or otherwise; but was unduly used for the purpose of fraud and to conceal her real name from the persons who heard them, the father of the minor, and others. If such was the purpose and effect, the publication was undue, [54] and the marriage is void: but if the name of Holmes was used not for the purpose nor with the effect stated, then the marriage is valid. I agree in the point of law laid down that fraud must be in the use of the name: other circumstances may bear collaterally, but not directly, upon this. I take this to be the result of all the cases. Those cases were fully discussed in argument, and I shall not travel through them. I shall only advert to that of *Fellowes v. Stewart*, which I perfectly remember was decided on the ground that the names were introduced for the purpose of deceiving the woman and her friends, and that it was calculated to effect that purpose. It is proper, therefore, to enquire whether the name was introduced here for that purpose, and whether it produced that effect; if fraudulent concealment was the purpose, the Court would infer the effect. So if the mode of publication would produce concealment and disguise, a fraudulent purpose would necessarily be inferred. But if the introduction of the name of Holmes is easily accounted for on other grounds; if it is not calculated to effect that purpose; if all the ends of publication would be as well answered with that name as without it; if the use of it is fully explained, and it appears to have been used *ex abundanti cautela*, it is impossible in my judgment to decide that this is such an undue publication as to render the marriage invalid. The presumption of law is in favour of marriage; a marriage *de facto* was formally solemnized in the face of the Church, after publication of banns, and was followed by cohabitation. [55] Before the marriage act this was unquestionably a good marriage. Parties actually joined together are not lightly to be put asunder. The marriage may be of great disparity, and the connection to be lamented: yet, in natural justice, it is also to be remembered that if it were annulled, the young woman would suffer irreparable injury; hence the maxim that, *semper præsuntur pro matrimonio*, where marriage is solemnized with religious ceremony. The marriage act gives no direction as to the mode of publishing banns; it requires notice, but does not expressly say that the marriage shall be void if the wrong names are used. But courts of law have very properly held that the very nature of banns, and the object of publication, require the names to be used which shall give effect to them. It is laid down, therefore, that banns must be so far in the true name as to designate the person who is about to be married. Sometimes there is a difficulty in determining what is the true name. The original names are sometimes dropped, and there may be doubts as to them: but that is not the present case. Here the true names are used; it is not a case of the omission of the true name. Three names are used. Maria is the name of baptism, Oldacre is the name of repute; and there can be little doubt that it is the true name. The name of Holmes is interposed; this may be a fraudulent interposition, and so disguise the parties as to defeat the object of publication, as was the case in *Fellowes v. Stewart*. It comes then to this; whether Holmes could have that effect. If Holmes was added to [56] that of Oldacre, there might possibly have been some mistake as to the identity. But a third intermediate name is so frequently dormant, and dropped, that even her former lover, if he had heard this publication, would have known it to have been intended for her. The object however was not to disguise it from her friends: but how any connection of Mr. Sullivan's could have been imposed upon by hearing these banns it is difficult to imagine, for his name was rightly published. If there had been an omission of his second name Augustus, and the banns had been published for John Sullivan, and not John Augustus Sullivan, it might have concealed his identity.

On these grounds I am of opinion that the interposition of the name of Holmes is not calculated to conceal the identity of the woman. I think it was not introduced for that purpose, and could not have produced that effect. Still the Court might require the introduction of that name to be accounted for; explanation on this point is satisfactorily given. It appears that the woman was born before the marriage of

her father and mother ; that they married soon after her birth ; that she was called by the father's name, and her illegitimacy was known but to few. It is not an uncommon, though it is an erroneous, opinion that the name of the mother is the only true name for an illegitimate child. The name of Holmes was used for caution—not to evade the law, but to make sure of using the true name. These facts satisfactorily explain the purpose for which the name was introduced.

[57] On the whole view of the case I think the name used was not calculated to disguise the marriage, nor intended to conceal it, and that the banns were not unduly published. In this view of the case the other circumstances are not material. The Court is expressly forbidden to inquire into the residence of the parties by the act. I am not willing to enter into the consideration of other circumstances which cannot answer any good end ; they may be properly left to the good sense of the parties. I shall best discharge my duty, after the full examination this case has met with here and elsewhere, by proceeding without further remarks to affirm the sentence of the Court below.

[58] *LADY HERBERT v. LORD HERBERT*. Consistory Court of London, Easter Term, April 30th, 1819.—A clandestine marriage between an Englishman and a Sicilian woman, celebrated in Sicily, and valid by the laws of that kingdom, held to be valid also in England.

[S. C. 2 Hag. Con. 263. Referred to, *Ogden v. Ogden*, [1908] P. 63.]

This suit was instituted by *Lady Herbert v. Lord Herbert* for the restitution of conjugal rights.

The libel consisted of eighteen articles ; and pleaded in substance—

1. That Lord Herbert, a bachelor, and aged upwards of twenty-one years, while resident at Palermo, in Sicily, in the months of June, July, and August, 1814, paid his addresses to Lady Herbert, then the widow of the Prince of Butera, aged upwards of twenty-one years, and that they mutually agreed to marry each other ; and that Lord Herbert, on the 17th of August, 1814, wrote a promise of marriage, and delivered it to Lady Herbert.

2. Exhibited the promise of marriage.

3. That, in pursuance of such contract, the parties on the 17th of August, 1814, were married according to the rites of the Holy Roman Catholic Church, in the palace of Butera, in Palermo, by a priest of the parish of St. Nicholas, of Kalsa, in Palermo ; and that in the presence of the said priest [59] they expressed their own free accord and consent to be married ; and the priest pronounced them to be lawful husband and wife in the presence of Michael Fardelli and Francesco Omorato, who attested the same.

4. Exhibited the certificate of the priest of the celebration of the marriage.

5. That the parish priest gave notice to the archiepiscopal Court at Palermo of the celebration of the marriage, and that such notice remains in the records of the Court.

6. Exhibited a copy of the registration of the marriage, and the identity of the parties.

7. The consummation of the marriage ; and the cohabitation of the parties as man and wife, for several days in August, 1814.

8. That by the laws of Sicily, and by the decree of the Council of Trent, A.D. 1563, which is received and obeyed as law at Palermo, and throughout all Sicily, clandestine marriages are held to be good and valid ; and it is enacted that the mutual and free will of the parties contracting marriage, expressed in the presence of the priest of the parish in which one of the parties resides, and in the presence of two witnesses, is sufficient to constitute the indissoluble bond of matrimony ; and that a man and woman thus married are held to be legally united in wedlock ; and that this is well known to the judges, advocates, and lawyers practising in the Courts of Law, at Palermo, or other places in the island and kingdom of Sicily of the greatest reputation for their skill and knowledge in the laws of that country ; and it is in [60] strict conformity with the exposition of the law of marriages in that kingdom as laid down in the writings of authors of the greatest eminence and authority on the subject.

9. That several ordinances promulgated in the kingdom of Sicily affix a civil punishment on persons contracting clandestine marriages ; and render the husband, if of noble birth, liable to imprisonment for five years in a fortress, and the wife for the

same number of years in a convent: but these ordinances are never enforced but at the suit of the parents or guardians of parties clandestinely married; and it is the general usage of the King, at the petition of the parties, to remit the execution of the law.

10. That Lord and Lady Herbert having mutually agreed, and freely expressed their consent to be married, and having been pronounced to be husband and wife by the priest of the parish in which they resided, in the presence of two witnesses; are lawful husband and wife according to the laws of Sicily, and are so known to be by the advocates and others professing the law in Sicily, and that this is in strict conformity with the law of marriages in that kingdom.

11. That the Earl of Pembroke, the father of Lord Herbert, arriving in Sicily shortly after the celebration of the marriage, presented a petition to the King praying the enforcement of the law against clandestine marriages; and that by the decree of the court, Lord Herbert was on the 21st of August forcibly separated from his wife, and imprisoned in the fortress of Castlemare, where he remained till [61] the 15th of November following, when he made his escape, and embarked for Genoa; and that Lady Herbert was at the same time imprisoned in the convent of Stimati.

12. That during Lord Herbert's imprisonment he addressed letters to Lady Herbert, in which he called her his wife, and expressed the highest love and affection for her, and fully recognized the validity of his marriage.

13. Exhibited one of these letters.

14. That after the escape of Lord Herbert, Lady Herbert petitioned the Court for her release; and in the month of January, 1815, the prayer of her petition was granted, and she then went and resided for a short time with her sister, the Duchess of San Giovanni, at Naples; and afterwards proceeded with her brother (the Duke Laurino, de Spinelli) to this country, where she arrived in March last.

15. That, notwithstanding the marriage, Lord Herbert has wholly withdrawn himself from her society.

16 and 17. Pledged the jurisdiction of the Court.

18. Prayed that the validity of the marriage might be pronounced for; and Lord Herbert might be compelled to take his wife home, and treat her with conjugal affection, and condemned in the costs of the suit.

In support of this libel forty-eight witnesses were examined, who fully proved the allegations it contained.

Phillimore and Lushington in support of the marriage.

[62] Arnold and Swabey *contra*, argued that if the municipal law of Sicily having authorized a separation for five years, it was impossible for the Courts of this country to decree a sentence of restitution of conjugal rights till that period had elapsed.

Judgment—*Sir William Scott*. This is a proceeding for the restitution of conjugal rights, brought by the Dowager Princess of Butera, in Sicily, against Lord Herbert. The parties are of noble birth, and of elevated station in their respective countries. They were both of age at the time of the marriage; there was no incongruity from disparity of condition or gross inequality of age. They both appear personally and not by their guardian.

It appears that Lord Herbert was in Sicily in 1814, and introduced into the family of the Prince of Butera, the husband of this lady; whose house was much frequented by the English nobility, who were received there with great kindness and hospitality. The Prince of Butera died in June, 1814—when the princess, being a widow, received attentions from Lord Herbert in a more marked and visible manner. Her sister, the Duchess of San Giovanni, speaks to receiving Lord Herbert at her house, who had been before introduced to her by the Princess of Butera, and to his opening his arms and telling her that he was entitled to embrace her, as he was going to marry her sister. A contract of marriage was executed by him, which has been exhibited; some of [63] her friends appear to have entertained doubts as to the propriety of the marriage, in talking with her, and endeavouring to dissuade her from it, as not suitable: to whom she replied that that was a question for herself to decide; that she had a right to determine for herself. Lord Herbert continued in intimacy with her, and communicated to the friends of her family his intention of marrying her. The fact of marriage took place on the 17th of August; it certainly was not conformable to the regular ceremonies of that country, in which, as in most other countries of

Europe, solemn ceremonies are appointed. The parish priest was sent for (it appears that he was an eminent person in that country); two servants of the family were present; and in their presence Lord and Lady Herbert taking hold of each other's hands declared themselves to be man and wife. This is said to be unsolemn: but all the solemnities which can attend an unsolemn marriage were observed. It was followed by the registration of the marriage: and nothing was left undone which the nature of the act would admit, by which the fact of marriage could be established.

The facts being so proved, the only question is respecting the validity of such a marriage—whether it be valid according to the law of Sicily, it being an established principle that every marriage must be tried according to the law of the country in which it took place: this is according to the *jus gentium*: whatever the regulations may be, according to which the marriage has been had, if they are what the canonical law of the foreign [64] country supports, the canonical law of this country must enforce it.

In proof of this witnesses have been examined, for foreign law must be established by professors of law of the country; the law must be produced, and it must be shewn to be the existing law of the country. (a) It is alleged that the decree of the Council of Trent (sess. 24, c. 1) is the law of (c) Sicily, by which the presence of the parish priest and two witnesses are made requisite to the validity of a marriage; but by which clandestine marriages, though illicit, are notwithstanding valid and indissoluble. Four professors of the law experienced in the canonical jurisprudence of their country have been examined, and they express strongly their opinion as to the law. The facts are too clear to be resisted: a communication took place between the parties by letters from each other; they corresponded as husband and wife; there is a letter from Lord Herbert in evidence, couched in the warmest and most passionate terms of conjugal affection; co-[65]-habitation had taken place afterwards till the 23d of August.

There is, it seems, a municipal and criminal law in Sicily which looks with a jealous eye on marriages of this nature; it subjects the parties to imprisonment, the husband in a fortress, the wife in a convent. The seclusion of the parties from each other is a consequence of this: but its immediate operation is imprisonment; the law does not look to a separation *a mensâ et thoro*.

This law has been dormant in its execution, and I suppose is seldom resorted to: but it has been enforced on the present occasion on the application of the Earl of Pembroke, the father of Lord Herbert, who was much dissatisfied with the marriage. Lord Herbert escaped from the fortress, and Lady Herbert was afterwards released from the convent on giving bail to appear if called upon. She has not been called upon, and the period for which the bail was given has almost expired.

Under these circumstances the Court is called upon by the counsel for Lord Herbert not to pronounce the ordinary sentence of the law, but to pronounce that the sentence for restitution of conjugal rights shall not take place but from a distant day; on the ground of this municipal law of Sicily, which would enforce a separation for five years, I am called upon to inflict a penalty by the criminal law of this country.

It is admitted that there is no precedent for this, nor is there any principle on which it can be contended that this Court should form a principle of [66] criminal law from a foreign country, and import it with its own jurisprudence. At whose suit too is this to be done? At the suit of the husband, who is equally involved with the wife in the offence, and who, by his counsel, now prays that his wife, in virtue of this law, may be debarred from his cohabitation. I should undertake a task, to which I am in no degree competent in point of jurisdiction, at the suit of a party *criminosus* to put in force a law almost in oblivion in Sicily. And it is totally out of the question in this case, if I were possessed of such authority; for the time is almost elapsed.

(a) The Decrees of the Council of Trent were received and adopted in Sicily by an ordinance of Philip II.

(c) The Council of Trent distinctly recognizes the validity of clandestine marriages. *Tametsi dubitandum non est clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ea ecclesia irrita non fecit; et proinde jure damnandi sunt illi, ut eos sancta synodus anathemate damnat, qui ea vera et rata esse negant; quique falsò affirmant, matrimonia, à filiis familias sine consensu parentum contracta, irrita esse et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex justissimis causis illa semper detestata est atque prohibuit.* Can. et Dec. Con. Trid. Sess. 24, c. 1.

I have no doubt on the evidence that the lady is the lawful wife of Lord Herbert, and that he is bound to receive her in that character; and I direct that he shall take her home and treat her with conjugal affection, and that he shall certify to this Court, by the first day of Michaelmas Term, that he has complied with this requisition of the Court.

Costs given against Lord Herbert.

[67] THE OFFICE OF THE JUDGE PROMOTED BY WILSON v. M'MATH. Peculiars Court of Canterbury, Trinity Term, July 10th, 1819.—The right of an incumbent, to preside at a meeting of his parishioners in vestry, established.

[Followed, *Rex v. Bishop of Salisbury*, [1901] 1 K. B. 573: affirmed, [1901] 2 K. B. 225. Referred to, *London County Council v. Dundas*, [1891] P. 13; *Bishop of St. Albans v. Fillingham*, [1906] P. 178.]

On the 8th of May, 1819, the Reverend Harry Bristow Wilson, D.D., rector of St. Mary, Aldermary, in the city of London, cited Alexander M'Math, one of his parishioners, to appear in this Court, and to answer to certain articles to be exhibited against him for interrupting him (the said Reverend Doctor Wilson) when he had taken the chair as president of a vestry meeting, held in the vestry room of the parish of St. Mary, Aldermary, and preventing him from exercising the office of chairman or president of the said vestry meeting, and dispossessing him thereof. On the 16th of June an appearance was given for M'Math, and the articles were now exhibited.

The third article which set forth the charge was as follows:—

"Also we article and object to you the said Alexander M'Math, that at a vestry held [68] for the parish of Saint Mary, Aldermary, London, aforesaid in the vestry room of the said parish, which is within, and part of, the parish church of Saint Mary, Aldermary, aforesaid, on Tuesday, the 15th day of March, now last past, in the present year of our Lord, 1819, the said Reverend Harry Bristow Wilson, Doctor in Divinity, the promoter of our office in this cause, Nathaniel Anger, one of the then churchwardens, John Hamman, John Custance, William Grave, Thomas Chandler, and you the said Alexander M'Math, and several other of the parishioners and inhabitants of the said parish being then present, you the said Alexander M'Math, neither regarding the sacredness of the place nor the respect due to the person and function of the said Reverend Harry Bristow Wilson, Doctor in Divinity, the rector of the said parish, as aforesaid, did interrupt him, the said Reverend Harry Bristow Wilson, when he had taken the chair as president of the said vestry meeting, prevent him from exercising the said office of chairman or president of the said vestry meeting, and dispossess him thereof in the indecent and unbecoming manner following, to wit, that the said vestry meeting having been held, pursuant to notice duly given in the said church, on the Sunday preceding, the said Reverend Harry Bristow Wilson attended, the same as had been his constant practice, from the time of his [69] becoming rector of the said parish as aforesaid; and at the appointed and usual hour took the chair at the north end of the table in the said vestry room, being the chairman or president's usual and accustomed seat. That William Grove, one of the parishioners present as aforesaid, said, 'I move Mr. M'Math do take the chair.' That you the said Alexander M'Math thereupon took your station at the opposite end of the said table, and assumed the right of acting there as chairman or president of the said meeting. That the same being objected to by the said Reverend Harry Bristow Wilson, and insisted upon by you the said Alexander M'Math, much altercation thereupon ensued, in the course of which the said Thomas Chandler said, 'I see no use in so much talking, it would be better to turn the rector out of the chair;' or said, 'I propose turning the rector out of the chair,' or to that or the like effect. That the said Reverend Harry Bristow Wilson, with a view to put an end to such controversy, desired the minutes of the last vestry meeting to be read by the vestry clerk, whereupon the vestry clerk, or a person officiating for him, quitting his customary place by the side of the rector, went and read the said minutes by the side of you the said Alexander M'Math; and, the reading being finished, you the said Alexander M'Math interrupted the said Reverend Harry Bristow Wilson when he was proceeding to put the question that the said minutes be confirmed, and insisted upon putting the question yourself, which you did; and thereupon the said Reverend Harry Bristow Wilson, finding himself completely dispossessed of the chair, to avoid further contention retired from the room, whereby you, the said Alexander M'Math, ousted the said Reverend Harry Bristow Wilson of the office of chairman or

president of the said vestry meeting in manifest violation of the laws and constitutions ecclesiastical of this realm, and of what is fitting and right to be observed, and in fact is observed in and throughout the whole realm, touching and concerning the premises, and to the evil example of others."

Adams in opposition to the admission of the articles. There is no charge that the party proceeded against acted in an intemperate manner: there was nothing of altercation in his conduct; he only acted in consequence of the vote of the vestry meeting that he should be chairman. The charge is that the rector was dispossessed of the chair in manifest violation of the ecclesiastical laws and constitutions of this realm. Nothing particular is stated as to the business for which the vestry was held: the question, therefore, is raised generally with respect to all vestries; it is not put on the ground of courtesy or propriety, but claimed as a right; it becomes therefore very important. Vestries are held for a variety of purposes; and it is usual, and not unfit, [71] that the clergyman should preside at them; and it is better that the matter should be left on general courtesy and comity than put as an absolute right. Not only I do not find any authority for this doctrine; but there is no canon or constitution pointed out, only a general reference to canons and constitutions. Our opponents must shew some right which the ecclesiastical laws can enforce.

It would be extremely inconvenient if it were an absolute right.

In case of non-residents what is to be done? Is the clergyman to depute? And in the case of an absolute right, how can any one act without a deputation? or how can the parishioners have a right contingent on their clergyman's absence? If the incumbent is not present at the beginning, and a chairman is appointed, what is then to be done? Must the other be displaced? or are the acts done qualified or affected by the absence of the incumbent? It cannot be sustained on the notion of any exclusive or peculiar interest; others contribute to the rates as well as he; no doubt he has a right to be present, because he is interested as well as others; though at the same time his right to be present has been questioned. It is highly proper, laudable, and decent that the incumbent should preside at such a meeting: but he has no right to do so. If any one has a right to preside, then all do not meet on an equal footing; it is incident to such an office to judge when and how the question is to be put, and to give the casting vote.

It is not easy to collect any thing specific on such a point from decided cases. There is one case, how-[72]-ever, that of *Stoughton v. Reynolds* (Strange, 1045), in which the point appears to have come in question.

Per Curiam. Was not the question there entirely on the right of adjournment?

Adams. Principally: but the right of presiding was also adverted to by Lord Hardwicke; and he seems to have laid it down that the incumbent had no right to preside.

Unpleasant consequences may result from the agitation of this question: but it is one over which the Court can have no jurisdiction.

Lushington on the same side. This is an attempt unprecedented since the days of the High Commission; the locality of the act is the only circumstance which can give this Court the appearance of authority. If it had taken place in an unconsecrated place, it clearly could have none. The adverse party must shew—1st. That the incumbent had a right to preside. 2nd. That it is an ecclesiastical offence to dispossess him. And 3rd. That he was actually dispossessed. A citation from Shaw's Parish Law, which is to be found in Burn, (b) will [73] probably be relied upon: but that is a mere assertion of Burn's, and not to be found in the book to which he refers.

In the act (stat. 58 Geo. III. c. 69) passed lately for the regulation of special vestries, if the rector, vicar, or perpetual curate is not present, the parishioners are to choose a chairman, which seems as if the legislature considered that the right did not exist, and this act passed rather for parochial affairs and the management of the poor. The

(b) Anciently, at the common law, every parishioner who paid to the church rates, or scot and lot, and no other person, had a right to come to these meetings: but this must not be understood of the minister, who hath a special duty incumbent on him in this matter, and must be responsible to the bishop for his care therein. And, therefore, in every parish meeting he presides for the regulating and directing this affair; and this equally holds whether he be rector or vicar. Par. L. c. 14. 4 Burn's Ecclesiastical Law, p. 9.

right cannot be supported unless authority can be produced for it: but the authorities shew that all the parishioners have a right to vote equally, and that the majority is binding on all questions.

The case of *Stoughton and Reynolds* is even stronger, as reported by Cases temp. Hardwicke (page 276), than in *Strange*.

If the incumbent has no right, there can be no offence; if he has a right, it is by common law or custom; and then having been dispossessed peaceably, and without brawling, it is not an offence cognizable in this Court. We have no authority to try the question; the remedy must be sought elsewhere, and by a civil proceeding. As no violence has been used, there can be no criminal jurisdiction even at common law.

That the majority binds the whole is a rule without any limitation: in all assemblies the choice of president is in the majority.

[74] Phillimore and J. Addams for the incumbent. This is a novel attempt on the part of the parishioners of this parish, an attempt pregnant with mischief and disorder, to take from the head of them the exercise of a function to which the parochial clergy of this country have been entitled by general law, by usage, and by practice from all time—a right which has never been before called in question in any court.

Objection is taken to the jurisdiction: but no ground is laid for any such objection. The offence is against an ecclesiastical person, in an assembly convened for ecclesiastical purposes in an ecclesiastical place. This Court has an inherent jurisdiction essentially, and from its constitution over the subject matter, to take notice of a gross breach of decorum against such a person in such a place. He could have no remedy except here. We have our unwritten as well as our written law; and if we could not proceed without the authority of a canon or of a constitution, we should be every day exceeding our authority.

In many points the ecclesiastical jurisdiction is exercised in the administration of unwritten law, as in the power of ordinaries, their jurisdiction over churchwardens and clerks. Nor will it be asserted that in cases of disturbance in churches they had not a jurisdiction antecedent to the stat. of Edw. VI. (Clarke's Praxis, tit. 132).

This office devolves on the incumbent from the nature of his functions; it is connected with the constitution and discipline of the church; and the [75] denial of it is pregnant with mischief. From the earliest times of the Christian Church the clergyman virtute officii presided in the assemblies: in the early writers they are called presidents. Tertullian mentions them as those who "presided over their assemblies." Justin Martyr styles them presidents. In Lynwood they are termed "Præsidentes Ecclesiarum et Capellarum." The very word rector implies governing in matters concerning the parish. When he receives induction, he is given "the real and corporal possession of the church with all the rights, profits, and appurtenances thereto belonging." In the instrument of collation "the government of the church is conferred on him." The government of a rector in his parish is analogous to that of a bishop in his diocese; in the canon law the word diœcesis being applied to a parish. Among the constitutions, adopted by the settlers in North America, in Charles the First's time, we find that a minister was always to preside in the meetings of each parish (Collier's Ecclesiastical History, Appendix, p. 112). And it is but fair to presume that these emigrants carried with them the same regulations which they had observed in their mother country. Burn lays it down that the minister presides in every parish meeting. It is said this is not in Shaw's Parish Law: but it is quite sufficient for our purpose that it is in Burn, for he is of considerable authority on such a point. Prideaux lays down the same doctrine: speaking of rates, he says, in every parish meeting the incumbent shall preside to regulate this [76] matter. In 58 Geo. III. c. 69, (a) a statute passed after much discussion, it appears clearly to have been the opinion of the legislature that the right was in the incumbent. In the appointment of select vestries provision is always made that the clergyman shall preside over them. The case of *Stoughton v. Reynolds* was whether an incumbent had

(a) And for the more orderly conduct of vestries be it further enacted that, if the rector, or vicar, or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes, to be ascertained as hereinafter is directed, one of the inhabitants of such parish to be the chairman, and preside in every such vestry, &c. &c. 58 Geo. III. c. 69, s. 2.

the power of adjourning a vestry meeting against the wishes of a majority; and that too in a case in which, if in any, a minister ought not to preside, for he had nominated his own churchwarden. And the question then was, about the choice of the second churchwarden who was to be nominated by the parishioners without any interference of the vicar.

The difficulty of our case is to argue in support of that which has never before been opposed.

The Court took time to deliberate.

Michaelmas Term, Nov. 11.—The registrar stated to the Court that he had been served with a notice that a rule had been granted by the Court of King's Bench to shew cause why a prohibition should not be granted in this cause; and that in the mean time proceedings shall be stayed in this Court.

[77] *Judgment*—*Sir John Nicholl*. After such notice, I shall, of course, suspend proceedings for the present: at the same time, as the suit has stood over for the convenience of the Court, in delivering its judgment on the admissibility of the articles, which judgment would otherwise have been given before the long vacation, I think it but due in justice to the parties to state the impression of my mind on the question, after having heard it argued at length, and given it much subsequent deliberation.

It is a suit by the rector of St. Mary, Aldermary, in the city of London, against a parishioner of that parish for disturbing him in presiding at a vestry meeting. The offence is thus charged in the citation: "More especially for interrupting the rector when he had taken the chair as president, at a vestry meeting, held in the vestry room within the church of the said parish, preventing him from exercising the office of chairman or president at the said vestry meeting, and dispossessing him thereof." To this citation an appearance was given on the part of Mr. M'Math, the person cited. The appearance was absolute, and not under protest; and articles were prayed and given in, stating that Mr. M'Math, at a vestry held for the parish, of St. Mary, Aldermary, in the vestry-room, which is within and part of the parish church, on the 15th of last March, did interrupt the rector when he had taken the chair as president of the vestry, did prevent him from exercising the office of chairman or president of the vestry, and did dis-[78]-possess him thereof, in the manner there set forth, which it is not now necessary more particularly to notice.

The admissibility of these articles was opposed and debated; and the objections to them, as far as I could collect, stood on two grounds:—

1. That the minister, as such, has no right to preside at a vestry meeting; and, consequently, that the interrupting him in so doing is not a disturbance.
2. That, even if it be a disturbance, this Court has no jurisdiction to repress or punish it as an offence.

It has been stated that the suit is brought to ascertain the right of the minister to preside at these meetings, and not from animosity or vindictiveness on account of the particular transaction; and, indeed, the form of the suit, and the manner in which the question has been treated on both sides, tend very much to confirm that statement. There are certain circumstances set forth in the articles which possibly might have warranted the party in bringing a different suit: but the present mode has been adopted in order to bring the general question to issue.

The question is certainly one of considerable importance, both as affecting the station of a highly respected class of the community, the established clergy; and as affecting the peaceable and orderly proceedings of parochial meetings. The case is said to be a new one, so far as regards any express law, or any judicial decision on the subject. There is no statute, no canon, no reported judg-[79]-ment, either expressly affirming or expressly negating the right. It nevertheless may exist as a part of the common law of the land, as a part of the *lex non scripta*, which is of binding authority, as much in the Ecclesiastical as in the Temporal Courts. Indeed the whole canon law rests for its authority in this country upon received usage: it is not binding here *proprio vigore*. Moreover, this Court upon many points is governed, in the absence of express statute or canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*.

It is true that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases: but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shewn by

legislative recognitions. Published reports of the decisions of Ecclesiastical Courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before. And some countenance is given to that notion from the general usage and practice of the kingdom; for it is pleaded in the articles, and on their admissibility must be taken as true, that the minister's presiding at vestry meetings "is observed in and throughout the whole realm." The fact of such general usage for the minister so to preside is notorious, and has not been denied even in argument. Now such an usage (unless absurd or improper) I take to found a common law right.

Law writers, particularly Mr. Justice Blackstone, lay it down that "general customs, which are [80] the universal rule of the whole kingdom, form the common law, in its stricter and more usual signification." Again, "the first ground and chief corner stone of the laws of England is immemorial custom."

Then, the general immemorial usage being averred, is it a reasonable usage? For "the common law," says Blackstone, "is the perfection of reason; what is not reason is not law:" adding, however, "that the particular reason of every rule of law cannot be always assigned. It is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume the rule to be well founded." Now this general usage, so far from being "flatly contradictory to reason," is admitted to be extremely proper. The propriety of the minister's presiding at vestries was in no degree controverted; all that was contended was that it ought to be accepted as a courtesy, and not claimed as a right, for that the right of choosing a chairman belonged to the parishioners, and that the minister was present merely as a parishioner, having no greater right to preside than any other individual.

The practical inconvenience of the rule thus contended for is obvious and manifest. At meetings held so frequently as vestries are in many parishes, often very numerous attended, and where every parishioner paying rates has a vote, if the election of a chairman were always a preliminary measure, the consequence would be, that in parishes where animosities and divisions unfortunately existed, a large portion of the time for the transaction of [81] business would be consumed in preliminary contest; and the business of managing the concerns of the church and poor, in which the feelings of piety and benevolence are so desirable, would be preceded by a conflict exciting all the angry passions of man.

To avoid these practical inconveniences, as well as from other considerations of propriety and principle, the universal usage of the minister's presiding probably took its rise; for in every view the propriety is manifest, and the right is founded on sound principle.

The minister is not, in consideration of law, a mere individual of vestry, as has been contended: nor is he in any instance so described. On the contrary he is always described as the first, and as an integral, part of the parish. The form of citing a parish proves this position, namely, as "the minister, churchwardens, and parishioners," he being specially named. Such is the legal description of a parish in all formal processes.

So, again, in the choice of churchwardens; if the minister and parishioners cannot agree in the choice of the two, the minister is to choose one, and the parishioners, the other, unless controlled by special custom.

So, again, churchwardens are directed by the canon to account before the minister and parishioners.

So far, therefore, from being a mere individual, the proper description of a parish, in vestry assembled, is "the minister, churchwardens, and parishioners in vestry assembled." The minister [82] is denominated the rector parochiæ, the præses ecclesiasticus. The vestry itself is an ecclesiastical meeting, of an ecclesiastical district, namely, a parish—it is held in an ecclesiastical place, in the church, or in a room which is part of the church, part of the consecrated building, from which the meeting itself takes its name of vestry, as being (Par. L. c. 17. 4 Burn, 8) held in the room where the priest puts on his vestments. It meets for an ecclesiastical purpose; for, though the sustentation of the poor is now carried on by rates, and overseers are appointed under special statutes, so that it has, in modern times, become more of a temporal concern, yet anciently it was a matter immediately of ecclesiastical duty and superintendence. So says Prideaux (*Directions to Churchwardens*, p. 19, 20), "The churchwardens were anciently the sole overseers of the poor; and it lay wholly

on them, under the direction of the minister, to take care of all such as were in want," &c.

In these meetings, then, of the parish, consisting of "minister, churchwardens, and parishioners," assembled in the church for an ecclesiastical purpose, that the rector parochiæ should not preside, but be considered as a mere individual, would be most strangely incongruous; and that he and any other individual should be put in competition for the office of chairman would be placing him in a degraded situation, in which he is not placed by the constitutional establishment of this country. On sound legal principle he is the head and præses of the meeting.

[83] To pronounce then against a right thus founded in usage, and supported by reason, convenience, and propriety, it would require some very clear and decided authority negating the right, and establishing a different rule. The single authority resorted to is the case of *Stoughton* versus *Reynolds*: and that, indeed, was hardly relied upon as sufficient; for the argument went rather upon the absence of direct authority to support the right, than upon the adduction of any sufficient authority to negative it. The case of *Stoughton* against *Reynolds* did not at all turn upon the right to preside, but upon the right of the chairman to adjourn. The question was, whether the minister presiding had a right to adjourn the meeting so as to prevent the election of a second churchwarden by the parishioners, he himself having previously nominated the first churchwarden. I have looked into the three reports of that case (2 Str. 1045. Fortescue, 168. Cas. temp. Hard. 274), which are to be found in Sir John Strange, in Fortescue, and in the cases during the time of Lord Hardwicke. They are in some degree different: but in neither is it stated that the right of the minister to preside made any part of the argument. In all the sole question was the chairman's right to adjourn the meeting; and it was held that the question of adjournment should have been decided, as it generally is, by vote, and not by the chairman. It is obvious that this question of adjournment must have assumed exactly the same shape, and have led to exactly the same conclusion, whether the minister had [84] been chairman by election or chairman by office. Any opinion thrown out, in a case like this, upon the right of presiding, must have been a mere obiter dictum upon a point not then requiring decision, nor even arising in argument.

In one report Lord Hardwicke is made to say, "That the general apprehension is, that the minister has a right to preside, but that he knows of no authority for it." This is in Ca. temp. Hardw. That observation is somewhat different in Fortescue's Reports. There it is said, "Supposing that the minister has a power of presiding, it does not follow that he has a power of adjourning." In Strange it is only said, "As to the vicar, he seems to have no share in the election of the second churchwarden, nor to have any right to preside." And, to be sure, if there was any case in which he ought to have retired from the chair, it was at the election of a second churchwarden, with which he had nothing at all to do.

A doctrine of this sort, however high the source from whence it flows, yet being on a point not raised in argument, not important to the decision, belonging not to the law familiar in that Court, but to another jurisdiction, is not of any very conclusive and binding authority. And yet it is the only one leading in any degree to negative the right of the minister against those other considerations which I have already stated.

Whether the question has ever been raised in these Courts is uncertain, from the want of reported cases: but that no decision negating the right has ever taken place would be no extravagant [85] inference to be drawn from the prevalence of the practice of the minister's presiding, coupled with the general impression of his right to do so. Writers on ecclesiastical matters partake of the same impression—not only Burn holds this, but Prideaux, whose work on the duties of churchwardens has always been held in these Courts to be of considerable authority. He is express upon the subject. First he mentions the regular mode of calling a vestry (p. 31): "When any such thing is to be proposed to the parishioners, the churchwardens, with the consent of the minister, call a meeting of the parish." And again, in speaking of the rates (p. 35), he says, "They only who pay to the rates should make the rates, &c.: but this must not be understood of the minister, though he be not charged to those rates, because, as having the freehold of the church, he hath a special right in it, and as minister of it he hath a special duty upon him to see that it be well and duly repaired, and that rates be made to enable the churchwardens to do it. And, therefore, in every parish meeting he presides, for the regulating and directing of this matter." This authority, then, as

far as it goes, is direct and express. It is not indeed of the same weight as an adjudged case, or a canon; but it is the understanding of a learned person, himself filling a judicial situation.

The last authority that I shall mention, however, is of greater weight—the recognition of the Legislature. In several parishes select vestries have [86] been constituted, under special Acts of Parliament, where, from the extent of the population, the business could not well be conducted by the whole parish. One can see no strong reason why, in such a select vestry, the minister should be appointed chairman, except upon the ground of his general right, and the propriety of the thing itself. The election of a chairman at a select vestry would take but little time, and would not be likely to be attended with conflict and animosity. And yet, as far as I am aware, it is the constant course of the Legislature, in Acts for appointing select vestries for the management of the general concerns of a parish, to direct that the minister shall preside in such select vestry. Be that as it may in these particular cases, the late Act, for the regulation of vestries generally, appears to contain so strong a recognition of the right, as almost by necessary implication to declare that it is in the minister; while the subsequent Act for creating select vestries, for a special purpose, in no degree derogates from the general rule, but tends, as an exception, to prove and support it.

The first of these Acts, that of the 58th of the King, chapter 69, is intituled *An Act for the Regulation of Parish Vestries*. The 1st section directs the mode of calling vestries: and the 2d section says, “For the more orderly conduct of vestries, be it enacted, that in case the rector or vicar or perpetual curate shall not be present, the persons so assembled shall forthwith nominate, by plurality of votes, one of the inhabitants to be chairman.” Now this is nearly tantamount to a declaration, or [87] by necessary implication declares, that if the rector, vicar, or perpetual curate be present, he shall preside: and the Legislature must evidently have considered that by law and usage he was entitled to preside. It is only in case of his absence that the parishioners are directed to choose a chairman: and consequently, when he is present, he is the chairman of course. I can construe the Act in no other way.

It is true that the parishes of London and Southwark are excepted out of this Act. Now, supposing that exception to apply to every clause of the Act, still that would only go the length of providing that if any special custom, any vestry in London or Southwark, had the right of choosing a chairman, notwithstanding the presence of the minister, this Act would not deprive them of the right under such special custom: but otherwise London and Southwark must be presumed to stand on the same footing, in this respect, as the rest of the kingdom.

The Act of last session (59 Geo. III. c. 12) does not diminish this inference. It is intituled “*An Act to Amend the Laws for the Relief of the Poor*.” By this Act a power is given to parishes to establish select vestries for the concerns of the poor, the principal object being to render unnecessary the interference of magistrates on every application for relief; and with this view the parish vestry may elect a certain number of persons not exceeding twenty-five; and the minister, churchwardens, and overseers, with those elected persons, shall manage the concerns of the poor. Now this [88] is not a select vestry for general parochial purposes, but for those particular concerns. The maintenance of the poor is now, in some places, become so heavy a burthen upon property, and so much more a matter of temporal than of spiritual concern, that in a parish committee, specially appointed for that purpose, where possibly the minister, as a payer of rates, may have little or no interest, it may be fitting enough to leave the choice of their chairman to these select persons, which would not be likely to produce any disturbance or conflict; and so the Legislature has provided. But this does not derogate from the propriety, or weaken the inference of the former act, that in all other vestries held for general parochial purposes, the minister is still to preside.

Upon the whole, I am by no means prepared to negative the right of the minister, supported as it is by usage and propriety, laid down by some writers, and recognized, and thus in effect declared, by the Legislature itself.

And in a case where the minister was in the actual possession of the chair, I think that the defendant, upon the facts stated in the articles, is to be considered, by his interruption, as an unlawful disturber.

The other point is whether this is a matter of ecclesiastical jurisdiction, and to be proceeded against as an ecclesiastical offence?

Now, this being a disturbance of the minister in the exercise of a function belonging to him in his ecclesiastical character at a meeting of an ec-[89]-clesiastical district (for a parish is such a district)—a meeting held for general ecclesiastical purposes—and in an ecclesiastical place, a consecrated place, the church, or vestry of the church; it seems to me that it must be of ecclesiastical jurisdiction and cognizance. I apprehend that such rights, and such places, and the orderly conduct of such meetings are under the protection and guardianship of the ecclesiastical laws. It has not been pointed out to this Court how any other Court can interfere, or how redress can be procured elsewhere. It seems as much an offence of ecclesiastical jurisdiction as the erecting tombstones in a churchyard, or the pulling down tombstones, or breaking a door into a churchyard, or neglecting to repair a chancel, or setting up arms in the church, or forbidding the organ to be played when directed by the minister, or many other matters which are proceeded upon in these courts, though there is no express canon or statute upon the particular subject. Yet in all cases of this sort the proceeding is in the Ecclesiastical Court, and in the form of articles as for an offence, which mode of proceeding is in a great degree like an indictment at common law for a misdemeanor, where no statutory sanction is provided to enforce any thing enjoined, or to restrain any thing prohibited.

Some cases of the sort to which I have alluded have occurred within my memory in these Courts; and I will here mention two or three of them.

1. *Cade* against *Newnham*, in the Consistory of [90] London, 1786. There a person was articled against for opening a door into a churchyard. An appearance was given under protest to the jurisdiction: but the protest was overruled, and the suit proceeded in this form.

2. *Seger and Hill* against *The Dean and Chapter of Christ Church*, in the Court of Peculiars, 1787. This was a suit for not repairing the chancel of Harrow-on-the-Hill, and the proceeding was by articles.

3. *Burton and Edwards* against *Calcott*, in the Consistory, 1788. These were articles for erecting a tombstone in Kensington churchyard, and for pulling down another in the same churchyard. The Court said it was "committing a nuisance in the churchyard;" and as such was an ecclesiastical offence, and subject to the jurisdiction of the Ecclesiastical Court.

4. *Maidman* against *Malpas*, in the Consistory, 1794. These were articles for erecting a monument without the consent of the rector. An appearance was given under protest, which was overruled, with costs.

5. *Hutchins* against *Denzilow*, in the Consistory, Michaelmas Term, 1791. This case is an authority not wholly inapplicable to the present proceedings; and I shall, therefore, state it a little more at length. It was a proceeding against the churchwardens by articles; and the offence was thus stated in the citation, "more especially for obstructing and prohibiting by your own pretended power and authority, and declaring your resolution to continue to obstruct and prohibit the [91] singing or chaunting by the parish clerk and children of the ward and congregation, accompanied by the organ." The churchwardens supposed that as they paid the organist and managed the children, they were to direct when the organ should play or not play, and when the children should or should not chaunt. The clergyman had ordered the playing and singing at certain parts of the service. The churchwardens forbade both; not in the church, but privately, so that there was no brawling or public indecency: but the offence was set forth in the articles conformably to the citation which I have just stated. Many objections were taken to the admissibility of the articles: among others (as in the present instance) it was said that no law was specially set forth as having been violated. But the Court said, "Where the general law is relied upon, it is not necessary to plead it." Again, it was objected that the fact charged was not of a criminal nature (as is also contended in the present case): but to this the Court replied, "That the right of directing the service was in the minister; and the churchwardens obstructing him in the exercise of that right was an offence, an usurpation of his right, which might be proceeded against in the Ecclesiastical Court."

The preceding are cases within my own recollection in these Courts: the same thing is to be inferred from some reported cases in prohibition. I shall only notice one, that of *Palmer* versus *The Bishop of Exeter* (1 Strange, 776). Sir Tho-[92]-mas Bury set up his arms in the church of St. David's, Exeter. The ordinary promoted a suit in the Ecclesiastical Court to deface them. A prohibition was moved for and

refused; and Justices Eyre and Fortescue said, "The ordinary was judge what ornaments were proper, and might order them to be defaced."

Now all these cases were proceedings by articles. I take it even the last was: and most of them, if not all, for offences under the general principles of ecclesiastical law, and not under any precise canon or statute. The remedy is a very lenient one; for however high-sounding some of the expressions in the articles may be, such as "touching and concerning your soul's health, and the lawful correction and reformation of your manners and excesses," the only effect of a sentence, as prayed, would be to admonish the party to forbear in future from the like disturbance and interruption; and, perhaps, to make him pay the costs: but as to costs, it always lies in the discretion of the Court to mitigate them, as the circumstances of the case may appear justly to require.

Such is the view that I should take of this question if it fell to my lot to determine it. It is certainly desirable that the point should be settled. It is probable that the opinion of this court may not be final; and it would be highly satisfactory to my mind that it should be settled by a superior tribunal, either in the way of appeal or of prohibition: but at present, after mature and careful consideration, forming the best judgment I am [93] able on the subject, I am of opinion, on the grounds already stated, that the articles ought to be admitted.

But a rule to shew cause why prohibition should not issue having been served on this Court, it is my duty not to proceed to admit the articles. I have, however, thought it respectful to state my opinion for the consideration of the Court of Common Law. If they should differ from me, I shall bow to their better judgment with every possible degree of deference and respect.

The admission of the articles was accordingly ordered to stand over.

Michaelmas Term, Dec. 4.—The registrar stated that the rule which had been granted by the Court of King's Bench to shew cause why a prohibition should not issue to this Court in this cause had been discharged with costs (*Wilson, D.D. v. M'Math, 3 Barnewall and Alderson, 241*).

Phillimore and J. Addams, in moving that the articles should be admitted, prayed to amend the article which stated the fact charged, by substituting Tuesday the 16th of March for Tuesday the 15th of March.

Addams and Lushington contra. The error is fatal; the fact must be proved as [94] laid. In *Thorpe v. Mansell* (Consistory of London, July 20, 1810), for such an omission the suit was dismissed with costs. Oughton, tit. 59. The same rule exists in other courts (1 Viner, Abr. 8). An indictment could not hold on an error in the name. Viner's Abr. Abatement.

Judgment—*Sir John Nicholl*. I have not the least doubt but that, before the articles are admitted, the amendment may be made. It is a material distinction in our practice from that of the Courts of Common Law that this Court has the power of reforming the articles; for we here debate the admissibility of them, and that is the very question before me. In the case cited the articles had been admitted, and the issue given.

The alteration is the slightest possible: when it is made I shall admit articles for the reasons I stated at length on a former day.

I shall only state my anxious hope that if, as has been stated, this question has been brought forward merely to try the question of right, it will be brought to the shortest conclusion, and that all unnecessary expense will be avoided. If the party wishes to take the opinion of the Court of Delegates, the shortest and least expensive mode will be to appeal from the admission of the articles.

Hilary Term, January 20, 1820. — An affirmative issue was given by Mr. M'Math to these articles.

[95] The judge pronounced that Alexander M'Math had interrupted the Reverend H. B. Wilson, D.D., when he had taken the chair, as president, at a vestry meeting held within the walls of the parish church of St. Mary, Aldermary, and prevented him from exercising the office of chairman or president of the said vestry meeting, and dispossessed him thereof as pleaded in the articles; and condemned the said Alexander M'Math in costs; and decreed a monition against him to abstain from such conduct in future.

[96] IN THE GOODS OF JOANNA WILKINSON, Deceased. Prerogative Court, Michaelmas Term, Nov. 15th, 1819.

Per Curiam. A married woman has taken probate without the consent of her husband; the husband is now consenting to its being revoked, and she brings in an affidavit that she has not intermeddled with the effects. I shall allow the probate to be brought in and revoked, and the administration with the will annexed to be granted to the residuary legatees.

[97] *ROPER v. ROPER*. Arches Court, Michaelmas Term, Dec. 5th, 1818.—

Two explanatory articles in a responsive allegation, admitted.

Judgment—*Sir John Nicholl*. This suit is brought by the wife for cruel conduct on the part of her husband. The libel had entered into a detail of circumstances; and pleaded the abuse of her family by the husband. In such a case the Court would be unwilling to narrow the husband in his defence. Both the articles objected to are offered, not as affording evidence of misconduct; but rather as explanatory of the general character and complexion of these family quarrels. I think it, therefore, proper to admit these articles, though the matter may not be strictly evidence; especially as I understand that the father and mother are to be examined upon them; they may shew the spirit with which they give their evidence, and tend to elucidate the nature of these family quarrels.

I will not anticipate how circumstances may more specifically bear upon the case. Perhaps it would [98] have been better if they had been brought forward by interrogatories than by plea: but I will not shut them out; as they may support the defence of the husband which may depend on what may be stated by the witnesses of the family. Though there might be objections under other circumstances, in this case it is quite proper that they should be admitted.

HALFORD v. HALFORD. Arches Court, Michaelmas Term, Dec. 5th, 1818.—

An exceptive allegation rejected.

Judgment—*Sir John Nicholl*. The question arises on the admissibility of an exceptive allegation. Although the party accused is not to be narrowed in her defence; yet exceptive allegations are always to be watched with jealousy; and more so when they are offered by the wife, because she has not the ordinary check of costs.

The wife has given in a defensive plea, on which she has examined fifteen witnesses.

The Court exercises a greater discretion over exceptive allegations, after publication, in a cause; because it can then see more of the general character of the case, and what facts bear upon the general issue of the cause.

[99] After publication the party is at liberty to plead specific facts contradictory to the testimony of the witnesses; which facts, owing to the generality of the adverse plea, it could not have met before: for instance, if general familiarities are pleaded, and under this head an important specific fact is introduced, which the party can have had no opportunity of contradicting before publication; then it is allowed, for the purposes of just defence, to shew, after publication, that it is untrue.

The present allegation is of a very slight kind.

The first article pleads that no credit ought to be given to the depositions of Margaret Stewart, produced as a witness on behalf of Mr. Halford; for that, on referring to the original deposition of the said Margaret Stewart, on the libel, she has towards the close of the tenth article deposed.

“And further to the said article the deponent cannot depose; except that after she had made the discovery of Sir Thomas Staines leaving his bed-room of a night; and, as near as she can recollect, some time in the month of July, she, the deponent, was engaged one day in settling some accounts with Thomas Birch, the bailiff of her brother's farm, at Dandelion (which she was frequently engaged in doing with him for several hours at a time); and the said Thomas Birch, who has been many years in the family, then told the deponent, in confidence, and with apparent great concern, that he, and several of the men employed about the farm, had seen Mrs. Richard Halford and [100] Sir Thomas Staines lying together on a hay-pent in the hayfield; and that they remained there for above an hour. The deponent heard what Thomas Birch had to say upon the subject; and in reply merely expressed her concern at what he had told her; but did not communicate to him any of the circumstances of criminality within her knowledge, as before deposed. Now the said Margaret Stewart,

widow, hath, in her said deposition, knowingly and wilfully sworn and deposed falsely and untruly ; for that, in truth and fact, the said Thomas Birch did not, at the time mentioned and intended in the said deposition, or at any other time, tell or inform the said Margaret Stewart in confidence, and with apparent great or any concern, that he and several of the men employed about the farm had seen Mrs. Richard Halford and Sir Thomas Staines lying together on a hay-pent in the hayfield, and that they remained there for about an hour, or to that or the like effect. And that the party proponent doth further allege and propound, as the truth and fact was and is that, on a day happening in the month of June in the said year 1816, being the day meant and intended by the said Margaret Stewart in her said deposition, the said Thomas Birch (who is bailiff to the said Sir Thomas Staines) being in the hayfield near the house of the said Sir Thomas Staines, at Dandelion, aforesaid, with seven-[101]-teen or eighteen workmen, the said Sir Thomas Staines came into the field to see them make and carry the hay. That some little time afterwards the said Sarah Halford, accompanied by her son, Robert Halford, a boy of upwards of ten years of age, came into the said hayfield, and joined the said Sir Thomas Staines. That after walking for some time amongst the work-people, and talking to, and asking them questions, they the said Sir Thomas Staines and Sarah Halford sat down on a hay-pent, removing from one to another, as the same were cleared and carted away, the said Robert Halford being constantly with them, and sitting by or between them. That the said Thomas Birch being shortly after sent for by the said Margaret Stewart to the house of Dandelion aforesaid, the said Margaret Stewart asked him where his master and Mrs. Halford had been, to which he replied that they had been out sitting in the hayfield amongst the workmen, or to that very effect. That she, the said Margaret Stewart, did not express her concern at what he so told her, or make any reply or observation whatever thereon."

The first objection to the admission of this is, that the part objected to is no evidence, and cannot be received. The tenth article of the libel pleads familiarities ; Margaret Stewart deposes at great length to a variety of them ; and, at the conclusion of her evidence, says that Thomas Birch told her of the transaction in the hayfield. This then is [102] mere hearsay, nothing more ; it is no evidence of any fact ; no fact has been pleaded ; the evidence of Birch could not be received to prove it ; it is quite unnecessary to contradict this fact, because it never can be brought against Mrs. Halford. But it is said it would affect the credit of the witness ; but how so ? She says he declared so to her ; he could not now be brought to contradict her. But suppose he could, and that he came forward and told his story as it is stated in the allegation ; it is not denied that conversation passed between them ; he might represent it differently ; but it would be mere witness against witness ; it might weaken the proof, but it could not discredit the witness. In a contradiction of this sort it would be the slightest of all possible evidence ; it may easily have been misapprehended ; it is not that which could affect her credit ; he might have exaggerated, or she not have understood him ; or have put too strong an interpretation on what he said.

It is very different from a case where specific interrogatories are put to a witness, and he is asked whether he did or did not declare so and so. There, by bringing two or three persons who were present to disprove what he said, you might materially affect his credit.

The same observations apply to each of the articles of this allegation ; they are all of the same sort ; and the Court is the less disposed to admit them, because Mrs. Stewart has been examined to the length of filling with her evidence forty sides of paper ; there will be opportunity enough of comparing her evidence with itself, and with the evi-[103]-dence of other witnesses ; her credit must stand or fall by other considerations much more important than that of persons recollecting or not recollecting the conversation she states. The persons vouched are already examined in the cause ; their evidence will be contrasted with that of Mrs. Stewart ; and if they represent the facts differently from her statement, they will afford an opportunity of trying her credit. Besides, the cause is never concluded against the judge ; and at the hearing he may admit an allegation or exception, if he shall think it necessary.

It would be irregular and unseemly to allow a cause to be delayed by contradictions of mere hearsay ; and, in one instance, the hearsay of hearsay.

I shall reject this allegation.

[104] MUSTO v. SUTCLIFFE. Prerogative Court, Michaelmas Term, Dec. 9th, 1818.
—Probate granted of unfinished instructions.

Judgment—Sir John Nicholl. In this case Mr. Sutcliffe died before his will could be prepared; the instructions are set up; they are in these terms:—

“To give (a) to Mrs. Sutcliffe all his property for life; and, after her death, to give one thousand five hundred pounds to be divided equally between the children of my late brother Thomas Sutcliffe, of Bolton-le-Moor, Yorkshire; and one thousand five hundred equally between the children of my late sister Hannah, the wife of Charles Musto, of Shenfield, in the county of Essex.

“To give, bequeath, and demise unto my wife Jane Sutcliffe all my right, title, and [105] interest in that, my freehold messuage or tenement in which I now live, situate on the north side of New Street, Henley-upon-Thames, in the county of Oxford; and to her heirs and assigns for ever; with the appurtenances thereto belonging.”

It is sufficiently proved that the person who received these instructions was satisfied with the intention of the deceased; and used all reasonable diligence, but could not complete them before the deceased died; this would not invalidate the instrument; it would have the same effect as if it had been completed, provided the Court be satisfied that volition went with the act, and that there was sufficient capacity.

The case turns on the proof of the intention at the time. In all testamentary acts in the last stage of life, the Court looks with vigilance and jealousy to the evidence by which they are supported. On the evidence of the drawer alone there is considerable doubt as to volition. No more is proved than uniform assent on the part of the deceased to the questions put to him; he says nothing of himself; he answers “Yes” to every thing. While this person was writing down the instructions, Mrs. Wigglesworth, a female friend who was present, asked the deceased several questions to which he did not attend till he heard her ask, “Do you know that gentleman?” The deceased then distinctly answered, “Yes,” as he had also in like manner (the witness adds) answered very distinctly all the former questions that had been put to him.

[106] If the case rested here, and there was no other fact, and the question lay between these instructions and an intestacy, the Court would have great difficulty in pronouncing that the disposition of the law was altered: there is nothing beyond mere acquiescence.

But in this case other circumstances release me from that difficulty; and raise strong presumptions, and high probabilities, of a testamentary intention and capacity.

The deceased, when a widower, and aged about fifty-five, married Mrs. Osborn, who was about thirty or thirty-one years of age; afterwards he executed a will by which he cut off his wife with a shilling: this was evidently a will of resentment, and made under an impression of unfounded jealousy; this will was deposited with Mr. Charles Musto who lived in the county of Essex. In 1804 the deceased went to reside at Henley-on-Thames, where he lived till his death on most affectionate terms with his wife; this is proved not merely by casual observers; but by those who were extremely intimate with them, and who have established, to my satisfaction, that they were “a particularly happy couple.”

These are strong presumptions that he did not intend to abide by the will he had made thirteen years ago; his declarations are to the same effect: he builds a summer-house at considerable expense; declares it is for her, and hopes she would long live to enjoy it. During an illness he had a year before his death he said, “I want Nancy to write to my friends in [107] Essex, that I may alter my affairs, and leave them more comfortable for her.” “Nancy, you will go with me to town in October; and then we will alter that will of mine.” His wife was unable to attend him at that time, and the visit was postponed till the following spring. In October he went as usual to London to receive his dividends, and then returned to Henley, bringing his wife presents from London.

These circumstances satisfy me that he fully intended to make a new will, and provide for his wife; this is a foundation and groundwork for instructions; it is more favourable than an insulated transaction; there are also some favourable circumstances respecting the deceased's capacity. He had been ill only a few days: he was not

(a) There were several erasures and interlineations in these instructions: the words “five hundred” in both instances were interlined.

exhausted by a long and painful disorder; at the time of giving the instructions he sat up on the side of his bed wrapped up in a flannel gown, with his feet on bottles of hot water (as the witness understood), apparently very ill, but not so ill as to induce the person who took the instructions to think him in immediate danger; he used few words, but the effect of this is taken off by the consideration of his being one of a religious persuasion (a Quaker) the members of which use few words; and from the nature of his disorder, which was a cough accompanied by depression and lowness of spirits, it is not extraordinary that he should use as few words as possible; it does not appear that his wife was at all importunate; and it is something to the advantage of that proposition that the suggestion did not originate with her, but with Mrs. Wigglesworth.

[108] The persons who were present are very respectable persons; there is no appearance of a conspiracy; the account they give presents no inconsistencies or incongruities during the transaction: when he was told that some lady had come to see him, he said, "It is very kind in her;" he hears, understands, and gives rational answers, before the commencement of the transaction; he seems to know Mr. Chapman immediately on his entrance: after the instructions were taken, and while Mr. Chapman was reducing them into writing, Mrs. Wigglesworth, in order to satisfy herself as to his understanding, asked him if he knew Mr. Chapman. "Yes, sure, child," was his reply.

Exercising therefore all caution and vigilance in examining a transaction of this kind, I am bound to pronounce for the paper.

As to the 500l. additional to the 1000l. to the children of Thomas Sutcliffe and of Hannah Musto, it was taken down in the presence of the deceased by the directions of the widow though without any immediate reference to the deceased: it is adverse to her interest alone; she, by propounding the paper, has assented to it; and, therefore, it must be taken as part of it.

This is a very fit case for the expenses to be paid out of the estate: indeed, it was quite necessary that the case should be brought before the Court.

[109] *LEWIS v. LEWIS*. Prerogative Court, Michaelmas Term, December 5th, 1818.

—Instructions for a codicil, given to a third person who was to transmit them to a solicitor, admitted to probate.

Judgment—Sir John Nicholl. This is a case of some novelty, and perhaps of some nicety; and there is every reason why the Court should decline to decide it on the admission of the allegation.

The allegation pleads—

First. That Elizabeth Williams died on the 16th of May last, having made her will, dated on the 14th of April, 1818; in which she constituted her nephew, Griffith George Lewis, Esq., and William Stace, Esq., executors.

Secondly. That Griffith Williams, the father of Elizabeth Williams the testatrix, by his will, dated Feb. 2, 1790; amongst other legacies bequeathed certain monies in the public funds to his three daughters, one of whom was the deceased in this cause, in the following words:—"And as to my said money in any of the public funds, I give and bequeath the same to my friend Stephen Remnant, jun., Esq., his executors, administrators, and assigns, upon trust to pay the interest and dividends thereof to and among my said three daughters, Elizabeth Williams, Ann Williams, and Jane Lewis, during their lives, for their sole and separate use, and independent of any present or future husband; and in case of the death of any of my said daughters, then in trust for [110] the said Stephen Remnant, his executors, administrators, and assigns, to pay and transfer the third part or share of such daughter so dying, to such person or persons as she shall by will give and bequeath the same: but it is my will and desire that my said daughters, or either of them, should not be at liberty to dispose of their share of the principal of such money during their lives."

Thirdly. "That Ann Williams, one of the sisters, died in February last, having made her will, by which she bequeathed the whole of her property to Elizabeth Williams, but made no specified disposition of her share of the money in the public funds, to which she was entitled by the will of Griffith Williams; and that the said Elizabeth Williams gave instructions to her solicitor, William Preston Morgan, to prepare her will for her, and that he accordingly did so; and, when she gave such instructions, she expressed herself as desirous of bequeathing her share of the money

in the public funds, to which she was entitled by the will of Griffith Williams, as well as the share of her deceased sister, among her three nieces, Elizabeth Anne Tortoiseshell Lewis, Jane Pitcairn Jones, and Anne Georgiana Martha Lewis; and she accordingly mentioned to William Preston Morgan that those two shares of herself and his sister comprised all the money she was possessed of or entitled to in the public funds. That William Preston Morgan thereupon requested to see the will of her father; but she declined shewing the same, and said [111] it was unnecessary, as she had the complete disposal of the property."

Fourthly. "That immediately after Elizabeth Williams had executed her will on the 14th of April, 1818, it was by her desire sealed up in an envelope by William Preston Morgan, who delivered the same to her; and that some time afterwards doubts having been expressed whether the share of Anne Williams, deceased, in the said stock would pass by her will, and the same having been communicated to Elizabeth Williams, the testatrix, she was much troubled thereat; and for some time before, and particularly during the last eight or ten days before her decease, expressed great uneasiness lest her own will might occasion any difficulty, saying that 'she wished Mr. Morgan would call, that he might make any addition or alterations that were necessary in her said will, to prevent the possibility of any question arising upon it as to the disposition of her part or share, as well as the share bequeathed to her by her sister.' That the deceased frequently made such declaration to Griffith George Lewis, and other of her friends who were then in the house with her; and several times desired the said Griffith George Lewis to send for William Preston Morgan, but he deferred sending for him until a correspondence, which had taken place between him and his solicitor as to the effect of the bequest contained in the will of the said Anne Williams, of her share of the money in the public funds, was concluded."

These circumstances in the four first articles leave little or no room to doubt that it was the in-[112]-tention of the deceased to give her property in the funds to her nieces. The question then is whether, from the facts stated in the subsequent article, she has done sufficient to remove the doubts she entertained as to the sufficiency of her will; the paper was not produced to her, nor even read over to her.

The fifth article pleads that on the 14th of May Elizabeth Williams desired her nephew Griffith George Lewis, who was then in her bedroom, to take her will out of a drawer in the said bedroom, and "to send for William Preston Morgan, and deliver it to him, and desire him to make what addition thereto he might think necessary for the purpose of preventing any question or litigation arising respecting her said monies in the public funds;" and that the next morning, finding the deceased very unwell, he went to the house of William Preston Morgan, and delivered him the message, and desired him to call on the deceased.

On the following day Morgan called; the deceased was asleep, but the will was delivered to him by her nephew; in consequence of his directions a codicil was prepared. Morgan carried it for execution; the deceased was in a stupor, and died on the following morning without any act of execution.

There have been many cases in which instructions received from the party deceased, but not reduced into writing in his presence, nor read over to him, have been pronounced for on clear proof of the intention: but I believe in all these cases the instructions have been given to the drawer by the [113] deceased; here they were not given by the deceased, but by him to a third person, that, however, a credible person, and one whose interest it was to maintain an opposite opinion, for he would be entitled himself to a share of that residue which purports to be given by the paper in question to the three nieces; the evidence, therefore, will come recommended by the circumstance of its being adverse to his own interest.

If the deceased had merely told Morgan to prepare such an instrument as would carry her intentions into effect, there can be no doubt but that the case would come under several decisions of this Court.

The question then is whether there is any rule of law that instructions which pass through the medium of a third person should not be admitted to probate, though no question arises on the credit due to the witness or of the intention of the deceased. The Court, undoubtedly, in such a case, would be doubly on its guard: but I have yet to learn that it is essentially and absolutely necessary that the instructions should come from the testator to the person who is to prepare the instrument. Here the instructions are recommended also by the additional consideration that the codicil

was not to alter the will, but was supplementary to it and explanatory of it, and with the express object of removing doubts that might be technically raised as to forms. If all these circumstances can be proved, I shall on principle be rather at a loss to know what further demands the law can make in order to induce the [114] Court to pronounce against the validity of this instrument.

Allegation admitted.

Hilary Term, February 1, 1819.—*Judgment—Sir John Nicholl.* When the allegation in this case was admitted, the Court expressed an opinion that if the facts should be proved, the codicil would be valid. I have since revised the arguments and my opinion, and I see no reason to alter the latter. The only question is whether the facts are so proved as to establish the truth of the allegation. The cases adverted to are those in which doubt was entertained as to facts but not as to principle; cases in which the Court could not safely rely on the memory of the person who was examined.

If the instructions were given by the deceased, and those instructions were reduced into writing during his lifetime, and sudden death intervened to prevent the due execution of the will, I know of no rule of law to exclude those instructions from probate, because they were reduced into writing by a third person. I see, therefore, no ground to alter my opinion.

On the facts, there is no doubt but that the deceased intended to leave her property in the funds to her nieces. The only reason which rendered the codicil necessary was whether the words of the will would give effect to this intention. The nature of the doubts were well known to the de-[115]-ceased and clearly expressed by her: she discussed them with her solicitor, Mr. Morgan. All she had to do was to make a codicil to remove doubts as to the construction of her will, there being none as to her intention.

The question is, whether she gave instructions for the preparation of such a codicil? The executor in this case gives evidence against his interest; for if the property should not pass by the will, he would be a party in the distribution of it: there is every reason to receive his evidence with perfect reliance: his examination on the fifth article shews that he had in effect received instructions and directions for preparing the codicil. The manner in which this was to be done he alone could decide. This is as perfect a direction as if she herself had dictated the words. This I consider as full proof of instructions; but it does not rest here. A young lady was present who heard this, and confirms it. The Court is extremely jealous where the drawer does receive the instructions himself, lest he should mistake or contravene the meaning of them. Here there is no difficulty of that sort. Her anxiety is clear, and there is no appearance of contrivance. Mr. Lewis directs the solicitor to come there; on his arrival the testatrix is not in a state to see him, she having fallen into a doze. The whole conduct of the party shews that the instructions were thought to have been finally given; they were written fair at the bottom of the will itself, under circumstances in which it was proper and regular so to do. The deceased herself considered that she had given final instruc-[116]-tions; she was anxious that Mr. Morgan should bring the instrument for her signature, being afraid that she should be too late to sign it at all. Where an instrument is not read over to the deceased, the Court is vigilant for fear of mistake or imposition. Here there was no neglect, and there could be no imposition. The solicitor attended to have it read over, and executed: but was prevented from seeing the deceased on account of her incapacity.

It is most clearly and satisfactorily proved that the deceased gave the instructions, and that the codicil was reduced into writing during her life. It is as valid, therefore, as if it had been absolutely executed by her, and I pronounce for it.

GRANT v. LESLIE. Prerogative Court, Hilary Term, February 8th, 1819.—An executor according to the tenor, entitled to be joined in the probate with the surviving executor of a wife.

Judgment—Sir John Nicholl. Lord Newark, the deceased in this case, leaves four codicils; by the last he appoints his nephew residuary legatee. His personal property amounted to 37,000l.; the legacies to 1400l. Charles Grant and Alexander Thompson, two of the executors, took probate, and possessed themselves of the property: but Alex-[117]-ander Thompson is since dead. Mr. Leslie claims now to be executor

according to the tenor. The question is whether he is entitled to be joined in the probate, with an executor expressly appointed.

It has been hardly denied in argument that if it was the clear intention of the deceased to appoint an executor according to the tenor, it is within the competency of the Court to grant probate to him. The distinction attempted is not founded on solid principle. Why is any person allowed to be an executor according to the tenor? Because it is the intention of the testator that he shall take the management of his property after his death. Undoubtedly, where there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office. Still, if the thing is clear, if a testator by codicil should say, "I direct A. B. to join in collecting my property, and paying my legacies," it can scarcely be denied that a person so distinctly appointed must be considered as an executor. The authority from *Wentworth* (*Wentworth's Executor*, pt. iv. s. 4, p. 230) is clearly to this effect.

I have caused inquiry to be made at the office and I find there is no rule of practice which should exclude a person so appointed.

In *Collard v. Smith* (Prerog. 1799) I see from my note that the Court said, "This will is so worded that it is hardly possible to understand it. Three persons are named in trust; the question is whether the son is to join with them; the best way [118] is to join him with the other three;" and I take it in this case the Court granted probate to an executor not named, together with three that were named.

In *Powell v. Stratford* (Prerog. 1803) the wife was expressly named as executrix. Lord Henniker was to assist her: but he was not called an executor; the Court said he might be so according to the tenor.

Hence, I think, that if the deceased intended to join this person in the management, the Court is to join him in the probate.

The second point is, whether Mr. Leslie is an executor in the terms of this codicil according to the tenor.

The codicil is dated on the 25th of March, 1818. Mr. Leslie was then on the point of attaining twenty-one years of age. The words are, "I appoint my nephew Shirley Conyers Leslie my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates."

It is a separate codicil; no other person is the object of it. It is alleged in the act of Court that this is a re-appointment of a residuary legatee: but it is not so. He was appointed residuary legatee when a minor by the will. The words "residuary legatee" are only descriptive. The remaining words express the real object of the codicil, "I appoint my nephew to discharge all lawful demands." To discharge lawful demands is the [119] very office of an executor, more especially to pay debts.

Supposing it doubtful what were the intentions of the deceased; where the expressions apply to the residuary legatee, the Court must willingly admit him, because he has the greatest interest in the proper management of the estate. Assuming the meaning to be doubtful, I cannot accede to the argument that the Court is not to take into its consideration the convenience and advantage which will be derived to the estate. I have heard no inconvenience stated in case he should be joined to Mr. Grant. I must presume Mr. Grant will do what he says he will do; namely, proceed against the representatives of the other executor, who has died. Suppose he should alter his mind, then there would be great disadvantage to the residuary legatee: but if the residuary legatee is joined with him, then he can take care to proceed against Mr. Thompson's estate. There is no inconvenience one way, there is the other way. I shall do what my predecessor did in a similar case. I feel myself authorized to grant a joint probate. I think it was the intention of the deceased that Mr. Leslie should be joined in the executorship: but if this is doubtful, I think there is good reason for granting a joint probate; and I shall grant it.

On the question of costs.

Per Curiam. I think that the expenses of both sides must be paid out of the estates.

[120] AUSTEN v. DUGGER. Arches Court, Easter Term, May 8th, 1819.—
Brawling proved.

[See as to costs, 1822, 1 Add. 307.]

An appeal from the Consistory Court of Exeter.

Judgment—Sir John Nicholl. The cause comes for hearing on the same evidence

as in the Court below : but the counsel on both sides have very properly agreed to omit the evidence on the exceptive plea.

The only question at issue is, whether the defendant is guilty of an offence against the statute of Edward VI. (5 & 6 Edw. VI. c. 4). The object of that statute was not to protect private individuals from personal offence : but to protect the Church and churchyards from profanation, and to preserve order and decency in the meetings which may be held within them. If an offence has been committed against this statute, and it shall be duly proved, it is the duty of the Court to punish the offender.

[121] An objection has been taken to the form of proceedings, and the heading of the articles, not to the citation itself : but the citation may lead to the interpretation of the articles. The judge cites the party to appear "before us, or our lawful surrogate," stating the charge and the promoter. The articles are in the name of the official principal, and in the usual style of the person filling the judicial situation. "We, Ralph Barnes, clerk, Master of Arts, official principal of the Episcopal Consistorial Court of Exeter, our lawful surrogate, or any other competent judge in this behalf, do object article and administer to you, Richard Dugger, of the parish of Fowey, in the county of Cornwall, and within our diocese of Exeter aforesaid, Cooper, all and singular the articles and charges following," &c.

The objection taken is to the expression "any other competent judge," which is said to make the whole matter so undecided before whom he is to appear, that it renders the whole proceeding null and void.

Undoubtedly, in criminal proceedings forms are to be strictly observed : but they must be forms connected with material points. How could this mislead the party? No other competent judge could be capable ; it must be the person filling the judicial situation in the Consistory Court of Exeter or the Court of Appeal. At most they would be only words of surplusage : but I do not think they are to be considered as such. The words appear to me to have been introduced with great propriety ; supposing Mr. Barnes, the official principal, had died [122] pending this suit, then his successor would become a competent judge, the suit would then not have abated by the death of the judge. So in the appeal the dean of the Arches must be considered as a competent judge. Although every protection is to be afforded to a person criminally accused ; yet frivolous objections in point of form are not to be allowed. It would be very injurious to the public interest if they were allowed to defeat a case of this description. The objection may certainly be taken in this the latest stage of the cause : but that makes it the more incumbent on me to see that the objection is valid. I am clearly of opinion that the objection will not avail the respondent.

The offence laid is, that on the 27th of April, the church rate being produced, Austen, a principal payer, in a peaceable manner asked Dugger whether a house of his did not let for 50l. a year, when the said Dugger, unmindful of his soul's health, and regardless of the sacredness of the place, in a loud and quarrelsome voice addressing himself to Austen, exclaimed, "It is a damned lie. I do not say you are a liar ; but it is a damned lie."

It has been contended that these words, if proved, are not an offence against the statute ; that they are neither quarrelling, chiding, nor brawling. As I have already observed, the object of the statute is not to protect the individual but the sacredness of the place. I am at a loss to know what words can be more improper. They may be so softened as not to impute a lie to Mr. Austen : but if they are not offensive to Austen, they would be to some other person who had asserted the thing ; they [123] are words of chiding, quarrelling, and brawling. I am clearly of opinion that they are rightly charged ; and that, if proved, they constitute the offence which it was the object of the statute to repress.

The next question is, whether they are proved ; two witnesses depose directly to them, the vicar, and one of the churchwardens of the parish. If these witnesses are to be believed, they fully bring the charge within the statute ; their official situation entitles them to credit ; long interrogatories have been addressed to them ; they go into irrelevant matter not properly introduced. I shall no further notice them than to say that they furnish no proof that the witnesses speak untruly.

But the defendant has undertaken to disprove the charge and to recriminate ; it is an admitted fact that the vestry was duly held for the election of the church-

wardens. Fowey had unfortunately been involved in political contests; before the arrival of the minister, Mr. Brown and his friends had voted the vestry dissolved, and quitted the church. The minister afterwards arrived; and he and those who remained considered the vestry as still subsisting, and proceeded to examine the rate. In the course of that examination the offence charged is stated to have taken place. Dugger protested against the rate on the ground that the vestry was adjourned, and entered his protest. Brown and his friends returning, an altercation ensues, and there is almost a scuffle.

Whether the rate was properly or improperly made; whether the adjournment was regular or not; whether the protest was valid or not, or [124] which party was to blame, do not bear upon the question. The Court has no further remark than to express regret that conduct of this kind should have taken place where decency and order were so peculiarly necessary.

The only remaining question is whether the charge is disproved? The defendant himself states that there was a dispute, and undertakes to prove that the quarrelling was on the part of Austen, and yet not one witness attempts to shew that Austen acted improperly.

The answers of Austen have been taken, he is represented as a respectable person, the words laid in the articles are addressed to him; he must have been able to answer upon oath whether the words were used or not. Without resorting to the right the Court has of reading the answers, I must presume, as they have not been read by the adverse party, that they contain a denial of what the defendant has alleged.

The Court, however, does not rely on this: but the witnesses state they did not hear the words; this is a mere negative, which would not be very stringent against positive witnesses. On examining their evidence, I am by no means certain that either of them satisfactorily proves himself to have been present at the time the words are deposed to have been spoken. On the whole, I am of opinion that it amounts not to a contradiction of the two witnesses who speak affirmatively in support of the articles. All may be true which is deposed to on both sides.

I am conscientiously satisfied that the defendant [125] has been guilty of the offence, and is liable to be convicted under the statute, which it is the duty of the Court to enforce, not only in obedience to the law, but because it is as necessary now as when the law was made to prevent the profanation of sacred places, and to repress such conduct at meetings where party and passion ought to find no place.

I reverse the sentence, pronounce the party to have been guilty of brawling, suspend him ab ingressu ecclesiæ for one week, which is sufficient to mark the sense I entertain of the case. In respect to costs, the complainant is entitled to them generally: but I am disposed in this instance to disallow those occasioned by the exceptive plea. With this exception, I condemn the defendant in costs in both courts.

[126] **LOXLEY v. JACKSON.** Prerogative Court, Hilary Term, Feb. 13th, 17th, 1819.

—When a will is not found on the death of a testator, the presumption of law is that it has been destroyed by him.

Judgment—*Sir John Nicholl.* The deceased made a will in 1809, and left every thing to Mr. Jackson except two small legacies; he was the sole executor; the will was deposited in his hands, where it remained till after the death of the testator. Another will is stated to have been made on the 28th of December, 1816, giving considerable part of the property to Mr. Loxley's family, who were next of kin. Mr. Jackson is residuary legatee and one of the executors. This latter will was in the custody of the deceased, but is not produced; a draft of it is propounded.

The question is whether it is proved by Loxley that the will was not destroyed by the testatrix or that it has been destroyed since her death. The presumption of law is that she herself destroyed it *animo revocandi*; the law does not presume fraud; the burthen of proof is on Mr. Loxley; he has charged Mr. Jackson with the [127] spoliation of the will; and the question is whether it has been destroyed or suppressed without the privity of the testatrix.

Sarah Thompson is the deceased; the parties are her nephews and nieces; the property amounted to 4000l.; the husband was an engraver; she took into partnership Mr. Jackson, who had been first an apprentice, and afterwards foreman. In 1808 Jackson married the daughter of her first husband; in June, 1809, the first will was made; there was no mention of this daughter in the first will; but it contained expres-

sions of the greatest regard and fullest confidence in Mr. Jackson. Mrs. Thompson retires from business; and in 1813 Mrs. Jackson dies without issue; no alteration in consequence of that event is made in the will of 1809; it remains in full force till 1816. In 1816 the deceased entertained a suspicion that Mr. Jackson had formed an illicit connection with a maid servant; in consequence of this he was lowered in her regard; but she does not, therefore, give him up; she selects him to accompany her to Harrogate in the autumn; it is suggested that about this time the deceased wrote a testamentary paper; but this is founded on such loose circumstances that it appears to be mere conjecture. She does, however, secretly and without the privity of Jackson, procure Watts to make a new will for her towards the end of the year; she signs the draft of it in November, and on the 8th of December executes the will: these facts are clearly ascertained; it is unnecessary to advert to the depositions; the instrument was left in the possession [128] of the deceased, and deposited in a blue box: the box was deposited in the closet of her room, and remained in that closet till after her death.

The questions are, whether the deceased is proved negatively to have been unable to destroy the will herself, or whether Jackson had access to it during her lifetime, or had possession of it after her death. The principal witness is Elizabeth Washington, who has released her legacy under the will; she has been examined by both sides; her impression is that it was in the blue box at the deceased's death. It is necessary to examine the grounds of this opinion; she went to live with the deceased on the 3d of January, 1815, and continued her servant till her death; she states on her examination "that on the evening after Mr. Watts had left the deceased, she told the deponent that she had been making her will; and that to prevent mistakes, and that the deponent might not have any trouble in getting it, she had left her 30l.; and she said she was sure that Mr. Jackson would see her righted; and that at the time she told her of the 30l. she enjoined the deponent, the moment the breath was out of her body, to take the will to Mr. Watts, and deliver it to him; that on the same evening, seeing the will lying upon the top of a low chest of drawers wrapped up, and fastened in a cover with three seals, she asked her mistress if it should not be put away, who then desired the deponent to put it into a drawer of the chest of drawers; that after it had remained there about a week she asked her mistress if it had not better be put in some more secure place; and [129] she desired her to bring a small box covered with blue leather in which she always kept some papers; that the box stood on a shelf in the cupboard in the deceased's bed-chamber, in which at that time she chiefly staid; that after she had fetched the box the deceased desired her to get the key (which was in a little drawer) and open it, which she did, and put the will into it, locked it again, and put the key into the little drawer; and then, by her mistress's desire, put the box again into its place in the cupboard; that whilst the deceased kept in her bed-room such cupboard was seldom locked; but when she did not keep her bed-room it was generally locked, and either the deceased or the deponent then had the key; when she replaced the box she put on the top of it five small pictures, wrapped up in a newspaper, and a pair of silver branches that belonged to some candlesticks also rested on it; and the said blue box never, to her knowledge, was afterwards moved after being so replaced by her as before deposed, during the deceased's lifetime; and after her death the deponent saw the newspaper parcel with the five pictures, and the silver branches, resting and lying on the said box apparently in the precise position in which she had before placed them. Wherefore she does verily believe that the said will was therein at the time the deceased died; for if the deceased had taken it out, she thinks she must have known it, as no person but her mistress and herself ever went to that cupboard. That in the course of the last week of the deceased's life she asked her if she [130] should write to any of the family of Mr. Loxley; and the deceased said, 'No;' that on the day after the deceased's death Mr. Jackson asked the deponent for the key of the cupboard, in the deceased's bedchamber, wherein the blue box was, and the deponent unlocked the cupboard in his presence, Mr. Jackson removed the pictures and silver branches, and then took out the blue box in which the deponent believes the will of the deceased, made by Mr. Watts, then was; she then told him that the will was in the box, and that the deceased had directed her to take it to Mr. Watts the moment the breath was out of her body; and that she was desirous of performing her mistress's request, and told Mr. Jackson so, who said, 'What have I to do with Mr. Watts? I shall employ the person who used to do business for your

mistress; and Mr. Jackson delivered the blue box together with a tin box, a red trunk, and a writing desk belonging to the deceased, to a Mr. Downe, who took them all away with him in a hackney coach."

In answer to an interrogatory this witness says, "The deceased could no doubt have had access to the box in which the will of December was deposited, but had not to the respondent's knowledge; that the blue box was locked when removed by Mr. Downe; that the key was in the drawer of the deceased's dressing table at that time."

Thus stand the facts on this evidence.

The first point is the inability of the deceased to destroy the will. Washington has a strong impression that the will remained in the blue box: but she does not suggest that the deceased, after the [131] 28th of December, made any reference to it as a will in existence; the injunction to carry it to Watts is not renewed: there is no recognition either directly or indirectly of its being in existence. On the other hand, the deceased lived for nearly three months with the will in the closet to which she had access without the knowledge of any person; is there any probability that she should have secretly destroyed the will? If she wished to destroy it, she would naturally replace the things in the state they were before. As to her bodily incapacity, when I find that, within a fortnight of her death, she is able to go from Kennington to the bank, and other places, it would require more satisfactory evidence than Washington's to convince me of it. Add to this: Mr. Spencer's evidence renders it not improbable that she should have destroyed the will. He says, "That the deceased frequently expressed great uneasiness to him at the conduct of Walter Jackson who had formed an illicit intercourse with his female servant, and expressed her fears lest he should marry her: but that in January, 1817, Walter Jackson requested the deponent, as a friend, to go to Burnham and discharge his servant Mary, the person of whom the deceased had complained, but did not explain his motives for so doing." The deponent discharged the servant; and a short time afterwards, that is, the end of January or beginning of February, 1817, being with the deceased, who was then ill, she was regretting to him not being able to go to see her son (as she always called Walter Jackson), and on the deponent's asking her why, she said on ac-[132]-count of that woman who is there of whom I have often spoken to you. I cannot go whilst she is there. The deponent told her that all her objections on that head were removed; for that she, meaning the aforesaid Mary, had left the house long before; and the deceased expressed the greatest pleasure and satisfaction at that event, and told the deponent he had made her quite happy by the communication."

Other witnesses, not less than seven, speak to the communication made by Spencer of the removal of the female servant. Some place it earlier than this will; three of them differ as to time; where they differ as to time the Court cannot rely on their fixing it, as they assign no particular reason for fixing it at any time. It is said this period is so important that Jackson should have been able to fix it with certainty; but he had no reason to expect contrariety of evidence, and Loxley did not counterplead the fact; but taking the fact the other way, that the communication was previous to the will, still being satisfied that Jackson had discharged the woman, it is not inconsistent with the ordinary movements of the human mind that she might have reverted to her original regard for him.

Spencer had several interviews with the deceased in March: he speaks to the warmth of her feeling, and to the relief of her mind at learning that Jackson had broken off the connection with the servant. She told him "she could not rest in her bed, or be easy in her bed, till she had done something." He believes these were her very words: she did not say [133] she had destroyed a will, or some other act prejudicial to Walter Jackson: but she said that "things were now as they had been before, and that she was perfectly happy."

These declarations, and her saying that things were as they had been before, coupled with her unwillingness to say any thing of the will, and her attachment to Jackson, make the court think that Spencer is correct in supposing that she continued her confidence to Jackson. He is the only person she wishes to be sent for during her last illness; the probability of the fact is strong that the presumption of law draws the right conclusion.

The burthen of proof is on the other party: is there any evidence that Jackson destroyed the will in the deceased's life time? It is not suggested that he had any

access to it at that period, or any knowledge even of its existence. If the case rested here, and immediately after her death her repositories had been opened, I should have had no difficulty in deciding it.


There is, however, the important fact that Jackson, having been told the will was in the blue box, thought proper to remove it; his conduct in this respect was imprudent and unguarded, to say the least of it. It is my duty for the interests of justice, and the security of testamentary instruments, to hold that when persons undertake to do this, they subject themselves to strong presumptions against their conduct: but fortunately Mr. Jackson has been able to prove the charge of spoliation unfounded; the blue box was placed in Mr. Downe's [134] hands; the key was in the hands of Washington.

Mr. Downe has been examined; he delivered the box to his wife to be locked up. Mrs. Downe proves the receipt of it; she went to market, and returned home, and found the solicitor and Mr. Jackson. The solicitor proves it was unlocked in his presence. This forms a complete chain of evidence directly proving that, notwithstanding Washington's impression, the box did not contain the will. From these circumstances, added to the consideration that she did not mean to die intestate, I am satisfied the box did not contain the will at the time of the deceased's death.

The presumption is that she destroyed it with the intention of reviving her former will; and I direct the probate of that will to be again given out of the registry.

[135] FRISWELL v. MOORE. Prerogative Court, Hilary Term, March 2nd, 1819.—

A will without date or signature established.—Residuary legatees for life taking administration with the will annexed called upon to give some security.

 *Judgment*—*Sir John Nicholl*. Thomas Matthew Field, the deceased, died in May, 1818; the paper propounded is entirely in his handwriting.

"Be it known to those whom it may concern that I, Thomas Matthew Field, now living at No. 93, Wimpole Street, near Oxford Chapel, being of sound mind, and revoking all former wills, being induced by prudential motives and the consideration of the uncertainty of human life to make such a distribution of whatever worldly property that may appertain to me at the time of my decease, as to prevent any litigation concerning the same. With this intent I have annexed a catalogue of my furniture, cloathing and household requisites, which, with my leasehold premises, and property in the public funds, will comprehend nearly the whole of my worldly possessions; and which it is my desire to dispose of in the following manner:—Imprimis. I have appointed Mrs. Mary Moore, and Mrs. Dodwell, now living at 40 Doughty-street, Gray's Inn Lane, to be my executors, to receive and dispose of, in manner hereinafter mentioned, all such rents, interests, and monies, as are now or [136] may hereafter become due to me. And to give them as little trouble as possible in the performance of this friendly office, I have intrusted Mrs. Friswell, with whom I now lodge (who is fully acquainted with the subject) to collect all such rents and interests and pay all such demands thereon as are or may become due thereon, rendering a true account of the same to my before named executors, and paying to them the net produce to be by them or her placed in the public funds, called the Old Navy five per cents., with the stock already there in my name. The interest of this increasing stock Mrs. Friswell may be enabled to receive by my executors granting to her a power of attorney so to do; and allow her twopence in the pound for her trouble in collecting. This process I desire may be continued for seven years after my death, or so long as Mrs. Friswell shall continue to discharge this office satisfactorily and faithfully to my executors; after which time I desire the net produce of all my rents and interests may be equally shared as they become due among my four nephews and nieces (that is to say) William Henry Moore, Thomas Matthews Moore, Elizabeth Moore, and Ann Moore, children of my late sister Martha Moore, or the survivors or survivor of them during their lives; and after their decease the remainder, both principal and interest, to be divided among such of their [137] legitimate children as may respectively attain the age of twenty-one years.

"Item. To Mary Frith, commonly called my niece, and formerly my servant, the sum of 30l. a year during her life, and independent of any husband she may contract, and 10l. in money.

"Item. To my executors I leave the sum of 100l. each in the 3 per cent. consols.

"Item. To Mrs. Brown 10l.

"Item. To Mrs. Davidson 10l.

"Item. To Mrs. Holcroft 10l.

"In case of the expiration of leases or other casualties, I desire my executors may act therein as they may think best for the benefit of my legatees consulting with them (should they or any of them be in England) on the means to be taken.

"Item. My household furniture, beds, bedding, wearing apparel, utensils requisite, writing desk, and implements, I leave to my servant Sarah Pardoe.

"Item. My books of account, leases, papers, and documents, it may be necessary my executors should have temporary possession of. These of every kind relative to my property or business, my printed books, plate, gold watch, I leave to my executors in trust for Thomas M. Moore.

"My veterinary stock I desire may be disposed of for the benefit of such of my nephews and nieces as may be then living. In case of any lapsed legacy occurring, I [138] desire it may be added to the general stock intended for my nephews and nieces."

It is written fairly; there is nothing to shew that he intended to do any further act; at the end of the whole there is an inventory setting forth the state of his property; but it has neither date nor signature.

The paper is propounded by Mrs. Friswell, who is to do all acts for seven years; the two executors have renounced probate probably for the purpose of being examined as witnesses in the cause. The deceased had been formerly a surgeon; he is described as of peculiar and singular habits which account for the shape of the will; his wife died before him, and he lived afterwards with a family of the name of Friswell, in Wimpole Street; he died suddenly at a small inn: all these circumstances are stated in plea, and proved by seven witnesses. From the evidence I am satisfied that it was the deceased's intention that the will should operate in its present form.

The question now is, who is to have the administration with the will annexed. Mrs. Friswell is to act as substitute; if there is no executor, it is said Mrs. Friswell is executor according to the tenor; but her claim is resisted by the intervention of one of the nephews who has been resident in New South Wales; if this person is come over with competent authority from three other residuary legatees, I do not see how I can refuse the administration to him.

I pronounce for the will; and decree administra-[139]-tion with the will annexed to Thomas Moore, and direct the sureties to justify.

Easter Term, May 5.—Application was made to the Court to rescind that part of the decree of the 2d of March last which called upon the sureties to justify.

Phillimore. The executors have renounced; the right to the administration is in Thomas Moore, who has competent authority from all the other residuary legatees for life to undertake the administration: he could find no sureties to justify; the demand for them was unusual; and, on general principle, the introduction of such a practice would be objectionable. No case could be produced of a residuary legatee being called upon by the Prerogative Court to give justifying security.

Adams contra. The reasons stated make it more incumbent on the Court to adhere to the decree; the not being able to find sureties increases the danger; besides it is objectionable to rescind a decree already made.

Per Curiam. I should recommend the parties to arrange this point between themselves; and, with that view, direct the cause to stand over till next Court.

Trinity Term, June 28.—It was stated on behalf of the residuary legatees for life that they were willing to give security in [140] 5000l., which was four times the amount in value of the legacies bequeathed to them.

Per Curiam. The Court will be satisfied with this; the only object is the protection of property belonging ultimately to minors. There is no suspicion against the party.

[141] ROCKELL v. YOUDE. Prerogative Court, Easter Term, April 28th, 1819.—

A bequest of residue omitted through the error or inadvertence of the solicitor to be inserted in a testamentary instrument, not admitted to probate.

John Hinksman died, at Erbstock, in the county of Flint, on the 6th of April, 1818, leaving personal property to the amount of 3800l. By his will which was formally executed on the 21st of July, 1806, he distributed his property amongst

several of his relations and friends, and appointed Ann Rockell, his sister, and Thomas Watkin Youde, executors.

An allegation was given in on the part of Ann Rockell, which, after stating a variety of circumstances which had induced a change in the testamentary intentions of the deceased with respect to Thomas Youde, who, besides being an executor, was a considerable legatee under the will, proceeded to plead, "That the deceased became indisposed in January, 1818; but that till the afternoon of the day previous to his decease the indisposition was never considered by himself or any of his friends or attendants as immediately dangerous; that from the time, or very shortly after, he had been attacked by illness he expressed an earnest wish that Mr. Pugh, an intimate friend of his, who resided at Erbistock, but who was then absent at Chester, would return home, as he wished him to draw up a will for him; but the said Mr. Pugh having broken his leg did not return home during the deceased's lifetime."

[142] "That having a desire to provide more amply for his sister, Ann Rockell, and finding his health fast declining, and that Mr. Pugh did not return, he on the 4th of April last sent to Richard Miller Benjamin, a solicitor, residing at Wrexham, about eight miles distant from Erbistock, to desire him to attend immediately in order to receive instructions for his will; that Richard Miller Benjamin accordingly waited on the deceased on the evening of the 4th of April, and found him in bed apparently in a very weak state of health, but of perfectly sound mind, memory, and understanding; that the deceased proceeded to give the said Richard Miller Benjamin instructions for his will; and one of the first observations the deceased made on giving such instructions, which he several times repeated, was that it was his intention to leave all his property to his sister, Ann Rockell, except a few legacies, which he then mentioned, and which were committed to writing by the said Richard Miller Benjamin in the deceased's presence; but he the said Richard Miller Benjamin having from the deceased's particularity respecting his said sister a perfect recollection of the instructions relating to her omitted to put in writing any disposition of the residue of his personal estate directed to be made for the benefit of his aforesaid sister; that the instructions, so as aforesaid in part committed to writing, were not signed or otherwise executed by the deceased; nor were they read over either to or by him, whereby he was unable to know that the disposition of the residue in favour of his sister was omitted; and the de-[143]-ceased verily believed that Richard Miller Benjamin had inserted in the instructions such intended disposition of the residue." And it was further alleged "that the deceased having given full, complete, and final instructions to Richard Miller Benjamin for the disposal of his personal estate and effects desired him to prepare a will therefrom, and to have the same immediately engrossed fair for execution, and said he would send for him to attend the execution thereof on the following day, viz. the 5th of April; and the deceased, being apprehensive of death, and very anxious to execute his will, again sent to Richard Miller Benjamin, desiring to see him: that not having drawn up the will as desired by the deceased, Richard Miller Benjamin taking with him the instructions, repaired very early on the following morning to the deceased's house; and then found that the deceased had departed this life some few hours previous to his arrival."

The allegation then exhibited the instructions, and alleged and propounded the same to be and contain the true and original instructions for the last will and testament of the deceased which were committed to writing in his presence, and at his desire, and propounded the same together with the bequest of the residue of the personal estate and effects of the deceased directed by the deceased to be given and bequeathed to his sister, Ann Rockell; but, through error or inadvertence, omitted to be therein inserted, as containing together the true and original last will and testament of the deceased.

[144] Jenner and Phillimore against the admission of the allegations.

Adams and Lushington in support of it.

Judgment—Sir John Nicholl. This is an allegation setting up a case of a very novel sort, and must have been brought before the Court rather to satisfy the wishes of the party than from any hope the counsel could have entertained that it could be attended with success: to admit it would be to establish a precedent contrary to all the rules which have governed this Court subsequent to the passing of the Statute of Frauds.

The deceased died on the 6th of April of last year; the will was made in 1806.

The residue is left to a sister for life, and afterwards to her children. The sister and Mr. Youde are appointed executors; the will remained in the possession of the deceased, and is found uncanceled. Between 1806 and his death a new will was begun; this unfinished will is very much like the former will; whether he would have gone on to appoint the same executors, and make it in other respects the same, the Court cannot decide: it breaks off in the middle. Two days before his death he sent for his solicitor, and gave him instructions in the manner stated; but these are merely the heads of legacies which amount to 350*l.*; there is no bequest of the residue; no appointment of executors; it is the mere inception of a disposition; an attempt is made to propound this paper with a bequest omitted to be reduced into writing; [145] there is no case that I am aware of in which a bequest has been established that has not been reduced into writing in the lifetime of the testator. The Court has gone the greatest possible length when it has pronounced for instructions which have been reduced into writing during the lifetime of the deceased; but which have not been read over to him. The Court has always stopped short where the instrument has not been reduced into writing till after the death; and I cannot agree in the construction attempted to be put on the Statute of Frauds that this would be a will by word of mouth.

The Court is always anxious to carry into effect the intentions of a party; but it must be when those intentions are shewn in a legal form; it cannot act upon conjectures of its own.

Whether this is pleaded in the usual form is immaterial further than to shew that it could not, from the nature of the attempt, be stated in the usual form. In supply of proof they exhibit B, and then propound that paper together with the bequest of the residue "through error and inadvertence omitted to be inserted." This is a perfect novelty; it would be difficult since the Statute of Frauds to find any pleading of this description.

It is a common rule that a paper in part proceeded upon cannot revoke a former will; it can only revoke it pro tanto even as to a personal estate; this paper is not, however, brought before the Court in that way; and, therefore, I am not called upon so to deal with it. All that is stated as to the dissatisfaction of the deceased with Mr. [146] Youde would be corroborative of his intention to make a new will; if a new will had been made, the allegation might in this respect have been admissible; but these circumstances are not sufficient of themselves to have the effect of a revocation.

What is the proposition? To pronounce for B with a disposition of the residue not reduced into writing during the lifetime of the deceased. I purposely forbear going into the detail of the circumstances which have been commented upon by the counsel in support of this allegation, because I am unwilling to shake the effect of the rule.

I hold it wise in the law not to open a door to the admission of parole evidence to this extent. Courts have gone the utmost length to which it would be prudent to go; they only go even that length with great caution, when they admit to proof papers reduced into writing during the lifetime of a testator. For the sake of the public, and to protect the interest they have in the disposal of personal property, it is quite right that the Court should firmly adhere to this rule; and, therefore, I reject this allegation.

[147] *NORTON v. SETON, FALSELY CALLING HERSELF NORTON.* Arches Court, Michaelmas Term, Dec. 4th, 1819.—A man not allowed to plead his own natural impotency as a ground for a sentence of nullity of marriage.

[Discussed, *B. v. M.*, 1852, 2 Rob. Ecc. 580; *A. v. A.*, *sued as B.*, 1887, 19 L. R. Ir. 403.]

By letters of request from the Consistory Court of Peterborough.

This was a suit of nullity of marriage instituted by George Norton by reason of his own natural impotency and defect in his organs of generation. The marriage had been solemnized by licence on the 18th of June, 1812, he being then forty-five and the woman twenty-three years of age. They had cohabited till June of the present year.

Adams and Dodson in objection to the libel. This is a novel suit, and one which cannot be entertained. A man, after seven years' cohabitation, sues for a nullity of

marriage on the ground of a defect in himself which has always existed; [148] he is desirous that his wife, having lost all opportunity of settlement, and he having taken all opportunities of fortune accruing to her, should now be dismissed from her marriage.

We find no express law that a man may or may not complain on this ground, probably because no one could contemplate such a case. A woman may complain of the impotency of her husband; and the canon law would hold such a marriage not merely voidable but void. X. 2, 27, 2, 29. Brower, 2, 4, 14, 16, 2, 4, 22. Sanchez, 7, 97, 9, 10, 12, 7, 98. But in X.(a) 4, 15, 4, we find that a person is not entitled to a divorce who knowingly contracts marriage with an impotent person; à fortiori, therefore, a person who knows of his own impotency cannot make it the foundation for a suit of nullity of marriage. We submit that the husband is not entitled to bring such a suit; and that if the point be only doubtful, the Court should not hesitate to dismiss the cause.

Phillimore and Lushington in support of the libel. No doctrine of the canon law is clearer than that a man may sue for a nullity of marriage by reason of his own impotency. The text law (Cod. 5. Nov. 22, 6), deduced originally [149] from the civil law, is unequivocal.(c) X. 4, 15, 1, X. 2, 19, 4. All the commentators have interpreted it in the same manner. Panormitan,(d) whom Hostiensis and all the others follow, is so explicit as not to be mistaken. Ayliffe(e) makes it clear that we have imported this doctrine into the canon law as administered in this country; and a manuscript opinion of the late Sir W. Wynne(f) shews his understand-[150]-ing of our practice to be the same. The ground of the nullity is that the marriage being void, there can have been no contract; all the reasoning, therefore, deduced from the authority of other contracts must fail. Put the case of a man naturally impotent intermarrying with a woman, and that woman becoming pregnant by another man, what remedy has he, or which is of more importance, what remedy have those who have a reversionary interest in his property but a suit of this description? By what other course of proceeding can his estates be prevented from being transferred to foreigners? This is the only remedy pointed out by the law of the land; the suit is to be entertained for the purpose of ascertaining whether there has been verum matrimonium, and to ascertain the relative status and condition of the parties to each other. It is very true that the books lay down that a man(g) is not entitled to a

(a) Consultationi tuæ qua nos consuluisti, utrùm fœminæ clausæ impotentes commisceri maribus, matrimonium possint contrahere, et si contraxerint an debeat rescindi? Taliter respondemus, quòd licet incredibile videatur quòd aliquis cum talibus contrahat matrimonium. Romana tamen ecclesia consuevit in consimilibus judicare, ut quas tanquam uxores habere non possunt habeant ut sorores.

(c) Accepisti mulierem, et per aliquot tempus habuisti, per mensem, aut per tres, aut per annum: et nunc primum dixisti te esse frigidæ naturæ, ita ut non potuisses convenire cum illâ, nec cum aliquâ aliâ. Si illa quæ uxor tua esse debuit eadem affirmat quæ tu dicis, et probari potest per verum judicium ita esse ut dicitis, separari potestis: eâ tamen ratione, ut si tu post aliam acceperis, reus perjurii dijudicaris, et iterum post peractam penitentiam priori connubio reparare debebis.

(d) Nota. Maritus potest reclamare et petere separationem etiam impedimento proveniente ex se; interest enim sua ut separentur; si non est inter eos verum matrimonium ut non teneantur ad onera matrimonii. Abb. super quarto. Accepisti, &c. l. 1.

(e) The husband may pray a separation of matrimony on account of a matrimonial impediment, though such impediment proceeds and arises from himself; as from his own impotency and frigidity. Parergon, 230.

(f) I think a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity in herself to perform the duties of marriage; and I think that if the persons appointed by the Court to inspect her (which is the method of proof upon which these cases always proceed) should certify that she appeared to them, from a defect in the natural formation of her body, to be absolutely incapable of being carnally known by a man; upon this proof the marriage must be pronounced null and void.

Doctors' Commons, May 5, 1777.

WILLIAM WYNNE.

(g) But if he knowingly marries a woman that cannot render him his due, he is (notwithstanding) bound to maintain her; and shall not be divorced from her, for he ought to impute it to himself. Parergon, 230.

divorcee who knowingly contracts marriage with an impotent person: but the very same books lay down that he may allege his own impotency as a ground of divorce.

Per Curiam. I shall examine the authorities before I give my judgment to see what was the doctrine of the canon law, and how far it has been adopted here; and, in the meantime, I wish search to be made whether there has been any precedent for such a [151] suit. If the defect is such as has been pleaded it seems as if the marriage must have been contracted scienter; then, after so long a cohabitation, the party comes to annul his own contract. I wish precedents to be produced, if there be any.

Hilary Term, January 20, 1820.—Phillimore stated the difficulties that had attended the search from the want of reported cases, and the inaccurate manner in which the Arches books had been kept. The search had been made with a twofold purpose: first, to ascertain the greatest number of years that had elapsed between a marriage and the institution of a suit of this description; and, 2ndly, whether any instance could be adduced of a person instituting a suit on the allegation of his or her own impotency.

The cases found were the following:—

The Honourable Catherine Elizabeth Weld (h) alias Aston against Edward Weld, of Lulworth Castle, in Dorsetshire, a cause of nullity of marriage, by reason of impotence, in the Arches primâ instantiâ by letters of request from the Chancellor of Bristol.(i) The parties were married in 1727, the suit was brought in 1730.

[152] *The Duchess v. The Duke of Beaufort*, Arches, 1742. The suit was originally brought in the [153] Consistory Court of London where the judge ordered the fourth

(h) A daughter of Lord Aston's.

(i) This cause was appealed to the Delegates. The first entry of it in the Court, or (as it is technically termed) the Assignment Book of the Delegates on April 27, 1732, is as follows:—

Archibaldus, Comes Ilay; Josephus, permissione divinâ Roffensis Episcopus; Thomas, eâdem permissione Bangorensis Episcopus; Thomas, eâdem permissione Asaphensis Episcopus; Johannes, Dominus Delawarr; Thomas, Dominus Foley; Jacobus Reynolds, Armiger, Cap. Baro Scaccarii S. D. N. R.; Alexander Denton, Armiger, unus Jurisconsultorum S. D. N. R. de Banco; Johannes Comyns, Miles, unus Baronum Scaccarii S. D. N. R.; Dominus Henricus Penrice, Miles; Matt. Tindall; Robertus Wood; Carolus Pinfold; Edwardus Kinaston, LL.D.

Honorabilis Fœmina Catherina Eliza Weld, alias Aston, uxor pretensa Edwardi Weld de Lullworth Castle, in comitatu Dorsetiæ, Armigeri, contra eandem Edwardum Weld.

Greenly exhibuit commissionem appendentem sub magno sigillo Magnæ Britanniæ. Domini acceptarunt onus executionis ejusdem ad petitionem dicti Greenly exhibitis procurium pro parte appellante—decreverunt citationem tertio, &c.—et monitionem pro processu transmittendo in primam sessionem proximi termini. Boycott exhibuit procurium speciale manu propriâ et sigillo Edwardi Weld, Armigeri, partis appellatæ (here follow two words not legible) Domini ad ejus petitionem assignarunt Greenly ad libellandum in proximum.

On February 17, 1732, the following entry occurs in the Assignment Book which appears to have been made under the direction of the Condelegates; for the names of none but the civilians in the commission, viz. Sir Henry Penrice, Drs. Tindall, Wood, Pinfold, and Kynaston, are prefixed to the minute. "Domini assignaverunt ad informandum in jure in diem proximum whether there must be a continual cohabitation per spatium triennale without interruption; whether, after three years' cohabitation and the woman found a virgin—whether the marriage shall not be declared null and void; whether a man that has been married three years, and at the end of that time is viewed by surgeons and reported by them to be fully capable of propagation; whether such marriage can be dissolved; notice to be given to the Lords Spiritual and Temporal."

The case was argued on the 21st and 23rd; and sentence was given on the 24th of May, 1733, in favour of Mr. Weld; when the cause was remitted to the Inferior Court. The Judges Delegates present at the hearing and the sentence were the bishops of Rochester and St. Asaph, Lord Delawarr, Chief Baron Reynolds, Baron Comyns, Sir H. Penrice, Judge of the Admiralty, Drs. Tindall, Pinfold, and Kinaston.

article of the libel to be reformed; it was appealed to the Arches, where the libel was admitted in its original form. The cause was finally heard in the Arches, May, 1743, on the duke's answers, and the inspection of physicians, and decided in favour of the duke; the duke was twenty-one years old at the marriage, the duchess seventeen; the marriage took place in 1729.

Leeds, otherwise Lamborn v. Leeds. Parties married in 1753: the suit was brought by the wife in the Consistory Court of London, in May, 1758. The libel was admitted; and the report of the physicians and surgeons was made on the 25th of May, 1759. The proctor for Mrs. Leeds objected to that report as not being sufficiently full and clear, and prayed a further report. The judge rejected the petition, and concluded the cause; it (*k*) was appealed to the Arches, where the appeal was pronounced for. The judge ordered a more full report: a further report was accordingly made; but that also was objected to on the behalf of Mrs. Leeds. (*l*) The cause was appealed to the Dele-[154]-gates. The Delegates pronounced against the appeal, but retained the cause; and it does not appear that any further proceedings were had in it.

Forster, otherwise Schutz v. Schutz, Consistory of London, 1770. The marriage took place in March, 1770. The suit was brought by the wife in November of the same year. The libel was admitted, some irrelevant articles being rejected. A report of physicians and surgeons was made. Objection was taken to that report. The judge pronounced it to be full. The cause was appealed to the Arches: but the appeal not being prosecuted, it was remitted to the Consistory, where Mrs. Schutz (February 17, 1772) was held to have failed in proof of her libel.

[155] *Grimbaldeston, otherwise Anderson v. Anderson*, Arches, 1778. The marriage was in 1775, the suit was brought in 1777, in the Consistory Court by the wife. The libel was rejected. The judge, Dr. Bettesworth, laying great stress on the time of bringing the suit, there not having been three months' cohabitation, it was appealed to the Arches; and it appears that in the argument the counsel (Dr. Wynne) pressed upon the Court the caution which ought to be observed in admitting pleas of this description. The note of the sentence of the (*n*) judge (Dr. Calvert) is to this effect: "Court. Impotency a good ground of nullity. Not much weight in argument as to unfavourable suit. Whether the case is such as the Court can redress. The virginity of woman very material. Libel properly drawn: but in this case the opinions of inspectors only must determine; and not sufficient for the Court, as in the words of the libel they could only say it appeared soft and short which does not always continue. Therefore, three years' cohabitation necessary.

"*Grimbaldeston, otherwise Anderson v. Anderson*, Consistory, 1777. Arches, 1778.

"Libel rejected for want of three years' residence, only about three months' cohabitation.

"*Schutz against Schutz. Leeds against Leeds. Larkin against Frost.*"

Harris, otherwise Ball against Ball. The parties were married in 1871; the husband was thirty-four, the wife seventeen years old. The suit was [156] brought by the

(*k*) The libel pleaded frigidity and impotency.

(*l*) December 14, 1759. In the principal cause an allegation was brought on the part of Mrs. Leeds, to which answers were given, and witnesses were examined, and publication was decreed: but there was no final hearing in either court on the merits of the cause. It was appealed to the Delegates (as it had been before to the Arches) on a grievance in December, 1760; and mention of it recurs at various intervals in the Court Book of the Delegates, till the 4th of December, 1762, when the assignation was continued till a day in Hilary, 1763: but no entry of the cause appears afterwards. In the valuable catalogue of the processes in the registry of the High Court of Delegates, digested with great care and industry by Dr. Jesse Addams, the following note is placed opposite the entry of this cause:—"In primâ inst. *Leeds (Hester) alias Lamborn, against Leeds*, in a cause of divorce by reason of impotence, in the Consistory Court of London, appealed by the wife to the Arches, and subsequently to the Delegates, on a grievance, viz. on the judges of those courts respectively overruling her objection to the report of the physicians and surgeons appointed inspectors of the husband's parts of generation as ambiguous, &c., and incapable of satisfying the Court with respect to his potency or impotence."

(*n*) This note is transcribed from an endorsement in the handwriting of Dr. Harris on the brief from which he argued the case of *Harris, otherwise Ball v. Ball*, Deleg. 1789.

wife in the Arches, 1788. The libel was rejected,^(o) but upon an appeal this sentence was reversed, and the libel was admitted by the Delegates to proof; the wife, however, ultimately failed in the suit.^(p)

^{*} *Dick v. Dick*, Arches, May 24, 1811.

Greenstreet, falsely called Comyns v. Comyns (2 Phill. Ecc. 10). The marriage was in 1807, the suit in 1812. Sir W. Scott in giving judgment in that case, said, "There is great disposition on the part of the husband to atone for the injury he has inflicted on this lady, being in utter ignorance of his constitutional defects." The libel in that case was drawn precisely in the same form as this; and why in that case was the man to be presumed to be ignorant of his natural defect, and not so in this?

In the text of the Canon Law, X. lib. 4, tit. c. 9, a case is stated in which a woman applied for a divorce on account of the frigidity of her husband after eight years' cohabitation, and obtained it.

The result of this search is that there are many in-[157]-stances of suits having been brought many years longer after the marriage than in the present instance; but none in which the party seeking redress had been the party labouring under the infirmity; at the same time there have been undoubtedly many suits of which no traces can now be found. It is observable also that none of these suits have been promoted by the husband. And would any one pretend to argue, because no case could be found, in which the husband had commenced proceedings, that the husband could not bring the suit. It is impossible to read the passages in the canon law on which this doctrine is founded to signify any thing else than that the impotent party might bring the suit. Every commentator on them has deduced the same conclusion. Sanchez was cited against it at the last hearing: but his authority was mistaken. It is directly in unison with that of the other commentators, p. 354; and the whole of his doctrine on this head was clearly summed up in the 114th disputation which had for its title "*Utrum conjugii impotenti et viro frigido, aut mulieri arctæ integram sit contra matrimonium proclamare, an potius id jus proclamandi soli competit potenti?*" Reasons for allowing such a conduct were not personal to the parties; but had for their object important public interests; and where founded upon a principle introduced into our law from the canon law to ascertain whether in the language of the canonists there had been *verum matrimonium* or not, and what was the relative status of the parties towards each other.

[158] Adams *contra*. The cases cited do not affect the point. The interval of time between the marriage and the institution of the suit might not be immaterial in this case: but time alone could bear but little upon it. The chief object of the Court was to ascertain whether there had been any cases in which the husband had been permitted to institute a suit for the purpose of establishing his own impotency. All the cases cited made out the negative to this position. In *Greenstreet v. Comyns* the Court threw out its belief that the man was ignorant of his situation; here, however, the man was forty-five years old at the time of his marriage, and his situation could not be unknown to himself.

The Court took further time to deliberate.

Jan. 27.—*Judgment*—*Sir John Nicholl*. This suit is brought by George Norton against Sarah, his wife, to declare his marriage void; the libel pleads that the marriage took place in June, 1812; that the husband was a bachelor, aged forty-five years, and the wife, a spinster, aged twenty-three; that they cohabited till June, 1819; that they were both in health, but that the husband was incapable, from bodily defect, to consummate the marriage; that his defect was incurable by art, as would appear upon inspection by [159] medical persons. The admission of the libel is opposed by the wife, who prays to be dismissed.

The question is whether the Court can entertain this suit; whether the husband

(o) By Dr. Calvert.

(p) November 24, 1790. The Delegates by their interlocutory decree pronounced that "Hannah Ball had totally failed in proof of her libel, and dismissed Thomas Bannister Ball from the suit."

The Judges Delegates who were present at the sentence were Mr. Justice Gould, Mr. Justice Buller, Mr. Baron Hotham, Dr. Fisher, and Dr. Laurence.

Mr. Erskine, Mr. Pigott, Dr. Harris, and Dr. Nicholl were counsel for Mrs. Harris: Mr. Bearcroft, Sir William Scott, and Dr. Battine *contra*.

is entitled to his remedy ; whether he states facts capable of proof ; or, whether, if the facts should be proved, the marriage ought to be set aside.

The first objection is, that the suit is of a novel kind. After the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity ; the party complaining has always been the injured party, and generally the suit has been brought by the wife ; there has been but one suit in my recollection brought by the husband, *Wilson v. Wilson* (Archers, 1795).

The next circumstance is the age of the man. It is incredible that he should have lived forty-five years, and be ignorant of his own bodily defect, which he alleges to be apparent upon inspection. I do not see how his ignorance could be proved ; it is incapable of direct evidence. The presumption is in favour of the marriage ; besides there was a subsequent cohabitation of seven years before the suit was brought ; at all events he must have discovered it some time before he applied for his remedy. The maxim then applies, *cur tamdiu tacuit* ? The lapse of time may act as an absolute bar to the suit not brought by the party injured. In *Ball v. Ball* (Deleg. 1790) it was so held by the Delegates ; the modesty of [160] the sex may account for forbearance on the part of the woman ; he has not only defrauded his wife into a marriage whereby he acquires a right to her property, but has kept her during a long cohabitation subject to continual injury, and now is seeking to throw off the burthen of maintaining her : this increases the weight of presumption against him. Another circumstance not to be passed over is, that the marriage was by licence ; it is so usual for the man to be the person to obtain the licence that it is to be presumed in this case he did so by his own affidavit ; and he swore he knew of no impediment to the marriage ; ignorance of the fact is not only not to be presumed, but is almost incredible. Another objection is, that we cannot obtain collateral proof either by the answers of the wife, or by the inspection of her person ; it has been stated by the husband's counsel that the wife is pregnant ; he cannot, therefore, call upon her to confess that her marriage was not consummated, for she must then furnish evidence to criminate herself. Nor can she allege that she is *virgo intacta*, a species of proof sometimes resorted to.

So that in point of proof the case must rest upon the inspection of the husband by medical men. And can any case be found where sentence has been given on the sole report of the inspectors ? This species of proof, even as collateral, is always received with caution. I am not aware that it has ever been held sufficient alone ; and if not in any former case, is it to be first taken in this [161] case where the wife is said to be pregnant ? The Court is called upon not merely to pronounce against the marriage, but to bastardize the issue. Is there any case in which bastardy has been established on the frigidity of the husband ; or by any proof, but that of non-access. There has been a cohabitation of seven years ; frequent endeavours to consummate ; and the Court is called upon to say that the issue is not of that person *quem nuptiæ demonstrat*.

Under these preliminary observations on the circumstances of the case it would be necessary, in order to support this suit, that the law authorities should be clear beyond all possibility of doubt. It has been said that the public has an interest that the real state of the parties should be ascertained, and that is true where the marriage is void under the marriage act : but this is a voidable marriage, and laid down to be so by Blackstone. Then here the state is ascertained. The marriage exists.

The sole authority in support of this suit is the text quoted from the canon law ; it is necessary to examine how far that law applies to this case, and how far it has been received in this country. X. 4, 15, 1. If a man alleges his frigidity, and wife alleges the same, and can prove the same, by seven compurgators, they may be separated.

X. 4, 15, 4. If a man contract, knowing the defect of the woman, he is not to come for a remedy.

[162] Many learned commentators have been referred to : but they leave the text much as it appeared at first. Sanchez, in his seventh book, has written a large Commentary on Matrimonial Law ; upwards of 400 pages *de impedimentis*. In his last disputation he considers it still as a question whether the impotent party may apply for the divorce ; and he holds he may, under circumstances ; but limits it by certain restrictions ; *quando illius ignarus fuit tempore matrimonii ; aliter minime*

auditor. But let us examine how the text and commentators apply to the present case. The text applies to frigidity which may be unknown before trial; but here the bodily defect is stated to be apparent. In the next place, the wife must join in the statement eadem affirmans: but here she resists the suit. So far from joining in it her pregnancy is proclaimed. But collateral proof is also required: it must be proved by seven compurgators; a mode of proof not used here, and which we cannot have instead of inspection and answers.

By the canon law the marriage is not absolutely dissolved; the parties are separated; and if the church is deceived the former marriage is to be renewed; and if a second marriage is contracted it becomes null and void. What a state to place the parties in! This is something in the text law which I cannot readily assent to belong to the law of this country. If the marriage was contracted scienter; the party knew of the defect, and he could not be heard. The assertion of the defect in himself raises the presumption that he con-[163]-tracted the marriage scienter, that he cohabited scienter, and defrauded the woman.

If the canon law is to govern the case, the text referred to does not come up to the point; even if it did, something more would be to be shewn, namely, that it has been received as the law in this country; it might not be necessary for this purpose to shew a case precisely similar; it would be sufficient to shew that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding that no suit appears ever to have been brought by any but the injured party.

Ayliffe (Parergon, p. 227) has been quoted: but he refers merely to the text of the canon law. Another authority has been cited from the opinion of counsel: but that was on the case of a woman. The opinion of any person of higher authority cannot be produced than of that person: but it cannot be considered as an authority applying to this case. The Court does not mean to lay it down that in no possible case, or under no circumstances, a woman may not be allowed to bring such a suit. But even if the canon law is direct on the point, is it according to the law of England to receive such a suit? It is a maxim that no man shall take advantage of his own wrong: it is the principle of the canon law itself, the principle of reason and justice. There is no instance of a suit brought by a person alleging his own incapacity: there is so strong a pre-[164]-sumption for the marriage that no sentence is ever pronounced against it, except on the fullest authority; and if a mistake is made, the marriage is not held dissolved, but to be renewed. This is a situation in which the law of England would not place the parties. On the whole I am not satisfied that the party would be entitled to the sentence prayed. I reject the libel and dismiss the suit.

[165] COOPER AND OTHERS v. ALLNUTT. Consistory Court of London. Hilary Term, February 9th, 1820.—A churchwarden duly elected by his parish directed to take the oath of office.

This was a suit promoted by James Cooper, one of the churchwardens, and by other parishioners and inhabitants of the parish of All-hallows Barking, in the city and diocese of London, against John Allnutt, one of the churchwardens elect of the said parish, to compel him to take the churchwarden's oath of office.

It appeared that on the 22nd day of April, 1819, Mr. Allnutt had been proposed and unanimously elected churchwarden for the ensuing year, and had been served with a notice to appear before the official at the visitation of the Archdeacon of London, and to take upon him-self the office of churchwarden: but he refused to comply with this notice, alleging that he was prevented by deafness from fulfilling the duties of the office.

On the 26th of January, 1820, he was cited to appear before the vicar general and official principal of the Consistorial and Episcopal Court of London (who exercises a concurrent jurisdiction as to [166] subjects of this description, with the official of the archdeacon) to appear and take the oath usually taken by churchwardens of the parish of All-hallows Barking.

Lushington moved the Court to compel John Allnutt to take upon himself the office of churchwarden.

No appearance was given for Mr. Allnutt.

Judgment—*Sir William Scott* directed Mr. Allnutt to take the oath before the proper ordinary.

[167] THE OFFICE OF THE JUDGE PROMOTED BY JARRATT *against* STEELE. Arches Court, Hilary Term, Jan. 27th, 1820.—Al essee of an impropiator of great tithes canonically punished for breaking open the church door with intent to erect pews in the chancel.

[Explained, *Ritchings v. Cordingley*, 1868, L. R. 3 Adm. & Ec. 133. Referred to, *Rector of St. Michael Bassishaw v. Parishioners*, [1893] P. 239 ; *Lee v. Hawtrey*, [1898] P. 73.

By letters of request from the Consistory Court of Bath and Wells.

This suit was instituted by the Reverend Robert Jarratt, vicar of Wellington, in the county of Somerset, against Frederic Ferdinand Armstead Steele, lessee of the Great Tithes, for having, in September, 1818, without any competent authority pulled down several pews, and erected others in the chancel of the church of the parish.

The articles alleged that Mr. Armstead had, on the 27th of August, 1820, clandestinely caused a key of the church door to be made by which he had introduced workmen into the chancel for the [168] purpose of preparing for the erection of pews in the chancel.

That the vicar having ordered a new lock, he, on the 17th of September, caused the door to be forced open, and again brought workmen into the chancel, who, by his order, pulled down part of two pews, and laid the foundation for two new ones.

That the door being secured and bolted, and he being warned by the vicar to desist, on the 18th of September broke open the belfry door, and one of the gallery doors ; and thus admitted the workmen, and boasted that they could not keep him out of the church.

That, on the evening of the 19th of September, the doors having been fastened, he applied to the vicar to admit him into the chancel at half past ten o'clock at night ; which he refused to do at so unseasonable an hour. To which he replied, "As soon as you are gone I will get in ;" and added, "I will be in within half an hour."

That, on the 25th of September, the workmen, under his orders, stript off part of the roof from the top of the chancel, and broke through the ceiling ; and, descending into the church, removed the inside fastenings from the doors, put on a roller lock, and proceeded with the work in the chancel.

The articles were admitted on the 10th of July, 1819. On the 4th of December, 1819, a negative issue was given. On the 9th of December, 1819, the negative issue was retracted, and an affirmative issue given.

Swabev for the Rev. Robert Jarratt.

No counsel appeared on the other side.

[169] *Judgment*—*Sir John Nicholl*. This suit is brought against Frederic Ferdinand Armstead Steele for having forcibly entered the church of Wellington, pulled down two pews, and erected others in the chancel ; he was cited to answer to this offence ; the proceedings are instituted by the vicar of the parish. In consequence of the citation articles have been given in. These articles set forth the circumstances of the case which have been fully stated by the counsel, and conclude with praying that the party proceeded against may be canonically punished and corrected ; that he may be admonished to restrain from such excesses in future ; condemned in the costs of the suit ; and ordered to remove the pews he has erected, and to restore the chancel to the state in which it was.

To these articles a negative issue was at first given ; that has been withdrawn ; an affirmative issue has now been given, and a proxy to the proctor to give it.

By giving an affirmative issue he confesses the facts charged, and submits himself to the law ; and certainly, if the facts stated are true, he has been prudently advised, and has acted wisely in so doing. The facts are most reprehensible, and his illegal conduct has been contumaciously persisted in.

All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these Courts ; that the possession of the church [170] is in the minister and the churchwardens ; and that no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority. That pews already erected cannot be pulled down without the consent of the minister and churchwardens, unless after cause shewn by a faculty or licence from the ordinary.

Here an individual, without any pretext or authority whatsoever, repeatedly

breaks into the church by violence, pulls down the old seats, erects new ones, breaks a hole into the roof of the church, and thus descends into the chancel, after repeated admonitions from the minister to forbear.

By giving an affirmative issue, however, he has shewn that he has become convinced of his error and improper conduct; and on that account the Court is unwilling to proceed against him with rigour. I shall, therefore, only condemn him in the costs of the proceeding; admonish him to pull down the seats he has erected, and to replace those he has pulled down, and to reinstate the chancel as it was: and to do this I shall allow him till the first day of next term, when I shall expect him to certify that he has complied with this sentence.

Trinity Term, June 22.—The proctor for Mr. Steele alleged that he had obeyed the monition served upon him by order of the Court, and the Judge dismissed him from the suit.

[171] THE OFFICE OF THE JUDGE PROMOTED BY DOBIE v. MASTERS. Arches Court, Hilary Term, Jan. 27th, 1820.—The ecclesiastical courts have jurisdiction to try questions of simony.

By letters of request from the Chancellor of Winchester.

Phillimore moved the Court in the behalf of Alexander Dobie, of the parish of Saint Clements Danes, to allow the office of the judge to be promoted against the Reverend John Whalley Masters, rector of Chorley, in Lancashire, in a cause of simony; and to permit a citation to be taken out against him for having purchased the immediate possession of the vicarage of Saint Nicholas, in the castle of Carisbrook, in the Isle of Wight.

He stated that there could be no doubt as to the jurisdiction of the Court on a question of this description; for that the statute of the 31st of Elizabeth specially guarded against taking away the right of the Spiritual Courts, and that subsequent to the passing of that act many dicta were to be found in books and adjudged cases which seemed to countenance the idea that the Ecclesiastical Court [172] was a more suitable forum on questions of simony than the Temporal Courts. *Risby v. Wentworth*,^(a) 40th of Elizabeth. *Baker v. Rogers*; ^(b) and in both which cases prohibitions had been refused.

In *Boyle v. Boyle*,^(c) Pollexfen, Justice, in pointing out that the Spiritual Courts might have jurisdiction in some respects over the same subject matter as the temporal, used this illustration. "So, after a man is found no simonist in this Court, the Ecclesiastical Court may very well examine the same matter." No doubt exists on this point in [173] any of the writers who have treated on the subject: *Degge*,^(d)

^(a) *Risby v. Wentworth*. Prohibition upon a sale for tithes; and grounds his prohibition upon the statute of 31st of Elizabeth, supposing that the said parson had committed simony in coming to the parsonage; and thereby the church was void, and the tithes not appertaining unto him. And it was agreed, per Curiam, Glanville absente, that a prohibition lay not; for the simony might more aptly be tried in the Spiritual Court, *Croke Eliz.* 642.

^(b) All the Court held that the prohibition lay not: for as to the first, although the presentee came in quasi per usurpation, yet because it is by means of a simoniacal contract which is the cause thereof (for otherwise it is to be intended that he would not have permitted that presentment) it was held that it was as well a simony as if the grant had not been void. And, as to the second, they held it to be simony; for there be not any accessories in simony; but all are principals therein, as well as in trespass; and it appertains to the Spiritual Court to determine it, and not to this Court to meddle therewith. And when the Spiritual Court hath so sentenced it, this Court ought to give credence thereto, and ought not to dispute whether it be error or not, &c. &c. &c. *Croke Eliz.* 789.

^(c) *Boyle v. Boyle* was a case in which a prohibition was moved for to the Spiritual Court in a cause of jactitation of marriage, *Com.* 72.

^(d) The fourth paragraph (of the 31st of Elizabeth) preserves the ecclesiastical jurisdiction that they may proceed judicially to censure the parties for their corruption in buying and selling church preferments. Wherein, as should seem, the ecclesiastical laws, in some circumstances, are more severe than this statute; for by that law, as I take it, he that is convicted of simony is after incapacitated not only to that living, but to all other church preferments; but of this be informed by the canonist. *Degge*, p. 61.

Bishop Gibson (Gibson, 798-801), and the author of Watson's Incumbent (Watson's Clergyman's Law, c. 5). The books of practice too are clear and explicit. In Clarke's Praxis the mode of proceeding is pointed out. Si (Clarke's Praxis, tit. 132) clericus commisit simoniam in obtinendo beneficium ecclesiasticum, potest sive ex officio judicis, sive ad instantiam partis conveniri ac juxta sanctiones canonicas puniri, sic etiam laici participes ejusdem criminis.

This passage has been adopted by Oughton to its full extent (vol. i. tit. 4).

Judgment—Sir John Nicholl said the authorities were satisfactory with respect to the principle; but directed a search to be made for any cases which might have been decided in the Ecclesiastical Courts.

[174] Feb. 3.—Phillimore cited the case of *The Office of the Judge promoted by Lucy v. The Bishop of Saint David's*,⁽ⁱ⁾ in which the Delegates were unanimously of opinion that the Ecclesiastical Court was fully competent to try the question; and finally affirmed the sentence of the Inferior Court, by which the bishop had been found guilty of simony.

Per Curiam. Let the citation issue.

Easter Term, May 8.—There having been a misnomer in the citation, it was alleged, on the part of Mr. Dobie, that he proceeded no further in that suit; and the same day fresh letters of request from the chancellor of the diocese of Winchester were presented and accepted by the Dean of the Arches, and the cause was commenced anew between the same parties.

[175] June 15.—The citation having been served and returned into Court, Denne, proctor for Mr. Masters, exhibited a proxy and prayed articles.

June 22.—The articles not being ready, further time was prayed on behalf of the promotor. To this objection was taken by the proctor of Mr. Masters; the judge said that in criminal suits the rule was always observed that articles should be exhibited on the next Court day after they had been prayed, and dismissed the suit.

[176] ZACHARIAS v. COLLIS. Prerogative Court, Hilary Term, Feb. 10th, 1820.—

The will of a naval officer in favour of an agent on the advance of money requires very clear proof of the animus testandi; it is not valid when executed as a mere security for debt. Will annulled.

Judgment—Sir John Nicholl. This case respects the will of J. Malbon, an officer in His Majesty's Navy. It is propounded by Zacharias, the sole executor and universal legatee named in it, and opposed by Mrs. Collis, a sister of the deceased, who, with three other sisters, and a brother, are his next of kin.

As the will of a person in the sea service, it rests, in some respects, on peculiar considerations; for it is the policy of the law of this country, and of several others, to grant special indulgences, and to extend special protections, to the testamentary intentions of this class of persons. In some particulars they are excused from observing the formalities required from other members of society, as in the case of nuncupative wills. While, on the other hand, greater formalities and special modes of attestation are in some respects required [177] as to their written wills; not, however, for the purpose of imposing restraints and disabilities upon them, but in order to protect them against fraud and imposition, and to secure due effect to their real testamentary intentions. In both respects the law appears to be founded in reason and justice: for it is to be observed that this class of persons, generally speaking, are, in early life, separated, in a great degree, from the rest of society; and have not the same opportunities which others have of acquiring, imperceptibly, the knowledge of ordinary

(i) Deleg. February 22, 1699. The Court was composed of a full commission, consisting of several Temporal and Ecclesiastical Peers, besides Common Law Judges and civilians. Treby, Chief Justice of the Common Pleas; Ward, Chief Baron of the Exchequer; and Sir Charles Hedges, Judge of the Admiralty, were of the number.

The suit was originally promoted before the Archbishop of Canterbury (Tenison) in a Court held at Lambeth, before the archbishop in person, assisted by six suffragan bishops. Lord Raymond, 447, 539, 545, 817. 2 Warn. 656. Gibs. 1006. Bishop Burnet has given an account of the trial and deprivation of this bishop, vol. ii. 226, and again 250.

business and its forms. They may, therefore, be allowed, in some circumstances, to dispose of their property by will with less ceremony: but for the same reasons they are more liable than others to imposition, and to commit acts of imprudence. They are generally careless, unguarded, open hearted, and little prepared to defend themselves against the artful and designing part of mankind; yet they are more frequently under the pressure of urgent wants; and to procure an immediate supply to those wants (such as an outfit and the like) they will, without thought, comply with almost any conditions proposed to them, not weighing, or even being aware of, the future consequences. These temporary necessities operate upon them as a sort of duress, on the part of those who are to furnish the supply. These are partly the considerations on which the policy of the law is extended to guard the testamentary acts of this class of persons. Their wills are, in some respects, exceptions to the rules applicable to ordinary cases; not indeed exceptions to the great fundamental principle of all [178] testamentary dispositions, the intention of the testator; but to some of the rules and presumptions by which the real intention is to be ascertained.

In this view, approaching the facts of the present case, I may properly look first at the history and character of the deceased party, in order to see how far these general considerations apply to the individual.

The deceased went early in life into the naval service. He became a lieutenant in 1804. He seems to have possessed a full share of that general character which belongs to his profession. He is described by those witnesses who intimately knew him as "extremely careless," "inattentive to business," "unsuspicious, and would sign any thing put before him." We find him returning from sea in 1811, having, as lieutenant, commanded two small vessels: but so negligent in keeping his books that his accounts could not be passed; and his pay and allowances were in consequence stopped. His own agent, Mr. Stanger, though probably not indisposed to assist him, was yet so far in advance that he would advance him no more; and the deceased was at that time in considerable embarrassment.

It does not appear whether he made any applications to his relations, nor whether they were in circumstances to assist him; he was one of rather a numerous family, having a brother and four sisters.

Such was the character and situation of the deceased a short time before the date of this will, which is June, 1811. It appears that he went to [179] Portsmouth either in search of employment or of pecuniary assistance, or of both; for shortly after his return to London, in July or August, he told his uncle, Mr. Malbon, the witness, "that he had been obliged to apply to a Jew at Portsmouth; and to give him a power of attorney to act for him as his agent in order to get him to advance him some money." This is the deceased's own account of his first acquaintance with the executor and universal legatee named in this instrument. It accords also with the result of the evidence given by Zacharias's own witnesses; for it is in no degree proved that any previous intimacy or regard subsisted between the parties; or that any other consideration led to this will than the advance of money.

This brings me to the evidence offered in support of the factum of the instrument; and certainly it is as meagre as can well be imagined.

It may hardly be necessary to observe that the factum of an instrument means, not barely the signing of it, and the formal publication or delivery, but proof in the language of the conditit "that he well knew and understood the contents thereof, and did give, will, dispose, and do in all things as in the said will is contained." It is true that, under some circumstances, all this may be proved by presumption only, arising from the mere act of signing: but, under other circumstances, more direct proof of the "knowing and understanding," of the "willing and disposing," may be necessary.

[180] On the conditit, which pleads the factum of this will, two witnesses have been examined; one the shopboy of Zacharias; the other, a friend who was in the habit of lending his aid in attesting similar instruments. The former, Morris Jacobs, who, at the date of the instrument, was under seventeen years of age, deposes in substance as follows:—"That he went to live with Zacharias, a navy agent and shopkeeper, in Point street, Portsmouth, as clerk, and to attend his shop, in 1811, and continued in his employ until November, 1812. That he had no knowledge of Malbon till sometime after he had been in Zacharias's employ: but before June he had seen Malbon, who was then a lieutenant, several times at Zacharias's house, with

whom he appeared to be rather intimate; and who, to deponent's knowledge, had done services to the deceased, by assisting him with money more than once previous to the said month of June. That on a day in June the deceased, who had not got a ship, had called on Zacharias, and was sitting with him in a parlour behind the shop. Deponent was called by Zacharias from the shop into the parlour; and Mr. Rumley, a slopseller, and near neighbour of Zacharias's, was sitting with them. That Zacharias then gave deponent a printed form of a will, which he had previously filled up in his own handwriting, and told deponent that Lieutenant Malbon had already read it, that it was his will; but that he, the deponent, was then to read it over to him; the deponent thereupon immediately read the said will all over, audibly, slowly, and distinctly, to [181] Lieutenant Malbon, in the presence of Rumley and Zacharias; that the deceased appeared to approve the same, and immediately executed it by signing his name, and by sealing it, and by publishing it as his will." He then states that Rumley and he attested it; and that the deceased was of sound mind. "That, immediately after the transaction was completed, he saw Zacharias give the deceased some bank notes." He says to the fourth interrogatory, "That Zacharias was a navy agent, and kept a shop for the sale of slops and other articles."

Sixth interrogatory. "That he has no recollection of having seen the deceased at Zacharias's house after he executed his will."

Eighth interrogatory. "That he supposes and believes the deceased was, at the time of executing the will, indebted to Zacharias for monies advanced to him; he does not know whether there was or was not any intention on the part of the deceased to benefit Zacharias further than by enabling him, as executor, to satisfy the debt due to him out of his effects; or whether the deceased did or did not intend to deprive his relations of all his property after payment of his debts; nor can the respondent form any belief on the subject."

Tenth interrogatory. "That Rumley is a wholesale and retail slopseller in Point street."

The other witness, Rumley, deposes, "That he has been acquainted with Zacharias ten or twelve years; and having always had a good opinion of him, as being a man very correct and particular in the transaction of his business, he hath frequently [182] attended at his house, and seen many instruments such as orders for prize-money, wills, and powers of attorney, executed by seamen and officers, and has attested them; at some times he did not see the person write his name; but then he invariably saw such person seal and deliver such power of attorney or will, 'as his act and deed;' and asked him if the signature was his handwriting, and took care to be quite satisfied that the person, so executing the same, was not intoxicated, and was of sound mind."

He then says, "That he cannot bring to his recollection either having ever seen the deceased, or any part of the transaction;" but, seeing his own signature of the attestation, he says "he is quite certain he either saw the deceased sign his name, or seal and deliver the same as his act and deed;" and did also fully satisfy himself that the testator was quite "sober and of sound mind."

To the eighth interrogatory, he says, "That he cannot answer whether the will was or was not executed as a collateral security for the payment of any debt; neither can he form a belief whether there was or was not any intention in the deceased to benefit Zacharias, farther than by enabling him, as executor, to satisfy any debt due to him out of the effects, nor whether he did or did not intend to deprive his relations of all his property after payment of his debts."

This is the whole evidence of the factum; and it amounts only to proof that the deceased did execute some instrument. The lad Jacob says that Zacharias desired him to read it over to the de-[183]-ceased, and he read it accordingly. This seems a strange ceremony to be performed by this shopboy to an officer in full health, who (as Zacharias said) had himself read it before. Rumley has no recollection of any such ceremony: nor was it one of those ceremonies which he, in his great caution, was accustomed to require. Jacobs says that the deceased published it as his will. Rumley says "that the usual form of executing powers of attorney and wills was to seal and deliver it as his act and deed," which, in truth, is the common way of executing sealed instruments such as this is upon the face of it. Without then giving implicit belief to every syllable stated by Jacobs speaking upon a recollection of five years; frequently (it may be presumed) called in like Rumley to attest wills and powers; nothing in this particular transaction to fix minute circumstances upon his

memory: there is no proof that the deceased knew the nature and import of the instrument which he executed, or that he himself declared it to be a will. The more natural instrument for an officer to execute to his agent was a power of attorney; his own description to his uncle, on his return to London, is that "he had given him a power of attorney to act for him as his agent in order to get him to advance him some money."

But it is urged "here is execution by a person in full health and capacity, and you must presume knowledge of the contents and import of the instrument;" and in ordinary cases the observation is true; but it is for the consideration of the Court whether the same presumption arises under the cir-[184]-cumstances of the case. Here is a distressed young officer, naturally of a very careless turn in matters of business, getting supplies of money from the slopseller, ready to sign any thing that might be put before him as a security; and here is the slopseller, for the advance of a few pounds, obtaining a security which may convey to him thousands, in exclusion of the testator's nearest and dearest relations; and, in addition, here is this striking circumstance that, immediately upon the execution of the instrument, Zacharias hands him over some bank notes; looking more like the valuable consideration advanced for some security than accompanying the voluntary disposition of property by will. It seems hardly possible not to suspect that some imposition was practised, and that the deceased was ignorant of the nature and effect of the instrument which he signed. The transaction takes place in this back-room behind Zacharias's shop. No intervention of any professional person. The instrument filled up by the most suspicious of all persons, by the executor and universal legatee himself; a printed instrument with the King's arms at the top, and a seal at the bottom, like a power of attorney, or legal security; only Zacharias's friend and the shopboy present; and, what is singular, it is not stated even by the lad, whose memory is so good, that the deceased uttered one single word in the whole course of the transaction, except the mere formal execution. Here he is in distress; anxious to get his money, signs the instrument, without any great probability that he attended to the lad's reading it [185] (if he did read it), receiving the bank notes and the whole is finished; for Jacobs, though he lived seventeen months subsequently in Zacharias's service, never saw the deceased afterwards.

Here is no previous declaration of any intention to dispose of his property by making a will in Zacharias's favour leading up to this act; here is no evidence of any subsequent recognition by mentioning that he had executed this will, or done any act to benefit Zacharias, except the declaration to his uncle that he had given him a power of attorney to act as his agent.

It becomes proper then to consider whether the instrument is proved to have been executed as a will, or only as a security for a debt; and if as a security for a debt from a seaman to his agent, whether it will have the legal operation of being something which it was not intended to be, namely, a testamentary disposition of the deceased's whole property in exclusion of his relations.

To lead to such a will, there is no appearance of any previous intimacy or regard; there is no trace of the deceased having had any knowledge of Zacharias till he went to Portsmouth a short time before the date of the instrument.

That the instrument was given merely as a collateral security for a debt, direct evidence can hardly be expected. The Court can only have circumstantial evidence: and proof of that sort is sufficient. The circumstances satisfy me in this case; even the attesting witnesses will not venture a belief that it was executed for any other purpose.

It is said in argument that there is no proof of [186] a will and a power of attorney having been executed at the same time; but Zacharias has not produced any power of attorney, nor proved that any other instrument than the will was ever executed. Take it either way; either that only one instrument was executed, or that two were executed. If only one, then here is the deceased's own declaration that it was a power of attorney. If two instruments, then the case comes more directly in circumstances within the authority of the leading case of *Craig v. Lester*, to which I shall presently advert.

The executor, aware that collateral aid was necessary to support the factum, gave in a supplemental allegation pleading continued affection, declarations and recognitions of this will; but the proof has totally failed. The only witness produced to it is Laing,

a shoplad, who succeeded Jacobs; and all he says is, that he overheard some conversation in which the deceased, after his return from abroad, expressed obligations to Zacharias. Supposing the conversation overheard to be as stated, it is not inconsistent with the deceased's ignorance of the nature and contents of this instrument. It might only accompany an assurance that he would immediately discharge his debt; that he, Zacharias, should be the first person that he would pay out of the prize-money he had acquired: for the fact is, that he immediately paid him, and took all his concerns out of his hands.

It is quite clear that he was suspicious of him, and was displeased at a difficulty in getting back some money he found out that he had overpaid [187] him; and was obliged to take a watch as one mode of balancing the account.

It is unnecessary to go minutely through the history of this part of the case; but it may be proper to observe that though the Court can seldom rely on single declarations as evidence of intention, yet the uniform tenor of declarations to confidential friends is of considerable weight.

The deceased, in his unreserved intercourse with his messmates, while abroad, with whom he was particularly intimate, never speaks with regard of Zacharias, nor recommends him to their notice; he remits home two thousand pounds, not to Zacharias, but to Findlay and Co. Immediately on his return he again appoints Stanger to be his agent, and pays off Zacharias.

Residing in London from that time till his death, being about five months, he repeatedly talked over his family affairs with his uncle, and some other old friends with whom he lived in the most unreserved confidence; he spoke of Zacharias in terms of great harshness and reproach. He talked of making a will, and of disposing of the bulk of his property to one favourite sister, Mrs. Collins, in preference to his other sisters, and his brother; he had even made an appointment with a professional person in order to carry these testamentary intentions into effect; but died unexpectedly before the time appointed. In all these conversations there was no hint that Zacharias was to be an object of his testamentary bounty; no suggestion that he had ever made a will in his favour: on the contrary, he declared "he had made no will."

[188] This evidence bears upon the case, not as admissible to affect the validity of an instrument, the factum of which had been fully established; but as tending to shew that the deceased never knew or intended this instrument to be a will; that he supposed it to be a mere power of attorney or a collateral security for the repayment of the money Zacharias had advanced to him.

Another part of the evidence may bear upon the case in the same way; and, further, it may raise some question upon the point of revocation.

The deceased had desired Zacharias to deliver up all his papers. Zacharias sent an order to his sub-agents in London, Hunt and M'Adam, to deliver them up; and they professed to have done so. The deceased desired a friend who was going to Portsmouth in December to call on Zacharias, and to enquire if he had any other papers. This witness accordingly applied to Zacharias, who told him he had delivered up all papers. "That he had no papers whatever belonging to the deceased in his possession. That he had long before sent them all to Hunt and M'Adam, in London; but that he would look again." Some days afterwards Zacharias told the witness "that he had looked through his papers, and that he had not a single paper belonging to Mr. Malbon." And yet all this time Zacharias had in his possession this will which he never produces till after the deceased's death; but immediately on the death he produces it, coming up from Portsmouth, and is sworn to the probate in four days after Captain Malbon died.

Looking to the whole tenor of the evidence, [189] there appears no doubt that if at this time, about a month or six weeks before the deceased died, the will had been delivered up, it would have been cancelled. Captain Malbon might indeed have been surprised by the appearance of such an instrument; for, in these enquiries after his papers, there is no allusion whatever to any will being in Zacharias's hands: but, if any belief is due to the evidence, it is almost morally certain that the deceased would, in some manner, have revoked this will, had it not been fraudulently kept back and concealed by Zacharias. Captain Malbon, however, died while intending to make a will quite of a different tenor: that intention was intercepted in its progress by unexpected death.

These are the facts of the case; and out of these facts the Court is to consider the legal result.

The statute of William, in consideration that wills and powers of attorney were obtained from seamen without them being aware of their contents and effect, rendered the will absolutely void, if embodied in the same instrument with a power of attorney; thus holding the presumption conclusive *juris et de jure* that the party did not know and intend that the instrument should operate as a testamentary disposition.

The case of *Craig v. Lester (a)*¹ followed not long [190] after the statute; and in that case Sir Charles Hedges decided, and his sentence was affirmed by the Delegates, that the will was invalid, though executed on a different instrument. It was in that instance executed at the same time with a power of attorney, and by a seaman in favour of his agent as a mere security for a debt. It has been said that this was a bold stretch of the statute. It is, however, to be recollected that this was not a restraining but a remedial and protecting statute, in order to defend this valuable, but unguarded, class of persons, against fraudulent imposition. It was not going beyond the spirit of the statute, nor departing from the principles of law and sound reason, to hold that an instrument, understood to be for one purpose, should not have an operation quite different, and much more extensive, when obtained from an unguarded seaman in the hands of his agent.

In the case of *Leake v. Harwood*, before Doctor Bettesworth, the will was set aside "as a security for a debt."

In the case of *Anderson v. Ward*, before Doctor Bettesworth, 1749, the will was set aside "as a security for a debt," though there was evidence of the deceased having declared that his wife had used him ill.

In the case of *Moore v. Smart (a)*² (or *Stevens*), [191] before Sir George Lee, in 1753, from a note in the handwriting of the learned judge himself who decided the case,

(a)¹ Deleg. 11th June, 1714. Mr. Justice Blencow, Mr. Baron Bury, Sir Nathaniel Lloyd (the King's Advocate), Dr. Herriott, and Dr. Henchmen, were the Judges Delegates present when sentence was given.

(a)² *Moore, formerly Arundell, Attorney of Moore against Stevens, Attorney of Smart, and Smart*.—A mariner's will given as a security for a debt, set aside.

Dr. Jenner for Moore. John Smart, mariner, on board the "Augusta" man of war, made his will on December 14, 1745, and appointed Thomas Moore his sole executor and universal legatee, who is now abroad, and acts by his wife as his attorney. The deceased gave instructions to Mr. Pike, of Plymouth, for making this will, who drew it up accordingly; and it was executed at the house of Dr. Martyn, then Mayor of Plymouth, who, together with the said Pike, and one Norton, witnessed it. Elizabeth Moore, as attorney of her husband, propounded the will; and it was first opposed by the deceased's mother; but is now, since her death, opposed by Stevens, as attorney for Christian and Hellen Smart, the deceased's sisters.

Dr. Hay for the sisters. Martyn and Pike, two of the subscribing witnesses, were utter strangers to the deceased; and Newton, the third witness, is not examined, or any account given of him. The identity of the testator is not sufficiently proved; but if it was, the will was only made to secure a debt from the deceased to Moore; and is, therefore, void by stat. 9 & 10 W. 3, . We have not pleaded.

Evidence for Moore.

I. William Martyn, M.D. John Smart, the testator in this cause, on or about December 14, 1745, applied to the deponent, as Mayor of Plymouth, to witness his will. He produced a will ready written, and duly executed it in the presence of the deponent and the other subscribing witnesses, and was of sound mind.

Second interrogatory. The said Smart was an utter stranger to the deponent: he believes he executed a letter of attorney at the same time.

II. Abraham Pike. John Smart, mariner, of the "Augusta" (as he styled himself) gave the deponent instructions for the will propounded; the deceased [afterwards proved and executed it in the presence of Dr. Martyn, Norton, and the deponent, and was of sound mind.

Second interrogatory. To the best of the deponent's memory Smart executed a letter of attorney to Moore at the same time.

Third interrogatory. Smart was an utter stranger to the deponent.

Sixth interrogatory. Cannot depose whether the will was made to secure a debt or not.

III. Robert Inis. The deponent well knew John Smart, of the "Augusta," who he

which has been furnished by Dr. Phillimore, it clearly appears that the will was set [192] aside on the ground of its having been merely a security for a debt. Sir George Lee held this to be a settled point. The ground is so stated clearly and distinctly by the judge himself as the [193] foundation of his sentence. It does not appear to have been considered as at all important that a power of attorney should have been executed at the same time; nor would that circumstance operate as [194] any guard or protection to the seaman, being so easily evaded by executing the instruments on different days. The true principle always relied upon has been that an instrument executed as a security for a debt shall not operate as a disposition of the whole property, unless the intention that it should so operate be made clearly to appear. But where that intention has been shewn, the wills have been established.

In the case of *Hay v. Mullo*, 1756,(c) before the [195] same judge, Sir George Lee, takes to be the testator in this cause. The deponent and he went together, in the "Ruby" man of war, to the East Indies, where Smart died.

Second interrogatory. Verily believes, but cannot positively depose, that John Smart, the testator in this cause, and he that died in the "Ruby," was the same person.

Sixth interrogatory. Believes that the will was made to secure a debt to Moore.

Seventh interrogatory. Believes the name John Smart to the will is the said Smart's writing, but cannot be positive.

Eighth interrogatory. Has heard and believes that the deceased was indebted to Moore at his death; believes the will and power was a security for the said debt.

IV. Judith Hall. The deponent knew John Smart of the "Augusta," afterwards of the "Ruby;" believes he was the testator in this cause, for he was an acquaintance of Moore's, and indebted to him.

Sixth interrogatory. Believes the will was made to secure debt, for the deponent has heard Elizabeth Moore say the overplus of the deceased's effects after her husband's debt was paid was to go to Smart's mother.

Eighth interrogatory. The deponent knows that Smart the deceased in this cause was indebted to Moore, and believes the security for the said debt was the will.

V. Thomas Christy. Believes the deceased, John Smart, in this cause was the same John Smart that died in the "Ruby."

Sixth interrogatory. Does not believe that the deceased intended to leave all his effects to Moore; but only to secure his debt to him.

Seventh interrogatory. The respondent has seen the deceased write. The name subscribed to the will looks like his writing: but cannot be positive it is so.

Eighth interrogatory. Knows the deceased was indebted to Moore; heard him say he had given a will, power, and bond to the said Moore, to secure the said debt to him.

Dr. Jenner for Moore. Identity is proved from the several witnesses taken together: they should have pleaded that the will was made to secure a debt; it ought not to be proved upon interrogatories, because we have no opportunity of counterpleading.

Dr. Hay for Smart. *Craig and Leicester*, Prerog. December, 1713, and afterwards in *Deleg.* *Harwood and Lake*, Prerog. January, 1739. *Anderson and Ward*, Prerog. Trinity Term, 1756. In all those cases the wills of mariners were set aside, because they were made only to secure debts.

Judgment.—I was of opinion the identity of the testator was tolerably well proved: but I thought it sufficiently appeared that this will was made to secure a debt to Moore; that from the cases cited and others it was a settled point that wills made by seamen to secure debts were void; that the evidence, therefore had generally arisen upon interrogatories, and not upon pleas; particularly it was so in the case of *Ivis* against *Preston and Brown*, Prerog. June 25, 1741, where the proof was much slighter than in the present case: but yet that will was set aside.

I, therefore, gave sentence against this will of Smart's, and pronounced him to be dead intestate, so far as appeared to me: but did not give costs.—From Sir George Lee's Manuscript Notes.

(c) *Hay against Mullo*, Prerog. June 23, 1756.

George Hay, a mariner, dying in 1749, a bachelor, left a mother and two sisters, living in Scotland. On the 14th of May, 1739, he, with his own hand, filled up the

and also from a note in his own handwriting, it appears that as there was no proof that the will was made to secure a debt; but this rested only in the belief of a witness; and on the contrary it was proved by two witnesses that the deceased, a short time before his death, had expressed a great esteem, regard, and friendship for Mullo, and said his will and power were there, and that he had made a will in favour of Mullo, and in fact had suffered the will to subsist for above twelve years, though he was often in England, and might have revoked it if he had intended his relations should have his effects, he pronounced for the validity of the will.

In *Douglas v. M'Cumming*, before Sir George Hay, 1773, the will was also established on similar grounds.

In both these cases it is to be observed there was [196] evidence of affection and regard, and of intention to benefit by will; and neither the statute nor the decisions meant to make the relation of agent and seaman, nor the circumstance of the seaman being indebted to his agent an absolute defeasance of the will, so that it could, in no case, be valid; but only so far to alter the onus probandi as to require evidence of intention beyond the mere act of execution. The law meant to protect the real intentions, and not to disable the seaman from disposing according to his real wishes.

In *Lander v. Young*, before Doctor Calvert, 1785, the will was established upon the ground that the proof of the intention was sufficient, and that the testator understood the nature and effect of the instrument, saying, "It should be good if he died." "If he died, he hoped God would bless him (the executor) with it;" "that he had rather Young (the executor) should have it, than the chest at Chatham;" so that there was direct proof that the testator knew that the instrument was to operate after his death, that it would convey his property to the executor, and that he intended it should have that effect.

In *Forbes v. Burt*, 1789,(d) before Sir William [197] Wynne, the will was set aside,

blanks of a printed will, and executed it in the presence of two witnesses; appointing David Mullo, with whom he then lodged, executor and universal legatee; in December, 1750, Mullo took probate; in Michaelmas Term, 1752, the mother cited him to bring in the will, and prove it by witnesses. He propounded it, and fully proved the factum of the will; the mother did not plead, but cross-examined the witnesses. William Gillespie, the only surviving testamentary witness, said he had been witness to a will and power from the deceased to Mullo, and on interrogatories that he believed the deceased's circumstances were not great in May, 1737; that he was then a mate of a ship, but afterwards became a master; that he (the witness) does not know nor ever heard, but believes, the said will was made to secure a debt to Mullo, as the deceased had lodged some time at Mullo's house; and the respondent has heard the deceased say that Mullo was indebted to him. The counsel for the mother admitted the factum of the will: but insisted it was void as being made to secure a debt.—From Sir George Lee's Manuscript Notes.

(d) *Forbes v. Burt*.

The deceased was quarter-master on board an East India ship; and died, while on service at China, in 1783, leaving a mother and sister his only next of kin. Two wills were propounded: the one dated the 3d of November, 1759, on board the "Princess of Orange," by which he gave all his property to his mother for life; and, after her death, to his sister: the other dated the 27th of September, 1770, by which all his property was bequeathed to Andrew Burt, a grocer, at Wapping, who was also the sole executor named in the instrument.

Sir William Scott and Dr. Battine were counsel for Burt.

Dr. Harris and Dr. Nicholl for the mother of the deceased.

The cases cited in argument were *Hovson v. Allen*, Michaelmas Term, 1785. *Craig v. Lester*, 1713. *Leake v. Harwood*, 1737. *Anderson v. Ward*, 1749. *Moore v. Smart*, 1756. *Hay v. Mullo*; *Lander v. Young*, 1785. *Brown v. Langley*; *Douglass v. McCallin*, 1763.

Judgment—Sir William Wynne. Two wills are propounded of Andrew Forbes: one dated on the 10th of September, 1770, in which Andrew Burt was sole executor and residuary legatee; the other on the 3d of November, 1759, in which Ann Forbes, his mother, is executrix; the effects are left to her for life, and then to his sister.

The will of 1770 is propounded in a condidit, with additional articles pleading that the two subscribed witnesses are dead, and their character and handwriting.

not on the ground that it was given as a mere security for a debt, for the Court was of opinion that the circumstance was not sufficiently proved; but upon the ground [198] that the evidence of the factum was insufficient to support such a will. The judge said, "It is extremely material that it should be proved the deceased knew it was a will, and not a power of at-[199]-torney; there were no recognitions of the act; no proof that the instrument was ever in possession of the deceased; strong evidence of affection for his mother and sisters, and that he was about mak-[200]-ing a will in their favour; upon the whole, that he could not apply the principle of the will being

Three witnesses are produced. Partridge speaks to the handwriting of both, and remembers one of them telling him that he and Scott had attested the will of one Forbes, to oblige Burt. Each of the others prove the handwriting of one of the subscribing witnesses; there are two witnesses then to each of their subscriptions.

There is a second allegation pleading acquaintance from 1769; that he had advanced money to him without interest, particularly 200l.; and that on account of these favours he was in great friendship with the deceased; that he lodged with him, and he exhibits several of his letters; that at several times in 1775, 1778, 1780, and 1782 the deceased signed orders authorizing Burt to receive two months of his pay; that on October 2, 1782, just before he sailed on his last voyage, he purchased 500l. 3 per cents. in the joint name of himself and Burt, and declared it was for the benefit of the survivor; that Burt never charged interest or commission, and lent him 45l. to make up the purchase. It alleges his handwriting and recognitions of the will, especially in his last illness. When he was asked by a shipmaster to make his will, he said his only friend, Burt, had his will.

Only one witness deposes to the handwriting. She was examined on the 18th of December, 1787; and says, that in October, 1782, she once saw the deceased write his name to an order; and that this was the only time she ever saw the deceased write.

The connection between Burt and the deceased is fully proved. He was received as one of the family; he always lodged there, and employed Burt as his agent; two letters are exhibited in 1770, and others in 1771; the subject of them was the impressment of the deceased; and he desires Burt to use his influence to get him off. He expresses his obligations to Burt, says Mr. Hamilton's expense must be great, &c. "and you may be sure of being repaid; you have laid out five or six guineas; need be under no apprehension, &c.;" this is written near the time of the will, but there is no mention of it.

The letters of attorney are produced; it is said by the witness that it is usual to give security at the India House, and for the person who is security to receive two months' pay. There is no proof of the purchase of the 500l. 3 per cents., nor is there any proof of the alleged declarations.

The whole evidence then is, that it is proved by two persons acquainted with the witnesses; that the subscriptions are their handwriting, and that they were men of character, and the declaration of one that he had subscribed, with the other, the will of one Forbes. There is no proof of the handwriting of the deceased but by one witness who had once seen him write seven years before; this is the only proof of the fact. There is general evidence that there was connection between the parties; friendship, on the part of the testator, and the employment of him as agent.

It has been asked what is wanting to establish the fact, the witnesses having died. A great deal more might be done: there is no proof that the instructions came from the deceased; there is no proof that the will was read to or by the deceased. In answer it may be said that the proof would arise from the witnesses who are dead, one of them often employed in writing in the whole business; it is usual for a will to be read over in the presence of the subscribed witnesses; it is usual, but it is not always so; their death does not supply the want of proof. The executor may have taken the instructions himself; and, therefore, cannot prove it: this is his own fault. There is no proof that the witnesses were unknown to the testator; it appears rather that they were, from the declaration; namely, that he had witnessed the will of one Forbes to oblige Burt; this is exactly the way in which a man would speak who had witnessed the will of a person whose name he only knew at the desire of the executor; and if this is proved by living witnesses—that he had attested the will of a person whose name was Forbes—it will not suffice, for it is necessary to establish the identity. Where there is such a connection between the testator and the executor as exists here,

a mere security for a debt, because there was no proof of any debt; but in the failure of that [201] clear proof of the factum which the circumstances of the case required, he should pronounce against the will."

[202] From these cases the result to be deduced is that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also [203] of his knowledge of its nature and effect; that wherever it is executed merely as a security for a debt, it shall not operate as a

such proof is peculiarly necessary. It appears that the will and power were executed in favour of Burt; it is not impossible that he may have been deceived, being an ignorant man; it is necessary to establish by proof, or necessary legal inference, that the party knew what he did and intended it. It is proper to shew declarations; such have been alleged; if they are proved, nothing is wanting, the question could not have arisen; but there is no proof of them. The only evidence is that of a woman servant at Burt's, ten or eleven years ago, who had heard the deceased say, when playing with Burt's children, if he died unmarried what he had should go to them: this does not point to this will.

The finding the will is a question of consequence in such a case; here there is no proof that it even was in the possession of the testator for one moment.

If this was all, it would be a weak case; if there is no evidence to substantiate it, the fact is improbable: but here there is very strong proof in aid of the improbability. Burt is a stranger in blood; he is the executor and residuary legatee. The deceased had near relations, a mother and sister, to whom he shewed every species of affection, which is proved in every possible way. When very young he made his will (in 1759) in favour of his mother and sister; the deceased sent it to his mother; he himself came soon after, read the will, and re-delivered it to his mother; this is proved by the sister, who has released her interest. Another witness knew Forbes from his childhood; he always had great affection for his mother; he corresponded with her, and sent her presents; he was the only support she had.

Chapman knew him twenty years; he spoke very affectionately of his mother and sister; he corresponded with them and sent them money. His sister had not seen him for seventeen years; but they have not made proof of his want of affection for her. In a letter to Burt, in 1770, he says he is glad he has sent her 10l., and that he shall be ready to pay any thing he has.

Another letter is dated August, 1771, in which he writes "be so good as to send 10l. to my mother, who I suppose stands in need of some supply." Other letters have been exhibited as written by the deceased: they are alleged to have been written by him; Burt says, in his answers, that he does not believe the article to be true: that he does not believe the letters to be of the handwriting of the deceased. In a subsequent allegation it is pleaded that it had been discovered that the letters were not written by the deceased, but by Burt. In answer to this he allows that he wrote them; but that the letters were sent without the knowledge of the deceased, who had conceived a disgust at her: but he allows he sent her presents. One of the letters says he has given an order to Burt to send her 10l. annually, which is proved by another letter of Burt's. This proves beyond doubt that a connection was kept up with the mother till 1782, his sending her money and presents, and in his last letter is the mention of annual provision.

There is evidence that he was on board ship in his last voyage down to the moment of his death.

Some objection has been raised as to the regularity of the way in which it is introduced and examined so long after the allegation given by the adverse party: but he had just arrived from an East Indian voyage. It is said it is extra-articulate; the articles allege that he was quarter-master on board the "Stormont," that he had a mother and sister and affection for them.

One witness says he had great affection for them; that he saw him with a bag of dollars, and that he said he could now settle and make his old mother and his sister comfortable.

Another witness says, that when he was confined to his hammock by illness, he spoke with great affection of his mother and sister, and said that he meant to go and spend his money with them; such expressions of affection he used again at another time. A quarter of an hour before he died he used expressions of regard towards

testamentary disposition of the whole property ; but on the other hand, [204] though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid.

Applying these principles to the facts of the present case ; the evidence by no means establishes, to my mind, that the deceased knew he was executing a will, having the effect and operation of giving his whole fortune to Zacharias in exclusion of his family. The evidence on the other hand satisfies me that whatever instrument the

them ; said that he meant they should have all ; that he had no obligation to any other person. This is all articulate, and there cannot be stronger evidence of affection. This witness goes on to speak of instructions for a will ; this, in order to establish such a will would be extra-articulate : but it is consistent as evidence of affection, and it is the strongest evidence of this description. It would be strange if general evidence were to be admitted, and such as this rejected.

Robertson says that a quarter of an hour before his death he appeared to be anxious that it should be understood that he left his mother and sister every thing, and that he desired the persons there to get him a will immediately, and that all should be left to his mother and sister. The witness desired the officer to draw a will, which he did : but before he could get the deceased to sign it, he died. This is confirmed by another witness.

It is objected that these might be only ravings. One witness, however, says expressly that he was sensible : but he is not examined on such a plea ; that he spoke to facts and circumstances, recollected the names of his relations, desired his property might be given to them, for that he had obligations to no other person ; there is full proof of his capacity.

It has been argued as to what would be the consequence if this will had been propounded : but it is not necessary for the Court to enquire into that, for it is not before the Court. The evidence is such that it would have been difficult to distinguish it from the cases where instructions have been taken, and the deceased died before execution ; for the probability is that it was written before the deceased died.

Neither is it a consideration for the Court, whether the will of 1770 is good under stat. 9 & 10 W. III. (c. 41, s. 6). There is no fact to found the law upon.

Under the circumstances deficit probatio, I do not think Burt has brought satisfactory and legal proof that the will of 1770 was executed by the deceased as alleged. The evidence would not amount to it ; and taking in the infinite improbability of his deserting his mother whom he had supported, it clearly will not suffice.

I do not, however, think there is evidence to pronounce that there was fraud ; therefore, it is not a case for costs.

In the course of reading the evidence to the Court, the following objection was taken by Sir William Scott to the introduction of some exhibits which had been annexed to interrogatories.

These exhibits are improperly introduced. Sometimes a witness is allowed to exhibit documents of this description on his depositions : but this is dangerous because it is to introduce evidence in a way in which the other party cannot be apprized of it. These exhibits were in the possession of the party herself, and should have been pleaded ; others of exactly the same kind are pleaded in this very cause ; these are brought forward by the witness only on interrogatories, and admitted by the examiner, which is irregular.

Per Curiam. In the interrogatory the witness is directed to produce and annex any writing of the deceased.

Sir William Scott. But she is not directed to introduce papers in the possession of the party herself.

Per Curiam. The examination of the witness as to competency cannot be objected to, for she has released. These exhibits are produced in consequence of an injunction in the interrogatories. I do not see how I can prevent the reading of them. What weight it will have in the way of evidence with the Court is a different question. When a paper is brought in in this way, though it may be read, it is not made direct evidence. In *Foster v. Wright* many letters were produced by one of the witnesses. Sir George Hay rescinded the conclusion of the cause to allow them to be pleaded, stating that the other was not the proper way of introducing papers on which the cause might turn.

deceased supposed himself to be executing, it was merely in consequence of the money advances made to him by Zacharias, and not with a view to testamentary benefit; and that when he had paid the debt, and taken his papers out of Zacharias's hands, he did not entertain any impression that Zacharias had a further claim upon, or would derive any benefit from, his property after his death. I am, therefore, of opinion that the factum, in the sense already given to that term, is not proved; considering further that Zacharias, when required by the deceased to deliver up all his papers, declared that he had done so; and, after a pretended search, repeated the declaration that he had not a single paper belonging to the deceased in his possession; yet fraudulently retained this instrument, which the deceased himself never saw except at the moment of signing it, under the circumstances already mentioned, I should feel great difficulty in [205] holding the executor and universal legatee entitled to take advantage of his own fraud by obtaining probate of this will. Upon the whole, I feel bound to pronounce against this will: but as Mr. Zacharias is now dead, and his representatives were not privy to the transaction, I shall give no costs.

[206] BRISCO v. BRISCO. High Court of Delegates, Hilary Term, Feb. 15th, 1820*
[See further, 1824, 2 Add. 259.]

An appeal from the Arches Court of Canterbury.

The Judges Delegates who sate under this commission were, Mr. Justice Burrough, Mr. Baron Garrow, Mr. Justice Best, Dr. Daubeney, Dr. Gostling, Dr. Dodson, Dr. Meyrick, and Dr. Jesse Addams.

This cause originated in the Consistory Court of London, in Hilary Term, 1814, by a citation taken out by Lady Brisco against her husband, Sir Wastel Brisco, in a cause for cruelty and adultery. A libel was given in by her, which was met by a recriminatory plea on the part of [207] the husband, she, in her turn, gave in an allegation responsive to the recriminatory plea. On these several pleas a great number of witnesses were examined.

On the 28th of May, 1817, publication of the depositions was decreed. An allegation was then given in on each side exceptive to the testimony of several of the witnesses; the allegation of the husband was admitted. But the judge of the Consistory Court rejected nine articles of Lady Brisco's exceptive plea, and directed two others to be reformed. From this sentence Lady Brisco interposed an appeal to the Arches Court of Canterbury on the 17th of April, 1818: but the inhibition was not returned till the 28th of November of the same year. On the 20th of May, 1819, a question arose in the Arches Court concerning alimony; the Consistory Court had, in Hilary Term, 1816, allotted 200l. per annum to Lady Brisco in addition to the sum of 200l. per annum to which she was entitled for pin-money. It was prayed, on the behalf of the husband, that alimony in the Arches Court should be allotted from the date of the inhibition, and not from the date of the sentence: but the Court decreed that it should be computed from the date of the sentence. From this decision Sir Wastel Brisco appealed to the Delegates.

Dr. Phillimore and Dr. Lushington for Sir Wastel Brisco cited the case of *Gresse v. Gresse* (vol. 1, p. 210), and the judgment in *Loveden v. Loveden* (vol. 1, p. 208), to shew that [208] it was in the discretion of the Superior Court to allot alimony either from the date of the sentence, or from the return of the inhibition; and contended that the delay which appeared on the face of the proceedings in the prosecution of the appeal by Lady Brisco fully justified their praying it to decree the allotment of alimony, in the present instance, from the return of the inhibition.

Dr. Arnold and Dr. Jenner were proceeding to reply on the behalf of Lady Brisco when they were stopped by the Court, who intimated their opinion that the alimony should be paid from the date of the sentence in the Consistory Court.

Per Curiam (Mr. Justice Burrough). Is there any instance where both parties, as they do in the present instance, have prayed this Court to retain a cause when it would be remitted to the Inferior Court?

Dr. Arnold. It is quite discretionary with the Court; it is sometimes prayed, as now, to avoid delay and expense.

The sentence of the Arches Court of Canterbury was affirmed; and the Court retained the principal cause.

[209] STRAUSS v. SCHMIDT. Prerogative Court, Hilary Term, Feb. 14th, 1820.—A recognition establishes testamentary papers which were conditional in their terms: testamentary effect given to three letters.

[Discussed, *In the Goods of Spratt*, [1897] P. 31.]

In June, 1788, George Lewis Hansen, being at Liverpool and on the point of leaving England for the continent of Europe, delivered a sealed paper to Messrs. Heywood and Co., merchants, in that town, in whose hands he had upwards of 2000l. at interest, with directions to them to open it as soon as they should hear of his death.

The letter was as follows:—

Messrs. Heywood, Son, & Co.

Liverpool, 21st June, 1788.

Gentlemen,—In case I should die on my travels, I request the favour of you to remit my money which I have in your bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin; or to deliver it to Mr. John Blackburne, of this place, whom I have requested to-day, in a sealed letter, to remit the money to my said three friends at Zinna, [210] at such a time as the exchange will be favourable to the three gentlemen, which Mr. Blackburne has promised me to do. I hope, from your kindness, that you will in this affair, conjointly with Mr. Blackburne, do for the best.

I have now in your bank 2182l. 18s. 6d. sterling; and shall soon send to you, or to Mr. J. Dennison in London, 2 to 300l. more.

Of all this I give the necessary information to the above mentioned three friends in Zinna. In case I should die, I humbly request you to acquaint the three gentlemen with my said will in the German language, as they do not understand English. Your letters you may address only to one, viz. Mr. C. F. Hansen at Zinna, per Berlin.

I recommend my friends to your kind remembrance; and am, with great respect,
your most humble servant, G. L. HANSEN.

On the first of July, 1788, he addressed the following letter (a) to Mr. I. C. Bangi at Zinna:—

My Dear Beloved Bangi,—How much I shall be able to write to you to-day I cannot at this moment ascertain.

If you know what offensive letters my brother [211] wrote to me sometime ago, you may easily imagine that I was very angry on account of it. My displeasure is so great that I have grown grey and old since; my digestion is very bad; I am no more in good health nor gay. The most clever physicians of Liverpool tell me that nothing but a sea sickness can cure me. I have, therefore, taken the resolution to go to France to try if I can be sea sick, and whether I am able to forget this shameful offence among the merry Frenchmen, and whether I can be easy again in my heart. I got to London a few days ago. All physicians whom I know here are of the same opinion as those of Liverpool, that I can only be saved by a sea sickness; therefore, as I may easily die, I think it to be my duty to write to you from here to inform you what you have to do with my property in case I should die. The cash I have at present in the bank of Messrs. Arthur Heywood, Son, and Co., of Liverpool, amounts to 2182l. 18s. 6d., of which I shall probably take out 206l. 9s.—so that 1976l. 9s. 6d. remain in their bank. I shall shortly remit from France and from Flanders 270l. to 300l. sterling, which sum I do not exactly know: but you may calculate that I have 2270l. to 2280l. in the before mentioned bank of Liverpool. Besides I have to receive of Mr. Lebins, at Newfarwasser, 190l. to 200l.; further, of Mr. Gene, at Stettin, 15l. or 16l., both amounts I cannot exactly say, as I forgot to look over the accounts in Liverpool; it is, however, nearly as much, either a little more or less. Should I die, and these [212] amounts have not been paid, you have to receive them of the above mentioned two gentlemen. Mr. Gene is inspector, and Mr. Lebins bookkeeper, both of the Maritime Trade Company. Should I live another year, I am to receive from 200l. to 250l. of Mr. J. Blackburne, in which case you will receive in June, 1789, 2690l., 2700l. Moreover, there are in Liverpool, at Mr. Blackburne's, a bathing machine, three trunks, and three large chests, with clothes, linen, &c. Echaratt and others also owe me a little. Mr. Peel knows how much it is; and I wish you would receive it. All my money, things, and whatever I may possess, I leave to you and my brother's

(a) This letter was not to be found. Mr. Benson had lost it: but he had a distinct recollection of the most important passages it contained. A draft of it, which had been found amongst the deceased's papers after his death, was propounded.

children, in equal shares, in case I die. Probably you know that one pound sterling makes 6½Rf. to 6Rf. 14ggr. Berlin currency. Messrs. Heywood understand the German language; they were at an academy at Hambro'; you may write to them in German. Mr. Blackburne is my particular friend, a very worthy Englishman. He does not know German; his letters may be translated to you by Mr. Zollner or others. I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open till I am dead. In them I order to transmit my money and effects to Mr. C. F. H., I. C. B., and G. G. Strauss; namely, to Mr. Martin Dormer, Hamburgh, by Mr. Blackburne's vessel. Mr. Dormer is Mayor of Hambro'. You may refer to this in your letters to Liverpool and Hambro'. You will be pleased to direct the letters as follows:—

[213] Arthur Heywood, Son, and Co., Esquires, per "Amsterdam," Liverpool.

John Blackburne, Esquire, Liverpool.

Mr. Martin Dormer, in Hamburgh.

Exactly so, my dear Bangi, Messrs. Messrs. and all titles are quite left out in English letters; you neither say Sir when you write in German. In my sealed letter I requested the gentlemen to send you my money at such a time when the exchange is in your favour, by which Mr. Heywood gains nothing; but you do. The money is sent in bills for which any banker in Hambro', Berlin, Leipzig, &c. will readily pay you cash. Heywood & Co. are very safe and good people; you may, therefore, leave the money with them for years, and as long as you please, as the interest increases the capital. Of the above 218l. 18s. 6d. I have not received the interest. From this year Messrs. Heywood must pay you 5 per cent. interest.

On my journey to Northwick, Liverpool, &c. I lost 4 to 500 ducats, in case they are not at the bottom of my trunk; I have not examined it particularly. If you find them so much the better. You, therefore, must request Mr. Blackburne to get all trunks, chests, &c. well corded and sealed. You take care of the needful in the Prussian dominions about opening, putting leads to it, &c. I think I have written the necessary to you now.

I had gained considerably three years ago: but I lost a great part by chicaneries with which I was not sufficiently acquainted. I shall write to you [214] from France or Flanders if I live. I leave London in a few days. If I do not get sea-sick on the short voyage I shall not go to sea.

It is already late: my best respects to you and all our friends, and I shall never cease to be your true friend.

In September, 1800, the deceased returned from the Continent; and took up his residence in the neighbourhood of London, where he continued till death.

On the 29th of April, 1816, he wrote a letter to F. W. Strauss, the son of G. G. Strauss, from which the following is an extract (a):—

"How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying? Do not think slightly of this case; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c.; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing."

"Bangi never thought it worth his while to speak to me on the subject; hardly a few words; never proposing how and in what manner I could place my money more securely, and to advantage, in your country, either at 5, 6, 7, per cent. interest, or in adventures, &c. He never troubled him-[215]-self about it. Last year I named to him an amount. I suppose he never took the trouble to calculate that I must be possessed of much more money than what I had stated, as he knew that I never drew the interest; but had it added every year to the capital, by which means the same is doubled in fourteen years and a quarter.

"In England all property left without a will, signed by three witnesses, belongs to the king. I have not made a will; for this is even expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool; and in which I wrote him that my brother and Bangi shall have my money in case I should die.

"When my brother died, I informed him that Bangi and your father should receive my money from him. I have not communicated to him yet the death of your father. Bangi is seventy-two, and I am seventy years of age. Consider how precarious,

(a) The remaining part of the letter was wholly of a private nature

how uncertain, we stand. I always hoped Bangi, or my brother, or your father, would have told, or written to me, every particular circumstance, how and in what manner I could place my money securely in your country; but no. This appeared to me strange and made me indifferent."

The deceased died in November, 1818, leaving Charlotte Louisa Bangi, his sister, and a niece, the daughter of his brother, C. F. Hansen, who would have been entitled to distribute his personal property if he had died intestate. His personal estate consisted of 3228l. in the hands of Messrs. Hey-[216]-wood, Son, and Co.; and of property elsewhere amounting to 623l.

The three letters, together with an English translation of them, for the originals were written in German, were propounded in an allegation, as containing together the last will of the deceased, by Johanna Frederica Strauss, widow, the daughter of John Christian Bangi; and, as such, one of the universal legatees under the said testamentary instrument.

Burnaby and Lushington against the admission of the allegation.

Jenner in support of it.

Judgment—*Sir John Nicholl*. This case very much depends on the construction of the papers. The deceased was a German, who had resided fourteen years in England. In 1788 he wrote two of the papers propounded, and then went abroad in search of health; he writes to a house at Liverpool, in case of his death, to send his money to Germany; he had money in their hands; he was not only a foreigner, but he was ignorant of our laws; his expressions, therefore, are not to be construed too strictly; the Court is to look as much as possible to the intention; the first letter is dated from Liverpool in 1788. It is addressed to Messrs. Heywood, Son, and Co., his agents, there; and requests them, in case of his dying on his travels, to remit the money he has in their bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin.

[217] In another part, after stating the amount of the money, he proceeds: "Of all this I give the necessary information to the abovementioned three friends in Zinna. In case I should die I humbly request to acquaint the three gentlemen with my said letter in the German language, as they do not understand English."

A few days afterwards he comes to London and arranges what he clearly intends to be a disposition of his property; his object is to get his money sent out of England. "All my money, things, and whatever I may possess, I leave to you and my brother's children, in equal shares, in case I die;" and in which part he says, "I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open till I am dead."

These two papers together are admitted to be testamentary papers, which would have operated had his death taken place during his absence from England; he was fourteen years absent.

Courts, however, are cautious how they construe conditions of this sort. I have looked whether it is an absolute condition, or dependent on any particular motive operating at the time. It does not say it is to take place only in the event of his dying: if on the return of the deceased in 1802, by subsequent acts he has recognized these papers, I should not hold his return to be such a defeasance as to invalidate the will. If he had returned and taken no notice of the paper, his silence would have put a construction on it; if, on the other hand, his conduct shews that he was mindful of [218] it, the Court is bound to carry his intentions into effect.

The case turns on the construction of No. 3: it is dated in April, 1816; it is addressed not to one of the three persons to whom the money was to be remitted, for events had changed; two of them were dead; the third had become advanced in life; he writes to his great nephew, directing and informing him, and there are passages which shew that he considered the papers as conveying directions respecting his property, especially No. 1, and No. 2 mixed up with No. 1. The parties who were to inherit were not dead. "How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying? Do not think slightly of this case; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c.; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing."

It is said this shews the loose way in which he expresses himself; and so it does; but these are the parts which more expressly recognize them.

"In England all property left without a will, signed by three witnesses, belongs to the king; I have not made a will, for this even is expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool, and in which I wrote him that my brother and Bangi shall have my money in case I should die."

This is a direct recognition of the existence of a letter which was not to be opened till after his [219] death; he goes on recognizing this direction; he keeps the disposition alive. "I have not communicated to him yet the death of your father."

I think the deceased did not consider his return to this country as a revocation. These circumstances shew that he regarded these letters as important, which were to direct the disposition of his property; and, therefore, I think the Court is warranted in admitting this allegation to proof.

[220] SALMON AND OTHERS v. CROMWELL. Prerogative Court, Hilary Term, Feb. 23rd, 1820.—Admission of an exceptive allegation suspended.

Judgment—*Sir John Nicholl*. The Court at all times admits exceptive allegations with caution, and they are seldom introduced with effect. This case is not a favourable one for an exceptive plea.

The question at issue is, whether an interlineation was or was not inserted by the deceased himself; the part interlined conveys, to the benefit of Mary Cromwell, from 20,000 to 30,000*l*. An immense mass of evidence has been produced; the witnesses excepted against are not examined to the interlineation which is the main point in the cause; but merely to a general conversation from which some inference may possibly be drawn; but which bears but distantly on the main fact. Where the main fact depends on the evidence of some particular witness, and it is necessary to weigh the credit of that witness nicely, the Court is less averse to admitting an exceptive allegation.

If the Court could not get at a satisfactory conclusion, but by nicely examining the credit due to these witnesses, there would be little hope of any satisfactory conclusion. Added to this, they have already undergone a pretty long examination; and I shall be very well able to estimate the degree [221] of credit to which they are entitled. What is the sort of exception? They are asked whether they made certain declarations, and they say "No." This is all that is alleged to affect their credit; and it really would go a very short way; if the witness herself should not recollect her declarations, it would but slightly affect her credit; but still less so would it affect that of one who speaks to so remote a fact; it is hardly justice to the party to allow such an expense to be undertaken; and this observation applies more forcibly to the second witness; so slight a circumstance will not justify me in admitting this allegation. What I propose to do is, to let the cause go on; and if I find this testimony material to the issue, I will then consider whether I will not rescind the conclusion of the cause to allow the witnesses to be examined on this exceptive plea; and I wish the counsel to argue upon it, *de bene esse*, if they think they can derive any benefit from it.

[222] GILLIAT v. GILLIAT AND HATFIELD. Prerogative Court, Hilary Term, Feb. 23rd, 1820.—Probate not necessary for a will appointing testamentary guardians.

Per Curiam. From the decisions which have taken place it is quite clear that it is not necessary that a will appointing testamentary guardians should be proved in this Court.

[223] PARHAM v. TEMPLAR. Arches Court, Easter Term, May 8th, 1820.—An appeal from the dean and chapter of Exeter lies to the Court of Arches, and not to the Consistory Court of Exeter.

[Referred to, *Ritchings v. Cordingley*, 1868, L. R. 3 Adm. & Ec. 119.]

An appeal from the peculiar jurisdiction of the dean and chapter of Exeter.

Articles were exhibited in the court of the dean and chapter of Exeter, by Benjamin Parham, of Ashburton, in the county of Devon, against the Reverend John Templar, curate of the parish, for altering a pew in the nave of the church. The court decided that John Templar had, improperly and without due authority, divided the seat in question; enjoined him to restore it to its former situation, and to certify the same within two months; but it declared that the seat, when so restored, would not be the exclusive property, or belong solely to the family of the Dolbeares under whom

the plaintiff claimed either by possession from time immemorial or otherwise; but that the same might be [224] allotted to the plaintiff, and his family; and also, part thereof assigned to any other family or persons.

Each party litigant thought themselves aggrieved by this sentence. Templar appealed to the Consistory Court of Exeter, whereas Parham brought his appeal into the Court of Arches; there the adverse party appeared under protest, and contested the jurisdiction; and the following act on petition was entered into by both parties.

Christian exhibited as proctor, and made himself a party for the Reverend John Templar, the party cited; but, nevertheless, under protestation to the jurisdiction of the Arches Court of Canterbury, in this behalf, and with all due deference alleged that this is a business of appeal and complaint of nullity, as asserted, promoted, and brought, by Benjamin Parham, of the parish of Ashburton, in the county of Devon, within the peculiar jurisdiction of the dean and chapter of the cathedral church of Saint Peter, in Exeter, and within the diocese of Exeter, as the party appellant and complainant against his said party the Reverend John Templar, clerk, the curate or officiating minister of the aforesaid parish of Ashburton, as the party appellant, which was originally a certain cause of the office of the judge, and lately depending in the peculiar court of the venerable the dean and chapter of the cathedral church of Saint Peter, in Exeter, at the promotion of the said Benjamin Parham against the said Reverend John Templar, clerk, touching and concerning his soul's health, and the lawful correction and reforma-[225]-tion of his manners and excesses, and more particularly for his having (as it was alleged) altered a certain seat or pew in the nave or body of the church of Ashburton aforesaid, of and belonging to the said Benjamin Parham, whereby he had caused to be reduced and taken away from the length thereof two feet ten inches or thereabouts, and from the width four feet one inch and a half or thereabouts, without the licence or faculty of the ordinary or other lawful authority whatever, from a certain interlocutory decree, whereby the Worshipful and Reverend James Carrington, clerk, Bachelor of Laws, official or surrogate of the venerable the dean and chapter of the said cathedral church, did, on the 19th day of March last past, amongst other things pronounce that the said John Templar had, improperly and without due authority, divided the seat in question; and that he, therefore, be enjoined to restore it to its former situation, and to certify the same within the space of two months from the date of such decree. But further declare that the pew in question in the said cause was not the exclusive property, or belonging solely to the family of the Dolbeares, under whom the plaintiff claimed either by possession from time immemorial or otherwise; but that the same may be allotted to the plaintiff and his family, and also a part thereof assigned to any other family or persons for the better accommodation of the parishioners, at the discretion of the churchwardens; and did moreover order and decree that each party should pay and [226] discharge his own costs. Now the said Christian alleged, and humbly submitted, that from the said interlocutory decree or judgment it is on behalf of the said Benjamin Parham unduly appealed to this Court, inasmuch as the right of appeal in the first instance from the jurisdiction of the said court of the dean and chapter of the cathedral church in Saint Peter's, in Exeter, as well in all causes *ad instantiam partis* as *ex officio* notoriously belongs to the lord bishop of the diocese of Exeter, or his chancellor or officer for the time being, and does not lay directly to the Arches Court of Canterbury, and to the right honourable the official principal thereof, and has so belonged to the said diocesan court by ancient and immemorial usage; and further alleged that in and by a certain instrument in writing, purporting to contain a composition or agreement made and entered into on or about the first day of May, in the year of our Lord 1616, and registered in the books of the said dean and chapter, between the Right Reverend William, by God's providence, lord bishop of Exeter; Barnaby Gooche, Doctor of Laws, chancellor to the said lord bishop; the dean and chapter of the said cathedral church of Saint Peter's in Exeter; Matthew Sutcliffe, dean of the said cathedral church; Thomas Barrett, archdeacon of Exeter; William Hutchinson, archdeacon of Cornwall; William Parker, archdeacon of Totton; William Hellyer, archdeacon of Barum; and the custos and college of vicars choral of the said cathedral church; it is recited [227] that whereas there had been theretofore and then was divers questions moved between the said parties touching the execution of the ecclesiastical jurisdiction within the said diocese of Exeter for clearing of which said questions and for the settling and establishing of a peace and certainty therein

for ever thereafter between the said parties and their successors, it was thereby concluded, agreed, manifested, and declared, by and between the said parties, for them and their successors, upon search, view, and due examination of divers instruments, evidences, and records remaining in the several registries and custodies of the said parties, that the execution of the said ecclesiastical jurisdiction of the said parties shall be bounded, limited, and for ever thereafter used and exercised by the said parties and their successors, and his, their, and every of their officer and officers within their several jurisdictions respectively, in manner and form as is therein expressed and declared. And the said Christian further alleged that it was and is amongst other things therein expressed, declared, and provided in the words, or to the effect following:—"That the said bishop likewise, or his chancellor, shall hear and determine all causes as well ad instantiam partis as ex officio brought unto him or them by way of appeal, complaint, negligence, recusation, or provocation from the said archdeacons, dean and chapter, dean and custos, and college, or any of them." And the said Christian brought into and left in the registry an official copy of the said com-[228]-position or agreement which he alleged to have been duly examined with the register book of the said dean and chapter, and to agree therewith, and to be signed by Ralph Barnes, chapter clerk and notary public, as a true copy thereof. And the said Christian lastly prayed that by reason of the premises the right honourable the Judge would pronounce in favour of the protestation by him made and interposed in this behalf to relax the inhibition heretofore issued at the prayer of the proctor of the said Benjamin Parham, and to dismiss the Reverend John Templar, his said party, from the said pretended cause or business of appeal with costs. In the presence of Bush who exhibited as proctor for the said Benjamin Parham dissenting and denying the allegation of Christian in great part to be true, and alleging that the right of appeal from any decree or sentence of any dean and chapter exercising peculiar jurisdiction, or their commissaries or officials within the province of Canterbury, does by law and ancient and immemorial custom lay in the first instance to this Court and to the official principal thereof, and not to any intermediate or inferior judge; that the dean and chapter of the cathedral church of Saint Peter, in Exeter, and their predecessors, have for time immemorial exercised and do still exercise ecclesiastical jurisdiction within and over the whole parish of Ashburton aforesaid, and divers other parishes in the counties of Cornwall and Devon; that the same is a peculiar jurisdiction, and is exempt from the lord bishop of the [229] diocese of Exeter and his vicar general and official principal; that the said parish of Ashburton and the other parishes within the said peculiar jurisdiction have, for time immemorial, been exempt from the visitation of the bishop of the diocese of Exeter, and are not visited by him nor by any person exercising ecclesiastical authority under him. And he further alleged that it does not appear that the pretended composition or agreement mentioned and referred to by Christian was ever executed by the persons who are therein mentioned and described as parties thereto; and the said Bush humbly submitted to the law and judgment of the Court that if the same ever was duly executed by the said parties, yet that it is invalid, so far at least as in any way relates to the right of appeal from the peculiar jurisdiction of the said dean and chapter of the cathedral church of Saint Peter in Exeter to this Court; and that the right of such appeal could not be altered or in any manner affected thereby. Wherefore the said Bush prayed the right honourable the Judge of this Court to overrule the protest of the said Christian; and to assign him to appear absolutely for the said John Templar, and to condemn the said Christian's party in costs.

Christian dissenting and alleging that whatever may be the law or practice as to the right of appeal from any decree or sentence of any dean and chapter exercising peculiar and exempt jurisdiction by their commissaries or officials within the province of Canterbury, appertaining in the first [230] instance to this Court and to the official principal thereof, and not to any intermediate or inferior judge, such usage would not, as he humbly submitted, be founded in any case in which the jurisdiction of the Court appealed from was not both peculiar and exempt; and he further alleged that the jurisdiction of the said dean and chapter of the cathedral church of Saint Peter, in Exeter, is exempted only from that of the lord bishop of the diocese as ordinary, and his vicar general and official principal, in those instances which are mentioned and declared in the aforesaid composition or agreement, and no other which was not so entered into as before alleged without diligent search, view, and due examination

of the instruments, evidences, and records remaining in the several registries or custodies of the parties thereto respectively, nor the entry of the said composition or agreement made in the register book of the said dean and chapter of Exeter without the original having been duly executed by the several persons who are therein described as parties thereto. And he further alleged that the jurisdiction of the bishop of the said diocese or ordinary has never been parted with except in the particulars set forth in the said agreement: but has been constantly and immemorially exercised by the said bishop or his vicar general and official principal to whom the same by law and practice (as he further submitted) does in the first instance exclusively appertain in all cases of appeal from the decrees and sentences of the Peculiar Court of the said dean and chap-[231]-ter, as also solely and without any concurrence in all matters of ecclesiastical cognizance not formerly declared to belong to the said peculiar jurisdiction in and by the agreement or composition before referred to. Wherefore he prayed the inhibition of Bush to be rejected, and as before.

Swabey for Mr. Templar. It is not true universally, as stated, that the appeals from all deans and chapters within the province of Canterbury are to the Court of Arches; in the royal peculiars they go to the Court of Delegates. By the civil law appeals go to the next Superior Court. The Statute of Appeals (24 H. VIII. c. 12) gives the course of appeals; if there is any difference in the canon law, this statute controuls it.

Per Curiam. Is the dean and chapter mentioned there?

Swabey. Certainly not: but the archdeacon is. No usage is alleged in this peculiar; and the statute is not intended to vary the course of the canon law further than is expressed by the Council of Clarendon, 1104, temp. Hen. 2. The appeal is from the archdeacon to the bishop, *et aliis inferioribus prælatis*. X. 1, 4, 2. Gibson, 1036. I take the jurisdiction of the dean and chapter to be derived from the bishop; then, if there is no composition or custom, the right of the bishop remains. Stillingfleet (*Ecclesiastical Cases*, 346) is to the same effect.

[232] But the (c) composition of 1616 leaves no doubt. It is stated to have been

(c) The following is a copy of the composition:—

To all Christian people to whom this present writing shall come,

William, by God's providence, Lord Bishop of Exeter; Barnaby Gooche, Doctor of Law, Chancellor to the said Lord Bishop; The Dean and Chapter of the Cathedral Church of Saint Petter, in Exeter aforesaid; Matthew Sutcliffe, Dean of the said Cathedral Church; Thomas Barrett, Archdeacon of Exeter; William Hutchinson, Archdeacon of Cornwall; William Parker, Archdeacon of Totton; William Hellyar, Archdeacon of Barum; and The Custos and College of Vicars Choral of the said Cathedral Church, send greeting, in our Lord God everlasting: Whereas there have been heretofore, and now are, divers questions moved between the said parties touching the execution of ecclesiastical jurisdiction within the diocese of Exeter aforesaid, for clearing of which said questions, and for the settling and establishing of a peace and certainty therein for ever hereafter between the said parties and their successors. Now know ye that it is concluded, agreed, manifested, and declared, by and between the said parties for them and their successors (upon search, view, and due examination, of divers instruments, evidences, and records, remaining in the several registries or custodies of the said parties), that the execution of the said ecclesiastical jurisdiction of the said parties to these presents shall be bounded, limited, and for ever hereafter used and exercised by the said parties and their successors, and his, their, and every of their officer and officers within their several jurisdictions respectively in manner and form following:—First, that the said Dean and Chapter, their successors and officers, shall for ever hereafter solely and without any concurrence prove (in common form) all testaments (except the testaments of knights, beneficed men, and such as are *de robâ Episcopi*) and grant letters of administration of the goods of all parties deceased (except knights, beneficed men, and such as are *de robâ Episcopi*) within all their several peculiars within the said diocese (*viz.*) Colyton, Shute, Muncton, Braunscombe, Sidbury, Salcombe, Culmestock, Topsham, Heavetree, Clithonyton, Stoake Cannon, Littleham, Ide, Dawlish, East Teignmouth, St. Mary Church, Kingskerswell, Coffinswell, Staverton, Ashburton, Bickington, Buckland, Norton, and Colebrooke, within the county of Devon; and St. Winnowe, St. Nectan, Bradock, Boconuock, Pieran in Zablo', and St. Agnes, within the county

made on a search into all the evidence in the custody of all the parties to determine for the future the jurisdiction between [233] the bishop and his chancellor on the first part; the dean and chapter of Exeter and the dean on the second; the archdeacons on the third; and the custos and vicars choral on the fourth. The [234] dean and chapter without concurrence grant probates, administrations, except of the rights, &c. and within their peculiar hear and determine without concurrence all causes ad instantiam partis. [235] So the dean does likewise; so the archdeacons as to probate of wills, &c. and hear and determine with concurrence. The bishop and chancellor solely and without concurrence exercise all juris-[236]-dictions within the peculiars, and throughout the diocese, and grant all faculties.

Per Curiam. Does the bishop visit within the jurisdiction of the dean and chapter?

Swabey. No, the bishop does not visit there.

Per Curiam. Do the bishop of London's licences prevail within the jurisdiction of the dean and chapter of St. Paul's? I am desirous to learn as much as I can of the general usage which is asserted in the act and not denied.

Swabey. I apprehend they do not: but the right of trying causes by appeal is inherent in all dioceses where it is not barred by composition or custom.

Per Curiam. If there be a jurisdiction to hear causes without concurrence, and no visitation on the part of the bishop, does it not almost follow that the appeal does not lie to the bishop? Especially [237] if this be according to the general custom of the province?

Swabey. In the case of bona notabilia in two peculiars of the same diocese the probate belongs to the bishop. This is constantly so exercised. It is the same in the

of Cornwall; and also solely and without any concurrence hear and determine within their said several peculiars all causes as well ad instantiam partis as ex officio.

Secondly, that the said Matthew Sutcliffe, Dean of the said Cathedral Church, and his successors, and his and their officer and officers, shall for ever hereafter, solely and without any concurrence, prove in common form all testaments (except before excepted) within the parish of Braunton, in the said county of Devon, and the Close of the said Cathedral Church of Saint Peter, in Exeter; and also, solely and without any concurrence, hear and determine within the said parish of Braunton and Close aforesaid all causes as well ad instantiam partis as ex officio. Thirdly, that the said Custos and College of Vicars Choral and their successors, and their officer and officers, shall for ever hereafter solely and without any concurrence prove (in common form) all testaments (except before excepted) and grant letters of administration of the goods of all parties deceased (except before excepted) within the parish of Woodbury, within the said county of Devon; and also, solely and without any concurrence, hear and determine within the said parish of Woodbury all causes as well ad instantiam partis as ex officio. Fourthly, that the said Thomas Barrett and his successors, within the said archdeaconry of Exon, and his and their officer and officers (salvo semper jure Decani). And the said William Hutchinson, and his successors, within the said archdeaconry of Cornwall, and his and their officer and officers; and the said William Parker, and his successors, within the said archdeaconry of Totton, and his and their officer and officers; and the said William Hellyer, and his successors, within the said archdeaconry of Barum, and his and their officer and officers; shall for ever hereafter, solely and without any concurrence, within their said several archdeaconries respectively, prove (in common form) all testaments (except the testaments of knights, beneficed men, and such as are de robâ Episcopi) and grant letters of administration of the goods of all parties deceased (except of knights, beneficed men, and such as are de robâ Episcopi), and have and shall have concurrent power with the bishop to hear and determine all causes as well ad instantiam partis as ex officio, within their said several archdeaconries, respectively. Fifthly, that the said Lord Bishop, and his successors, and his and their Chancellor for the time being, or any of them, shall and may for ever hereafter, solely and without any concurrence, at his or their will and pleasure within all the peculiars of the said bishop, viz. Crediton, Sandford, Kennerleigh, Morchard Epi., Nymett Epi., Tawton Epi., Sambridge, Landkey, Chudleigh, Teington Epi., West Teignmouth, Painton, Marledon, Stoak Gabriel, within the county of Devon. And Lezant, Lanhitton, South Petherwin, Trevenne, Larack, St. En, St. Germans, Egloshaille, Breock, St. Ervin, Padstow in dune, Merdin, St. Issie,

diocese of London. A list of causes has been produced from 1749 to the present day. In that list there appear to have been two appeals to the bishop, the latter of which was deserted before the libel was given. In the books of the dean and chapter there are twenty-five cases in which there have been protestations of appeal to the bishop; and, on the other hand, there is no instance of any appeal to the metropolitan: (d) the usage is all one way.

Phillimore contra. It is not intended to deny that in general the appeal lies from the archdeacon to the bishop; or that it can only be taken from the bishop by composition or custom.

But the argument is—First. That this is a peculiar exercising episcopal jurisdiction. Secondly. That from all such peculiars the appeal lies to the archbishop, and not to the bishop. Thirdly. That there is no valid composition; for that of 1616, to which the archbishop was no party, could not oust his jurisdiction. Fourthly. That the practice is so contradictory that it cannot avail in argument against general principles.

[238] First. The jurisdiction is denominated a peculiar in those proceedings; and it is not denied to be exempt from episcopal visitation.

Secondly. The rights of a dean and chapter are essentially different from those of an archdeacon; and no instance has been produced of an appeal from the peculiar of a dean and chapter to a bishop. In the statute 24 H. 8, c. 12, which had for its object the destruction of the ecclesiastical jurisdiction of the Pope, and the regulation of the course of appeal which was to be substituted for it in this realm, the appeal is directed to be from the archdeacon to the bishop. No other mention is made of any appeal from the dean and chapter to the bishop. The sixth section enacts that if the

St. Euvall, Petrock parva, St. Gerance, Anthony in Roseland, Gluvias, Budock, Miler, Mabe alias Larape, within the county of Cornwall aforesaid, use and exercise all manner of jurisdiction whatsoever; and within the residue of the said diocese the bishop or his chancellor, solely and without concurrence, shall have power to dispense in all causes to grant all manner of licences, sequestrations, and relaxations, and generally to do whatsoever is not formerly declared to belong to the said Archdeacons, Dean and Chapter, Dean and Custos and College, or to some of them as aforesaid. The said bishop likewise or his chancellor shall hear and determine all causes as well ad instantiam partis as ex officio, brought unto him or them by way of appeal, complaint, negligence, recusation, or provocation, from the said Archdeacons, Dean and Chapter, Dean and Custos or College, or any of them. Lastly, that the said bishop, his or their chancellor or officers for the time being, shall and may for ever hereafter, once in every three years complete, visit all the said dioceses (except the peculiars of the said Dean and Chapter, Dean and Custos and College of Vicars and their successors) and during the time of such visitation (which shall not be held at any time in Easter week or in the week next before Easter) the said bishop, his successors, his or their chancellor or other officers for the time being, shall or may prohibit the said several archdeacons and their successors from doing and attempting any thing in prejudice of such visitation, during the time of such visitation which shall be for the time of two months and no longer; the said two months to be accounted from the time of execution of such inhibition upon the said several archdeacons respectively; and during the said two months the jurisdictions of the said archdeacons shall wholly cease, and the same be exercised by the said bishop or his chancellor in all things saving in such causes whereof they the said archdeacons were possessed before the execution of the said inhibition; and that after the end of the said two months the said archdeacons and their successors shall and may resume and exercise their several jurisdictions respectively without any relaxation or other leave whatsoever. In witness whereof the said parties have hereunto put their several seals. Given the five and twentieth day of March, in the year of the reign of our Sovereign Lord, James, by the grace of God of England, France, and Ireland, King, Defender of the Faith, &c the fourteenth, and of Scotland the nine and fortieth, and in the year of our Lord God One thousand six hundred and sixteen, and of the consecration of the said Lord Bishop the eighteenth.

A true copy examined with the Register Book of the Dean and Chapter of Exeter, the first day of May, 1816, by me Ralph Barnes, Chapter Clerk and Notary Public.

(d) One appeal was entered to the Prerogative Court of Canterbury.

suit be commenced before the bishop diocesan or his commissary, (d) the appeal shall [239] lie to the archbishop; and Gibson holds that this is to be extended to all who have episcopal jurisdiction; and he cites the case of *Johnson v. Ley* (Skinner, 589. Gibson, 1305) in which the dean of Salisbury, having made letters of request to the dean of the Arches, a prohibition was refused at the suit of the bishop. In that case it was stated that there were three sorts of peculiars: 1st. Subject to the bishop; 2d. Not subject to the bishop, but to the archbishop; and the 3d subject to neither.

In *Robinson v. Godsalve* (Gibson, 1036. 1 Lord Raymond, 123) it was ruled that where an archdeacon has a peculiar jurisdiction, he is totally exempt from appeal to the bishop. The deaneries of St. Paul's and of Lichfield are mentioned in the Year Books (Rolls. Abr. Ayliffe, 417, 419) as exempt from episcopal jurisdiction.

Thirdly. If the representatives of peculiar jurisdiction (within a diocese) and of the diocesan meet together, and enter into a composition, no such agreement can be held to affect the rights of the archbishop who is no party to it. Here the very terms of the composition do not constitute them peculiars; but state them to be before constituted [240] peculiars. Besides, the instrument is imperfect, and there is no proof that it was ever executed.

An affidavit has been made by Kemp, the registrar both of the dean and chapter, and also of the Consistory Court. He states that he finds appeals from the decrees of the dean and chapter interposed to the bishop, and then to the arches; if this were proved, it would be something in support of the pretension; but no trace appears of any such appeal. He adds that faculties for seats and monuments in churches within the jurisdiction of the dean and chapter are frequently granted in the bishop's court. If so, they have been erroneously granted; otherwise they would afford evidence of a concurrent, and not of a peculiar, jurisdiction on the part of the dean and chapter.

An affidavit has been made by Ellard, a proctor, practising in both courts, who declares that he has made search, and finds two causes in which appeals were lodged to the bishop's court, one of which was compromised, and the other, from the dean and chapter's court, deserted; and he produces a very long list of causes originally, and in the first instance brought in the Episcopal Consistorial Court of Exeter, although the parties cited resided in the peculiar of the dean and chapter.

The inference from this statement is that the practice of such courts can be of no avail in regulating our practice; the conduct of courts in which such irregularities have prevailed cannot affect the decision of the case.

The Court took time to deliberate.

[241] *Judgment*—*Sir John Nicholl*. This is an appeal which has been brought to this Court in a cause instituted before the dean and chapter of Exeter, the suit arising originally out of the erection of certain pews in a church without the consent of the ordinary. On the part of Mr. Templar, the respondent, who appears under protest, it is contended that this appeal is unduly brought.

[The Judge then stated the substance of the protest, and the reply to it.]

(d) V. And furthermore in eschewing the great enormities, inquietations, delays, charges, and expenses, hereafter to be sustained in pursuing such appeals and foreign process, for and concerning the causes aforesaid, or any of them, do therefore, by authority aforesaid, ordain and enact, that in such cases where heretofore any of the King's subjects and residents have used to pursue, provoke, and procure, any appeal to the See of Rome; and in all other cases of appeals in or for any of the causes aforesaid, they may and shall from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise, that is to say, first, from the archdeacon or his official if the matter or cause be there begun; to the bishop diocesan of the said see, if in case any of the parties be aggrieved.

VI. And in likewise if it be commenced before the bishop diocesan, or his commissary, within fifteen days next ensuing the judgment or sentence thereof, there given to the Archbishop of Canterbury, if it be within his province; and if it be within the province of York, then to the Archbishop of York; and so likewise to all other archbishops in other the King's dominions as the case by the order of justice shall require; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts. 24 H. 8, c. 12.

Now, without going into any further details of the case, it is manifest, I think, that the sole question at present to be decided is whether the appeal lies to this Court or not. And, in considering that question, it it may be proper to examine, first, how such appeals, and more particularly appeals from deans and chapters, lie of common right and by the general law; and then to examine how far the general law is controuled or supported in this particular instance.

Appeals, in some instances, are regulated by statute. Thus the statute of the 24th of Henry VIII. c. 12, is principally for the purpose of preventing appeals from being carried to Rome. It enacts "that in all cases ecclesiastical, the final decision shall be of the king's authority; that the first appeal (if it began in this court) in every such cause shall lie from the sentence of the archdeacon to his diocesan, from his diocesan to the archbishop of the province, and from the archbishop to the king." This statute says nothing of [242] exempt jurisdictions to which even the act of the succeeding year (the 25th of Henry VIII. c. 19) applies only in one respect: it enacts "that appeals from certain abbottries, monasteries, and other religious houses, which had theretofore been exempt, and whose appeals had always gone directly to the Pope, should, for the future, be made to the King." This statute, therefore, applies only those peculiars which had before been wholly exempt from the jurisdiction both of the diocesans and the archbishop, and which appealed only to the See of Rome; these were now directed to carry such appeals before the King; therefore, neither of these acts directly applies to the present case. The statute regulating appeals from archdeacons does not appear to me to regulate any appeals from deans and chapters; for a dean and chapter are of a higher rank than an archdeacon. The dean himself is next to the bishop in rank by right of his office and constitution. A dean is continually styled, we find in ecclesiastical records, "*archi-presbyter*:" but an archdeacon is styled "*archi-diaconus*." And a dean is, in some respects, co-ordinate with a bishop. There are, indeed, functions (such as ordination and confirmation) which can be performed only by a bishop: but the dean and chapter has, in some instances, a controul over the bishop, while the archdeacon is only an officer of the bishop, and is sometimes called "*oculus episcopi*," subordinate to him, and supervising for him. If deans and chapters had been comprehended in the 24th of King Henry VIII., the appeals in all [243] cases must have been to the diocesan. But we know the fact to be otherwise, even at our own doors; for thus an appeal from the dean and chapter of Saint Paul's lies not to the Consistorial Court of the bishop of London, but to the Arches Court of Canterbury. It seems to me, therefore, that the jurisdiction of a dean and chapter is superior to that of an archdeacon; and is not necessarily comprehended in the statute. Even archdeacons themselves may, I apprehend, have their peculiars; and, in that case, they would not be bound by the statute of Henry VIII., which applies to the ordinary cases of archdeacons presiding in jurisdictions, where they are subject to the superior jurisdiction of the bishop, and not to cases of peculiars.

Before, however, I consider the nature of all peculiar jurisdictions, it may be proper to consider, in some degree, what is the true description of a dean and chapter. Lord Coke, in his Third Report (p. 3, 75), speaks of deans and chapters, and tells us what they are. He says that they are the council of the bishop; the *senatus episcopi*; *episcopi confratres*, *consilarii*, et *assessores*; and, in the second place, he says, "They must consent to every grant of the bishop, in order legally to bind his successors; and, thirdly, they elect him." Fitzherbert says the same thing relative to the necessity of their consent to grants and so forth, and considers the bishop with the dean and chapter rather as one body than as two distinct or [244] different bodies; but we very well know that appeals do not lie from one co-ordinate to another, but from a subordinate to a superior authority. In the Fourth Institute (p. 338), it is declared that if the bishop appoint a commissary for the more remote and distant parts of an extensive diocese, which commissary is called "*commissarius foraneus*," the appeal will not lie from that commissary's decree to the chancellor of the Consistorial Court of the diocese, but immediately to the Metropolitan Court; and this very case occurs in the diocese of Winchester where, from the commissary of Surrey, the appeal does not lie to the chancellor of Winchester, but to the dean of the Arches. So, likewise, as I have before observed, the appeal from the dean and chapter of St. Paul's, having a commissary of their own, does not lie to the bishop, but to the archbishop. It has been said in the course of the argument, and has not been contradicted,

that in all other instances the appeal lies from the dean and chapter to the Court of Arches. This has not been denied; and if the fact be so, it will furnish a very strong presumption indeed against the claim set up on behalf the dean and chapter of Exeter. I should be very sorry, however, to rely too strongly on that fact; merely because it has been asserted on the one side, and has not been contradicted on the other. I have made some enquiry into the subject (upon which I may presently have one or two observations to make), without being able distinctly [245] to ascertain whether in all instances the appeal lies from the dean and chapter to the Court of Arches. I may, however, observe that, having searched into the law authorities with considerable diligence, I find nothing to establish a different principle. Deans and chapters are of two descriptions: the one of the old form, and which grew principally out of Papal usurpations; and the other, those which were erected by the Crown in the reign of Henry Eighth, upon the dissolution of the monasteries and religious houses. Each of these have generally some parishes under their peculiar jurisdiction.

This leads me a little to examine what is the nature of a peculiar of any kind. Now the very term "peculiar" "ex vi termini" supposes an exemption from ordinary jurisdiction. And Ayliffe, in his "Parergon Juris," heads his chapter "of peculiars or exempt jurisdictions" as if these were synonymous terms. He goes on to say, "Peculiars are called exempt jurisdictions; not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own." And so Gibson in his Codex, and Godolphin also, though they treat the subject more at large, draw the same conclusion. There are, however, different sorts of peculiars; and they have different rights belonging to them, which must be regulated either by the nature of the peculiar itself, or by ancient usage. There are some more highly exempt than others, I mean royal peculiars; which were anciently exempt from the jurisdiction not only of [246] the diocesan, but of the archbishop also, and which were immediately subordinate to the See of Rome. By the statute of King Henry the Eighth, as already stated, these were placed immediately under the jurisdiction of the Crown; and all appeals from them lie directly to His Majesty in the High Court of Delegates. But the more common sort of peculiars are those in which the bishop has no concurrence of jurisdiction, and are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan within the circle of whose diocese they are locally situated. There is a third description of peculiars which are still subject to the bishop's visitation; and, being so, are still liable to his superintendence and jurisdiction. Wood in his Institute mentions these. He says, "These the bishop visits at his first and at his triennial visitations." Here the appeal lies from the peculiar to the diocesan: but the right of appeal and the right of visitation seem almost necessarily to go together. And in a case that has been quoted in argument, (a) Lord Chief Justice Holt said "that there were three sorts of peculiars; the first royal peculiars, where the appeal is directed to the King; the second peculiars having exempt jurisdiction, such as that of a dean and chapter; and the third where the jurisdiction is not exempt, but under the controul of the diocesan."

The bishop and the dean and chapter, in some respects, within their respective jurisdictions are [247] held to be co-ordinate. This may be inferred, in some degree, from the one hundred and fifty-sixth canon, which recites, "That whereas deans, archdeacons and others, exercising peculiar jurisdiction within certain dioceses, claim liberty to prove the last wills and testaments of persons deceased within their several jurisdictions, but who have no public nor known place of registry for the same; such possessors of peculiar jurisdiction shall, once in every year, exhibit such original testaments in the registry of the bishop, or of the dean and chapter under whose jurisdiction the said peculiars are, &c." Here the canon, while it refers to the jurisdiction of the bishop, at the same time recognizes the peculiar jurisdiction of the dean and chapter. This tends to prove that they are to a degree co-ordinate, and not that the bishop has jurisdiction over the dean and chapter. So again in cases of wills and administrations, where there are "bona notabilia," peculiars are considered as separate jurisdictions, and not as being part of the diocese. For if there be "bona notabilia" in a diocese, under the ordinary jurisdiction of the bishop, and also in a peculiar in that diocese, or in two peculiars situated in the same diocese, in such case the probate

(a) *Johnson v. Ley*, Skinner's Rep. 589.

belongs to the archbishop. It is expressly so laid down by Gibson, Swinburne, and in a case in *Siderfin*; and it is declared by those authorities that in such case probate shall be granted, not by the diocesan, but by the archbishop, because such peculiars are exempt from the jurisdiction of the diocesan. Therefore, if upon "bona notabilia" being so circumstanced the pro-[248]-bate is to be granted by the metropolitan, and not by the bishop of the diocese, nothing can more strongly infer that peculiars are exempt from the jurisdiction of the latter. And my Lord Holt, in a case which is in 6 *Modern Reports*, lays down pretty much the same position. That is an *Anonymous case*: but from the similarity of the subject, and the wording, it appears to me to be the same case as that already referred to of *Johnson and Ley*. Here a prohibition was applied for upon several points: but on the third point Lord Holt says, "All peculiars are not under the ordinary of the diocese in which they lie, and such as are not cannot transmit any cause to that ordinary: such transmission must be always to the immediate superior. The dean and chapter of Salisbury have a large peculiar within the diocese of Salisbury; but as much out of the jurisdiction of the diocese of Salisbury as the diocese of London is. The peculiar jurisdiction of an archdeacon is not properly a peculiar, but rather a subordinate jurisdiction. A peculiar 'primæ facie' is to be understood of him who has a co-ordinate jurisdiction with a bishop." The general result of this is that a peculiar is not subordinate to, but co-ordinate with, the jurisdiction of a bishop. There is another case in *Modern Reports* in which it is still more directly and broadly laid down that appeals from peculiars go, not to the diocesan, but to the archbishop. The case is in the 11th *Modern Reports* (p. 6). "If sentence [249] be given in a peculiar, the appeal therefrom is not to the diocesan but to the archbishop." This, therefore, directly intimates the general rule of our law to be, that these appeals shall not travel to the bishop, but to the metropolitan.

Now upon these authorities the practice, the propriety, and the reason of the thing, lead to the same conclusion; and if the bishop have no concurrence whatever in the hearing of causes, and if the bishop have no right of visitation, he seems to be in no one particular the ordinary of the place: but the peculiar is quoad hoc co-ordinate with the bishop, and the only appeal is to the metropolitan. There may, indeed, have been specially and originally reserved to the bishop some particular acts; such as the granting probate to the will of persons of higher degree, and the granting of licences; and certainly, as far as these exceptions go, the peculiar does not exclude the bishop. But if the peculiar has the hearing of causes as well "ad instantiam partis" as "ex officio," and is exempted from visitation, it should seem, in common propriety, that his superior is not the bishop, but the metropolitan.

I have directed some enquiry to be made into the registers of this Court as to appeals which have been made to its jurisdiction. Carrying back the search above eighty years, to the year 1737, I find that there have been about thirty appeals from different peculiar jurisdictions not diocesan. Some of these have been from deans and chapters, some from archdeacons, and one from a prebendary. There are not less than three and [250] twenty from deans and chapters. And they have been brought from a great many different deans and chapters and deans: from the dean of Sarum, the dean of Litchfield, the dean and chapter of Norwich, the dean and chapter of Wells.

Here are appeals from seven different archdeacons, Canterbury, Northampton, Oxford, Hereford, Ely, Norwich and Huntingdon; and one from the prebendary of Aylesbury. These parties, it should seem, appealed from peculiars; for I should be a little at a loss to account for these appeals from archdeacons, unless in those particular instances the archdeacons had peculiar jurisdictions, and were not to be considered in the ordinary acceptation of archdeacons, but as those having jurisdictions exempt from the bishop; for otherwise the appeal was irregular and in the face of the statute of Henry the Eighth. But I am not aware that one instance is to be found in which an appeal has been brought from deans and chapters to the bishop, and afterwards from the bishop to the archbishop. The conclusion which I draw from this view of the subject is this, that as by the general rule of law a peculiar is not subject to the ordinary authority of the diocesan; so the appeal does not lie from the peculiar, and more especially the peculiar of a dean and chapter, to the diocesan, but to the metropolitan.

The peculiar in question is that of the dean and chapter of Exeter, which is clearly of the species I have just taken a view of; namely, exclusive of the bishop in the

hearing of causes, and exempt [251] from the bishop in point of visitation. The very instrument which has been produced by [the party who objects to the present appeal so asserts the nature of that peculiar to be. It is stated in this instrument that the dean and chapter and their successors shall for ever after do and perform certain acts, and that they shall "solely and without any concurrence, hear and determine within their said several peculiars, all causes, as well ad instantiam parties, as ex officio." But archdeacons in their jurisdiction are only declared to have "a concurrent power with the bishop to hear causes." It goes on to state that the bishop, within his own peculiars, and in the rest of his diocese, shall exercise his own ordinary jurisdiction. And, lastly, the said bishop and his successors are to have visitation and inhibition within certain archdeaconries, &c.; but here again the peculiars of the dean and chapter are expressly excepted out of this right of visitation. So that by this very instrument, brought in by the respondent himself, it is clearly shewn that this diocese follows the general rule of law, that is, that the peculiars of the dean and chapter are completely exempted; that they have the sole right without any concurrence of hearing all causes whatever, and that they are exempt from the visitation of the bishop.

The case then comes to this: Whether this extraordinary anomaly of the appeal lying to the diocesan has been made out, and established by competent authority? Two species of evidence have been offered in support of this part of the case: the one, the agreement or composition; and the other, [252] usage. With respect to this composition it is of no very high antiquity; it seems to have been made not earlier than the reign of James the First, consequently, sometime after the dissolution of the monasteries, and when the jurisdictions to which they became liable had been arranged; nor, as far as respects the right of appeal, were the parties either competent or disinterested persons; for the agreement is made between the bishop, the dean and chapter, the archdeacon, and their officers. It states that this agreement or composition is made upon a view of ancient usage, and upon searching and consulting proper authorities. But it does not state how far any such search was made, nor recite any particulars to prove this ancient usage. In short, whether it may not be altogether irregular and an usurpation, the instrument itself does not afford any means of ascertaining. The search was most probably made, not by the archdeacon or the bishop, or by any of the principals, but by their agents or officers; possibly some practitioners in these Courts not very well versed either in the canon or the civil law of the country. As far as they had conflicting claims, such, for instance, as related to what parishes belonged to each of them as peculiars, these persons might be safely relied on, because they would form a check upon each other. But who was to check them as to this right of appeal? To the officers of the dean and chapter, if they exercised all the original jurisdiction, it was a matter of little consequence, and it could little concern them to what court the causes [253] afterwards travelled; whether they went to the Diocesan or to the Metropolitan Court. But these other persons, the bishop's officers, on the contrary had an interest in saying that the appeal lay, in the first instance, to their Diocesan Court, because it was likely to bring to themselves additional business and additional profits; and in some instances the very same persons might be the officers of the one Court and the other. The suitors, however, to whom this question was one of immense importance, and the metropolitan whose duty it was to protect the rights of all the suitors in the courts of his province, none of these persons were in any degree parties to this instrument. And, therefore, against the general principles applying to the case, the agreement does not appear to me to be sufficient to establish a different rule from that to which I think it to be otherwise liable.

The evidence of usage goes no further back than about the middle of last century; and is of still less effect; for it is so extremely irregular, and, in some respects, so contrary to the agreement itself, that the one defeats the other. Between the years 1750 and 1819 there are about twenty-four cases in the Court of the dean and chapter where the appeal has been asserted to the Diocesan Court. But in all those cases, excepting only two, the appeals were deserted without any application being made to the Diocesan Court, and without any inhibitions being granted; in two instances inhibitions were granted; and of these two, the one was settled by arbitration, and the [254] other was deserted before any libel was given in the cause. So that in point of fact there is no one instance in which an appeal from the Court of the dean

and chapter has ever been brought to a hearing, and prosecuted in the Diocesan Court, still less has the direct question ever been raised and decided, even in that jurisdiction: yet, in order to amount to any sort of authority upon such a point as the present, this Court would require something more than even a decision of the Diocesan Court: it would require the decision either of the Metropolitan Court, or a decision at common law. Nothing of that sort has been produced.

On the other hand, here is a list of about thirty cases occurring at different times, and of all descriptions: profane swearing, brawling in church, erection of pews, divorce cases, cases of nullity of marriage, in short, cases of every imaginable sort that can be brought into an Ecclesiastical Court, and arising within the jurisdiction of the dean and chapter; yet these are all commenced in the Diocesan Court directly in contravention of this agreement itself; for that agreement says that the jurisdiction of the dean and chapter shall be exclusive, and not concurrent. And, therefore, all such instances are manifestly in breach of the rights of the Court of the dean and chapter, and are in direct violation of the agreement. This proves such an extreme irregularity that I confess these other instances have no weight in the opinion of the Court.

It may be further observed that the policy of the law is against the claim which is here set up in the [255] protest. For though the law favours the right of appeal, yet it does not favour the multiplication of appeals. It would be a serious grievance upon the subject to be liable to be dragged through a fourth court before he can get at the final decision of his suit; and, therefore, although where a certain course of appeal is clearly by law established, the suitor cannot go "per saltum" from an inferior to a superior Court, passing over the intermediate Court; yet where no such intermediate Court is already settled and established, the intervention of a fourth jurisdiction would be found productive of great delay and expense. The appeal from this Court is to the Delegates; and to introduce another intermediate Court before the cause arrives here would be that against which the law would very strongly lean, because it would be very highly inconvenient to suitors.

Upon the whole, therefore, I am of opinion that by the general law the appeal from a peculiar, and more especially from the peculiar of a dean and chapter having exclusive jurisdiction to hear and determine all causes without any concurrent jurisdiction whatever, and being exempt from the visitation of the diocesan, lies to the Court of the archbishop; and I see no sufficient evidence in this case to render the dean and chapter of Exeter an exception from the general rule. Upon these grounds I overrule the protest.

[256] REDDALL v. LEDDIARD. Arches Court, Easter Term, May 8th, 1820.—A marriage declared null because the guardians of a minor were not appointed by an instrument attested by two witnesses.

Judgment—*Sir John Nicholl*. This is a suit brought by a woman, acting by her guardian, to declare her marriage void; the facts are clearly proved; the minority of the woman, and the sort of consent given.

The only question is, Whether it was a valid consent? The marriage was solemnized on the 8th of October, 1818. The parties were both minors. The licence was obtained on the oath of the man, swearing that he was of age: but he appears not to have been twenty. The woman is described as a minor with the consent of two persons alleged to be her guardians. It excites regret and disgust to see how lightly these affidavits are made; the man could scarcely not know that he was a minor; more caution should be used with respect to these affidavits; they trifle with the sanctity of an oath in a manner to undermine the very foundation of society. The licence was granted with the consent of the testamentary guardians of the woman, who both appeared and signed the consent. The father and mother were dead: but the father had made a will, and appointed the two persons guardians who have given their consent. But the Court has to consider whether that consent is such as the Marriage Act requires, that is, the consent of the guardians of the person lawfully appointed.

[257] By the common law a father has no right to appoint guardians (12 Car. 2, c. 24, s. 8) by his will, that power was given by statute; this statute enables a father to do what he could not do before; consequently, he must do it according to the requisites of the statute, which are by deed or will attested by two witnesses; the will was not attested by two witnesses, or executed in the presence of two witnesses:

if the appointment has not been made according to the statute they are no guardians at all ; and, therefore, not guardians in the sense of the Marriage Act.

I am under the necessity of pronouncing this marriage to be null and void.

[258] LADY HARRIET BLAQUIERE v. BLAQUIERE. Consistory Court of London, Easter Term, May 16th, 1820.—Allotment of permanent alimony.

Judgment—*Sir William Scott*. The parties having lived together three years after their marriage, separated in 1814, on account of differences : what they were, whether arising from incompatibility of temper, does not appear ; 310l. per annum, the produce of the wife's own fortune, were settled on her ; and this sum has been continued to her ever since. It has occurred in this case that while they were living in that state of separation the husband committed an act of adultery, which possibly might not have occurred in other circumstances. His separate income amounts to 750l. or 800l. ; and the question turns on the deduction of 160l. per annum, the interest of money borrowed for the improvement of a house and land he has purchased in Sussex, which he says, after the improvements are deducted, are not worth more than 160l. per annum ; but it [259] is to be remembered at the same time that he has the enjoyment of this house of which she has no participation. On what ideas this sum of 300l. per annum was originally settled we have no account : it is the bare produce of her own fortune. I cannot think the 160l. per annum quite clear from claim on her part ; she is entitled to some consideration for the want of a residence. At the same time it would be improper to dismiss out of my consideration that there are two sons who are to be maintained in a rank corresponding with that of the father and mother ; and not only to be maintained, but to be educated. I think I shall not depart from a just consideration of the effect of these circumstances if I give a moiety of this 160l. in addition to the 300l. per annum now paid to the wife.

[260] HUNTER v. BULMER. Prerogative Court, Easter Term, May 31st, 1820.—

Where a party intervening in a cause alleges that he proceeds no further, costs given.

Per Curiam. It is almost a matter of course where a party alleges that he proceeds no further to give costs, unless some special circumstances are shewn why he should not be liable.

I think I must give costs. I take it up, not on the merits of the case, but on the general ground that the party is to be condemned in costs, unless he shews special grounds why he should not.

I must in this case adhere to the general rule. Costs are incurred by the intervention. I shall give 10l. nomine expensarum.

[261] BEEVOR v. BEEVOR.(a) Arches Court, Trinity Term, July 9th, 1809.—An application on the part of the husband to be relieved from taxation of the costs of the wife rejected.

Judgment—*Sir John Nicholl*. This is a prayer by the husband to the Court not to tax the costs of the wife, or to relieve him [262] from the burthen of them to such extent as to the wisdom of the Court shall seem meet.

The general rule is that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband. The rule however is not universal—the exception is where the reason fails—where the wife has separate property of her own ; for then marriage does not give all the property to the husband.

That there are exceptions appears by the cases, as in *Furst v. Furst* ; the Consistory Court refused alimony and costs : the Court of Arches refused alimony, but gave costs,

(a) It will be seen from the dates of this case, and of the two which immediately follow it, that they would more properly have found their way into the first volume of this work : but in two of them the editor's notes were very imperfect, and those from which the judgments are taken have only recently come into his possession—the other, viz. *The Office of the Judge promoted by Kemp v. Wickes*, has long been before the public, and in a shape almost as authentic as that in which it now appears : but the importance of the decision has induced a very general wish that these reports should not be closed without including it.

and the Delegates affirmed the sentence of the Consistory (Delegates, 1740). The wife had 200l. per annum, the husband only 100l.; therefore the necessity did not arise.

In *Holmes v. Holmes* (1755) the costs were refused. I suppose there was no foundation for the appeal: it was in a cause for the restitution of conjugal rights.

In *Pomfret v. Pomfret*, where the wife had 2000l. per annum, separate property, the application was made at the conclusion of the cause, when the Court had had an opportunity of seeing that the charge was not duly proved, and refused costs as to that part.

In *Davis v. Davis* (Consistory, 1786) the wife had all the property.

[263] In *Wilson v. Wilson* the wife had 440l. per annum, the husband 400l., and four children to maintain.

These cases shew that exceptions to the general rule exist: but only where the principle of the rule does not apply; where it is not necessary in order to enable the wife to carry on the suit, and to obtain justice.

Here the prayer is in the alternative: to what extent it is prayed does not appear. In the first instance, the expenses are for the consideration of the registrar on taxation—to allow no unnecessary expenses. I presume he will only allow those to which the husband is liable.

It is said there has been delay—the suit commenced in 1802; but it does not appear that it is imputable to the wife to any great extent—there has been some delay in giving the libel. The defendant offered a case in which the Court doubted whether it could give relief—additional articles were brought in—on the whole the Court thought the case laid before it was one which it was bound to entertain. But treaties of agreement from time to time were alleged on both sides. The husband was not pressing on—there is no ground to say the proceedings of the wife were vexatious. Finding a large sum (165l.) taken off, I must conclude that the registrar has taken off the unnecessary expenses—a large sum is still chargeable. But length of time is the consideration—in a degree this is attributable to the husband who entered into treaties. I do not see it is a case in which, on account of delay, I can relieve if it is an ordinary case in which the [264] husband would be liable—is it such? The wife has received 85l. 10s. for the last two years; the husband admits 817l. per annum. He now claims deductions which would leave about 700l. During the suit, in all she has received about 70l. per annum, that is, one-tenth of the income of the husband—this is not the usual alimony.

This is not like the other cases cited—there is not sufficient income to aliment the wife—she could not carry on the suit. That she lives with her mother does not alter the case; her mother is not bound to maintain her. And there is less reason for the husband to make the application, as above 500l. per annum of his income came with the wife. The costs, therefore, are to be taxed in the usual way.

The Court regrets that the negotiation did not succeed: but as the cause is to go on, I shall expect it will proceed with more than ordinary diligence—it is the interest of the public as well as of the parties that there should be no delay.

THE OFFICE OF THE JUDGE PROMOTED BY KEMP v. WICKES. Arches Court, Michaelmas Term, November 9th, 1809.—A minister of the Established Church cannot refuse to bury the child of a dissenter.

[Followed, *Escott v. Martin*, 1842, 4 Moore, P. C. 104. Referred to, *Martin v. Mackonochie*, 1868, L. R. 2 Adm. & Ec. 154; *Read v. Bishop of Lincoln*, 1889, 14 P. D. 109.]

Judgment—*Sir John Nicholl*. This suit is brought against the Reverend John Wight Wickes, described as the Rector of Wardly cum Belton, for refusing to bury the infant child of two of his parishioners. The usual proceedings have been had in the institution of this suit; and [265] articles are now offered detailing the circumstances of the charge proposed to be proved. The admission of these articles is opposed, not upon the form of the pleading, but upon the entire law of the case; it being contended that, if the facts are all true, still the clergyman has acted properly, and has been guilty of no offence. This is certainly the proper stage of the cause for taking the decision of the Court upon the point of law; for, if the facts when proved should constitute no offence, it will only be involving the parties in useless litigation, and keeping alive unnecessary animosity, if they should go on to the proof of these facts. If, on the other hand, the facts are true, and the defendant has, through ignorance of the law, or otherwise,

violated its injunctions, it is the shortest way to admit the facts, and to submit to the legal consequences. It is indeed to be collected, from the mode in which the arguments have been conducted, that a spirit of candour actuates both the parties; they wishing merely to ascertain by a judicial decision what the law is upon the subject, in order to set the question at rest generally, and in order that these particular parties may live in charity and kindness with each other.

The articles plead, in the first place, the incumbency of Mr. Wickes. In the second article the 68th canon is recited, which directs, "That no minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holidays to be christened; or to bury any corpse that is brought to the church or church-yard (con-[266]-venient warning being given him thereof before) in such manner and form as is prescribed in the Book of Common Prayer: and if he shall refuse to christen the one or bury the other, except the party deceased were denounced excommunicated majori excommunicatione for some grievous and notorious crime (and no man able to testify of his repentance), he shall be suspended by the bishop of the diocese from his ministry for the space of three months."

The articles then go on to plead, "That Mr. Wickes did in August, 1808, refuse to bury Hannah Swingler, the infant daughter of John Swingler and Mary Swingler his wife, of the parish of Wardley cum Belton aforesaid, then brought to the said church, or church-yard, convenient warning having been given: that Hannah Swingler died within the parish of Wardley cum Belton, and being the daughter of the said John Swingler and Mary Swingler his wife, who are Protestant dissenters from the Church of England of the class or denomination of Calvinistic Independents, had been first baptized according to the form of baptism generally observed among that class of dissenters; that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend George Gill, a minister, preacher, or teacher, in all respects duly qualified according to law, and of the same class of Protestant dissenters; and that of that fact of baptism Mr. Wickes was sufficiently apprized, upon application being made for the burial of the infant in the church-yard of the said parish in manner and form [267] as is prescribed in the Book of Common Prayer: but he assigned the same," that is, the form of the baptism, "expressly as the ground of his not complying with the said application." Here, then, it is pleaded, and it is undertaken to be proved, and at present in this respect the articles must be taken to be true, that Mr. Wickes did not doubt on the question of fact that the infant had been so baptized; but he refused upon the ground of law, namely, that he was not bound to bury a person of that description. The remaining articles are in the usual form; they are not material to be stated for the purpose of considering the question that is now to be decided.

In these articles it is pleaded that the minister was required by regular warning to bury this infant in the form prescribed by the Book of Common Prayer and by the canon. The canon, not made merely (as has been thrown out) for the protection of the clergy, but made for their discipline also, and to enforce the performance of their duty, prohibits the refusal of burial in all cases except in the case of excommunicated persons, and punishes such refusal; and perhaps the learned counsel who spoke last is correct in saying that by the general description "persons" is here to be understood Christian persons; and therefore that, where application was made for the burial of any persons who might not be considered as Christians, they did not come within the description of the canon. The rubric, however, which is that part of the Book of Common Prayer that contains directions for the performance of the different offices, adds two other [268] exceptions expressly. The rubric before the office of burial is in this form: "Here is to be noted, that the office ensuing is not to be used for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves." And, by the old law, burial was refused to persons of the same description, and indeed of some other descriptions; persons who had fallen in duels, and some others, were interdicted from receiving Christian burial: but here the rubric does expressly state, "That the office is not to be used for persons unbaptized or excommunicated, or who have laid violent hands upon themselves."

These directions, contained in the rubric, are clearly of binding obligation and authority. Questions indeed have been raised respecting the Canons of 1603, which were never confirmed by Parliament, whether they do, in certain instances, and proprio

vigore, bind the laity ; but the Book of Common Prayer, and therefore the rubric contained in the Book of Common Prayer, has been confirmed by Parliament. Anciently, and before the Reformation, various liturgies were used in this country ; and it should seem as if each bishop might in his own particular diocese direct the form in which the public service was to be performed ; but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular liturgy to be used throughout the kingdom. King James the First made some alteration in the liturgy ; particularly, as it will be necessary to notice, in this matter of baptism. Immediately [269] upon the Restoration the Book of Common Prayer was revised. An attempt was then made to render it satisfactory, both to the Church itself, and to those who dissented from the Church, particularly to the Presbyterians ; and for that purpose conferences were held at the Savoy : but the other party requiring an entire new liturgy on an entire new plan, the conference broke up without success. The liturgy was then revised by the two houses of Convocation ; it was approved by the King ; it was presented to the Parliament, and an act passed confirming it in the 13th and 14th Charles II., being the last act which has passed upon the subject ; and so it stands confirmed to this day, except so far as any alteration may have been produced by the Toleration Act, or by any subsequent statutes.

The rubric then, or the directions of the Book of Common Prayer, form a part of the statute law of the land. Now that law in the rubric forbids the burial service to be used for persons who die unbaptized. It is not matter of option ; it is not matter of expediency and benevolence (as seems to have been represented in argument), whether a clergyman shall administer the burial service, or shall refuse it ; for the rubric, thus confirmed by the statute, expressly enjoins him not to perform the office in the specified cases ; and the question is, whether this infant, baptized with water in the name of the Father, the Son, and the Holy Ghost, by a dissenting minister, who is pleaded to have qualified himself according to the regulations of the Toleration Act, did die unbaptized within the true meaning of the rubric. If the child died un-[270]-baptized, the minister was not only justified, but it was his duty, and he was enjoined by law, not to perform the service. If the child did not die unbaptized, then he has violated the canon, by a refusal neither justified by any exception contained in the canon itself expressly, nor by any subsequent law.

The question has been most ably and most elaborately argued by the counsel on both sides ; and not only are the parties, but certainly the Court itself is, under very considerable obligation to them for the assistance which it has received in considering this question.

To ascertain the true meaning of the law, the ordinary rules of construction must be resorted to ; first, by considering the words in their plain meaning and in their general sense, unconnected with the law ; and, in the next place, by examining whether any special meaning can be affixed to the words, when connected with the law, either in its context or in its history.

The plain simple import of the word “unbaptized,” in its general sense, and unconnected with the rubric, is, obviously, a person not baptized at all, not initiated into the Christian Church. In common parlance, as it is sometimes expressed, that is, in the ordinary mode of speech and in the common use of language, it may be said that this person A. was baptized according to the form of the Romish Church ; that another person B. was baptized according to the form of the Greek Church ; that another person C. was baptized according to the form of the Presbyterian Church ; that another [271] person was baptized according to the form used among the Calvinistic Independents ; and that another person was baptized according to the form used by the Church of England : but it could not be said of any of those persons that they were unbaptized ; each had been admitted into the Christian Church in a particular form ; but the ceremony of baptism would not have remained unadministered, provided the essence of baptism, according to what has generally been received among Christians as the essence of baptism, had taken place.

Such being the general meaning of the word in its ordinary application and use, and standing unconnected with this particular law, is there any thing in the law itself, in its context, that varies or limits its meaning ? The context is, that the office shall not be used for persons who die unbaptized, or excommunicate, or that lay violent hands upon themselves. What, then, is the description of persons excluded from

burial that is put in association with these unbaptized persons? Excommunicated persons and suicides.

Now excommunication, in the meaning of the law of the English Church, is not merely an expulsion from the Church of England, but from the Christian Church generally. The ecclesiastical law excommunicates Papists. The ecclesiastical law excommunicates Presbyterians. Dissenters of all descriptions from the Church of England are liable to excommunication. But what is meant by the Church of England by the term of excommunication can be best explained by the articles of that Church. By the 33d article it is expressly stated, [272] "That person which by open denunciation of the Church is rightly cut off from the unity of the Church and excommunicated ought to be taken of the whole multitude of the faithful as an heathen and publican until he be openly reconciled by penance, and received into the Church by a judge that hath authority thereunto:" that is, he is no longer to be considered as a Christian, no longer to be considered as a member of the Christian Church universal, but he is to be considered "as an heathen and a publican," for those are the words of the article.

It has been said that in this country a foreign excommunication could not be noticed, and that a foreign country could not notice an excommunication by this country; and certainly that is true, for no laws can be made binding and compulsory beyond the country over which the authority making the law extends. The articles of religion, though confirmed by act of Parliament, only extend to this country, and to the subjects of this country. The discipline of the Church and its punishment by excommunication can therefore only extend to this country: but all his Majesty's subjects, whether of the Church of England, or whether dissenting from that Church, either as Papists or as any other description of dissenters, are bound to consider an excommunicated person as an heathen and a publican, be the person himself of the Church of England, or be he of any other class or sect. This is the first description of persons put in association with persons unbaptized.

The next description is that of suicides: they [273] are supposed to die in the commission of mortal sin, and in open contempt of their Saviour and of His precepts; to have renounced Christianity; to have unchristianized themselves; that is the view which the law takes of the persons who are self-murderers.

Then, taking the context of the law, putting unbaptized persons in association with excommunicated persons and with suicides, both of whom are considered as no longer Christians, it leads to the same construction as the general import of the words; namely, that burial is to be refused to those who are not Christians at all, and not to those who are baptized according to the forms of any particular Church.

Having thus considered the words in their general meaning, and as connected with the context of the law, it may not be improper, before the Court proceeds to what is next proposed, namely, the history of the law, to notice another rule of construction, which is this; that the general law is to be construed favourably, and that the exception is to be construed strictly. Here the general law is, that burial is to be refused to no person. This is the law, not only of the English Church; it is the law, not only of all Christian Churches; but it seems to be the law of common humanity; and the limitation of such a law must be considered *strictissimi juris*.

It is with some degree of surprize that the Court has heard the suggestion of there being no law to compel the clergy to bury dissenters. This seems to be most strangely perverting, or rather [274] inverting, all legal considerations. The question is not, is there any law expressly enjoining the clergy to bury dissenters: but, does any law exclude dissenters from burial? It is the duty of the parish minister to bury all persons dying within his parish, all Christians. The canon was made to enforce the performance of that duty, and to punish the refusal of burial: nothing can be more large than the canon is in this respect. It does not limit the duty to the burial of persons who are of the Church of England; he is to bury all persons that are brought to the church, upon convenient warning being given to him. The canon has the single exception, expressly of excommunicated persons. The rubric adds the other express exceptions, of persons unbaptized and suicides. It is true that the canon says they are to christen any child, and to bury any corpse; and hence it has been suggested that the canon means they are only to bury those who have been first christened according to the form of the Church: but the canon says no such thing, nor does the rubric say any such thing; there is nothing of the sort to be found in any express law;

nothing can be more general than the injunction to bury all persons, and all persons who are not specially excepted are entitled to that rite. Exceptions, then, being to be construed strictly (for it is always to be presumed that if the lawgiver meant that his exception should be more extensive he would have expressed his intention in clear and distinct words); and exceptions not being to be extended by mere implication so to limit the general law, it would [275] be necessary, in order to give to the exception the meaning which has been contended for in argument (namely, that of excepting all persons who have not been baptized by a lawful minister of the Church of England according to the form prescribed in the Book of Common Prayer), that it should have expressed it, not only by the term persons "unbaptized," but by the terms "persons who have not been baptized according to the form prescribed in the Book of Common Prayer." It has not done so, at least in express terms.

It was proposed, then, to examine the history of the law in order to see whether the rubric, though it has not this exception in express terms, still by the general term "unbaptized" has this limited meaning, "not baptized according to the forms of the English liturgy and by a lawful minister of the Church of England." Now, if the Church of England has recognized persons, though not baptized in its own forms and by its own ministers, yet as validly baptized; if it has recognized lay baptism to be, though irregular, yet valid, and so valid that the person who has been baptized by a laic cannot properly be baptized again; it will necessarily follow that it cannot mean to exclude from burial all persons who have not been baptized according to the forms of its liturgy, that it can only mean to exclude those who have not been baptized at all by any form which can be recognized as an initiation—a legal and valid initiation into the Christian Church.

This leads me into a very extensive question, namely, the validity of lay baptism; but which the [276] Court is, however reluctantly, compelled to examine, by the nature of the case, and the arguments which have been offered to its consideration.

The law of the Church of England, and its history, are to be deduced from the ancient general canon law—from the particular constitutions made in this country to regulate the English Church—from our own canons—from the rubric, and from any acts of Parliament that may have passed upon the subject; and the whole may be illustrated, also, by the writings of eminent persons.

Now if the first head be enquired into (the ancient canon law) it will appear that, from the earliest times, the use of water with the invocation of the name of the Father, of the Son, and of the Holy Ghost, was held to be the essence of baptism; that baptism, so administered, even by a layman or a woman, was valid; and that a person, who had been so baptized was not to be baptized again.

It may not be improper just to refer to the passages of Scripture which have been referred to by the Church itself as the foundation of its law in this respect: they are these. First, the words of our Saviour: "Unless a man be born again of water, and of the Spirit, he cannot enter into the kingdom of God." Hence the Church, without presuming to decide whether a person unbaptized might not be saved through God's mercy, yet has held that baptism was so strongly enjoined as a matter of indispensable necessity, that rather than omit it altogether, the ceremony was to be per-[277]-formed even by a layman. The words of our Saviour after His resurrection: "Go and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost," have been held to require the invocation of the Holy Trinity, as the essential form of words necessary to baptism. The passage in the Epistle to the Ephesians, "One Lord, one faith, one baptism," has been held by the Church to prohibit a second baptism; or, as the learned Hooker has expressed it, "Iteration of baptism once given has always been thought a manifest contempt of that ancient apostolic aphorism, 'one Lord, one faith, one baptism.'" It is here, however, to be observed that the Court is not entering into any question of theological controversy; it is merely endeavouring to trace and to ascertain the fact, what has been held by the Church to be the law. The Court has only to administer the law as it finds it; it is not to presume to enter into any speculations upon its propriety.

Now, conformable to what has been already stated will be found the text of the canon law. The passages in that law are almost innumerable. Many have been cited by the counsel. In the third part of the decree *De Consecratione*, and in the fourth distinction *De Baptismi Sacramento*, there are a great number of paragraphs to this effect: and it may be sufficient just to state the titles of the different paragraphs or

sections of that distinction. For instance, the nineteenth paragraph states, *Nemo nisi sacerdos baptizare presumat*; certainly directing that regular baptism is to be administered by the priest; or, perhaps it may be more properly said, public baptism. The 21st section is, *Etiam laici necessitate cogente baptizare possunt*; "in cases of urgency laymen may baptize." The 23d, *Non reiteratur baptismum quod a pagano ministratur*; "if baptism has been administered by a pagan, it is not to be iterated;" so cautious was the ancient Church that there should be no re-baptism. The 25th, *Sicut per bonum ita per malum ministrum æque baptismum ministratur*. The character of the person who administered, therefore, was of no effect in the validity of baptism. The 26th is to the same effect, but rather more explanatory: *Non merita ministrorum, sed virtus Christi, in baptismo operatur*. The 28th, *Non reiteratur baptismum quod in nomine Sanctæ Trinitatis ministratur*; and it goes on to illustrate by an example, *Si qui apud illos hæreticos baptizati sunt, qui in Sanctæ Trinitatis confessione baptizant, et veniant ad nos, recipiantur quidem ut baptizati, ne Sanctæ Trinitatis invocatio vel confessio annulletur*. This, therefore, points out that the essence was the invocation of the Holy Trinity. The baptism of any heretics (and the Church deemed all dissenters to be of that description), that of any dissenters, who made use of the name of the Holy Trinity in baptism, was to be received, lest the invocation of the Holy Trinity should be rendered and considered as of no effect. The 32d, *Non reiteratur baptismum quod in fide Sanctæ Trinitatis ab Hæreticis præstatur*: that, therefore, is to the same effect as the former section. The 36th is, *Valeat baptismum, etsi per laicos ministratur*; and that section again explains the principle upon which the Church acted, *Sanctum est baptismum per seipsum quod datum est in nomine Patris, Filii, et Spiritus Sancti*. There are many other passages to the same effect, confirming all the foregoing; and it is perfectly clear that, according to the general canon law, though regular baptism was by a bishop or priest, yet, if administered by a laic, or by a heretic or schismatic, it was valid baptism; and so valid that it was not to be repeated.

The next branch of the law of our Church, and which reached down to the time of the Reformation, was the law which is to be found in the legatine and provincial constitutions: the former being laws made in this country under the sanction of the Popes' Legates—Otho, Legate of Gregory the Ninth, and Othobon, Legate of Clement the Fourth. The latter, the provincial constitutions, were those made in Convocation under several archbishops. The whole of these have been collected by the very eminent English canonist, Lyndwood, who has written a very learned commentary or gloss upon them, which is also of high authority in all courts administering the ecclesiastical law of this country. These constitutions are precisely to the same effect as the former. Regular baptism was to be administered by a priest, and in the church, and at certain stated times of the year; but in cases of urgency a layman might administer baptism in private houses, rather than it should not be administered at all. If a layman interposed without necessity in the office, he was punishable; but still the [280] baptism was valid, and by no means to be repeated.

In the constitution of Otho *De Baptismo et Formâ Baptizandi*, which will be found in Lyndwood, page 10 of the Legatine Constitutions, it is among other things directed that priests shall particularly instruct their parishioners in the form of baptizing: of course shewing that lay baptism was allowed; that it was recommended, rather than that no baptism at all should take place; otherwise it could not have been proper and necessary for the priests to have instructed their parishioners in the form. The constitution of Othobon, to be found in Lyndwood, page 80, confirms and approves of this former constitution, and enjoins precisely the same thing. The provincial constitutions of Archbishop Peccham particularly enjoin, that after baptism by a layman it is not to be iterated. The passage will be found in Lyndwood, 41, *Caveant sacerdotes ne baptismum legitime factum audeant iterare*; and Lyndwood, in his gloss upon the word *baptismum*, says, *Sive per laicum sive per clericum etiam per paganus in casu necessitatis*; so that it is good, "Whether by a layman, or a clergyman, nay, even in a case of necessity by a pagan;" and, in his gloss upon the words *legitime factum*, he says two things are essential to it, *duo sunt necessaria, verbum et elementum aque*; and in describing what is meant by *verbum*, he explains the form of the words to be those which have been always used, "I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost." In a further constitution of Archbishop Peccham, to be found in [281] page 244, it is again strongly enjoined not to baptize a

second time persons who have been baptized by laymen or by women ; and he speaks rather strongly of those priests who do so baptize, terming them *stolidi sacerdotes* : and the constitution concludes, *Quod si sacerdos rationabiliter dubitet an parvulus in formâ debitâ baptizatus sit, dicat, si baptizatus es, ego non rebaptizo te ; si nondum baptizatus es, ego baptizo te in nomine Patris, et Filii, et Spiritûs Sancti.* Lyndwood here again cautiously explains the words in formâ debitâ, as he had before, to mean by the use of the element water, and by the use of the words of the invocation of the Holy Trinity ; and that it was in formâ debitâ, though by a layman.

Now these passages shew, not only that those baptisms were held to be valid, but they shew how extremely cautious the Church was that baptism should not be repeated. These references to the ancient law will also serve to explain and illustrate any matter which could be considered as doubtful in the construction of the more modern law of the rubric. It therefore seems to admit of no doubt that by the law of the English Church, as well deduced from the general canon law as from its own particular constitutions, down to the time of the Reformation, lay baptism was allowed and practised. It was regular, and even prescribed, in cases of necessity ; it was so complete and valid that it was by no means to be repeated. It also clearly appears that, in order to ascertain its validity, no enquiry was necessary to be made into the existing urgency under which it was adminis-[282]-tered ; but only into what was declared to be the essence, whether it had been administered by water, and in the form of the invocation ; for, if those forms were used, the baptism by a layman was complete and valid.

So the matter stood at the time of the Reformation : and that period is an important one ; for, if lay baptism had been considered as one of the errors of the Romish Church, it would have been corrected at the time when all the Christian world had their attention pointed to those particular errors. But the fact is otherwise, for the use of lay baptism was manifestly continued by the English Reformed Church. Liturgies were framed, and acts of uniformity passed by Parliament, in the reigns of Edward VI. and of Queen Elizabeth. In those the rubrics run thus : " Let those that be present call upon God for his grace, and say the Lord's Prayer if the time will suffer : and then one of them shall name the child, and dip him in the water, or pour the water upon him, saying these words, ' I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.' " Here is no mention whatever of a priest or lawful minister, as the person who is to officiate upon the occasion : it is directed to be done by " those who are present," or one of them, without singling out or particularizing what the person is to be who is to administer this sacrament. And the better opinion seems to be, that all private baptism was by laymen antecedent to the time of King James ; that it was only public baptism in the church which was to be administered by a priest ; and that, wherever there [283] was the sort of urgency and necessity which prevented the child being brought to the church, and required the child to be baptized at home, the baptism was to be administered by any person without requiring the attendance of the priest. The same rubric, although it enjoins the people not to baptize their children at home except in cases of necessity ; yet, lest the necessity should arise, expressly directs the pastors to instruct their parishioners in the form of doing it. Hence it is evident that subsequent to the Reformation the English Reformed Church itself did allow the practice of lay baptism.

So the practice stood from the Reformation till the time of King James the First ; except that in the year 1575, among some articles agreed upon at that time in Convocation, there appears to have been one (the 12th article) which states, " That to resolve doubts by whom private baptism is to be administered, it is directed that in future it shall be administered by a minister only, and that private persons shall not intermeddle therein." This article rather appears not to have been published and circulated. It remained in manuscript. It had no authority, not appearing to have been even confirmed by the Crown. There could have been no doubt upon the rubric of Edward VI., coupled with what was the old law, so far as respected the validity of lay baptism. And the bishops certainly had not authority to alter the law ; they had only authority to explain matters which were doubtful ; and the doubt seems to have been, not whether lay baptism was valid, but whether it was regular and [284] orderly. Up to that time, wherever private baptism was allowed, there was nothing to be found in the ancient canons, the constitutions of the Church, or the rubric, that required the minister as a person at all necessary to be present for the orderly administration of such private baptism : it was not even to be inferred that it would be more

regular, for the minister is not mentioned; on the contrary, in cases where private baptism was necessary (and it was only allowed in cases of necessity) the people were to be instructed how to perform it themselves. The most to be deduced from this article therefore is, that it was thought at that time, by the Convocation, that it would be more proper, regular, and decent, to have the ceremony of private baptism performed by ministers; and therefore it was directed to be performed by them, and laics were restrained from doing it: but the article, as before stated, does not appear to have been published.

King James the First (who considered himself a great divine) disapproved of the practice of lay baptism. Soon after his accession conferences were held at Hampton Court with the clergy for the purpose of revising and reconsidering the liturgy, and particularly this article of private baptism. The King expressed strongly his disapprobation of lay baptism; and seemed more inclined to no baptism at all than that the office should be performed by a laic: but his divines (most of them prelates of very great eminence) differed from him in respect to preferring the total omission of baptism to its being administered by a layman. It was, however, agreed so far to alter the rubric, as to direct that private [285] baptism should be administered by a lawful minister: but whoever reads the account which has been preserved of these conferences will see that neither the King nor the bishops maintained that baptism, if *de facto* performed by a laic, was invalid; on the contrary, even King James expressly declared his opinion to be, that if baptism had been performed by a laic with water and the invocation of the Trinity (which he also admitted to be the essence of the sacrament itself) such baptism was not to be iterated; that is, that the person was not to be re-baptized; for the King's words, as recorded, are, "I utterly dislike all re-baptization on those whom women or laics have baptized." He himself, therefore, considered lay baptism as valid, though he thought fit to enjoin the administration, even of private baptism, to be by a clergyman as much more orderly and proper.

The rubric at that time agreed on was never confirmed by Parliament; but a proclamation afterwards appeared "for the authorizing a uniformity in the Book of Common Prayer;" and His Majesty says in that proclamation, "We have thought meet that some small matters might rather be explained than changed." The proclamation has no suggestion whatever of so important a change in the English Church—in the established constitution of that Church as it had existed, not only in early times, but as it existed after the Reformation had taken place—as that baptism actually administered even by a laic in the due form with the element and the words should be considered as wholly null and invalid, and that such a [286] baptism could bear re-baptization. There is nothing of the kind in the proclamation; on the contrary, explanations in some small things rather than a change are alone referred to.

In construing all laws, it is proper to enquire how the law previously stood; for it will require more express and distinct terms to abrogate and to change an old established law, than to provide for a new case upon which the former law has been wholly silent. Private baptism by laymen had always been held valid, and almost enjoined as regular. The rubric having now introduced the order that it shall be administered by the lawful minister, what would be the obvious construction of this alteration? That in the regular and ordinary and decent administration of private baptism it became the duty of the lawful minister to perform the office. But if the old law was meant to be completely changed; if it had been intended to invalidate the old law in this respect, and that all other baptism, except that by a lawful minister, should be considered as absolutely null and void; the new law would most expressly and distinctly have declared it.

Upon this rule of construction the case of marriage has been referred to as strongly analogous. Marriages are by the rubric enjoined to be solemnized by a minister: there is to be a previous publication of banns, and other ceremonies are to be observed; the laws of the Church, and the State by several acts of Parliament, prohibited marriage to be performed in any other way: it punished the parties concerned in clandestine marriages, both the [287] minister who solemnized them, and the parties between whom they were solemnized. But, notwithstanding all these laws enjoining how a marriage was to be solemnized, and punishing those who solemnized it in any other way, what was the consequence? did the marriage become void? By no means. A marriage in a private house, between minors, was a perfectly valid marriage (notwith-

standing it was an irregular, and, so far, an unlawful marriage) till the Marriage Act by direct and positive terms expressly declared that such a marriage should be null and void to all intents and purposes. So baptism in a house, to be regular after this rubric, could only be administered upon occasions of urgency, and by a minister of the Church: but if it was performed by a layman, and without necessity (though it was an irregular baptism, though the parties might be punished for violating the injunctions of the rubric), still it was not an invalid baptism, and the party could not be re-baptized.

The rubric itself, as published by King James, leads to the very same conclusion. Certain questions are directed to be asked for the purpose of ascertaining whether the child has been already baptized; and the questions run in this order and form: "If the child were baptized by any other lawful minister, then the minister of the parish where the child was born or christened shall examine and try whether the child be lawfully baptized or no. In which case, if those that bring any child to the church do answer that the same child is already baptized, then shall the minister examine them further, saying, By whom was this child [288] baptized? Who was present when this child was baptized? Because some things essential to this sacrament may happen to be omitted through fear or haste in such times of extremity; therefore I demand further of you, With what matter was this child baptized? With what words was this child baptized? And if the minister shall find by the answers of such as bring the child that all things were done as they ought to be, then shall not he christen the child again, but shall receive him as one of the flock of true Christian people."

Now it by no means follows, from asking "By whom was this child baptized?" or "Who was present when this child was baptized?" that the person who administers the ceremony is essential to the validity of the baptism, or that those enquiries are made for the purpose of ascertaining whether the baptism be valid or not. For it is obvious that it is not essential who were the persons present. Why then is it to be inferred as essential who was the person by whom the ceremony was performed? On the other hand, it may be extremely proper and convenient to enquire into both those circumstances, for the purpose of enabling the minister more satisfactorily to ascertain whether the essentials themselves have been performed; for if the office has been performed by a lawful minister, then there is less suspicion of irregularity or defect in the performance, and a less minute enquiry may satisfy the minister that the baptism has been properly administered. Again, if the persons present at the baptism were respectable intelligent persons, or persons who are at the time attending, and who [289] therefore can be further questioned by the minister in respect to the essentials of baptism, it may be material and proper for that reason to enquire who were the persons that were present. Hence it appears that these questions being introduced does not establish that a minister was essential to the administration of the rite: but more especially, when we find this preamble to the third and fourth questions interposed in the middle of the queries "because some things essential to this sacrament" (for so I think is the natural mode of reading it, and not in the way in which the emphasis was laid by the counsel, "because some things essential to this sacrament") "may happen to be omitted" (for if any thing essential was omitted, it might be proper to consider the baptism as null), "therefore I demand of you, With what matter was this child baptized? With what words was this child baptized?"

If any doubt could be made upon what is meant by the rubric in this respect, it would be cleared up most satisfactorily by adverting to the old law upon the subject; and by the old law (as has been already stated) it was the use of the water and the invocation of the Holy Trinity that was essential to the baptism; those, as Lyndwood has explained, were the duo necessaria.

Again, if every thing has been "done as it ought to be." What is meant by the phrase "done as it ought to be" is explained by adverting to the commentary of Lyndwood; for he has stated in his gloss the terms rite ministratus, legitimè factum, and formâ debitâ to mean the use of water and [290] the form of words: this can therefore leave no doubt what was the meaning of the rubric, thus illustrated as it is by reference to the ancient law and to Lyndwood.

But the concluding part of the rubric is equally decisive upon the subject; for it is, "If they which bring the infant to the church do make such uncertain answers to the priest's questions as that it cannot appear that the child was baptized with water in the name of the Father, and of the Son, and of the Holy Ghost (which are essential

parts of baptism), then let the priest baptize it in the form before appointed for public baptism of infants, saving that at the dipping of the child in the font he shall use this form of words, "If thou art not already baptized, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost." If there were a doubt then whether the child was baptized with water, and with the invocation (which are here expressly declared to be essential parts of baptism), then the child was to be conditionally and hypothetically re-baptized, the Church being so extremely anxious to avoid iteration. But, supposing a doubt arose whether the former baptism had been administered by a lawful minister, was the child in that case to be re-baptized even hypothetically? Such a doubt might very easily happen: the persons present might not be able to answer who the person was that had baptized, or they might not be able to answer whether the person who had administered the baptism was or was not a lawful minister. He might have been an entire stranger to them: and yet, if that fact appears [291] doubtful, here are no directions in the rubric for a conditional re-baptization. Hence it is obvious that the person performing the baptism was not essential by the rubric; and in this respect the rubric exactly conformed to the old law, for the baptism remained valid, and was not to be repeated; and even to what King James said at the conference just before this rubric was approved, that he utterly disliked all re-baptization.

After the Restoration the rubric was revised, and was confirmed by Parliament; and no alteration was made, except in the title of the office: for, unless I have been misled by a book of some authority (not having seen the Prayer Book of the time of King James), the title of King James's office for the administration of private baptism was this, "Of them that be baptized in private houses in time of necessity by the minister of the parish, or other lawful minister that can be procured." Now the title of the office stands thus: "Of the ministration of private baptism of children in houses;" there is an omission, therefore, in the title, of the words "lawful ministers," or any thing referring to them. This alteration in the title, if it meant any thing as applied to the present question, seems pretty strongly to infer that the title was considered as in too precise a manner requiring both the existence of the necessity, and the intervention of a lawful minister; and the title of the office was therefore left in more general terms, "Of the administration of private baptism in houses" simply; and it was only in the directory part, as in marriages, that it was set forth, let the "lawful minister" say so and [292] so, inferring that lawful ministers were the persons regularly to perform the office, and that it was considered a part of their duty.

So the matter still remains; and, after tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt that the Church did at all times (whatever might have been the opinions of particular individuals upon this point, as there will be difference of opinions among individuals upon all points—that the Church itself did at all times) hold baptism by water in the name of the Father, and of the Son, and of the Holy Ghost to be valid baptism, though not administered by a priest who had been episcopally ordained, or rather, to state it more generally, though administered by a layman or any other person. If that be so, if that is the construction of baptism by the Church of England, then the refusal of burial to a person "unbaptized," that term simply being used, cannot mean that it should be refused to persons who have not been baptized by a lawful minister in the form of the Book of Common Prayer; since the Church itself holds persons not to be unbaptized (because it holds them to be validly baptized) who have been baptized with water and the invocation by any other person, and in any other form.

During the usurpation it was most highly probable that great numbers of the subjects and inhabitants of this country—be their proportion greater or less, it does not much vary the consideration, but there must have been a great number of persons, after episcopacy and its ministers had been discounte-[293]-nanced for a great number of years, who had received baptism from persons not episcopally ordained. Now, if those baptisms had been mere nullities, what would have been the course at the Restoration? Surely to direct that such persons should be baptized, provided they were to be considered as persons unbaptized because they had not been baptized by a lawful minister, according to the form of the Book of Common Prayer. But there is no trace to be found either in the historical or controversial writings of those times, that such a measure was adopted: nothing that leads even to a suspicion of it. On the contrary, it will be found that one of the first cares of the bishops, upon the

Restoration, was to go about confirming—and confirming whom? Why, confirming the very persons who had been thus baptized; considering, therefore, and necessarily considering, that though these baptisms might be held to be irregular, yet they were to be considered as valid; otherwise no confirmation could take place upon them. Not only did they confirm, but I apprehend they must have ordained in many instances, upon those very baptisms: indeed, the one would seem almost of course to follow the other. They must also have buried great numbers who had been baptized in no other way.

The practice also, as I understand, has always been, if Presbyterians or any other dissenters from the Church of England have come over to that Church, and have become members of it, nay, have become ministers of it, they have never been re-baptized. Their baptism being with water and [294] with the invocation of the Trinity, has always been considered as a sufficient initiation into the Christian Church to qualify them to join that Church, to become members, and even to become ministers, of the Church of England. The same practice has prevailed with respect to Catholic converts; they have never been re-baptized: and, though they have been baptized by persons episcopally ordained, and persons whom we consider to be so far ministers, being Catholic ministers, as not to require that they be re-ordained, yet they have not been baptized according to the Book of Common Prayer; and the rubric is as precise in requiring that the office shall be administered in that particular form, as it is that it shall be administered by a regular minister. Yet Catholic converts are not re-baptized if they choose to become ministers of the Church of England; still less are these persons excluded altogether from the rite of burial: and yet if the term “unbaptized” in the rubric means what has been contended for, namely, “those persons who have not been baptized by a lawful minister of the Church of England, and according to the form prescribed by the Church of England,” no persons dissenting from that Church, neither Catholics nor Protestants, are baptized in that form. If those persons are considered by the practice and constitution of our law as lawfully baptized, it appears there is an end of the question.

But the matter was placed, by the learned counsel who last spoke, in a much more favourable shape. The Court is not to decide whether this be a valid baptism, so as to entitle the person [295] to become a member of the English Church or a minister of the Established Church; but whether the person so baptized is excluded from burial by the Established Church: it is a question of exclusion and of disability. Now the Church of England does not refuse the office of burial to all persons who are not conforming members of this Church; there is no law to be found to that effect. Papists, who ever since the Reformation have been considered as much more widely separated from the Reformed Church than Protestant dissenters, are not only permitted to be buried by our Church, but are required so to be. Popish recusants are required to be buried in the church or church-yard, or a penalty is incurred by their representatives; and this not by putting the body into the ground without the ceremony being performed, but the minister is to read the service; our Church knowing no such indecency as putting the body into the consecrated ground without the service being at the same time performed.

It may not be wholly unworthy of observation that this very act of Parliament, compelling the burying of Popish recusants in the church or church-yard and by the Church in the same manner as the other subjects of his Majesty, passed only in the third year of King James, very soon after the alteration of the rubric. Could he then mean by the rubric that no persons but members of the Established Church should be buried by it; and that all other persons non-conforming should be excluded from it? The union of the two crowns had just taken place; many of his Majesty's Scotch [296] subjects had followed him into England; his own children had come with him, his own children had been born in Scotland, and were baptized by Presbyterian ministers. Could he ever intend that all persons but members of the Church of England should be excluded from church burial? Indeed, it is to be observed that in his canon and in his rubric there is nothing that expressly interdicts the burial service from being performed for persons “unbaptized.” The only express exception there is “persons excommunicate.” It has been ingeniously argued that that amounts to pretty much the same thing; for that the canons declared those persons to be excommunicate who did not conform, and several canons to that effect have been noticed. But the 68th canon only excepts from burial one “denounced excom-

municated majori excommunicatione for some grievous and notorious crime, and no man able to testify of his repentance." Now an infant baptized by a Presbyterian minister or by a layman would surely not have come within this exception; and therefore, during the reigns of King James and King Charles the First, this being the only exception to be found in the canon, a minister would certainly have violated the canon by refusing to bury a person so baptized, unless that person came within the general description of not being a Christian at all.

The rubric, made upon the Restoration, introduced the words "unbaptized and persons who had laid violent hands upon themselves" into the preamble to the burial service. Now, was there any thing in the circumstances of those times which [297] should give a different construction to the term "unbaptized?" It should seem just the reverse. Here had been (as already stated) an usurpation of twelve years, during which many, at least, had not received baptism in the forms of the Church: they were yet considered as validly baptized, to the extent that they were confirmed without re-baptization. They were even ordained; and it seems to be utterly incredible, that the Convocation in revising the rubric, or the King and Parliament in confirming it, could have meant, by introducing the word "unbaptized" into the rubric before this office, that those only who had been baptized according to the form of the Church could receive the performance of this office. It would be most extravagant to suppose that such was the intention of introducing it into this rubric. In every view of this subject, and the more accurately and fully it is considered the more clearly it appears, that burial cannot in such a case be refused; and it should in no view of the subject be forgotten that the question is a question of disability and exclusion from the rights which belong to his Majesty's subjects generally, an exception from a general law.

It seems by no means proper, however, wholly to pass over the view which may be taken of this subject as affected by the Toleration Act. By that act an important change was worked in the situation of his Majesty's Protestant dissenting subjects; and the baptisms now administered by dissenting ministers stand upon very different grounds from those by mere laymen. There were many laws, both of Church and State, requiring [298] conformity to the Church, creating disabilities, imposing penalties, and denouncing excommunications upon all non-conformity. Now, supposing that during the existence of these disabilities it could be maintained that in point of law no act of non-conformists could be recognized in a court of justice, and therefore that a baptism administered by such persons could not be noticed at all, either by the Church or by the courts administering the law of the Church, yet could it be maintained now that such a baptism was to be considered as a mere nullity? If such could have been considered as the view of the law before the Toleration Act, yet that act would change the whole shape of the thing: that act removed the disabilities; it allowed Protestant dissenters publicly to exercise their worship in their own way under certain regulations; it legalized their ministers, it protected them against prosecutions for non-conformity.

Now, their ministers and preachers being allowed by law (and so far as that goes they are lawful ministers for the purposes of their own worship), their worship being permitted by law, their non-conformity being tolerated, could it any longer be said that rites and ceremonies performed by them are not such as the law can recognize in any of his Majesty's Courts of Justice, provided they are not contrary to, nor defective in, that which the Christian Church universally holds to be essential, that is, provided they are Christians? This appears to be a necessary consequence of the Toleration Act. The manner in which that act has been considered by other Courts is not altogether foreign [299] to the consideration. Its general principle was much canvassed in the famous case of *Evans v. The Chamberlain of London*. The particular circumstances of that case are foreign to the consideration of this. The case began in a jurisdiction in the city. It was afterwards appealed to a commission of the Judges, and then to the House of Lords; and, in the first of the stages of the appeal, a very eminent judge, Mr. Justice Foster, thus expressed himself in his judgment: "The defendant does not plead the Toleration Act to excuse one offence by another; but to shew that, although the rubric did require conformity in all things, yet by the Toleration Act the rubric is taken out of the way and does not extend to his case. The Act of Toleration is not to be considered merely as an act of connivance; it was made that the public worship of Protestant dissenters might be legal, and they might be entitled to the public protection." So again Lord Mansfield, in the House of Lords,

said, "Conscience is not controulable by human laws, nor amenable to human tribunals; and attempts to force conscience will never produce conviction. Non-conformity is no offence by the common law, and the pains and penalties for non-conformity to the established rites of the Church are repealed by the Act of Toleration." This shews something of the general view taken of that statute by the judges of the common law. Acts of non-conformists are now legalized; and they are to be recognized, and were upon that occasion recognized, in Courts of law. Indeed, the Legislature itself (as has been pointed out) has recognized the baptism of dissenters; [300] for stat. 23 Geo. III. c. 67, which laid a duty upon registers of baptisms by the Church, was extended by stat. 25 Geo. III. c. 75, to the registers of baptism of Protestant dissenters. Both are now repealed: but the passing of that second statute is a recognition of baptism by Protestant dissenters.

Protestant dissenters then, being allowed the exercise of their religion, being no longer liable to pains and penalties, their ministers lawfully exercising their functions, the rites of that body being allowed by the law, it can no longer be considered that any acts and rites performed by them are such as the law cannot in the due administration of it take any notice whatever of, or that a baptism performed by them, when attended with what our own Church admits to be the essentials of baptism, is still to be looked upon as a mere nullity, or that infants so baptized are to be rejected from burial as persons unbaptized at all, or, in other words (though that has been disavowed by the counsel in the argument), as not being Christians—for the Court finds it difficult not to concur with the learned counsel who spoke last, that unbaptized and not being Christians amount to pretty much the same thing.

Having thus examined the law itself, it may seem superfluous to consider what may be the opinions of ecclesiastical writers upon the subject: but they lead to the same conclusion. The opinion of the learned Hooker has been stated: his eminence has been referred to and admitted on all sides, and it cannot be placed in a higher point of view by any [301] observation that would fall from the Court. The very accurate and careful examination of this question by Bishop Fleetwood has been stated. They are both of them decidedly of opinion that lay baptism is legal and valid, according to the law of the Church. Watson's Clergyman's Law, and Bishop Burnet, have also been referred to; and if what has been related of a very eminent and learned prelate of the Church, the late Bishop Warburton, be true, he is another practical authority. The circumstance I allude to was this. A person who had applied for holy orders, but was rejected, went into the country pretending that he was ordained; and he performed various sacred functions, and, among others, he administered baptism in very many instances. When it was at length discovered that he had not been ordained at all, the parents of the children who had been baptized by him felt considerable uneasiness, and wished the minister of their parish to re-baptize their children. The clergyman of the parish very properly consulted his diocesan, Bishop Warburton: but the bishop charged him on no account to re-baptize the children; for that the baptism already administered, though performed by a mere layman, was a valid baptism, and that the Church did not allow a re-baptization. This fact, if it be true (and the Court has no reason to doubt it), at the same time that it does honour to this distinguished prelate by shewing how accurately he had studied the law and the constitution of the Church of which he was a ruler, is another authority in opposition to the almost only [302] authority which has been relied upon on the other side, and that is Mr. Wheatley.

Now, if the character and the reputation of the different writers were to be matter of consideration, there could not be any great doubt whether the weight lay with Hooker and Fleetwood and the other persons who have been referred to, or with Mr. Wheatley: but if the writings themselves be examined, the difference may perhaps be still more striking. In the former writers, particularly in Hooker and Fleetwood, there are not only great powers of reasoning, but accurate references to legal authority. In the latter, there is a great deal to be found that rests upon assertion, and assertion only. This writer, among other things, maintains that no person is to be buried but those who are baptized by the Established Church: nay, he seems to go further, that no persons are to be buried but those whose baptisms have been registered; for his words are these, "All persons are supposed to die unbaptized but those whose baptism the registers own; and, therefore, the registers not owning dissenting baptisms, those who die with such baptisms must be supposed to die unbaptized." Now this is

assertion, but nothing more ; for there is no authority whatever referred to in support of it, there is no law to be found which so declares, there is no practice which justifies this as being the rule. And to what extent—to what monstrous length would this go? No foreigners who are in this country, not only no Catholics, but no persons born in any Protestant country in Europe, [303] coming into this country and dying here, could be buried according to the forms of the Church of England, because they are persons clearly not registered in this country, clearly not baptized by a lawful minister of this country, or according to our Book of Common Prayer. Not only these, but none of his Majesty's Scotch Presbyterian subjects could be buried here, no member of the Church of England whose baptism has been by omission neglected to be registered in his parish; nay, a person born in one part of the kingdom, if he happened to die in another and a distant part of the kingdom, could not receive Christian burial, from the want of facility to procure the register of his baptism.

It has been asked, if you do not require proof from the register, what other proof can you have? how are the clergy otherwise to find out who are baptized, and who are not? To that it may be properly answered, they must be satisfied with reasonable evidence, with what a person acting fairly and not captiously, would require; for if a clergyman meant to act vexatiously, and, under the pretext of not being satisfied of the fact, when taking all the circumstances of the case together no doubt could reasonably be entertained upon the subject refused burial, he would not only be liable to the punishment of the law, but exposed to that punishment in its utmost extent. In the present case there appears, however, no difficulty of the sort: for the articles assert that the child was baptized according to the form generally observed among that class of dissenters; that Mr. Wickes [304] stood upon the fact as the ground of his refusal. This was acting certainly much more properly than pretending to doubt a fact of which he had no conscientious doubt; and though he has, perhaps, unfortunately mistaken the law, it was much more honourable not to state a doubt of the fact, but to act upon the existence of his doubt of the law.

It has been said that the present case is important, both to the interest of the dissenters and of the Church. It may be important to the dissenters that their right of church burial should be established, and that their baptisms should be recognized, and should not be considered as mere nullities; for that goes far to the denial of their being Christians at all; and every thing which savours of disability and exclusion is of importance to any subjects of his Majesty; and, if the law does not exclude them from church burial, no blame whatever can be imputed either to the individual, or to the body, if the body countenance the individual in the attempt now made to assert the right of burial by the institution of the present suit. But how the object of the suit can be that which has been suggested by the counsel, namely, for the purpose of establishing their ministers as "lawful ministers," is difficult to be imagined. As lawful dissenting ministers they are already established; for the law allows them and recognizes them as such; and the event of this suit cannot by possibility make them lawful ministers of the Church of England episcopally ordained, nor can it in any manner alter their station and character in the political society of the country.

[305] The importance of the suit to the interests and dignity of the Church is not less difficult to be apprehended. If the legal rights of the Church were affected, it would not be more the duty than the inclination of the Court to uphold them. The suit may be interesting to individuals who have been embarked in controversy and contest; it may be interesting to the clergy in general, who are doubtful what the law is, that the law should be ascertained by a judicial decision: but why the rights and interests of the Church are to be affected by considering dissenting baptisms as Christian baptisms, by allowing persons so baptized the common right of being buried according to the ordinary forms of the Church, and by a minister of the Church to whose support they are bound to contribute, has not been explained. If the law has not excluded them from this ordinary right of Christianity and humanity, the ministers of the Church will not surely be degraded by performing the office. On the contrary, the generality of the clergy, it may be presumed, will rejoice that in this last office of Christian charity there is no separation between the Church and their Protestant dissenting brethren. It is by a lenient and a liberal interpretation of the laws of disability and exclusion, and not by a captious and vexatious construction and application of them, that the true interests and the true dignity of the Church establishment are best supported.

Upon the whole of the case, and for the reasons assigned, the Court is of opinion that the minister, in refusing to bury this child in the manner pleaded [306] in the articles, has acted illegally. The suit is probably brought for the sake of deciding the question, rather than of punishing the individual. The minister may have acted, and it is presumed has acted, from a sense of his public duty: for, upon his understanding of the law, it was his duty, and he was bound not to perform the service, which he might most willingly have performed if he had more correctly understood the law. The Court has therefore thought it proper to state its opinion, and the grounds of that opinion, the more fully, in the hope of setting the question at rest, and of putting an end to the suit. If the facts are truly stated, and the decision now given upon the law should be acquiesced in, it may reasonably be expected, from the spirit of candour which has been avowed on the part of the promoter, that he would be satisfied in correcting the error, and in establishing the right; and that the suit might end here, and harmony be restored between these parties, each of them recollecting that, however they may differ upon certain points either of doctrine or of ceremony, still they are both equally bound by Christian charity to dismiss as quickly as possible from their minds all feelings of animosity, and to return to the exercise of mutual kindness. The Court, upon the grounds already stated, has no doubt at all in admitting these articles, and does admit them accordingly.

[307] NORTH v. BARKER. Arches Court, Trinity Term, July 16th, 1810.—Dilapidations at St. Cross—conflicting estimates—the tender of the defendant affirmed with costs.

Judgment—*Sir John Nicholl*. This is a suit for dilapidations at St. Cross: the libel states the estimate to have been 5327l.; the allegation for the defendant states another estimate to have been 3795l.: which was tendered and refused. The question is whether the tender was sufficient, or whether the plaintiff has proved more to be due. The parties have not desired the Court to send a third surveyor to arbitrate between them. Clarke (Praxis, tit. 115) has laid it down that if the plaintiff has given an estimate, the opposite party may examine another surveyor to contradict the estimate, and prove it to be excessive: this may be done, and was done in the case of *The Bishop of Rochester v. Thomas*.

It may be observed that the burthen of proof is on the plaintiff; the tender admits a certain sum to be due. The estimate of the plaintiff is supported by two eminent surveyors, the estimate on the other side by three; numbers are not conclusive, in case there are other reasons why two should outweigh the three; but it is something that in point of character they stand equal before the Court as eminent surveyors.

The Court, however, is to look to some of the circumstances arising out of the case itself: Mr. [308] Moneypenny was first employed alone by Mr. North the plaintiff, he went down afterwards with Mr. Craig. Moneypenny was thirty-five years old, and had had some experience: but two others of them had had twenty years more. Craig has had more than any of them.

It is not a matter of mere fact, but of opinion and judgment, in which a man may depose strongly without being aware of a bias. There is nothing to shew any promise of the work to Moneypenny, he might rather be expected to be the surveyor of the work than the contractor, a high estimate would find favour with his employer: he might be called upon to undertake the work at his own estimate, if thought low. These surveys are generally paid for by a per centage on the estimate; all these things may give something of a bias. I think it was proved, even by Mr. Craig, that Moneypenny had over-estimated, for he would not join in his report, differing to the amount of 500l. I am therefore inclined to think that Moneypenny overrated the matter. There has been an opening of floors, &c.; as the others say, beyond what was necessary: this would rather shew over-zeal to constitute something of a deduction. Moneypenny treats it lightly—says it might be repaired for forty shillings; Craig allows twenty pounds. I find Moneypenny guilty of inadvertence likewise in subscribing Craig's survey instead of his own: it also appears to have been the original intention of the parties that Wilson and Moneypenny should make a joint estimate, and perhaps if this had been done the matter might [309] have been settled two years ago: but Wilson states that there was a difference of opinion between them respecting the principle.

I have looked through the survey, and the statement does impress my mind as

having been made on a very large scale ; it looks like renovating the building not only in its ancient form, but in its pristine beauty ; there has been estimated a relaying of all the old pavement ; in some instances it should seem as if things were to be added which were never there before. I think this is going beyond the principle ; for although these Courts carry the point far as to the incumbent's house, they will not go so far as to buildings of this kind. The stone-work of fine old windows is decayed, this is serious when the obligation to repair them occurs ; there must be some moderation, the thorough repair of the old building is not all to fall on one incumbent ; this last incumbent received 450*l.* for dilapidations—he laid out 2220*l.* in his whole incumbency, which was for about twenty years ; and 500*l.* within the last few years.

The income is stated to be 650*l.* When the Court sees nearly one-sixth of the income laid out voluntarily, and when in cases where the Court is called upon to sequester it seldom lays apart more than one-fifth ; when it finds that by Gilbert's act if the repairs exceed one year's income the incumbent may burthen his successor, when the sum here demanded amounts to eight years' income—and even the sum tendered to that of six years, the sum demanded strikes me as enormous.

The Court could not decide on such circum-[310]-stances alone ; yet these open the door to the opinions of the other surveyors, and enable me to decide that their estimate and tender are sufficient.

Three surveyors state that the work might be done for the lower sum ; they are more in number, have greater experience, and they made their estimate jointly ; they swear they have been liberal, more so than usual, to prevent disputes. The Court can form no judgment as to the amount : but looking to the principles which they state, I do not object to them.

The estimate has been revised on account of an additional rise in materials ; this was perhaps going beyond the legal demand—for the Court rather thinks it ought to be estimated as at the death of the last incumbent ; the debt was then accruing. The representative of the incumbent loses an advantage of timber which may be applied to the repairs. If some little items have been overlooked, this sum remains to cover them. These surveyors offer to undertake to do the work for the sum stated, although they are not in the habit of contracting, and that they will do it to the satisfaction of two surveyors, or any one of six named, or of the surveyor of the Court ; this the other party is not bound to accept ; but it goes far to satisfy the Court of the justness of the estimate.

I think the plaintiff has failed to prove more to be due than the tender. I pronounce for the tender ; of course costs must follow.

[311] PRENTICE v. PRENTICE. Prerogative Court, Easter Term, May 12th, 1820.—

A proctor condemned in costs for improper practices in the conduct of a suit.

John Prentice, of Stoke Newington, died on the 19th of February of the present year, a widower and intestate. He left three daughters, and two sons. His two sons were in the West Indies ; two of his daughters, Hannah and Anne, lived with him at the time of his decease ; the other, Mary Maxwell, was alleged to have been taken up as a vagrant, and confined for several days in the Giltspur-street prison, a few weeks before her father's death. The deceased kept a chandler's shop ; and was possessed of 100*l.* Navy 5 per cents., besides the stock in his shop and his household furniture.

Mr. Jenner appeared as proctor for Hannah Prentice ; and took the regular steps for procuring for her the administration to the effects of her father. On the 6th of March the letters of administration were in their progress through the Prerogative office, when Mr. W. G. Clarkson appeared as proctor for Mary Prentice ; and on being informed that the bond was already taken, and that the letters of administration for Han-[312]-nah Prentice were actually filled up, he entered a caveat to prevent them from issuing under seal—and immediately afterwards applied at the office of the commissary of London for letters of administration for Mary Maxwell Prentice, although the parish of Stoke Newington in which the deceased lived and died was not within the jurisdiction of the commissary of London. On the 7th of March, however, he procured letters of administration to Mary Maxwell Prentice from the commissary of London ; Hannah Prentice thereupon applied for and obtained a distringas to prevent the transfer of the 100*l.* 5 per cent. bank annuities to her sister.

These facts were set forth by Jenner in an act on petition, which concluded by praying the Judge that he would direct the administration to issue under seal to Hannah Prentice; that he would assign W. G. Clarkson to bring the pretended letters of administration obtained from the Commissary Court of London into the registry of the Prerogative Court, and condemn his party in the costs of the suit.

To this statement no reply was offered by the adverse proctor.

Judgment—Sir John Nicholl. The first question is to render justice to the parties. This Court never forces a joint administration, unless the parties agree to it. I have only to consider who is the most proper person. No objection is taken to Hannah Prentice: but it is stated that the other person applying has been [313] taken up as a vagrant; and by her conduct in this suit she has shewn herself to be an improper person; the act is not written to on her part; it is said she has no money. I have no doubt but that injustice has been done to Hannah Prentice, and that she has been kept out of the administration to which she was entitled for two months.

It is a painful task to arraign the conduct of a proctor: but facts are disclosed in the act on petition which Mr. Clarkson was bound to contradict. He appears to have lent himself to a very improper act—he applied to the Prerogative Court for administration for Mary Maxwell Prentice—he found another next of kin had been already sworn, and that the bond was filled up. He proceeded to enter a caveat; by this conduct shewing that he knew the Prerogative Court to be the proper jurisdiction. He however took his party to another jurisdiction (the Commissary Court of London) which had no authority to grant the administration; he there however obtained it; these facts are strong against the proctor. The explanation he has offered is not satisfactory. When he was aware that a prerogative administration was about to issue he purposely, and without notice, went to another jurisdiction, by which the other party has been many months fraudulently kept out of the administration.

I feel justified in condemning the proctor in the expenses; and I shall consider whether it may not be expedient to go a step further, and to suspend him from his functions.

[314] WOOLLEY AND GORDON v. GREEN. Prerogative Court, Trinity Term, June 10th, 1820.—An application to continue a certificate of service before a process served on the Royal Exchange had become returnable into Court rejected. An administration with the will annexed, granted to a creditor, limited to filing a bill in equity.

Charles Perks, of Walsall, in Staffordshire, died in July 1819, having made his will but appointed in it neither an executor or residuary legatee. He had no child: but he left a widow, brothers, a sister, and the children of a deceased sister.

Isaac Newton, one of the legatees, instituted a suit to prove the will, which was contested by Samuel Perks, one of the next of kin. The other next of kin were cited by a decree to see proceedings. In May, 1820, the several proctors who had appeared in the cause declared they would proceed no further. On the termination of this suit a decree was taken out by Messrs. Woolley and Gordon, bankers, at Birmingham, and creditors to the estate of the deceased; calling upon all parties entitled in distribution to accept or refuse administration, with the will annexed of the goods of the deceased, or to shew cause why it should not be granted to them as creditors. Charles Green, one of the parties entitled in distribution, a private in the 11th of Dragoons, being with his regiment in India, the decree, according to the custom observed on such occasions, was served on one of the pillars of the Royal Exchange, and not returnable into Court till the 19th of this month.

Lushington moved the Court to dispense with the formality of awaiting the return of the process, [315] on the ground that the necessity for a representative to the deceased was urgent.

Per Curiam. The instrument has been served on the Royal Exchange. By practice it has been usual to continue that by certificate until another Court day: but here the Court is applied to continue the certificate before the process is returnable, on the ground that it is a mere form, and that the person cited being in India it is impossible he can appear. It is possible that he may return before the time has expired—but the object is to give notice to his friends, and to any agent he may have in this country. Under the circumstances of this case I would have granted a limited administration, if the necessity was pressing for carrying on proceedings in the

Court of Chancery : but to accede to this motion would be quite breaking down the form of the process, which I should be unwilling to do ; as long as that form is preserved, the Court must not depart from the line of practice prescribed by it.

Administration was afterwards applied for, limited to filing a bill in equity, and granted.

[316] LYON v. FURNESS. Prerogative Court, Trinity Term, June 10th, 1820.—

Answers on oath not to be dispensed with.

Judgment—*Sir John Nicholl*. This is an application to grant probate on admission of the adverse party in acts of Court, with a view to saving the answers. The deceased died leaving a widow and a child ; the will is in his own handwriting—there is an attestation clause, but no witness to it ; the will has been propounded in an allegation which was discussed and admitted to proof. *Good v. Good* is cited as a precedent for the present application ; and this is one of the many instances which point out the danger of the Court's relaxing its rules of practice—*Good's case*, however, is materially distinguished from this. The widow admitted the facts in acts of Court : but proxies were exhibited from the daughter and the husband, the only persons who were interested in opposing the will. In this case the will may be beneficial to the widow, and adverse to the child. The answers of the widow upon oath may be something of a ground on which the Court can act, she having been present during part of the transaction.

I must require, especially in cases where the property is of sufficient value, that the answers upon oath may be brought in.

[317] BARTHOLOMEW AND BROWN v. HENLEY. Prerogative Court, Trinity Term, June 10th, 1820.—Three checks on a banker pronounced codicillary.

Judgment—*Sir John Nicholl*. The party deceased is John Eyre Bartholomew. He died on the 22d of February, 1819, leaving a widow, a son, and a daughter ; he was possessed of a small real estate, and of personal property amounting from 7 to 10,000*l*. He had lived apart from his wife, and had for several years before his death cohabited with a Miss Saunderson—he had a high regard for her—by his will of the 12th of November, 1813, he bequeathed to her the rent of two houses in Avery Row, all his household furniture, plate, money in his house, and a third in reversion of 2000*l*. in the event of the death of a son he had by her, before he should attain the age of 25 years.

There is a paper dated the 13th August, 1814, by which he gave her the improved rent of a house in Grosvenor-street—this is all in the deceased's handwriting, but not signed ; this is admitted to be a codicil.

A check is produced dated the 16th of January, 1817, for 250*l*. ; another of the 4th of November, 1817, for 500*l*. ; and nine months afterwards another check for 150*l*. ; corresponding entries to them are made in the check-book.

The first entry is “2808, Jan. 16, 1817. I give this check to Miss Eyre, for fear any thing should [318] happen to me before I can make a codicil to my will, 250*l*.” The second entry is “2544. I give this draft to Miss Eyre, being very ill, for fear any thing should happen that I should die, as it is my intention to make another will in her favour.” The third is, “June 16-18, Miss Eyre. This draft to be paid from my bankers, in case I should die, 150*l*.”

These several checks and entries are pleaded as codicillary—on the other side it is pleaded that they were only written during occasional illnesses, and have no effect ; and that he wrote checks for others ; that he died suddenly, and that payment of the checks was not applied for till after his death.

The question for the Court to consider is, whether, under these circumstances, the instruments are a part of the testamentary disposition of the deceased ; or whether they became void on his recovery ; or whether he intended only one of them to operate ; or whether each is to be added to the other.

Paper B is in the form of a codicil ; but these three are not so. Indeed it must be admitted that the papers are not in a testamentary form : but that is not necessary. Deeds of gifts, or letters if dispositive of property and to be consummated by death, have effect, although the deceased might not be aware that he had performed a testamentary act. Even if they are testamentary, the Court must enquire if they are contingent or cumulative.

This Court is often called upon in cases of this description to ascertain the real intentions of the testator. On the face of these papers I think they [319] are testamentary ; they are directions as to the property after death ; there is nothing to make me think them provisional. It cannot be denied that if he had died immediately after writing the drafts, they would have been valid. If they would have been good at that time, it is for the party opposing them to say when they ceased to be good ; the construction usually put on such instruments is this, "In case I neglect the opportunity of making my will, I wish this to be a protection against my own negligence and omission." This is the only safe construction which can be put. I do not consider a certain time imposed during which they are to be good, as the deceased has imposed no time himself.

In the next paper he states "for fear any thing should happen to me that I should die ;"—500l. This is much too large a sum for the purpose suggested of immediate supplies after death ; this is an absolute benefit, not a condition the deceased imposed on himself. The third draft states "in case I should die 150l. ;" this is not like a substitution, it is a much smaller benefit. The general principle is, that bequests are *prima facie* to be taken cumulatively where they are on separate papers, unless they are revocatory of each other. It is observable also that the deceased was not then in a dangerous state ; from the very words of one of them it was most clearly intended to be an addition to his will.

This is the view the Court is disposed to take of the papers. His mode of carrying his intentions into effect is singular : but the only point for my consideration is, whether he intended the party to [320] have the benefit. Suppose a bank note in an envelope with a similar endorsement to this, no one can doubt what the effect would be—indeed I remember a case of that sort ; although cases are seldom precisely similar, the Court must endeavour in all of them to extract the intentions of the parties.

These observations arise on the face of the paper ; the circumstances and evidence lead to the same conclusion. The deceased's wife had deserted him, and he was not on terms of civility with his son ; he was desirous of marrying Miss Eyre, and had resorted to legal advice to ascertain whether he could do so. It is clear from the other testamentary papers that he intended to increase the provision for Miss Eyre. In 1813 he made his will ; in 1814 he wrote paper B ; in 1816 and 1817 new wills were began ; and it is clear from the contents of those papers that he intended a very considerable addition to Miss Eyre. It is not then improbable that he should from time to time do further acts in her favour ; he spoke of her as extremely attentive to him during his illnesses ; and there is considerable probability that during these illnesses he intended to increase the benefit he destined for her.

These drafts on the death of the deceased are in the possession of Miss Eyre. It has been argued that the receipt of one draft must put an end to the preceding one, and so on ; the one putting an end to the other : but there is nothing on the checks themselves to shew that such was the opinion of the deceased.

[321] With respect to the parol evidence, one witness, Bell, a friend of the deceased's, has been examined, who deposes that he had often heard the deceased speak in terms of regard for Miss Eyre. He states that the deceased referred to these checks, although he cannot fix the time of his doing so ; and the Court cannot rely strongly on this : but where it is in concurrence with the other evidence, some reliance is to be placed on the statement.

On the whole, I am bound to look to benefit intended ; and although it has been done in an anomalous form, it is the duty of the Court to carry into effect the intentions of the deceased, and to consider these papers as a part of the will and codicils of the testator.

PARKIN v. BAINBRIDGE. Prerogative Court, Trinity Term, June 11th, 1820.—

Legacies drawn over by a pencil holden not to be cancelled.

[Referred to, *Francis v. Grover*, 1845, 5 Hare, 47.]

Judgment—*Sir John Nicholl*. The question before in this case was whether Mr. Bainbridge was to be considered as joint executor and residuary legatee. The case has since been before the Court of Chancery, and is now sent here to ascertain whether certain legacies are revoked.

Certainly these legacies were once a part of the [322] will—pencil lines are

drawn across them; the question is whether they are drawn for cancellation or deliberation. Where the crossing of an instrument is in pencil, it is as valid, if it is intended as a cancellation, as if it was in ink; but it is more equivocal as to intention: persons are apt to make pencil marks for memoranda. Till I am better instructed I shall hold them to be equivocal. I will reserve my opinion how I should decide, if no facts could be alleged on either side, till called upon for a decision upon such a case.

Here are circumstances which tend strongly to shew that the deceased considered these as acts for subsequent deliberation; on the face of the paper such is the presumption: in some instances, where he had first crossed them in pencil, he afterwards crossed them in ink, he did not consider the pencil as the final alteration. Where he did not pursue the same mode, I infer that he had not decided on the revocation.

Another fact appearing on the face of the paper is that he carries out and casts up the amount of the legacies. Where he has struck through the legacies with ink, he has altered the casting up, so as not to include the legacies so revoked: but the legacies struck through only in pencil are still included in the casting up of the total amount of the legacies.

The last ground is that the Court has held, and it was admitted, that the deceased did not mean to revoke by pencil marks, for the name of Mr. Bainbridge, the executor and residuary legatee, has been [323] drawn over by pencil: but it has been established by the averment of Mr. Bainbridge and Dr. Lettsom that the deceased did not consider Mr. Bainbridge's name erased; he continued to treat him as his executor, and directed his will to be delivered to him and Dr. Lettsom after his death; if Mr. Bainbridge was not revoked by these pencil-marks, what reason have I to suppose that the other legatees are? The deceased's conduct leads to an opposite inference.

On the whole, I am of opinion that the deceased did not consider these legacies as revoked, and that they are a part of the will of the deceased.

BUCKLE v. BUCKLE. Prerogative Court, Trinity Term, June 20th, 1820.—The presumption, arising from an attestation clause without witnesses, repelled.

Judgment—*Sir John Nicholl.* Lewis Buckle is the party deceased; in August, 1818, he wrote a testamentary paper which was found sealed up at his death; and from the appearance it should seem that he did not intend it to be opened again.

Although the will is expressed in eccentric terms, there is nothing in it which indicates any want of capacity. But there is an attestation clause without witnesses, which raises a presumption against the [324] paper: yet it is a slight one, and the sealing up seems sufficiently to shew that he did not intend the paper to be witnessed. The hand-writing and finding are admitted: I think I must conclude that it was the intention of the deceased that it should operate in its present form; and I pronounce for the paper.

[325] **BRIGGS v. MORGAN.** Consistory Court of London, Trinity Term, June 21st, 1820.—It is competent to a man to bring a suit of nullity of marriage against a woman for natural malformation.

[S. C. 2 Hagg. Con. 324; 161 E. R. 758.]

This was a suit for nullity of marriage, brought by a man against his wife, by reason of incurable natural malformation and bodily defects in her person. She was described in the libel as having been a widow when he married her.

Arnold and Phillimore. This suit is unprecedented; and the circumstance of the woman having been a widow raises such a presumption in her favour as cannot be averred against, unless it could have been pleaded that the former husband died too soon to complain: but that cannot be the case, for the cohabitation was of eighteen years' continuance. Added to this, the age is omitted to be stated. This might be sufficient of itself to protect the party from such an inquisition as she must submit to, should the libel be admitted to proof. The charge is not sufficiently specified; if the idea is to be conveyed that she is nimis ætæ, then the triennial cohabitation might be necessary, as it is in the case of frigidity; and it could not be competent to this man, who has [326] been married only one year and five months, to institute the suit. Such was *Grimbaldeston's case* (Cons. 1777. Arches, 1779). Only two cases within our recollection have been brought in these Courts by the man, viz. *Wilson v. Morris* (Cons. of London, 1785) and *Guest v. Guest* (Cons. of London, May 20, 1820); and in the first

of these the libel was rejected. Sir William Wynne said that none had been admitted in his memory, where the suit had been brought against the woman. C. 5, 7. Nov. 22, 6. Dec. 2, 33. X. 4, 15. X. 2, 19, 4.

Jenner and Lushington contra. The triennium is not required where the case set up is that of the woman being nimis arcta. It is objected that she is a widow: but if the first husband acquiesced in her infirmity, the second is not bound to do the same. The sentence would not affect the former marriage—for it could be only voidable, and therefore cannot be enquired into after the death of one of the parties. Besides the acquiescence of the husband is contemplated in law; “habeat ut sororem.” It is objected that her age has not been stated. The Court is not to presume that she is past the age of sexual intercourse: if she were, it is extraordinary that the husband should bring the suit. The woman may plead her age or state it in the answers: but at all events she is not entitled to defend herself by the species of protest here resorted to. In *Greenstreet v. Comyns* (vol. ii. p. 10) the inspectors reported that there was not such appa[327]-rent incapacity as necessarily implied impotency; yet, on hearing the man's account of his own state, they believed it—and the Court pronounced for the nullity. There can be no natural reason why there should not be malformation in a woman as well as in a man, and consequently no reason why the one might not bring a suit of this description as well as the other.

Mascardus, De Prob. 311. Brown, 2, 14, 16. Oughton, 215. Sanchez, 7, 107. Godolphin, 492, 2, 36.

Judgment—Sir William Scott. This suit is brought on the ground of alleged impotency. Cases of this nature are said to be of rare occurrence; and that three only have been brought by the man within the last 60 years, and that these have been unsuccessful. A person need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Malformation is not common in our sex, and perhaps is still more uncommon in the other; and where it does exist, and is known to the parties, it naturally deters them from contracting marriage; and where it is otherwise, there may be many reasons, some good and some bad, which may prevent them from applying to a Court of Law for redress. The possibility of the case is not denied: the topic is known to form no small extent of discussion in the canon law. Unless the possibility is denied, the right of complaining can hardly be denied to the husband: the rights and duties of both parties are co-equal, whe[328]-ther the failure is on one side or the other. I am inclined to pay as little deference to the objection taken on the ground of the indelicacy of the proceedings. Courts of Law are not invested with the powers of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender; here the claim is for a remedy, and the Court cannot refuse to entertain it on any fastidious notions of its own.

In *Harris v. Ball* the judge here rejected the libel: but the Court of Delegates on solemn argument rejected that decision, and decided in favour of the complainant.

It has been said that the evidence must be such as would lead to no certain conclusion: but this is equally applicable to every case of the same description, and would go to shew it is wrong to give such a jurisdiction. The expectation of infirm evidence may induce greater caution: but is not to preclude parties from having recourse to those modes of proof which the law allows.

These general objections must be dismissed; but it is said there are particular objections, viz. that the woman had been the wife of another man who had never complained. As to how long, or why he acquiesced, we are all in the dark; a variety of reasons good or bad might have prevented him from complaining. In my view, however, the conduct of the first husband can form no more than a presumption; it cannot be considered as an [329] estoppel to one man's grievance that another has not brought his forward.

Another objection taken is the age—which has not been stated in the libel. The woman may be advanced in life; and I do go the length of saying that private disappointment should be submitted to. The man is pleaded to be of sound health, the age of the woman does not appear; if he has married a woman of an advanced period of life, he must bear the consequence.

The great and final objection is that the suit is premature, and that the triennalis cohabitatio is required—on all consideration of reason, and on examination of the

authorities, I do not think that this rule applies to the present case; where the infirmity can be ascertained at once, this cannot be required. All the great authorities, ancient and modern, subscribe to this, which is the rule of reason, from the Digest of the canon law to Brown, and the oracles of our own practice. Godolphin and Oughton.

I am disposed therefore to admit the libel, but not at present; for I shall give the adverse party an opportunity of stating any thing in the way of protest which may induce the Court to abstain from allowing any further proceedings against her.

Michaelmas Term, Nov. 24.—Affidavits were exhibited on both sides, and the effect of them argued at some length.

Judgment—*Sir William Scott*. This proceeding is brought by James Briggs against Sarah Briggs his wife for a nullity of mar-[330]-riage, on account of incurable defect and natural malformation; the marriage took place on the 16th of February, 1819, she being a widow, and having lived with a former husband for eighteen years. It appears that James Briggs is in his forty-second year, that is, he will enter into his forty-third year in January next. She is some years older, being now in her fiftieth year, and in January next will enter into her fifty-first year.

No dissatisfaction was expressed on the part of the husband till March, 1820; the libel was brought in on the 2d of June, 1820. The libel is short: it alleges the incapacity to exist; that it is natural and incurable, as will appear by the inspection of matrons and other lawful proofs; and prays that the marriage may be pronounced null and void. When the libel was first offered the Court was disposed to consider that unless something could be shewn in the way of protest on the part of the wife, it must be admitted. The subject itself is fair ground of complaint. Parties marry for offspring; for the enjoyment of each other's person. Natural malformation is of rare occurrence in either sex, and is more rare in the female than in the male sex. Still, instances do occur: sometimes they are without the knowledge of the party. Where it is with the knowledge, it is a gross fraud, and a grievous injury. In either of these cases the law provides a remedy; and it is the duty of the Court to supply the remedy on complaint being made.

It has been said that the modes resorted to for proof on these occasions are offensive to natural modesty: but Nature has provided no other [331] means; and we must be under the necessity either of saying that all relief is denied, or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own.

If there is just reason either to suspect the truth of the statement, or to think the injury inconsiderable, the Court will hesitate before it descends to modes of proof which are painful.

The age is entitled to great consideration. The injury is very different from that which may occur in an earlier period of life, at a time of life when the passions are subdued, and marriage is contracted only for comfortable society. The exposure also of the person at an advanced stage of life may be felt with greater abhorrence, and complied with much more reluctance, than in the case of a younger person.

On considerations of this sort the Court desired the ages to be stated before the libel went to proof. The woman is near fifty, beyond the ordinary crisis of female life—little likely to have children; and it does not appear that she had children by her former marriage. His age is less advanced; he might form other expectations if he had married a younger woman. At any rate the fact standing thus, I must order the process of the Court to be executed upon a woman in her fifty-first year. I should feel much reluctance on this ground if this were the only objection. The man is a little advanced beyond the octavum lustrum, approaching to the period when a philosopher has stated that desires are no longer in a state of unsubdued provocation, but must be held to be under reasonable controul; and [332] he therefore may be fairly left to just reflection and more placid gratifications.

But this is not the only objection. I see reason to suspect his sincerity.

First, from the lateness of the complaint; the libel is brought sixteen months after the marriage, it is a case to which the triennalis cohabitatio does not apply. Surely it did not require more than a twelvemonth to discover this defect.

In the next place, with respect to the natural malformation. She swears most unreservedly that she had constantly carnal intercourse with her first husband for eighteen years till near the time of his death. This is confirmed most materially by

the laundress who washed their linen for many years, and who describes marks which might be denominated as certain indicia of real matrimonial connexion; there cannot then be any natural malformation as he avers; it must be then a case of supervening infirmity to which the most vigorous persons are subject in the decline of life, this would not be a case for the Court to interfere in.

Thirdly, he has brought forward a history to which no credit is due, viz. that she lived on bad terms with her former husband, the fact being that they lived on terms of the greatest harmony and affection, so much as to be an object of notice and commendation to their friends and neighbours. And it is confirmed by her husband having made a bequest of his whole property to her, leaving his own sister unprovided for, and having a family to maintain; and though his sister applied to him to make a different disposition just before his death, [333] which he repelled with indignation, and expressed himself most strongly in favour of this woman.

The party proceeding here alleges likewise a cohabitation of the former husband with another woman; as to which it appears that the cohabitation with this woman was before marriage, and broken off on that event taking place. The only witnesses to the contrary are the disappointed sister and a person whom I suppose to be the attorney in the cause, who speaks to some allusions wholly overturned by other evidence in the case which proves that he lived happily with her, and remained true to his own spouse in life and in death.

On every ground I shall act improperly if I were to wade further in this business. He must find his remedy either elsewhere, or in his own patience. I shall not subject the woman to the process consequent on the admission of this libel, under such proof of the husband's insincerity; and I dismiss this proceeding.

[334] DEAN v. RUSSEL. Prerogative Court, Trinity Term, July 14th, 1820.—The wife of an executor an incompetent witness in a cause touching the validity of the will under which her husband is executor. An application for the payment of costs out of the estate of the testator refused.

In this cause the wife of one of the executors of a will which was contested was produced and examined as a witness. The executor had no legacy.

At the hearing of the cause the evidence of this witness was objected to, and the Court sustained the objection.

In the same case upon an application for the costs to be paid out of the estate of the testator—

Per Curiam. It is only under special circumstances that the Court directs costs to be paid out of the testator's estate; indeed, it is only in modern times that it has found itself (a) authorised so to do. In this case the party might earlier have judged that he ought not to have proceeded so far in the cause.

[335] THE OFFICE OF THE JUDGE PROMOTED BY GILBERT v. BUZZARD AND BOYER. Consistory Court of London, Hilary Term, July 19th, 25th, 1820.—The use of iron in the structure of coffins not unlawful: but they are not to be admitted into churchyards on the same terms of pecuniary payment as coffins of ordinary wood.

[S. C. 2 Hagg. Con. 333. Referred to, *Reg. v. Price*, 1884, 12 Q. B. D. 250; *In re Dixon*, [1892] P. 386; *In re Kerr*, [1894] P. 284; *Winstanley v. Manchester Overseers*, [1910] A. C. 9.]

This was a proceeding by articles exhibited by John Gilbert, an inhabitant of the parish of St. Andrew, Holborn, against John Buzzard and William Boyer, the churchwardens, for refusing to permit the body of his wife to be interred in the churchyard or burying ground of the said parish. The articles set forth that Mary Gilbert died on the 2nd of March, 1819, an inhabitant of the parish of St. Andrew, Holborn; that her body was soon after her death deposited in an iron coffin for interment; that due notice of the intended interment of the said body in the churchyard or burying ground

(a) In *Henshaw and Hadfield v. Atkinson*, and *Atkinson v. Passey and Hemming*, Deleg. 1814, on an appeal from the Prerogative Court of Canterbury, the costs of the several parties in the cause in both Courts were decreed to be paid out of the estate of the testator. Judges Delegates—Mr. Justice Heath, Mr. Justice Le Blanc, Mr. Baron Wood, Dr. Parson, and Dr. Phillimore.

of the parish was given, and the usual fees for such burial were paid: but that notwithstanding the same the churchwardens did by themselves, and other persons acting under their orders and directions, several times refuse to permit the said body so enclosed in an iron coffin to be interred in the churchyard or burying ground of the [336] parish, and did obstruct and prevent such interment thereof contrary to the laws and constitutions ecclesiastical of the realm; and that in consequence of such obstruction the body in such coffin was deposited in the bone-house of the parish.

The articles went on to allege that the coffin in which the body was deposited was made of thin plates of wrought iron, one twelfth part of an inch in thickness; and that it was of less exterior dimensions than a single coffin made of wood for the same body must necessarily have been; and that it was so constructed as to afford security against the removal of the corpse enclosed therein.

An allegation responsive to these articles was given in by the churchwardens in which the principal points made were, that the select vestry, which had the sole management of all affairs relating to the parish, had come to the resolution of refusing the admission of iron coffins into the burial grounds belonging to the parish; and had ordered the vestry clerk to communicate this order to the person conducting this funeral before the body was brought for interment. It moreover set forth that the parish of St. Andrew, Holborn, was large and populous, that there were according to the last census upwards of 30,000 inhabitants, which number had since increased; that the annual number of burials exceeded upon an average of the last three years 800; that besides the churchyard there were three burial grounds purchased by and belonging to the said parish; that they are of small dimensions, and very nearly filled with the corpses of persons [337] buried therein; that if the majority only of the persons brought for interment in the said burial grounds were deposited in iron coffins, the said burial grounds would soon be rendered useless on account of the imperishable nature of the said iron coffins, and that it would not be possible to procure a sufficient quantity of ground for a new burial ground without going to a great distance, and then only at an enormous expense to the parish as well as to the individuals who had to bury their relatives, by their being obliged to take them so far from the parish for interment.

Arnold for Gilbert. Various transactions have taken place with respect to this matter: several demands for burial were made and refused. A suit was then instituted against the incumbent for the purpose of trying this right: but the incumbent died, and that suit abated. Application was then made to the Court of King's Bench (a) for a mandamus; which that [338] Court refused on the ground that

(a) *The King v. Coleridge and Others* (2 B. & Ald. 806). On an application for a mandamus to compel the burial of the body—

Abbott, C. J. I am of opinion that in this particular case the Court cannot interpose by granting a mandamus. It may be admitted, for the purpose of the present question, that the right of sepulture is a common law right: but I am of opinion that the mode of burial is of ecclesiastical cognizance alone. If a clergyman should absolutely refuse to bury the body of a dead person brought for interment in the usual way, I am by no means prepared to say that this Court would not grant a mandamus to compel him to inter the body. But in so doing we should be acting in aid of the Ecclesiastical Court; for that Court would compel the burial, although not in so speedy a manner as by mandamus. In this case there has been no refusal to inter the body in the usual and ordinary mode: the contest between the parties is, whether the officers of the parish shall be compelled to bury the body in an unusual and extraordinary manner. I am of opinion that it is a question proper for the decision of the Ecclesiastical Court, and not of this Court. I need not say that in matters purely of ecclesiastical cognizance this Court does not interfere, as, for instance, in the case cited from 5 T. R. (*Rex v. The Churchwardens of St. Peter's, Thetford*, p. 364), the Court will not grant a mandamus to make a church-rate. I am therefore of opinion that this rule should be discharged with costs.

Bayley, J. I agree entirely with my Lord C. J. in the judgment which he has delivered; the object of this application is to compel a burial in a specific manner. It is not for this Court to say that there shall be a specific mode of burial: but that is a matter purely for the consideration of the Ecclesiastical Court.

Holroyd, J. I am also of the same opinion: the matter in dispute is merely as to

the suit was purely of ecclesiastical cognizance: the present suit was next instituted against the churchwardens; the articles were admitted without opposition, and an allegation is now given in defence: and the question is whether there is a right on one side to insist upon interment in the material mentioned; and, on the other side, whether there is a right to refuse it. This allegation recites circumstances of alleged misconduct; these tend to embarrass the question, and to lead away the attention of the Court from the main object; if admitted, they will lead to a long detail on the other side: it cannot be argued, even should the misconduct be proved, that it would create a forfeiture of right; and it would be disadvantageous to the churchwardens to take this course, because they would obtain a decision on the particular case, and not on the general question.

The suit is brought avowedly for the purpose of arguing the right; it is put in a criminal form, because, according to practice, that is the most convenient form; no real punishment is intended [340] to be inflicted. The interment has been long deferred: part of our articles therefore is historical—analogueous to the leading article in a suit of divorce—no other effect is intended: this part of them is only introductory to the subsequent matter; the subsequent part of the plea is said to be useless and inadmissible, and this raises the whole question.

It is the duty of an executor to take care of the funeral; this discretion is variously exercised; our ancestors buried in stone; we at this time often bury in lead, the outer coffin being of timber; and for this, timber of the most durable kind is selected. The executor here has chosen another material; the advantage is that the body is better secured from removal by this mode. Attempts are frequently made to remove bodies; it is the duty of the executor to provide against this; it grows out of the best feelings of our nature: the offence is an indictable matter. *K. v. Lynn* (2 T. R. 733).

The metal is intended to preserve bodies from violation after death: the dimensions of it will not produce greater inconveniences than those of an ordinary coffin; it is only one twelfth of an inch in thickness. The objection goes to future inconvenience; we apprehend that the arguments in favour of a more perishable material are not good. In the first place, the fact is not admitted that the article is more imperishable than other articles in constant use: leaden coffins are not objected to—[341] it is obvious that iron is not more imperishable than lead. Iron goes to rapid decay; and it is stated, would decay as soon as wood.

Secondly. If the imperishable nature of the article is admitted as a ground of objection, where is the objection to stop? It may next be made to the interment in lead. There can be no legal right to reject the material: the churchyard and burial grounds belong to the parish, for the interment of the parishioners; they are vested by law in the incumbent and the parishioners. Every parishioner has generally a right to a place in the churchyard; he has no right to any particular spot; but when death and interment have taken place, then there is a severance of the common property, the general right has become a particular right, there is a legal appropriation of a legal

the mode of burial; that I think is purely of ecclesiastical cognizance. In 3 Inst. 203, it is said "that in every sepulchre that hath a monument two things are to be considered, viz. the monument, and the sepulture, or burial of the dead. The burial of the cadaver (that is, *caro data vermibus*) is nullius in bonis, and belongs to ecclesiastical cognizance: but as to the monument, action is given, as hath been said, at the common law for defacing thereof." It seems to me that the mode of burial is as much a matter of ecclesiastical cognizance as the prayers that are to be read, or the ceremonies that are to be used at the funeral. I therefore think that this rule should be discharged.

Best, J. It seems to me that this is a matter purely for the Ecclesiastical Court; and that of itself is a sufficient reason why this mandamus should not be granted. But considering this as an application to the discretion of the Court, I think that this mandamus ought not to go. The consequence of enforcing such a mode of burial would create great public inconvenience; for it is evident that in a few years the churchyard would be filled, and a great additional expense cast upon the parish in providing other places for the burial of the parishioners. I think therefore that this Court should not interfere in the exercise of its discretion to enforce a mode of burial calculated to produce such consequences.

The rule was discharged with costs.

right. Inviolability of sepulture is one of the dearest and most ancient rights of mankind; it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed; it is his last home; and this, ut requiescat in pace, usque ad resurrectionem (2 Inst. 489), is considered by Lord Coke as a ground of the parishioners' duty of repair.

This appropriation is complete and perfect, till the time comes when appropriation cannot be maintained; that time is no matter of consideration for the present generation. The law which contemplates the appropriation cannot contemplate the extinction of that right, the period is too remote.

[342] On the other hand, no such right exists as that claimed on the other side.

As to the inconvenience, it is one of the many other inconveniences arising from increased population: this must be borne; it will neither create nor destroy a legal right till it amounts to actual necessity.

Jenner on the same side. The funeral service is to be preserved from all indignity: no order of the vestry can justify the churchwardens, if they have acted illegally in obstructing and preventing the funeral.

Phillimore on the same side.

Per Curiam. Has there not been a representation made that the parties could not get redress? There has been no denial of justice here; this Court is always open. It is strange that the proceedings of Courts of Justice should be slandered because persons have taken upon themselves to act without informing themselves as to their proper course.

Swabey for the churchwardens. This is a case of the first impression—in all cemeteries we must revert to the persons at whose cost and charge the ground is purchased. There are, it seems, three burial grounds in the parish, which are small; from this material being imperishable, the ground would soon become useless, and it would be impossible that all the parishioners could find room for burial.

Per Curiam. That is an important point: it is asserted that iron consisting of laminæ perishes as soon as wood. [343] The first question is whether there is ground, for the inconvenience of which the parish complains.

Swabey. Cast-iron would certainly be imperishable. Allusion has been made to stone coffins: but the use of these can never have been frequent, they have only been the depositaries of the bodies of persons of some note. Again, as to the lining of lead, that is not common; the expense prevents its being common; and a higher fee is demanded for it. The objection is, Where would it stop? If the law does not expressly and in words prohibit the use of iron coffins; still, if a novel mode of burial is attempted, contrary to the wish of the parishioners generally, the Court will attend to their wishes; not more is exacted in any case than an appropriation for burial: on an application for a vault, the Court requires the consent of the parish. The words of the consecration of a church-yard generally apply to the separation of such a place for the purposes of sepulture only.

This case (2 B. & Ald. 806) underwent much discussion in the Court of King's Bench. The mandamus was refused, it being the unanimous opinion of the Judges that the mode of burying the dead was matter of ecclesiastical cognizance; it is quite clear, therefore, that this Court may make any regulations called for by the circumstances; and if the mode of burying in iron coffins were resorted to, it would be impossible for all the parishioners to be buried in the church-yard; and they would be driven at considerable [344] expense to purchase additional grounds out of the parish. The right of burial is like other rights; it is not to be so used as to injure others.

It has been objected that the appropriation of ground for each party for interment is for ever: this is not so; all that is required is, that the body be kept unmolested till it decays. In fine, the whole is under the discretion of the ordinary to make such arrangements under the circumstances as may be best for the public service.

Lushington and Dodson followed on the same side.

Sir William Scott. I shall admit this allegation for the mere purpose of trying the general question: but I do it on the distinct understanding that neither in this nor in any other Court the question is to be considered as one in which costs can be given.

It has been said that these iron coffins are more durable than wood; a fact which I should wish to have shewn in the shortest way possible, not by allegation, but by affidavits.

Michaelmas Term, Nov. 20.—*Judgment*—*Sir William Scott*. This suit is brought by John Gilbert, parishioner of St. Andrew, Holborn, against John Buzzard and William Boyer, churchwardens, for the offence of obstructing the interment of his wife, Mary Gilbert. The criminating articles state in substance that she was a parishioner; that she died 2d March, 1819. The body was deposited in an iron coffin, and proper notice given of the intended interment on the 9th; but that the [345] churchwardens prevented by force the burial taking place; and in consequence thereof the body was deposited in the bone-house; that such iron coffin takes up less space than a wooden coffin, and is so constructed as to prevent the corpse from being taken out. That again on the 14th April, in the present year, a written notice was given to the rector, churchwardens, and sexton, of an intended funeral on the 18th, and a written answer returned by the churchwardens that they would not permit it. That the demand for interment was made on the day mentioned; but the churchwardens refused to permit the interment, unless the body was taken out of the iron coffin, and forbade any grave to be prepared.

The defensive allegation states in substance that the account given by Gilbert misrepresents the transaction; that nothing was said by Gilbert or the undertaker about an iron coffin in the first inquiries, though then informed that the parish would not receive one: but Gilbert said it was to be of wood. He paid the usual fees, and then declared it to be of iron, refusing to take back the fees; that a select vestry being assembled, and informed of it, passed a resolution not to admit the iron coffin; and a copy of such resolution was served upon the undertaker, who threatened the officer who brought it. That on March 9, a forcible entry was made into the burial ground and church-yard, and a disturbance created: but the body was returned to the bone-house. That the parish is large and populous—30,000 parishioners, and increasing; annual burials above 800, and [346] increasing; three burial grounds, besides the church-yard, all nearly filled with corpses; that they would all soon be rendered useless by the introduction of iron coffins; that it is not possible to get a new burial ground, but at a great expense, and also at a great distance. And that their proceedings had been all guided and authorised by the select vestry, and by the parish at large.

It appears that the suit was begun under great mutual irritation, which is now properly subsided; and the parties have agreed to take the opinion of the Court on the dry question of right, without introducing with that question any imputation of the conduct on either side, or engrafting on it any demand of penalties to be inflicted, or of costs to be decreed. In this act of amnesty the Court entirely concurs; and therefore forbears to repeat any of the wanderings into which this case has strayed since the transaction which gave it birth.

Before entering upon the immediate question, it may not be totally useless or foreign to remark briefly that the most ancient modes of disposing of the remains of the dead recorded by history are by burial or burning, of which the former appears the more ancient. Many proofs of this occur in the Sacred History of the Patriarchal Ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of His own person, and those of His followers, has confirmed the indulgence of that natural feeling which appears to prevail against [347] the instant and entire dispersion of the body by fire; and has very generally established sepulture in the customary practice of Christian nations. Sir Thomas Brown, in his treatise on Urn-burial, thus expresses himself (it is his quaint but energetic manner): “Men have been fantastical in the singular contrivances of their corporal dissolution: but the soberest nations have rested in two ways, of simple inhumation and burning. That interment is of the elder date, the examples of Abraham and the Patriarchs are sufficient to illustrate. But Christians abhorred the way of obsequies by burning; and though they stuck not to give their bodies to be burnt in their lives, detested that mode after death; affecting rather a depositure than absumption, and properly submitting unto the sentence of God to return not unto ashes, but unto dust again.” But burning was not fully disused till Christianity was fully established, which gave the final extinction to the sepulchral bonfires. The mode of depositing in the earth has, however, itself varied in the practice of nations. “Mihi quidem,” says Cicero, “antiquissimum sepulturæ genus id videtur fuisse quo apud Xenophontem Cyrus utitur.” That great man is made by that author to say,

in his celebrated dying speech, "That he desired to be buried neither in gold nor in silver, nor in any thing else, but to be immediately returned to the earth." "What," says he, "can be more blessed than to mix at once with that which produces and nourishes every thing excellent and beneficial to mankind?" There certainly, however, occurs very ancient mention (in-[348]-deed the passage itself rather insinuates it indirectly) of sepulchral chests, or what we call coffins, in which the bodies being enclosed were deposited, so as not to come into immediate contact with the earth. It is recorded specially of the patriarch Joseph that when dead he was put into a coffin and embalmed; both of them, perhaps, marks of distinction to a person who had acquired other great and merited honours in that country. It is thought to be strongly intimated by several passages in the Sacred History, both Old and New, that the use of coffins, in our sense of that word, was made by the Jews. It is an opinion that they were not in the use of the two polished nations of antiquity. It is some proof that they were not, that there is perhaps hardly in either of them a word exactly synonymous to the word coffin; the words in the Grecian language usually adduced referring rather to the feretrum or bier on which the body was conveyed, rather than to a chest in which it was enclosed and deposited; and the Roman terms are either of the like signification or are mere general words, chests or repositories for any purposes (*arca* and *coculus*, &c.) without any funeral meaning, and without any final destinations of their depositions in the earth.

The practice of sepulture has also varied with respect to the places where it has been performed. In ancient times caves were in high request; mere private gardens or other demesnes of the families; enclosed spaces out of the walls of towns, or by the sides of roads; and, finally, in Christian countries, churches and church-yards, where the deceased could receive [349] the pious wish of the faithful who resorted thither in the various calls of public worship. In our own country, the practice of burying in churches is said to be anterior to that of burying in what are now called church-yards, but was reserved for persons of pre-eminent sanctity of life; men of less memorable merit were buried in enclosed places not connected with the sacred edifices themselves. But a constitution imported from Rome in 750, by an Archbishop Cuthbert, took place at that time; and churches were surrounded by church-yards, appropriated entirely to the burial of those who had in their lives continued to attend divine service in those churches, and who now became entitled by law to render back into those places their remains into the earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the acts of interment.

In what way the mortal remains are to be conveyed to their last abode, and there deposited, I do not find any positive rule of law or of religion that prescribes. The authority under which they exist is to be found in our manners rather than in our laws. They have their origin in sentiments and suggestions of public decency and private respect: they are ratified by common usage and consent; and being attached to subjects of the gravest and most impressive kind, remain unaffected by private caprice and fancy amidst all the giddy revolutions that are perpetually varying the modes and fashions that belong to lighter circumstances in human life. That a body should be carried in a state of naked [350] exposure would be a real offence to the living, as well as an apparent indignity to the dead. Some coverings have been deemed necessary in all civilized and Christian countries: but chests containing the bodies, and descending into the grave along with them, and there remaining in decay, do not plead the same degree of necessity, nor the same universal use. In the western part of Europe the use of sepulchral chests has been pretty general. An attempt was made in our own time by a European sovereign to abolish their use in his Italian dominions; much commended by some philosophers on the physical ground that the dissolution of bodies would be accelerated, and the virulence of the fermentation disarmed by the speedy abruption of all noxious particles into the surrounding soil. Whatever might be the truth of the theory, the measure was enforced by regulations prescribing that bodies of every age, and of both sexes, of all ranks and conditions, and of all species of mortal disease; and every form of death, however hideous and loathsome; should be nightly tumbled, naked and in the state they died, at the sound of a bell into a night-cart, and thence carried to a pit beyond the city walls, there to rot in one mass of undistinguished putrefaction. This system was so strongly encountered by the established habits, as well as by the natural feelings of a highly

civilized and polished people, that it was deemed advisable at no great distance of time to bury the edict itself by a total revocation. In the Southern American establishments of the European nations coffins do not appear to be used.

[351] In our country the use of coffins is extremely ancient. They are found of great apparent antiquity, of various forms and of various materials—of wood, of stone, of metals, of marble, and even of glass (see Gough's *Sepulchral Monuments*). Coffins, says Dr. Johnson, are made of wood and various other matters. From the original expense of some of these materials, or for the labour necessary for the preparation of them for this use, or for both, it is evident that several of them must have been occupied by persons who had filled the loftiest stations of life. In modern practice, chests or coffins of wood or lead, or both, are commonly used for persons who can afford to pay for them. For persons of abject poverty, whom the civil law distinguishes by the title of the *miserabiliter egeni*, what is called a shell is used, and which I understand to be an imperfect coffin; and in very populous parishes is used successively for different individuals, unless charity, public or private, supplies them with a better. Persons dying at sea are, I believe, usually committed to the deep in their bed-clothes and hammock: but I am not aware that any of these are nominally and directly required. A statute (30 Car. II.) has required that the funeral vestment shall be made of wool; and coffins must by the same statute be lined with wool, but the use of it is not enjoined. I observe that in the funeral service of the Church of England there is no mention (and indeed, as I should rather collect, a studied avoidance of the mention) of coffins. It is throughout the whole of that service [352] vice the corpse or the body. The officiating priest is to meet the corpse at the gate of the church-yard; at certain parts of the service dust is to be thrown, not upon the coffin, but upon the body. Certain parts of the service are to be recited whilst the corpse is making ready to be put into the grave. I observe, likewise, that in old tables of parish fees a distinction is stated between coffined funerals and uncoffined funerals in point of payment. There is one of 1627, quoted by Sir Henry Spelman in his *Tract de Sepulturâ*, where a certain sum is charged for coffined burials, and half the same sum for uncoffined burials, and expressly under those general heads of coffined and uncoffined funerals. From whence I draw this conclusion of fact, that uncoffined funerals were at that time by no means so unfrequent as not to require a particular notice and provision.

The argument, therefore, that rests the right of admission for particular coffins upon the naked right of the parishioner to be buried in his church-yard seems rather to stop short of what is requisite to be proved, viz. the right of being buried in a large chest or trunk of any material, metallic or other, that his executors may think fit. The law to be found in many of our authoritative text writers certainly says that a parishioner has a right to be buried in his own parish church-yard: but it is not quite so easy to find the rule in those authorities that gives him the right of burying a large chest or trunk along with himself. This is no part of his original abstract right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his [353] parent earth for dissolution, and to be carried there for that purpose in a decent and inoffensive manner; when those purposes are answered, his rights are perhaps satisfied in the strict sense in which his claims in the nature of absolute rights can be supposed to extend. At the same time it is not to be denied that very natural and laudable feelings prompt to something beyond this; to the continuation of the frame of the body beyond its immediate consignment to the grave, and an indulgence of such feelings very naturally engrafts itself upon the original rights so as to appear inseparably with it in countries where the practice of it is habitually indulged. For however men may feel, or affect to feel, an indifference about the fate of their own mortal remains, few have firmness, or rather hardness of mind, sufficient to contemplate without pain the total and immediate extinction of the remains of those who were justly dear to them in life. A feeling of this kind has been supposed to have caused the preference of burial to the process of burning; and has likewise given rise to extravagant means for preserving human remains for a period of time long after the term at which any memory of the individuals themselves, or any affection of their survivors, can be supposed to extend. Amongst such extravagances the use of coffins is not to be numbered; they are temporary securities, certainly not of longer duration than is necessary for the protection of the bodies they contain from the ravages of the reptiles of the earth, if any such ravages are to be apprehended. In later ages and in populous cities other [354] and more formidable invasions are to be

apprehended—more, I mean, committed by persons employed in furnishing subjects for dissection; an employment which, whatever be its necessity, is certainly conducted, not without lamentable violations of natural feelings, and occasionally of public decency itself.

It is particularly, I presume, with a view to prevent such spoliations of the dead, that the use of the coffins in question is pressed in the present application to the Court. The purpose of security against such spoliations is, as I understand, proposed to be effected by some ingenious mechanical contrivance, which prevents these iron coffins being opened, when once effectually closed. I don't find that any objection is made to the contrivance itself on the ground of inefficacy or any other. The objection is to the metal of which the coffin is composed, the metal of iron; and I must say that, knowing of no rule of law that prescribes coffins, and certainly none that prescribes coffins of wood exclusively, and knowing that modern and frequent usage admits coffins of lead, a metal of a much more indestructible nature than iron, I find a difficulty in pronouncing that the use of this latter metal is clearly and universally unlawful in the structure of coffins, and that coffins so composed are inadmissible upon any terms whatever. These coffins, being composed of thin laminæ, occupy, I presume it is alleged, rather less space than those of wood itself—there is then no objection on that ground; and the objection that they may be magnified to any inconvenient size seems to apply to [355] coffins constructed of this substance no more than to those of any other. But the claim on the part of these coffins is (which is quarrelled with, though not distinctly avowed) that they shall be admitted on the same terms of pecuniary payment as the ordinary wood. This claim cannot, I think, be reasonably maintained but under the support of one or other of these propositions, either that there is no difference in the duration of the coffin of wood and coffin of iron, or that the difference of duration, be it what it may, ought to make no difference in the terms of admission.

Upon the first of these points, the comparative duration, a wish was expressed by the Court that it might be assisted by opinions obtained from persons more scientifically conversant in such subjects than I can describe myself to be: but being left to my own unassisted apprehensions on such a matter, I must confess that it was not without a violent revolt of every notion that I entertain, that I heard it rather indeed insinuated in argument, than directly asserted or maintained, that iron coffins would not keep a longer possession of the ground than those of wood. To me it appears, without any experimental knowledge that I can venture to claim, that upon all common theory it must be otherwise. Rust is the process by which iron travels to its decomposition. If the iron coffin, deposited in the ground, contracts no rust at all from want of air or moisture, then it preserves its integrity unimpaired: but contrà, if from the moisture of the soil in which it is deposited, or from the occasional access of a [356] little air, it contracts rust, that rust, until it scales off, forms an external covering, which protects the interior parts and retards the decomposition; whereas the decay of the external parts of the wood propagates inwardly its own corruption and promotes and hastens the dissolution of the whole. It is the fault of the party complainant if, being left by him to judge of this matter without sufficient information, I judge amiss in holding that coffins of iron are much more, perhaps doubly more, durable than those of wood.

It being assumed that the Court is justified in holding this opinion upon the fact of comparative duration, the pretension of these coffins to be admitted on equal terms must resort to the other proposition, which declares that the difference of duration ought to make no difference in the terms of admission. Accordingly it has been argued that the ground once given to the interment of a body is appropriated for ever to that body; that it is not only the *domus ultima*, but the *domus æterna* of that tenant, who is never to be disturbed, be the condition of that tenant himself what it may. It is his for ever; and the insertion of any other body into that space at any other time, however distant, is an unwarrantable intrusion. If these positions be true, the question of comparative duration sinks into utter insignificance.

In support of them it seems to be assumed that the tenant himself is imperishable; for surely there cannot be an inextinguishable title, a perpetuity of possession, belonging to a perishable thing: but obstructed in a portion of it by public authority, [357] the fact is, that "man" and "for ever" are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous

remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalmments and splendid monuments may preserve for centuries the remains of those who have filled the more commanding stations of human life: but the common lot of mankind furnishes them with no such means of conservation. With reference to men, the *domus æterna* is a mere flourish of rhetoric. The process of nature will resolve them into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession. It is objected that no precise time can be fixed at which the mortal remains, and even the chest which contains them, shall undergo the complete process of dissolution; and it certainly cannot, being dependent upon circumstances that differ, upon difference of soils and exposure, of climate and seasons: but observation can ascertain it sufficiently for practical use. The experience of not many years is required to furnish a certainty sufficient for such purposes. Founded on these facts and considerations, the legal doctrine certainly is, and remains unaffected, that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed; but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation. There exists a right of succession in the whole, a right which can only be lawfully [358] obstructed in a portion of it by public authority, that of the ecclesiastical magistrate, who gives occasionally an exclusive title in a part of the public cemetery to the succession of a single family, or to an individual who has a claim to such a distinction: but he does not do that without just consideration of its expediency, and a due attention to the objections of those who oppose such an alienation from the common use. Even a brick grave without such authority is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the just rights of the living.

If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period at which common local usage has fixed it, are acts of injustice, unless compensated for in one way or other. In country parishes where the population is small, and the cemeteries are large, it is a matter less worthy of consideration. More can be spared, and less is wanting. But in populous parishes, in large and crowded cities, the exclusive possession is unavoidably limited; for, unless limited, evils of formidable magnitude would take place. Church-yards cannot be made commensurate to a large and increasing population; the period of decay and dissolution does not arrive fast enough in the accustomed mode of depositing bodies in the earth, to evacuate the ground for the use of succeeding claimants. New cemeteries are to be purchased at an enormous expense to the parish, and to be used at an increased expense to the families, and at the inconvenience of their being compelled to resort to very [359] incommodious distances for attendance upon the offices of interment. Three additional burial grounds in this very parish have been so bought. This is the known progress of things in their ordinary course; and if to this is to be added the general introduction of a new mode of interment, which is to insure to the bodies a much longer possession, the evil will be intolerable. A comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis must be surrounded by a circumvallation of church-yards, perpetually enlarging, by becoming themselves surcharged with bodies; if indeed land owners can be found willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead, contrary to the humane maxim quoted by Tully from Plato's *Republick*, *Quæ terra fruges ferre, et, ut mater, cibos suppeditare, possit, eam ne quis nobis minuatur neve vivus neve mortuus.*(a)

If, therefore, these iron coffins are to bring additional charges upon parishes they ought to bring [360] with them a proportionate compensation; upon all common

(a) De sepulcris dicit (Plato) hæc: vetat ex agro culto, eove, qui coli possit ullam partem sumi sepulcro, sed quæ natura agri tantummodo efficere possit, ut mortuorum corpora sine detrimento vivorum recipiat, ea potissimum ut compleatur: quæ terra fruges ferre, et, ut mater cibos suppeditare possit, eam ne quis nobis minuatur, neve vivus, neve mortuus. Extrui vetat sepulcrum altius quam quod quinque diebus homines quinque absolverint, nec e lapide excitari plus, nec imponi, quam quod capiat laudem mortui incisam quatuor herois versibus, quos longos appellat Ennius.—Cicero, De Leg. lib. ii. s. 27.

principles of estimated value, one must pay for the longer lease which you actually take of the ground. And what is the exception to be pleaded for iron? If you wish to protect your deceased relative from the spoliators of the dead, by additional securities, which will press upon the convenience of the parish, we do not blame the purpose, nor reject the measure: but it is you, and not the parish, who must pay for that purpose. I am aware (as I have already hinted) that very ancient canons forbid the taking of money for interment, upon the notion that consecrated grounds were among the *res sacræ*; and that money payments for them were, therefore, acts of a demoniacal complexion. But this has not been the way of considering that matter since the Reformation (for the practice certainly goes back at least as far); it appears founded upon reasonable considerations, and is subjected to the proper control of an authority of inspection. To inland and populous parishes, where funerals are very frequent, the expense of keeping church-yards in an orderly and seemly condition is not small; and that of purchasing new church-yards, when the old ones are likely to become surcharged, is extremely oppressive. To answer such charges, both certain and contingent, it is surely not unreasonable that the actual use should contribute when it is called for. At the same time parishes are not left to carve for themselves in imposing these rates; they are submitted to the examination of the ecclesiastical magistrate, the ordinary, who exercises his judgment, and expresses the result by a confirma-[361]-tion of the propriety, pronounced in terms of very guarded caution. It is difficult to say where that authority could be more properly lodged, or more conveniently exercised.

Having already declared sufficiently my opinion on the question of right, it remains only that I should direct the parish to exhibit a table of burial fees for the consideration of the ordinary. It will be for their own consideration, in the first instance, how far these coffins should be placed upon the same footing as those of lead. It is certain that they occupy less room, and that they are more temporary in duration: but it is to be remembered that, being much more accessible in point of original expense, and, therefore, likely to be much more numerous, they are on that account more likely to convert these cemeteries into mines of iron than there is any hazard of their being converted into mines of lead. It may be said that this will operate indirectly as a prohibition in populous parishes and crowded church-yards; and if it should have that effect, it is still better than that the parish should be robbed of the fair and convenient use of their public cemetery. Patent rights (and on which it seems these coffins are constructed) must be held by the same tenure as all other rights, *ita utere jure tuo, alienum ne lædas*; they must not infringe upon rights more ancient, more public, and such as this Court is peculiarly bound to protect. I would recommend in the mean time that the body should be committed to the grave without further obstruction: but without prejudice to the present question, or to the rights of the parish. No pro-[362]-hibitory resolutions existed at the time of the death; and I willingly lay hold of that circumstance to recommend a measure of peace and charity to the living and to the dead.

I shall admit affidavits to be brought in on both sides, before confirming the tables of burial fees.

Easter Term, May 4, 1821.—*Judgment*—*Sir William Scott*. From the former discussion the Court came to the general determination of the legal question; and decided that, if iron coffins were more durable than those of wood, a higher payment ought to be made to the parish for their longer duration in the ground.

The question of longer duration remained to be controverted; and the expectation perhaps was not to be indulged, that there should not be difference of opinion, or that opinion on either side should reach exactness. The influence of various causes on both these substances must be tried, and such experiments cannot be had in time to guide any decision. The matter, therefore, must rest upon opinions, and the facts which have been adduced in support of them.

The Court has before it the declared opinions of eminent professors of chemistry: these disagree, as is not unfrequent; the aphorism, therefore, of *cuiuslibet in arte sua credendum est* has no application. The Court cannot pronounce directly a decisive judgment on a point which conflicting opinions have left in doubt—still less can it pretend [363] to decide another question, that of the comparative skill of the different professors. The balance of members is on the side of the greater durability of iron; therefore, *primâ facie*, the balance of authority is that way. I may perhaps be

THE TABLE OF DUES,
FOR THE PARISH OF SAINT ANDREW, HOLBORN, IN THE CITY OF LONDON AND COUNTY OF MIDDLESEX ;

SETTLED AND APPOINTED

At a Meeting of the Vestrymen of the said Parish, held in the Vestry Room of the Church, on Wednesday, the 22d Day of November, 1820.

FOR BURIAL, MARRIAGE, &c.

(confirmed by Judge, May 18, 1821.)

FOR BURIAL.
For Parishioners.

	Church Vault.		Church Yards.		Upper New Ground.		Lower New Ground.		Shoe Lane Ground.	
	Grown Person.		Grown Person.		Grown Person.		Grown Person.		Grown Person.	
	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.
Rector.	1 2 6	1 2 6	0 13 6	0 8 0	0 18 4	0 9 4	0 12 0	0 7 0	0 5 0	0 5 0
Churchwarden.	2 15 6	1 7 6	0 5 4	0 5 0	0 6 6	0 6 2	0 4 0	0 3 8	0 1 6	0 1 6
Clerk.	0 4 10	0 4 10	0 3 2	0 1 4	0 4 10	0 1 4	0 2 8	0 1 0	0 1 6	0 1 4
Sexton.	0 5 8	0 5 8	0 1 6	0 1 2	0 2 6	0 1 2	0 1 6	0 1 2	0 2 0	0 1 2
Gravedigger	0 1 6	0 1 6	0 1 6	0 1 0	0 1 6	0 1 0	0 1 6	0 1 0	0 2 0	0 1 6
	4 10 0	3 2 0	1 5 0	0 16 6	1 13 8	0 19 0	1 1 8	0 13 10	0 11 6	0 10 6

For Non-Parishioners.

	Church Vault.		Church Yards.		Upper New Ground.		Lower New Ground.		Shoe Lane Ground.	
	Grown Person.		Grown Person.		Grown Person.		Grown Person.		Grown Person.	
	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.	£ s. d.	Child.
Rector.	1 15 11	1 12 0	1 4 2	0 14 0	1 7 6	0 12 6	0 18 3	0 10 0	0 10 3	0 7 6
Churchwarden.	3 19 6	1 19 0	0 9 0	0 9 0	1 9 9	0 18 6	0 6 3	0 16 0	0 3 3	0 4 0
Clerk.	0 7 3	0 7 3	0 6 4	0 2 8	0 7 3	0 2 0	0 4 0	0 1 6	0 2 3	0 2 0
Sexton.	0 8 6	0 8 6	0 3 0	0 2 4	0 3 9	0 1 9	0 2 3	0 1 9	0 2 3	0 1 9
Gravedigger	0 2 6	0 2 6	0 3 0	0 2 0	0 2 6	0 1 6	0 2 6	0 1 6	0 3 0	0 1 6
	6 13 8	4 9 3	2 5 6	1 10 0	2 10 9	1 6 3	1 13 3	1 0 9	1 3 3	0 16 9

thought unduly influenced by my own opinions if I say that the statements of Mr. Brande, who fixes the proportion of durability of iron to wood as three to one, in which he is confirmed by Mr. Aikin and two other persons, find a readier admission to my mind than those of their opponents. A test has been suggested to me by a person (a) well informed on such subjects; arising from the casual discovery of both substances found in contact with the soil at very distant periods of time; sometimes separated from, sometimes in conjunction with, it. The soil may be in three states—first, where the ground has been dry at all times, both substances in such a state seem entitled to longevity; rust does not affect one, or rottenness the other. The *Ægyptian* mummies, made, as it is supposed, of the sycamore wood of the country, and the *immortale lignum*, as the larch is termed by Pliny. But the wooden coffin of Charles the First is described as much decayed, though enclosed in a leaden coffin carefully soldered up.

Secondly, Where either of these have been permanently covered with water, salt or fresh, as anchors fished up from the bottom of the sea, where they have been known to have laid for ages. The keys of Lochleven Castle had suffered very little [364] injury when they were lately found, after having been covered with water two hundred and fifty years. Manufactured wood is said to resist the effect of water less perfectly: but the Coway stakes in the Thames, said to be fixed by Cæsar, and the piers of Trajan's bridge over the Danube, afford strong proofs of the durability of wood under certain circumstances.

The third state applies more directly to this question. Where the substances are subject to alternate damp and dry—weapons with metallic heads, belts, sword blades, and other instruments found in burrows, can be easily recovered to their ancient use, while no particle of the wood remains. Numerous instances of this kind are to be found in the *British Archæologia*.

An affidavit has been made by the patentee, signed by three persons, respecting an iron coffin buried in the church-yard of St. Giles, Cripplegate, which was soon afterwards taken up covered with rust. I cannot infer much from this single instance, produced, perhaps, by singularity of circumstances; the common practice of having the ends of park palings shod with iron may be deemed a sufficient counterpoise to this solitary fact.

Upon these four species of evidence, my own opinion, what appears to be the common apprehension, the preponderating opinions of men of science, and of discoveries I have mentioned, I am called upon to act. If succeeding experience shall shew my conclusions to be erroneous, it will be for the remedial justice of this Court hereafter to revise and correct the decision.

[365] The remaining question then is as to the proper quantum of increased taxation. I am satisfied that no general measure of quantum can be laid down—not even such a one as would be applicable to the several parishes of this town; the size of the church-yard in proportion to the number of inhabitants; the possibility of enlargement; the means of procuring other ground, make a regulation which would apply to this parish applicable to others only with a due consideration of circumstances. In St. Dunstan's in the West they have demanded 25*l*.; that is a populous parish, with a small church-yard, in the heart and most busy part of this metropolis. There is less in appearance to justify the demand of the parish of Islington for 21*l*., though at the same time I cannot say that there may not be reasons which may justify it.

Upon this charge of St. Andrew, Holborn, an ingenious calculation has been made; assuming the facts to turn out as stated, I should suspect it would prove a fallacious one. The basis of it, that the graves should be sunk fifteen feet below the ground; if parishes could act conveniently on such a calculation it would prevent the necessity of buying new cemeteries.

An objection has been taken to the application of the sum charged to the incumbent and the churchwardens: but the present party has no right to look into that question, or to quarrel with the public uses to which it has been applied by the parish. The incumbent by the general law has the freehold by acquiescence, confirmed by usage: parishes in this town have acquired common rights [366] with the incumbent. The sum charged is not specifically for an iron coffin, but generally for a metallic

(a) Mr. Hatchett, an eminent chemist.

coffin, and not improperly ; for the patent allows the use of any metal, precious metals are excluded from their intrinsic value : but the Court cannot take upon itself to assign limits to the contrivance which human ingenuity may exercise over different metals and their mixtures. From the general words of the patent it appears that the patentee had various metals and their mixtures in his contemplation : the coffins cannot be examined at the time of sepulture ; they may be varnished or tinned, and not betray outwardly the metal of which they are made.

The state of this parish is also gravely to be considered, in the midst of this great town, with a large and increasing population, both of living and dead ; four cemeteries are already filled with bodies, and there is a crying demand for more sepulchral space. It is no fit subject for an experiment, even according to the opinion of those who are most favourable to the introduction of iron coffins, there being these inconveniences on one side, the patentee must postpone his greater harvest of gain till it is found that the novelty can be safely introduced ; apprehensions are raised which must be treated with tenderness, let experience shew whether they are entertained without foundation. If they are so, it is to be hoped parishes will do their duty ; if they do not, Courts must endeavour to do theirs : at present I cannot allow the claim of admission generally to be supported.

The sum proposed is 10l. ; it seems the parish [367] of St. George's, Hanover-Square, a peculiarly well governed parish, has demanded this sum. I might myself, if called upon in the first instance, have fixed it somewhat lower—at 5l. or 6l. : but I am not now inclined to lessen what has been claimed.

May 18.—I hesitate more on the condition of making the graves fifteen feet deep. I doubt, whether it would be right or prudent so to do ; whether, if the iron coffin is admitted it should not be taken on the same condition as the other coffins. The condition proposed will create expense, may let in water which may affect other coffins ; and, what is of more importance, may prevent all knowledge as to the decay of these iron coffins, and thereby there can be no experience of their decay or otherwise : but the question of their durability will be placed in the hands of the other party. I wish this point to be reconsidered ; and when that is done, I shall be prepared to affirm this assessment.

The judge signed the Table of Fees, of which the annexed is a copy [pp. 1352, 1353].

[368] BUTTER v. ROBSON AND HOLLAND. Arches Court, Michaelmas Term, Nov. 11th, 1820.—In a libel for a legacy, the averment of the legacy should be in the exact words of the will.

A libel was given by Joseph Butter against Richard Bateman Robson and Richard Holland, the executors of Henry Holland, for a legacy bequeathed to him in the following terms :—"To each and every of my servants and clerks who shall have lived with me or been in my service for three years two years' salary or wages, at the rate of such salary or wages as they have previously received."

Swabey in opposition to the libel. The interest of the legatee is not set out with such distinctness as it ought to have been.(a) It has been laid down in a case in Vernon's Reports that a steward of a court baron, who officiated also for other persons, was not to be considered in the light of a servant attached to a particular individual. It may happen that the party proceeding here served Mr. Holland in some such vague and temporary capacity, and then it would be in the power of the executor to resist the demand ; which it would be [369] impossible to do under the present plea, which is in the general terms of the will, without specifying the particular capacity in which he had served.

Adams contra.—It is unnecessary to plead more specifically ; the words pleaded are the words of the will ; it might be difficult to give a description of the legatee's services under any specific head, as the testator employed many clerks or servants in a sort of intermediate capacity.

Judgment.—Sir John Nicholl. In a common libel it is not only unnecessary to go into a minute description, but it is more regular and proper to follow in the averment the exact words of the will. I think the averment in this action is exactly within the words of the will ; and it lies on the other party to shew that the claimant, though he was in the deceased's service, was not within the words of the will ; this may be

(a) *Townshend et al. versus Windham v. Robinson*, 2 Vernon, 546.

alleged in the way of answer: but I am of opinion that it is properly pleaded here, and I shall admit the libel.

Libel admitted.

[370] CHAPMAN v. WHITBY AND PARSON. Prerogative Court, Michaelmas Term, Nov. 22nd, 1820.—The admission of an allegation exceptive to the general character of a witness suspended till the final hearing of the cause.

An allegation offered to the Court excepting to the character of William Day: pleaded that "William Day, of Birdcage Fields, Stoke Newington, in the county of Middlesex, a witness produced, sworn, and examined in this cause on the part and behalf of John Whitby and Jemima Parson (widow of William Parson) two of the parties in this cause, was and is a person of bad character, fame, and reputation, and one to whom no faith or credit in the law whatsoever is or ought to be given; for that he is a person who for the sake of gain or reward, or other benefit to himself, might be induced to depose falsely and untruly."

Phillimore and J. Addams against the admission of the allegation. This is an unfortunate case which has been two years in litigation, and in which the property does not amount to 1800l. Generally speaking, an allegation exceptive to general character may be admitted at any time before publication; and publication has not yet passed in this case: but the Court has always a discretion to exercise in questions of this description, and under the particular circumstances of this case such an allegation is inadmissible. This witness was vouched to certain facts in a plea given in by us so long ago as in May, 1819. In the second article of that allegation it was pleaded, "That the deceased took up his abode at Clapton with William Day and Elizabeth his wife, which said William Day then followed the business of a jobbing gardener, but had been heretofore, together with his wife, employed as servants in Brook House, and that James Chapman, this other party in the cause, had been likewise employed as a farming man at Brook House; and thereby they, the deceased, the said William and Elizabeth Day and James Chapman, had become acquainted with each other."

William Day has been examined on this, as well as on most of the other articles of that allegation, and cross-examined by the adverse party. Moreover, in February of the present year the adverse party gave a responsive allegation, contradicting the facts pleaded by us, but yet raising no question as to the character of William Day. They have therefore lost their opportunity; and it is now too late, when publication is about to be prayed, and the cause is ready for hearing, to introduce a general objection to the character of a witness, which might have been taken so much more advantageously for all parties, and for the general purposes of justice, at an earlier stage of the proceedings.

In *Raybould v. Raybould* the Court rejected an exceptive allegation when publication had passed: but the depositions had not been seen.

[372] Dodson contra, maintained that they had a right to give in an allegation exceptive to general character at any period before publication had passed in the cause. In *Raybould v. Raybould* publication had passed, and that circumstance constituted the distinction between the two cases.

Judgment—*Sir John Nicholl*. The circumstances of this case are such that the Court will not be disposed to admit unnecessarily any matter which is not essential to the purposes of justice; the property is small and the parties have gone into great length of pleading.

It is very true that in this Court the general character of a witness may be gone into before publication, I take this to be the general rule: but after publication it cannot.

An exceptive allegation before publication stands on the same footing with any other facts in the case. There may be reasons why it should be offered in a late stage: but I apprehend the correct rule to be where general character is objected to; the facts as to the general character of the witnesses ought to be pleaded to when the responsive allegation is given in: extreme inconvenience would otherwise arise from the protraction of causes; every cause might, by the introduction of such an allegation as this, be extended six or eight months beyond its just limits. I apprehend where a party has any thing to allege against the character of a witness, he ought to introduce it in the [373] general allegation, unless he can shew that the facts have lately come to his knowledge.

There never was a case to which these observations could apply more strongly than to this. An allegation was given in by the party opposing the will in May, 1819. Day was vouched to many facts pleaded in it; he was produced as a witness, and subject to the interrogatories of the other party. In February, 1820, the other party gave in a responsive allegation, in which not a word is said as to the character of Day. That was the right time to have objected to his character; and, unless there is some new ground, the subsequent production of other unexceptionable witnesses is no reason for not having so done.

I should not consult the general principles of the practice of the Court, or of real justice, if I admitted the executors now to introduce this allegation.

Looking to the general circumstances of this case, I do not think that witnesses now produced to the general character of this man would do much to satisfy the Court as to the weight it ought to give to his testimony. Having been produced to all the circumstances of the case, he must have undergone a very full examination on the allegation, and upon the interrogatories; and unless the Court could form its judgment from the depositions, it would be difficult to do so from the testimony of three or four witnesses to general character.

I am unwilling, however, to reject the allegation entirely. I shall therefore do that which I did [374] in a former case (*Salmon v. Cromwell and Others*, ante, p. 220); I shall allow the admission of this allegation to stand over till the final hearing of this cause. If the evidence shall then be so nicely balanced that the Court should be in doubt, as the cause is never concluded against the judge, I may allow it to go to proof.

I shall allow the allegation to stand over, reserving the further consideration of it till the final hearing of the cause.

WEST AND SMITH v. WILLBY. Prerogative Court, Michaelmas Term, Nov. 22nd, 1820.

—An administration granted to creditors in preference to a grandmother who had been appointed guardian to minors; and having renounced the administration had prayed to be re-appointed before the administration passed the seal.

[Referred to, *Burls v. Burls*, 1868, L. R. 1 P. & D. 475.]

William Sampton, of Oxenden in the county of Northampton, died on the 18th of August, 1820, leaving a widow and three children, the eldest of whom was not more than thirteen years of age. The widow died five days after her husband, and without taking out any letters of administration to his effects.

The children elected Elizabeth Willby, their maternal grandmother, to be their guardian, for the purpose of renouncing their right to letters of administration of the goods of their deceased father; which guardianship she accepted, and having formally renounced her right to the letters of administration, William West and Joseph Smith, two creditors, were on the 1st of September sworn administrators, and entered into the usual bonds: but on the 4th of September, before the administration had passed the seal of the Prerogative Court, a caveat was entered against it; and Austen appeared as proctor for Elizabeth Willby, and alleged that her grandchildren had retracted the election heretofore made of their grandmother to be their curatrix or guardian for the purpose of renouncing their right to the letters of administration of the goods of the deceased, and had re-elected the said Elizabeth Willby to be their curatrix or guardian for the purpose of taking upon her the letters of administration for their use and benefit until one of them should attain the age of twenty-one years; and that Elizabeth Willby herself had expressly retracted the renunciation before made by her as guardian to the minors, of the letters of administration, and applied for the letters of administration to be granted to her.

Fox, proctor for the creditors, prayed to be heard on his petition against the grant of this administration; and he was assigned to be heard on the caveat day in October. On that day (i.e. the 3d of October) he alleged he had delivered his act to Austen, who was assigned to return the same to Fox on the first session of Michaelmas Term (viz. 6th of November); the assignation was continued till the next Court. On the 11th of November notice was given to Austen that, unless he delivered his reply to the act on petition on the second session, application would be made to the Court to hear the cause *ex parte* on Fox's act already delivered.

[376] Nov. 22.—On the second session of Michaelmas Term (viz. the 15th of

November) Fox alleged that Austen had not returned the act; and prayed leave to bring in a copy of it, and that the judge would hear the same *ex parte*; and the Court gave leave accordingly, and assigned to hear the cause on the next Court day.

Phillimore moved the Court to allow the act on petition given in by Fox, and the evidence adduced in support of it, to be read, in order to found upon it a notice that the administration should be granted to William West and Joseph Smith, the two creditors who had been already sworn as administrators, and also give the usual bonds for the due performance of their functions.

Dodson *contra*, contended that the next of kin had a full right to claim such a re-appointment as this; that it was the daily practice of the office to grant such, nor could the grandmother be concluded by the hasty act of renunciation; he asserted that she did it, as he could prove, under threats, and undue means of intimidation; that he could prove also that the estate was not, as has been stated, insolvent. Under this statement, he prayed to be allowed to reply to the act given in.

Phillimore in reply.

Per Curiam. No reason has been assigned why the act has not been replied to long ago. This delay must be accounted for, or the case must be heard upon an *ex parte* statement of facts. If you go upon the merits of the case, and stand upon the right of retracting, [377] I am willing to hear you on that point. And then the *ex parte* proceedings on the other side are admitted; or I am willing under the strong averments that have been made of threats and undue influence, and also as to the solvency of the estate, to give further time to reply to the act or petition, and to bring affidavits in support of the averments: but if I do this, it is at the risk of costs which I shall certainly give against them if their averments are not proved.

Dodson elected to have further time to reply to the act.

Per Curiam. I expect not merely a general denial of the insolvency, but a specific statement of the assets; the debt is asserted on the other side to be upwards of 700*l.*, and the assets not to amount to more than 170*l.* It is to be remembered that the party may involve herself in costs, though the question of right may be in her favour.

Dec. 11.—The cause came on for hearing on the act on petition, and the affidavits which had been adduced in support of it. On the part of Mrs. Willby it was alleged that she had executed the proxy of renunciation under threats and intimidations; that by law she had a right to retract a proxy of renunciation at any time before the administration passed the seal; that the estate was not insolvent; that William West and Joseph Smith took means for turning the deceased's family out of the house, by getting possession of the licence, and advertising an immediate sale of the effects; and that [378] in order to prevent the ruinous consequences to the deceased's children from such proceedings, and in compliance with the wishes of several of the creditors, Thomas Wade and Richard Burton had obtained letters of administration from the proper Court within the diocese of Peterborough.

These facts were all contradicted by the creditors, except the circumstance of Wade and Burton having obtained the letters of administration from the Court at Northampton; in answer to which it was stated that they were neither of them creditors of the deceased; and that at the time they obtained the said letters of administration they knew that the deceased had left bona notabilia to found the jurisdiction of the Prerogative Court of Canterbury.

Phillimore for the creditors.

Dodson *contra*.

Judgment—*Sir John Nicholl*. The facts of this case have been set forth in an act on petition, in which it is alleged that William Sampton died on the 18th of August, insolvent; that West and Smith are creditors; that his widow died on the 15th of August, that his children are minors; that the minors elected Elizabeth Willby for their guardian for the purpose of renouncing the administration—she accordingly executed a proxy of renunciation. West and Smith were sworn administrators, and gave bond. On these grounds they pray the administration may pass the seal. Application was made to hear this case *ex parte* on account of the delay on the other side—and that application was acceded to: but upon [379] its being stated that new proxies were executed by the minors to re-appoint their grandmother, that she was ready to act, that her renunciation had been obtained by threats and intimidations, that the estate was solvent, permission was given them to answer the act or petition.

To this a reply was put in by the other parties contradicting all the material averments. This is the general substance of the statement of facts.

The first question is whether a renunciation once made may be retracted before the administration has passed the seal, and I am of opinion that it may.

The next question is whether the Court is bound to allow it to be retracted; and I am of opinion that this depends upon the circumstances of the case. Mrs. Willby does not come here to claim in her own right, but as appointed by the next of kin. She only claims the administration *durante minoritate*; she is not within the statute; it has been so laid down in a variety of cases; the same rule has been laid down in Courts of Westminster Hall, *King v. Bettesworth* (2 Strange, 956). There are instances within my own memory where the Court has granted to persons not guardians of the minors the administration, and refused to grant it to the person nominated by them. In *Lovell and Brady v. Cox*, Lovell and Brady were appointed trustees by the deceased, and his heir Anne Cox was executrix and residuary legatee. She was a minor; the father claimed the administration *pendente minoritate*. The Court expressly held it had a discretionary power, refused it [380] to him, and gave it to the trustees, the parties in the cause.

There is an old case, *Hawkesworth and Simpson v. Warner* (Prerog. 1731), which more directly falls under the circumstances of this case. My note says, "Wilkinson was the deceased; he left a brother a minor and his next of kin. Warner was the deceased's brother by the half blood; and he applied in this case to be joined with the minor, and to take administration with him of the effects of the deceased; administration however was granted to the creditors, because the estate was not sufficient to pay the debts due from it." So the administration *durante minoritate* may be granted to creditors in exclusion of the guardian of the minor, if the estate be insufficient to pay the debts according to this decision in 1731. It has been laid down in other cases that the Court is not bound by the choice of the minor: but that the administration may be given away from the person so chosen.

I recollect a case of *Lewer v. Lewer* (Prerog. 1792) where administration was contested between the father's brother and the mother's brother, and in which the Court held it was not bound by the choice of the minor.

The choice of the minors would have no great weight here as the eldest of them is not fourteen. If he was near of age it would be otherwise: when the case is out of the statute, and the Court is called upon to exercise its discretion, its leaning is to guide itself by the interest in the property, and [381] it is desirous of granting the administration to that person who is most likely to dispose of the property to advantage.

Where the next of kin has no interest in the property he is by the spirit, though contrary to the letter, of the act excluded; where there is a residuary legatee he excludes the next of kin. If the residuary legatee declines it is usual to grant it to the next of kin: but there have been cases where the Court, considering the next of kin excluded, has granted it to the creditors. In *Furlonger v. Cox and Others* (Prerog. Jan. 8, 1811) the deceased left a widow and a son; the widow was sole executrix and universal legatee. She renounced probate, and the son contended for the administration against a creditor. The Court held that the son was excluded, and the estate being insolvent gave the administration preferably to the creditor. There is an old case before the Delegates, *Bridges v. The Duke of Newcastle* (Deleg. 1712). Lord Hollis died; Bridges claimed administration as next of kin. The effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased. Sir Charles Hedges (g) first, and afterwards the Delegates, held that the next of kin was excluded, and granted the administration to the Duke of Newcastle.

The principle is clear that the next of kin, when he has no interest, may be excluded, and the administration be granted to a person who has an interest in the effects.

That, however, is not the question of the present [382] case: the party before the Court is not the next of kin, but a relation of the next of kin claiming during the minority. The guardian has once renounced, a circumstance pretty strong to shew that the creditors are interested. They have entered into the bond, and given the usual securities; and yet this old woman, upwards of seventy, is brought forward to

desire the administration may be granted to her. I very much agree with what was said by Lord Mansfield in *The Archbishop of Canterbury v. House* (Cowper, 140), "That no next of kin ever wished for the administration of an insolvent estate for honest purposes." A long act of Court has been gone into alleging threats, intimidation, and that the estate is solvent; affidavits have been made. It is not necessary to wade minutely through all these affidavits: but let us look who are the parties. On one side only this old woman aided by Elizabeth Barton, the daughter of a pretty active person in this business. She (Elizabeth Barton) was only present on the 31st of August: but was not present on the 28th. Why have not Mr. Wade and Mr. Barton, and Doughton their solicitor, come forward to state the condition of this estate? These persons I consider to be the real parties to this transaction, not the grandmother. On the other side there are the affidavits of all the creditors stating the amount of the property, and the insolvency of the estate, in which they are joined by Mr. Shuttleworth, the deceased's own solicitor. They give the history of all that passed; and they are supported by an extract [383] from the registry of the Court at Peterborough, and by an affidavit of the clergyman of the parish.

The deceased kept a small public house which was his own freehold: but it was mortgaged to its utmost amount, or nearly so. A meeting of the creditors took place on the 28th of August. And I agree that dates are most material in this case—it was settled at this meeting that the administration should be granted to West and Smith and Wade: but Mr. Shuttleworth, the solicitor, then expressed his doubts whether Wade, not being a creditor, could be joined in it. In consequence of there being bona notabilia, Shuttleworth writes to his proctor here to obtain a proper instrument. On the 31st of August the proxies of renunciation are signed. On the 1st of September a commission issues to swear the creditors on the 2nd of September; they are sworn, and the bond is executed. What do Wade and Barton in the mean time? They go to the Court of the diocese of Peterborough, and obtain an administration on the 30th of August on curious averments. If the administration oath was properly administered, they must have taken it under an extraordinarily loose, and utterly false averment. Cousins and next of kin are stated to renounce the administration; they must therefore have sworn then that the deceased died without children; and really I feel a good deal of surprize that parties should venture to come before this Court after such conduct—this is within twelve days after the deceased's death; and yet it has been observed in argument that the other parties were to blame for making preparations to take out [384] the administration in this Court after fourteen days, his own administration being thus clandestinely and secretly snapped up. The obtaining the administration thus throws a colour upon the whole case. I must take the facts as stated by the creditors and their solicitor to be correct against the old woman and Barton's daughter.

Mrs. Willby sets forth at the close of her affidavit, "That if the administration should be granted to her, the relations and friends of the deceased will come forward, and raise such a sum of money as will be necessary to pay off the whole of the debts owing by the said deceased, even if the estate of the deceased should be insufficient for that purpose." The other party has very much to regret that the relations and friends did not come forward in this mode. They would readily have consented to the grant: but Mrs. Willby herself states to the clergyman of the parish that she cannot undertake the conduct and management of the business; and the clergyman and creditors set on foot a subscription for the maintenance of the children which they abandoned on account of the interference of Mr. Willby, Wade and Barton, in the affairs of the deceased.

How stands the fact of the solvency of the estate? According to the account given by Mrs. Willby with all the assistance of Mr. Douglas, the debts amount to 279l. and the personal effects to 205l. Upon her own statement the estate is insolvent one-fifth; she throws in the value of the real property: but this Court has nothing to do with that, the administrator cannot dispose of that. There may [385] indeed be special cases in which the creditor under certain circumstances may get at the freehold property: but all this Court enquires into is the solvency of the personal estate. Besides, I have no other constat as to the value of the real estate but the statement of this old woman, and her affidavit was not made till the 8th of December, when the other party had no opportunity of replying. There is however a mortgage on it, amounting with the interest to 492l. This probably is the total value—the mortgage

prima facie is a charge on the personalty before the realty; and the heir will have a right, if he can, to have his property exonerated from it; more especially if, as is generally the case, a bond or other collateral security has been given. Upon her own statement therefore the estate is insolvent. I cannot hesitate in so holding it. And I am still more decidedly of this opinion, when I look at the affidavits on the other side on which I place more reliance. Without therefore deciding whether a next of kin may retract an administration before it passes the seal; without deciding whether at any time, durante minoritate, a creditor may not contest for that administration; still I am of opinion, looking at all the circumstances of this case, seeing that there has been a renunciation formally made, that the estate is insolvent, that the minors are very young, and that this woman is quite unfit to carry on the business for their interest and benefit; I am of opinion that I ought to grant this administration during their minority to the creditors. They have an interest in managing the property to the best advantage, and they must ac-[386]-count hereafter for the monies they receive and expend. Moreover, if they have the administration, the other creditors may come in and prove their debts so as perhaps to secure the payment of them all pro rata at some future time. Whereas if the next of kin should possess the grant, he may have no interest in discharging their claims, or he may give a very unfair preference among the creditors. I shall grant the administration to the creditors.

On costs being pressed,

Per Curiam. I think, under all the circumstances, I am bound to give costs.

[387] REES v. REES. Arches Court, Hilary Term, 1821.—Allotment of alimony, pending suit.

An appeal from the Consistory Court of Bristol.

On the 16th of January, 1816, Ann Catherine Rees took out a citation against John Rees her husband in a cause of divorce by reason of adultery.

On the 31st of August, 1816, she brought in a libel, consisting of twelve articles; and many witnesses were examined in support of it.

On the 3rd of January, 1818, an allegation of faculties was given, in which the freehold property of the husband was estimated at 1800l. per annum.

The husband in his answer to this allegation deposed that his landed estate did not produce a net income of more than 1015l. 19s. 10d. per annum; [388] that by a deed dated the 17th of June, 1817, for the payment of debts amounting to 3000l., he secured the annual payment of 350l.; that by another deed of annuity dated the 25th of March, 1812, he secured 190l. out of his estates to other persons, and consequently that he had remaining only the sum of 475l. 12s. 10d. for the support and maintenance of himself and of several infant children; and that his wife was entitled to the interest of a certain legacy amounting to 6700l. bequeathed to her for her life, by the will of her father, which produces the sum of 335l. annually.

Arnold and Daubeney for the appellant. The allotment of alimony made by the Court below is extravagant, and beyond all precedent. It should be observed that the annuity of 350l. has been granted sometime after the citation in this cause was taken out, and we were compelled to take the income as existing without that deduction, the alimony under that calculation amounts to something between a half and a third of the whole property; a proportion which, after examining between thirty and forty decided cases, we venture to state, has never been allotted by any Court.

Stating the case in another point of view, i.e. the comparison of the income of the wife with that of the husband, she would be entitled to no alimony according to the rule of these Courts. Their joint income is 811l. The wife in her own right has less than a moiety, and more than a third, a proportion never allotted by any Court; and taking it as it stood when the citation issued, she would have between a third and a fourth of his whole aggre-[389]-gate income. There is no case in which such an allotment of alimony has ever been made, and besides the husband has seven children to maintain.

Swabey and Jenner contra. It appears that the deputy registrar was served with this inhibition on the 24th of April, 1819; and that the process was not brought in till the first session of Hilary Term in that year. No libel for the appellant was admitted till that term.

Per Curiam. Why then was not an application made to this Court to enforce the inhibition?

Argument resumed.

On the main argument the Court will take into its consideration the nature of the case, and the charges of gross adultery which are alleged against the husband.

Judgment—Sir John Nicholl. This is an appeal from the Consistory Court of Bristol, where it was originally a suit brought by the wife against the husband for a separation by reason of adultery. This appeal is from a grievance; that grievance is the allotment of alimony; it is contended that there should have been no allotment.

It has been truly stated that there is no fixed rule as to alimony; it is in the discretion of the Court, and that discretion is to be formed from an equitable view of all the circumstances of the case.

Though at the commencement of a suit I cannot take the charge made against the husband as proved, yet it gives a complexion to the case.

[390] It is perpetually stated against a wife who is proceeded against by her husband for adultery that, though the Court cannot assume her guilty of the offence till it has been proved, still that it is a sort of charge which ought to make her content to live in decent retirement. On that account a comparatively small allotment is given during the pendency of the suit. So, on the other hand, where the wife brings the suit, and is the complainant, where there is no complaint against her, and that not in a suit of cruelty, which frequently turns out a complication of equivocal facts where there are faults on both sides: but here is a continued course of gross and profligate adultery. And I agree with Dr. Jenner that I must look at the complexion of the case. The parties were married in 1803—they lived together till 1814—they had a large family—there are seven children living. A young woman is admitted as governess in the family, with whom the husband is charged to have formed an adulterous intercourse; and to have deserted the residence of his wife and family; and to have cohabited with at various lodgings, under various names, in the city of Bristol till this suit commenced.

This is the complexion of the charge; the suit has been pending for four years—treaties of compromise have been entered into, and no blame can be attached to the wife, the mother of seven children, for having listened to proposals of compromise. But what is the conduct of the husband? No defensive allegation has been given in on his part—the suit has been going on for four years. If the charge was completely unfounded, hardly a Court [391] day would have been suffered to elapse before the injured husband would have met it.

It is quite impossible to lay out of my consideration the general tenor of the charge.

It appears from the allotment of the alimony that there was some delay on the part of the wife, and that she did not apply for it till some time after the suit had commenced.

The allegation of faculties states that the husband possessed landed property to the amount of 1800*l.* per annum; his answers deny this, but admit the net produce of his estate to be 1015*l.* 19*s.* 10*d.*, and deny that he has any other property. As the Court has no certain proportion which it allots, a very minute examination of the income is not necessary: but the Court will presume the husband, who alone makes the statement, to have made every possible deduction in his own favour. Out of 1015*l.*, he claims a deduction for debts—and states that he has granted annuities to the amount of 540*l.*: but the last and most considerable part of this deduction is for an annuity granted during this suit, one year after it had commenced, and three years after the adultery has been charged. If the husband, living in public adultery, incurs debts and grants annuities to pay them, this is not a deduction he is entitled to make. The utmost the Court could allow would be the interest of the debt; and even then the husband should satisfy the Court that the debt was contracted before the injury was done. Where the party himself has the benefit of being heard on his own statements he should set forth every thing fully, or the Court will take the statement to his disadvantage.

[392] It has been pressed that he has the maintenance of seven children. I wish that fact had been more fully stated in his answers; it is highly improbable that he has during this suit, or that he is likely hereafter to have, the sole maintenance of them. I am aware that the obligation of maintaining them lies on the husband, and I shall not take this part of the subject into much consideration.

The wife has a separate income of 350*l.* per annum for his life; if she had not

had this property I think the Court below would have been called upon to grant her more than 100l.

I know no such rule as that stated that the Court usually grants one-sixth; the general proportion of alimony is much higher than has been stated.

The Court of Appeal is always unwilling, except a decree is manifestly wrong in point of principle or extent, to disturb a sentence: but, considering that the wife was two years before she applied for alimony, I shall be disposed not to carry the grant back to the return of the citation, but shall make it merely prospective. The wife must be put to additional expenses in the conduct of the suit beyond those which will be allowed upon taxation.

I think the wife is entitled to 100l. per annum additional to her separate income; and, under all the circumstances, it is fair and equitable to reverse that part of the sentence which directed the 100l. alimony to be paid from the return of the citation: but I shall direct it to be paid from the date of the decree.

[393] There has been great delay. I wish that in the future proceedings all possible expedition should be used; and it should be understood generally by the registrars in the Courts below, that if they do not enforce the process of this Court this Court will take means to compel them to do so.

[394] *TEMPLE v. WALKER*. High Court of Delegates, Michaelmas Term, Nov. 30th, 1820.—An allegation, pleading the will of a married woman, ordered to be reformed.

An appeal from the Prerogative Court of York.

The Delegates who sat under this commission were—

Mr. Baron Graham, Mr. Justice Bayley, Mr. Justice Park, Dr. Arnold, Dr. Jenner, Dr. Daubeney, Dr. Phillimore, and Dr. Gostling.

The cause commenced in the Prerogative Court of York, by a citation taken out on the part of John Walker the younger, the sole executor named in the will of Sarah Walker, citing Richard Temple, doctor of physic, as the lawful husband of the deceased, to appear and shew cause [395] why probate should not be granted to him of the said will. An appearance was given for the party cited, who alleged himself to be the husband of Sarah Temple, and as such entitled to the administration of her personal estate and effects; and prayed administration accordingly. An allegation was given on the part of the executor, which pleaded,

1st. That the said Sarah Temple, the party in this cause deceased, was the natural and lawful and only child of Thomas Stockdale, wine-merchant, and Sarah his wife, and afterwards his widow, late of Scarborough aforesaid, both now deceased; and in or about the month of December, in the year of our Lord 1787, was lawfully married in the parish church of Scarborough aforesaid, to the said Richard Temple, the other party in this cause, and that this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes and hath confessed to be true; and the party proponent doth allege and propound of any other time and times, and every thing in this and the subsequent articles of this allegation contained, jointly and severally.

2d. That the said Sarah Temple and Richard Temple, from and immediately after their said marriage, mentioned in the next preceding article, lived and cohabited together as lawful husband and wife, at Scarborough aforesaid, until in or about the month of October, in the year of our Lord 1789, when the said Richard Temple did of his own accord forsake the said Sarah Temple his [396] wife, and depart from his residence at Scarborough aforesaid; that in consequence thereof, and of many unhappy disputes and differences then existing between them the said Richard Temple and Sarah Temple, they mutually agreed to live separate and apart for the remainder of their joint lives. And the party proponent doth further allege and propound that in and by a certain indenture or deed of separation, bearing date the sixth day of July, in the year of our Lord 1790, and made, or mentioned to be made between the said Richard Temple, then or late of Scarborough aforesaid, and the said Sarah Temple his wife, late Sarah Stockdale, spinster, the only child and heiress at law, and also next of kin of Thomas Stockdale, late of Scarborough aforesaid, wine-merchant, deceased, of the one part, and Sarah Stockdale of Scarborough aforesaid, widow and relict, and also administratrix of the goods, chattels and credits of the said Thomas Stockdale deceased, and mother of the said Sarah Temple and John Walker, of Malton in the said county of York, merchant, of the other part, the said Richard Temple did absolutely grant,

bargain, sell, assign, transfer, and set over unto the said Sarah Stockdale and John Walker, their executors, administrators, and assigns, for the considerations therein mentioned, certain household furniture, monies, funds and securities, goods and other personal estate, effects and premises therein mentioned, in trust, for the sole and separate use, benefit, advantage and disposal of the said Sarah Temple during her life, whether married or sole, and as if she was unmarried-[397]-ried; and from and after the decease of the said Sarah Temple as to what should remain of the said furniture monies, funds, and securities, goods and other personal estate, effects and premises, unapplied or undisposed of as aforesaid, upon trust that they the said Sarah Stockdale and John Walker, and the survivor of them, her or his executors, administrators or assigns, should assign, transfer, pay, release, or otherwise dispose of the same respectively, to such person or persons, for such intents and purposes, and in such manner as she the said Sarah Temple, whether married or sole, as if she were unmarried, by any deed or writing under her hand and seal, or otherwise, should, notwithstanding her coverture, order, direct, or appoint, and in default of and until such order, direction or appointment should be made: and as to such part or parts of the said trust premises as should from time to time remain undisposed of, under the trusts aforesaid, upon trust that they the said trustees should assign, transfer, pay, apply and dispose of the same to such person or persons, and in such manner and form, as she the said Sarah Temple, by her last will and testament, or any writing in the nature thereof, or any codicil thereto, should, notwithstanding her coverture, give, devise, bequeath, order, direct, limit, or appoint; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true; and the party proponent doth allege and propound as before.

3d. That the said Sarah Temple, the testatrix [398] in this cause, deceased, being of sound and disposing mind, memory, and understanding, and not having previously by her deed or writing disposed of the monies, funds, and securities, and premises by the said indenture submitted to her disposal and appointment, but having an intent and purpose to make her last will and testament in writing, or a writing purporting to be and in the nature of her last will and testament, and thereby to dispose of all the property, estate and effects, of which she had a disposing power, under and by virtue of the said indenture, by virtue and in execution of the powers and authorities mentioned and recited in the said indenture, and of every other right, power, or authority enabling her thereunto, did give directions and instructions for making and drawing thereof; and pursuant to such directions and instructions the very will or testamentary writing now pleaded and exhibited was drawn up and reduced into writing, in the very manner and form as the same now appears: and after the same was drawn up and reduced into writing, the same was audibly and distinctly read over to or by the said testatrix, who well knew and understood the contents thereof, and liked and approved of the same; and in testimony of such her good liking and approbation thereof, she the said testatrix did, on or about the 21st day of April, in the year of our Lord 1817, being the day of the date thereof, set and subscribe her name at the foot or bottom of the thirteen first sheets of the said will or testamentary writing, and at the foot or bottom of the fourteenth or last sheet thereof did set and sub-[399]-scribe her name and affix her seal in the manner and form as the same now appears thereon; and did publish and declare the same as and for her last will and testament, in the presence of several credible witnesses, who, at her request, in her presence, and also in the presence of each other, did then also set and subscribe their names as witnesses thereto, in the manner and form as now appears thereon; and she the said testatrix of such her last will and testament, or testamentary writing, did nominate, constitute, and appoint the said John Walker the younger sole executor, and did give, will and bequeath, dispose, and do in all things as in the said last will and testament or testamentary writing is contained; and she the said testatrix was, at and during all and singular the premises, of sound and perfect mind, memory, and understanding, and talked and discoursed rationally and sensibly, and well knew and understood what she then said and did, and was capable of making a will, or of doing any other serious or rational act of that or the like nature; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true; and the party proponent doth allege and propound as before.

This allegation had been admitted in the Court below ; and from that sentence the present appeal was interposed.

Dr. Adams in opposition to the sentence of the Court at York. Unless the general law is controuled, the hus-[400]-band has a right to the administration. There are two modes by which a married woman may acquire a right to dispose of property ; one, by settlement made anterior to marriage ; the other, by an agreement subsequent to marriage, through the medium of trustees : the latter is the more questionable mode. It should seem from the will which is propounded that certain property is mentioned as at the disposal of the wife without the value of it being set out : it is limited not only to certain personal property, but to consist only of what shall remain of this property.

Per Curiam, Mr. Justice Bayley. I take it for granted that when a will is made by a femme coverte under a power, the usual course is to give a probate limited according to the power.

Per Curiam, Dr. Arnold. The Court understood you to object that the deeds recited are not pleaded in the allegation and exhibited.

Dr. Adams. Certainly that is one objection : this seems a novel experiment, to prove by parole the contents of a written instrument.

This allegation is not capable of being reformed—to allow them to reform it now would be to make a case for them.

The Court stopped the argument, and directed the counsel on the other side to state why the deeds alluded to in the allegation were not exhibited.

Dr. Lushington and Mr. Parke were on the same side with Dr. Adams.

[401] Sir Christopher Robinson (K. A.) in support of the sentence. The real question is whether the power shall be exhibited in this Court, or in another stage of this cause. In our practice it is not necessary to introduce such a deed in an allegation ; it may be taken to exist by admission of the opposite parties. In *Richard v. Meade*, Prerog. 1805, where Mrs. Shave the testatrix had a separate property, the deed by which she had a power of disposing of it was not pleaded in the allegation ; the settlement there was brought in, in a later stage of the proceedings, upon an assignation on the adverse proctor.

Per Curiam, Mr. Justice Bayley. Is it not much more obvious that the party who claims under a particular document should himself exhibit that document ?

Sir Christopher Robinson. The executor may not have the instrument ; it may not be in his power to exhibit it ; he may be himself a party to it.

Per Curiam, Mr. Baron Graham. *Primâ facie* a married woman has no title to make a will. If she claims a right, she must at least shew her title, because such a right is contrary to the general tenor of the law.

Sir Christopher Robinson. He may not be able.

Per Curiam, Mr. Justice Bayley. Then you must plead that it is not in your power ; such at least would be our course.

[402] Sir Christopher Robinson. The course of our Courts was different in Mrs. Shave's case ; and if a case justifies the distinction, it surely is the present.

Some authorities of the Courts of common law are in favour of a contrary course ; it is laid down that a defendant shall not have oyer of a record when he is a party to it.

Per Curiam, Mr. Justice Bayley. We never have oyer of a record now.

Sir Christopher Robinson. Still on the broad challenge between other cases and the present ; suppose it essential that the instrument should appear good to the Judge, or essential as to the other parties ? If this was not an original cause, I should not think it of much importance to resist it : but here, on an appeal, the Court would not press lightly on forms of jurisdiction.

On the authority of Mrs. Shave's case we contend that we are not bound to plead the deed.

Swabey on the same side. Contracts of this nature have frequently received the sanction of the Ecclesiastical Courts when entered into after marriage.

Per Curiam, Mr. Justice Bayley. But the question is whether that point is ripe for discussion ; we are not likely to give an extrajudicial opinion upon it.

Dr. Swabey. *Clouds v. Robinson*, Prerog., and *Copeland v. Pedder*, Prerog., were both cases in which the power was granted subsequent to marriage ; and [403] both the wills were established by Sir George Hay.

Mr. Tindal on the same side.

Judgment. Per Curiam, Dr. Arnold. The Court is of opinion that the allegation must be reformed for the purpose of allowing the party to plead the power under which the will was made. With the concurrence of the rest of the Court, I state also that we think it proper to omit the following words in the third article of the allegation, viz. When the said Richard Temple did of his own accord forsake the said Sarah Temple his wife, and depart from his residence at Scarborough aforesaid. We think these words may tend to the introduction of extraneous matter, and lead to evidence which cannot affect the question before the Court in this allegation.

The Court reversed the sentence of the Prerogative Court of York, retained the principal cause, and directed the allegation to be reformed.

Feb. 20, 1821.—The allegation was brought in reformed according to the directions of the Court.

July 12.—Before the Condelegates, Dr. Arnold, Dr. Jenner, Dr. Daubeny, Dr. Phillimore, and Dr. Gostling.

Moore, proctor for Richard Temple the defendant, declared that he did not further oppose the will of Sarah Temple, the party in this cause deceased; and prayed the Judge to decree the ex-[404]penses of his party, the appellant, to be paid out of the estate of the said deceased, and to dismiss her party from this appeal. Present Toller (proctor to the respondent) objecting thereto. The Condelegates having heard counsel on both sides, rejected the prayer made by Moore, and assigned him to give in his client's answers on the by-day.

Nov. 7.—Richard Temple gave in his personal answers.

Feb. 13, 1822.—The Delegates pronounced for the force and validity of the last will and testament of Sarah Temple, bearing date the 21st of April, 1817, propounded in this cause; and decreed that letters of administration, with the will annexed, of all and singular the goods, chattels, and credits of the said Sarah Temple to John Walker the younger, present Moore, on behalf of Richard Temple the husband consenting thereto.

The Judges moreover decreed the expenses (a)¹ of the said Richard Temple to be paid out of the estate of the party deceased.

[405] FINUCANE v. GAYFERE. Prerogative Court, Michaelmas Term, December 1st, 1820.—Probate of an imperfect codicil which had been granted in 1807, revoked.

Elizabeth Gordon, of Percy-street, London, died a widow in July 1807. On the 30th of October of the same year probate of a will and two codicils, disposing of property to the amount of 90,000l., was granted to Thomas Gayfere and the Rev. Harry Welstead, the executors. On the 20th of October, 1820, the probate of the second of the two codicils was called in by Maria Finucane, widow, one of the substituted residuary legatees named in the will; and Thomas Gayfere, the only surviving executor, was cited to shew cause why the probate should not be revoked, and the codicil be pronounced null and void.

On the 15th of November following the executor brought in an allegation propounding the second codicil, and pleading that “the deceased, having an intention to alter the disposition of property, as contained in her last will and testament, and the first codicil thereto, and more particularly with respect to the bequest of the residue of her estate and effects by her said will; did some time subsequent to the 28th of June 1806, being the date of her first codicil, with [406] her own hand prepare and write the aforesaid second codicil, with its several obliterations and interlineations; that the whole body and contents of the instrument were of her own proper handwriting; and that on the 28th of July, 1807, being four days after the death of the deceased, this second codicil, and also the aforesaid will and testament and the first codicil, were found locked up in a mahogany box, in which the deceased was accustomed to keep her papers of moment and concern.”

The codicil (a)² propounded was as follows:—

“I wish to revoke the fifty pounds to Michel Anglo Taylor, having by the codicil given him a ring bequeath in this will, to the late George Richard, esquire decease.

(a)¹ The property disposed of by the will amounted to nearly 50,000l. Out of this an annuity of 50l. per annum was bequeathed to the husband.

(a)² There were many erasures and interlineations in the paper.

And I also revoke the give of the residue of my proprety real and personal to James Gordon, son of the late James and Mary Gordon of Rochester; and in the stead thereof, I give to the said James Gordon the sum of one hundred pounds as a legacy at my decease, and the sum of one hundred pounds a year during his natural life; and then the residue of my estates real and personal, to be equally divided between the children of the said James Gordon, Henry, George, and Maria Finucane, brothers and sister to the aforesaid James Gordon, son of the late James and Mary Gordon of Rochester, and to the children of Mary Payler, daughter of the late George and Ann Gordon of Rochester, decease, the children of John Wathen, grandson to the [407] aforesaid John Wathen, late of Catherine Court, decease, and the children of Eliza Wathen, grand-daughter of the said John Wathen decease. To the children of Phebe Smith, daughter of Francis and Mary Smith of New Building Yorkshire. To the children of Kathre Harman, and Mary Southam, grand-daughter to Eliza Bellew decease, in equal division, to and amongst such child or children equally divided. Power to the trustees to advance what they may think proper to any of them for education, or to apprentice to such situation as might be proper to place them in a way to provide for themself, and as they may die, their share become as part of the residue, and to be equally defted to any among the survivors equally as their share, if they do not live to the age of twenty-one years; and I also give and bequeath to my servant Eliza Norton five pounds a year during her natural life. I also give to the parish of Shorne and to Allowes Barley, Tower Street, each one hundred pounds, the interest of it to be laid out in coals or bread, in such manner as the churchwardens for the time being shall think most for the poor persons of the said parish; and fifty pounds I give and bequeath to the City of London Lying-Inn-Hospital.

"And Thomas Gordon Ansell. I also wish to give to Hannah Beesley, above what she is entitled to by the codicil of my will, twenty pounds for mourning."

Lushington and Dodson in opposition to the allegation. The length of time which the party has been suffered to remain in possession of the probate is to [408] be explained by the proceedings which have taken place in Chancery, where this property has long been litigated. The parties interested had no idea till a late period that there was the informality which exists in the codicil. The case of *Satterthwaite v. Satterthwaite* (vide supra, p. 1) is precisely analogous to this.

Swabey and Jenner in support of the codicil. The time which has elapsed since the grant of this probate in 1807 will at least induce the Court to accept a less degree of proof than it would do in an ordinary case; it is a strong circumstance that it was found in the same box with the will and the other codicil; the probate has been acted upon, and many of the legacies have been paid.

Judgment—Sir John Nicholl. Probate of the will and two codicils was granted by this Court in 1807; probate of the second codicil is now called in by a person who is a substituted residuary legatee; her right devolved upon her, it is stated, in the year 1816; since that time the property has been in the Court of Chancery.

Certainly the application comes at a late period to revoke such an instrument; but time alone is no absolute bar to it. It has been said that, being brought forward at so late a period, the Court will be contented with slighter proof. This observation is well founded to a certain extent: but still there must be that degree of proof which would bring the case [409] within the rules of the Court: at the same time the executor is not to be protected, if he has proceeded in the first instance, in a manner in which he was not warranted.

I must decide this case upon ordinary principles; and, if so, I can entertain no doubt respecting it. It is pleaded that the deceased died in July, 1807; that, intending to alter her will and codicil subsequent to June, 1806, she wrote the codicil in question; and that at her death the three instruments were found together in her mahogany writing desk. These are all the circumstances pleaded. There is nothing that fixes it at so short a time before her death that she can be supposed to have been struck with death in the very act of writing this paper. The date cannot be fixed at a later period than the last year of her life: there is nothing to shew that she was prevented from finishing it by the intervention of death, and not completing the instrument, the presumption of law is that she abandoned the intention.

If there was nothing to prevent her from finishing this paper, the question then comes to this, whether it can be considered as a finished paper; whether she intended it to operate in this form, and to do nothing more to it.

I am therefore to consider whether it is possible that the deceased could have considered this as a finished paper? She had executed a formal will in 1801, drawn up by her solicitor—the bulk of her property was real property. Upon the last sheet of that will she had subsequently a codicil regularly and formally drawn up. This also was [410] signed by herself, sealed, and attested by three witnesses; and is dated in June, 1816.

The present paper is all in her own handwriting: it begins, “I wish.” It has a variety of interlineations and erasures, no date, no signature, no concluding words; it ends with a legacy of 20*l.* to a servant for mourning; there is nothing like a conclusion. It seems particularly intended for the disposition of the residue: she also makes a new disposition of her real as well as personal property; I cannot doubt that she intended to have a regular instrument drawn and executed in the same manner that she had executed her will and the other codicil, and did not consider this paper as finished or operative.

I must therefore reject this allegation.

REDMILL AND REDMILL v. REDMILL. Prerogative Court, Michaelmas Term, December 2nd, 1820.—When there is no party before the Court who has an interest in supporting a testamentary paper propounded, the Court will require the appearance of such a party.

Robert Redmill, C.B., a captain in the Royal Navy, died on the 19th of February 1819. A will and codicil bearing date respectively on the 12th and 15th of February, 1819, were propounded in an allegation by the residuary legatees named in the will, as to one moiety of the deceased's estate and effects; and were opposed by Susanna Redmill the widow of the deceased, who cross-examined [411] the witnesses examined on the part of the residuary legatees, and gave a responsive allegation, but produced no witnesses in proof of it, and took no copies of the evidence. In the course of the proceedings the residuary legatees as to the other moiety of the estate, intervened and opposed the codicil, and cross-examined one of the witnesses produced on the allegation given in by the other residuary legatees.

The cause stood for hearing.

Per Curiam. A difficulty strikes me as to the want of proper parties before the Court—there is no person before the Court who has an interest in supporting the paper—two parties are here both interested to get rid of it; there are, I think, considerable doubts as to the validity of the codicil, but all the parties interested should be called before the Court either by notice or by formal process; it does not appear from the proceedings that any party has had notice; how am I to pronounce against the codicil when I find there is no person before me interested to support it?

The will is most clearly proved, and it excludes the widow; the more clearly the will is proved, the more doubt is thrown on the codicil. The wife abandons her opposition; the residuary legatees are in fact the next of kin. The cause cannot proceed till some party interested to maintain it is before the Court—it would be a strong thing for a party having propounded a codicil to take probate of a will without it.

[412] Let the question stand over for the consideration of the parties and their counsel.

BATES AND OTHERS v. GITTENS. Prerogative Court, Michaelmas Term, Dec. 2nd, 1820.—A party is not precluded from proving himself to be the husband of the same person whose will he had propounded in a former suit as executor and residuary legatee.

John Cox Gittens applied for probate of the will of Elizabeth Cox Gittens, widow, as the executor and residuary legatee. The usual proceedings were had. Proxies and affidavits of scripts were brought in from each party; and Austen (Proctor) on behalf of John Cox Gittens declared he propounded the will, and asserted an allegation. On the 15th of November, this allegation not having been brought in, Townsend (Proctor) prayed the Judge to decree letters of administration to the next of kin, unless the allegation was brought in on the next Court. On the 23d of November, Austen alleged that John Cox Gittens was as well the lawful husband of the deceased as the executor named in her will; and therefore denied that the other parties had any interest in the goods of the deceased, or were competent in law to call upon the executor to propound the will, and declared he was ready to propound the interest of

the husband if it should be denied—but the allegation not having been brought in as assigned, the Court decreed the administration to the other parties.

Before the administration passed the seal a caveat was entered against it—this caveat was warned [413] and objection was taken on the ground that the parties had already been before the Court, and that the Court had decided between them. To this it was replied that this was an entire new suit, and that it was competent for John Cox Gittens to prove himself the husband of the deceased, which must of necessity exclude all other interests.

Per Curiam. I must consider this to be a new suit, and that I cannot preclude the party from proving himself to be the husband to the deceased.

EVANS v. KNIGHT AND MOORE. Prerogative Court, Michaelmas Term, Dec. 2nd, 1820.—A responsive allegation, materially reformed.

[See further, 1822, 1 Add. 229.]

John Moore, of Tottenham Court Road, in the county of Middlesex, gave instructions for his will on the 21st of April, 1812; but died on the 24th of that month, before the will was prepared for execution. On the 23d of May, 1812, probate of these instructions, as containing the last will and testament of the deceased, was granted to Mary Moore, his widow, Richard Moore, his brother, and Joseph Knight, the executors. The will remained undisputed till the 7th of April, 1820, when a decree was taken out at the instance of Ursula Sheriff, widow, and Mary Evans, widow, the sisters and two of the next of kin of the deceased, against the executors, to shew cause why probate of the will should not be revoked as having been obtained under false suggestions, and the said will declared null and invalid.

[414] The executors propounded the will in an allegation consisting of sixteen articles. The first article pleaded that in April, 1803, a marriage in fact, but not according to the rites and ceremonies of the Church of England, was had between John Moore, the deceased, and Mary Hewitt, spinster, that they lived and cohabited together as husband and wife. That during such cohabitation two children were born: Jane Moore on July 21, 1804; and Richard Moore on the 7th of April, 1810. That the deceased constantly owned and acknowledged them to be his children; and maintained, clothed, and educated them as such.

The remaining articles pleaded declarations and acts of the deceased from which his testamentary intentions were deducible; the circumstances under which the instructions for the will were given: and the manner in which the deceased was prevented by the intervention of sudden death from signing the formal will which had been prepared in conformity with those instructions.

A responsive allegation was brought in on the part of the next of kin: it consisted of eight articles, and pleaded—

First. The death of John Moore in April, 1812; and enumerated the relations who would be entitled to share in his property if he should be pronounced to have died intestate.

Secondly. That no marriage was in fact contracted between John Moore and Mary Brown; and that in the beginning of 1819 a correspondence took place between William James the son of Mary Evans, one of the parties in the cause, [415] and James Brown the husband of Mary Brown, in the course of which correspondence James Brown at first declared that he had seen an entry of such marriage, and also the clergyman who had solemnized the same, and offered to produce a certificate thereof: but that he afterwards acknowledged his inability to do so, and admitted that no such marriage had taken place.

Thirdly. In supply of proof of the facts stated in the preceding article two letters from James Brown to William James.

Fourthly. That the deceased, prior to his cohabitation with Mary Brown, had cohabited with two other females in succession; that by the first of them he had a natural daughter, who was called Betty Moore, and was since married to a person of the name of White; and by the second a son, called John Moore, and a natural daughter, called Mary Moore; that from the period of the respective births of these children he acknowledged, maintained, clothed, and educated them; that John Moore, being a midshipman in the Royal Navy, resided when from sea at a short distance from his father's house, and was in the habit of taking his meals and passing his time with him; that, notwithstanding his daily visits at the house of the deceased, he was

nevertheless forbidden, and prevented by the said Mary Brown (a) (late one of the parties in this cause) from having access to the said deceased during his confinement with the illness of [416] which he died. That on the night previous to the death of the said deceased he, the said John Moore, having expressed an anxious desire to be permitted to sit up with his said father, was peremptorily refused permission to do so by the said Mary Brown, who compelled him to quit the said house. That during such the illness of the deceased Mary Brown treated him with great indifference and neglect, which increased after the period when the pretended instructions propounded in this cause had been, as pretended, obtained from him; that the said deceased in consequence thereof, at the commencement of his said illness, sent for his daughter the said Betty White to nurse and attend upon him, and would not permit any other person so to do, frequently declaring, when other persons approached him for that purpose, that his girl (thereby meaning and intending the said Betty White) should attend upon him.

Fifthly. That the said deceased about two or three years prior to his death took upon him the entire maintenance, education, and bringing up of ——— White, a child of the said Betty White, who was then of the age of six or seven years or thereabouts, and frequently declared that it was his intention to take the said child entirely from off the hands of the said Betty White and her husband, and to provide wholly for him. That the said deceased accordingly from that time maintained the said child at his own charge; and that the said child was at school at the expense of the said deceased at the time of his the said deceased's death.

Sixthly. That for some days preceding his death [417] he was almost constantly in a state of delirium, and totally incapable of knowing what he said or did; and when the delirium subsided he was subject to delusion and mental derangement.

Seventhly. At the time the instructions were alleged to have been taken, that he was utterly incapable.

Eighthly. That Joseph Knight, who is described in the instructions as residing in Southampton Row, Bloomsbury, at that time, and for several years prior to the same, resided in High Holborn, near Gray's Inn, which circumstance was well known to the said deceased so long as he retained the enjoyment of his mental faculties; that Richard Moore, the brother of the said deceased, another of the executors named in the said pretended instructions, having attended the funeral of the said deceased, together with the said Joseph Knight and others, and having then for the first time heard the said will read, called the said Joseph Knight into a private room, and expressed his disapprobation of some parts of the said will, and his inclination to oppose the validity of the same upon the ground of the mental incapacity of the said deceased at the time the same was drawn up. That the said Joseph Knight thereupon admitted his belief that the same was in fact on that account invalid (if opposed), and added that the fact of his the said Joseph Knight's residence being so improperly described in the same, was a very strong proof in this the said Joseph Knight's mind of such the mental incapacity of the said deceased at the time when the said instructions were prepared; but that the [418] said Joseph Knight then prevailed upon the said Richard Moore to permit the said will or instructions to remain unopposed, as, in the event of the same being pronounced invalid, the property of the said deceased would still descend to the said Mary Brown and her children, who were at that time believed to be the lawful relict and children of the said deceased.

Jenner and Phillimore objected to the 2nd, 3rd, 4th, 5th, and 8th articles of the allegation.

Lushington and Dodson contra, cited Phillips, p. 91, and *The King v. The Inhabitants of Hardwicke* (11 East, p. 578), to shew that the letters annexed to the third article were admissible evidence.

Judgment—*Sir John Nicholl*. In considering the admissibility of allegations, the Court exercises a certain degree of discretion upon a view of the whole case: it looks whether the facts pleaded bear remotely, whether they bear directly upon the question, or whether, if proved, they can make no impression. In doing this the Court exercises a discretion advantageous and convenient for the parties themselves. Parties are frequently anxious to introduce matters they think of consequence, but which eventually are injurious to themselves, and lead only to unnecessary expence.

(a) Subsequently to the death of John Moore she had intermarried with a person of the name of Brown.

In this case I cannot lay out of my consideration that the suit is commenced eight years after the probate has been granted: the party, after sub-[419]-mitting so long to this will, has now put the executors upon the proof of it in solemn form of law; and not only this, but offers to plead facts negatively to set it aside. The persons provided for by the will are the reputed wife and two children of the deceased; and it is after the drawer of the will is dead that they are now called upon to prove it.

Under such circumstances, it is the duty of the Court not to admit any matter which is not of the most stringent kind; the real point at issue is to be kept in mind, namely, the validity of the will. The whole texture of this allegation is of a slight kind, and looks rather like hopeless opposition; if so, the Court will do well for the party to reduce it, as in all probability it will involve the next of kin in costs. Still, however, the Court must admit those facts to go to proof which directly impeach the validity of the will.

The second and third articles are offered in opposition to the first article of the opposite allegation. The Court here is enquiring not into the validity of a marriage, but into the validity of a will. Whether the fact of marriage be true or not it is equally probable that the deceased should have made this will; nay, it is even more probable that he should have made it, if he knew he was not validly married. It was an additional circumstance that rendered the making this will an act which duty and natural affection pointed out. All that these two articles assert is, that there was no fact of marriage; they cannot prove this negatively. It is said that the letters pleaded are [420] written by a person whose declarations are admissible evidence. I will not go into that question, because the contents of the letters cannot carry the case further than it now stands. One letter says there was the certificate of a marriage, the other that there was not; the fact itself is immaterial. The Court must confine itself as much as possible to facts that are necessary, leaving to the party any benefit which may arise from the adverse party failing to prove the fact of marriage. I shall reject these two articles.

The fourth article recites a further part of the first article, which pleads the affection of the deceased for the children, in whose behalf the will is written. It does not contradict the fact of that affection: but it pleads that he had before cohabited with two other women, and left children by them, a daughter grown up, and a son a midshipman. How does this bear even on the probability? Is it improbable that, because he had children by other women, which children appear to have been provided for, that he should not have made a will providing for these children, and a woman whom he lived with, not merely as a mistress, but subsequently recognized as his wife? These facts, if proved, would not in my judgment bear materially upon the case. Another circumstance is stated, that Mrs. Moore excluded the young midshipman from his father's house when he was dying: but really I think the party would get no benefit at this remote period in being allowed to go into the investigation of a collateral transaction which can bear very little on the question. It also pleaded that [421] during his illness Mary Brown treated him with neglect: how does this bear upon the case? and how is it to be enquired into? If she neglected him after the instructions were drawn up, it rather looks as if he was considered a capable testator upon giving the instructions: but this is so remote a circumstance that it cannot be admitted.

The fifth article states that the deceased took upon himself the maintenance of a child of his natural daughter, Betty White, and frequently declared it was his intention to provide for her. This circumstance, in a case of recent occurrence connected with others, might have some little weight: but what is the conclusion from this? That he might have had thoughts perhaps of this: but that he altered his mind. This is a grandchild, and he had children of his own to provide for. Again the inference from this fact, in any way, is very remote; it is hardly worth putting the parties to the expense of proving it.

The sixth and seventh articles go directly to the validity of the will; they plead frequent delirium, and, in the absence of delirium, incapacity: if the party has an opportunity of proving this it may materially affect, and ultimately decide, against the validity of this paper.

The eighth article pleads that Joseph Knight, who is described in the instructions as residing in Southampton Row, Bloomsbury, never resided there, but in High Holborn, near Gray's Inn. This, it is argued, would furnish evidence of incapacity.

I think it is not more than a fact of an equivocal nature, such as may have escaped the [422] recollection of a person of the best capacity, or may have been the misapprehension of the writer in taking the instructions. If the deceased is proved to have been delirious, the party will have the benefit of it; if he was not delirious, this circumstance cannot bear at all on the case: this part however of the article, if it is pressed, may stand; but the remainder cannot. As his executors have acted as if they thought him capable by taking probate, I shall not now allow them, by introducing their private conversations, to swell out the proofs and expenses of this cause. I should not do the party any benefit by admitting it to proof; for, independently of such a conversation at such a time being very incredible, it is difficult to suppose that the deceased meant to leave his wife and children without provision.

I will allow the former part of the eighth article and the fifth to stand if pressed to do so by the counsel: but, having reformed the allegation by rejecting the other articles objected to, I shall admit it.

In the same case. Lushington applied to the Court to allow further interrogatories to be administered to Hannah Roberts and John Kersey, two witnesses who had already been examined in the cause. He founded this application on an affidavit of the solicitor in the cause, who stated that certain facts had come to his knowledge, which were very material to the interests of his client since the examination of the witnesses had been completed, [423] and they had been dismissed by the executrix; and he cited *Cowslade v. Cornish* (2 Vezey, 272) as an authority to induce the Court to accede to this motion.

Jenner and Phillimore contrà. The application is novel—may lead to the introduction of a most dangerous precedent; the practice of the Court of Chancery not at all analogous to ours, and the case of *Cowslade v. Cornish*, shew that even in that Court, under the circumstances of this case, such an application would not be acceded to.

Per Curiam. This application is perfectly novel; for the thirty-five years that I have known this Court I do not recollect such a one: it would be exceedingly dangerous; a witness may be tampered with, and then re-examined; at the same time I am not quite prepared to state that I would allow this to be done under no circumstances, though I should be loth to establish such a precedent.

Here the application is founded on the affidavit of the solicitor: the solicitor is not known to the Court; the proctor who is dominus litis, and the party, are alone known to the Court; and there is another reason why the proctor ought to have made the affidavit in preference to the solicitor, viz. that the proctor has a knowledge of the practice of the Court, and knows what circumstances ought to have weight, whereas the solicitor is a mere stranger of whom the Court knows nothing.

[424] The practice of the Court of Chancery is not analogous to our proceedings.

I cannot allow this to be done: if the fact is material in the cause, it should have been pleaded in an allegation—if it affects the character of a witness it should have been stated in an exceptive plea; if it could be alleged to be matter noviter ad notitiam perventa it might be admitted even after publication, the Court would have had an opportunity of judging itself how far the facts are or are not material.

Motion refused.

LYNCH v. BELLEW AND FALLON. Prerogative Court, Michaelmas Term, Dec. 8th, 1820.—The same will may contain the appointment of one executor for general, and of another for limited, purposes.

Henry Lynch, a merchant, died in May, 1820, in the city of Cadiz, where he resided, leaving considerable property both in Spain and England: his personalty in this country was stated at 30,000l. in the funds, and 8000l. due to him from certain merchants and bankers in London.

His will was formally executed on the 11th of December, 1819, in the presence of a Spanish notary at Cadiz; and a question arose upon it as to the appointment of the executors. The will was divided into several clauses: those which bore upon the question at issue were the following:—

“I order that when my death shall take place, my body shall be ecclesiastically buried with the shroud funeral apparatus, and masses that shall be deemed fit by my testamentary executors.

[425] “I do moreover order that the said funds in England, or the lands that may be therewith purchased, should that take place, may be and may be understood to be

entailed, as I constitute them such ; and I appoint for the possession and enjoyment thereof, in the first place, the said Don Henrique Edwardo Lynch, the firstborn son of my brother Don Patricio Lynch, and of Dona Maria Blake of Clogher House in the province of Connaught and county of Mayo in Ireland, who is to have and enjoy the entail during his life only. At his death it shall devolve to his eldest son, following the line of firstborn amongst the male children, and not female children had in lawful marriage. Should he not have any male children on the death of my said nephew, his own brother next of age shall enter into possession and enjoy his entail, and the lawful succession of the latter in like manner so that the possessor is always to be a male. In default of sons or legal male descendants of my brother Don Patricio, the children of my sister Dona Juana Lynch De Blake, had by her marriage with Don Isidoro Blake, and their lawful descendants, shall in like manner enjoy and possess the entail, preferring the elder to the younger with the exclusion of the females, and under the condition, that the possessor shall at all times bear the surname of Lynch only. And, in default of all the abovementioned, my nearest relation shall possess the entail, always preferring the elder to the younger. And in case of there not being a male, and not otherwise, it shall devolve to the females my nearest relations, with a like preference of the elder to the younger ; [426] the possessor indispensably using whatever may be the said my surname and no other. And I charge my said nephew Don Henrique Edwardo, first called to the possession and enjoyment thereof, that out of the income of the said funds he may apply per annum, for the period of five years, one hundred pounds sterling therewith during the said period to attend to the good instruction of the firstborn son of his brother Don Patricio Lynch, in the event of Don Henrique not having sons ; for, should he have any, he shall only employ for the aforesaid purpose thirty pounds in each of the aforesaid five years.

"I order that the debt due to me by Don Pedro Beighbeder and Company of the City of Xerez de la Frontera, after deducting what I may bequeath therefrom in the following clauses, may be divided by my testamentary executors amongst my poor countrymen and countrywomen in real distress in this city.

"I order that out of the property which I have in the funds in England no part shall be disposed of, except it be to purchase lands in the said county of Mayo in Ireland, with the friendly aid of the house, under the firm of John William Lubbock and Co. of London so as to guard against any imposition in the title deeds, and with the express condition, that the same is to be entailed according to the terms permitted by the laws of Ireland.

"I appoint as my testamentary executor Don Henrique Fallon in the first place ; and, should he not be living, Don Thomas Heming respectively of this city, merchants, to whom I give the power of [427] testamentary executor, in form for him in the fixed period of four months to conclude and terminate this commission at all events, proceeding within that time to the sale of the house possessed by me in this city at the most advantageous price which he shall hold at the disposal and order of my heir Don Henrique Edwardo Lynch, as well as every thing else belonging to me.

"All the residue of my property, rights, and actions, after every thing hereinbefore mentioned shall have been carried into effect, I leave to my aforesaid own nephew Don Henrique Edwardo Lynch, firstborn son of my brother Don Patricio Lynch, and of Dona Maria Blake, who is to have the said rest or residue, as my heir, for such I institute him under the obligation of paying immediately and without the least delay to my sister Dona Juana Lynch de Blake one thousand pounds sterling ; and to her two sons Don Roberto and Don Juan Blake, had, in her marriage with Don Isidoro Blake, a further sum of one thousand pounds of the money to each. He shall also pay one thousand pounds sterling to Don Patricio Lynch, and one thousand pounds of like money to Don Juan Lynch, both of them my nephews, and likewise sons of the aforesaid Don Patricio Lynch and Dona Maria Blake ; and I request the aforesaid Don Henrique Edwardo Lynch, my nephew and heir, to assist with his advice his two other brothers, disposing them to be careful in improving the property by me left to them, and any that they may obtain from their parents, so as not to come to indigence, as they have no other hopes or assistance [428] than these properties and their good conduct ; wherefore I recommend to them, and I hope that the same will be done by Don Henrique Edwardo, to conduct themselves well, be particular in their deportment, application, and honour for their own benefit.

"I desire that the debts due to me in accounts current at the time of my death

by the houses in London of John William Lubbock and Co., James Campbell and Co., and Messrs. Baring, Brothers, and Co., or any others that I may have to receive in any place whatever, may be punctually recovered by my aforesaid nephew Don Henrique Edwards, or whoever may have his special power, or his testamentary executors, or heirs; and what shall be owing to me in Spain shall be recovered by my testamentary executor, and the balance shall be held by him at the disposal of my aforesaid nephew; charging him, as I do hereby charge him personally, if possible, to attend to the recovery of the balances in London, or any other place in England and Ireland, so as not to fall into bad hands there, and not to take any paper not having the responsibility of the debtors to avoid any imposition, he being a man who is not acquainted with business; and, upon recovery thereof, he shall forthwith make the payments of the money by me disposed in the next preceding clause; and I farther impose the obligation, that he shall likewise give to my niece Dona Eliza Lynch de Crane one hundred pounds sterling, and fifty ditto to the daughter by the last marriage of my aforesaid brother."

An act on petition was entered into on the part [429] of Henry Edward Lynch on the one side, and Henry Fallon on the other: on the part of the former it was alleged that he was the nephew of the deceased, heir and residuary legatee named in the will; and also the executor according to the tenor for all the personal estate and effects of the deceased, save his property in Spain; and that Henry Fallon was the executor for the will of the property of the deceased in Spain, but no further or otherwise; and accordingly prayed the Court to grant probate of the last will of the deceased, save as to the effects in Spain in him.

On the other side it was alleged that the testator had by his will constituted Henry Fallon general executor for all his property, whether in Spain or elsewhere; and that Henry Edward Lynch was according to the tenor of the will appointed executor limited to the sole purpose of recovering debts due to the deceased in account current at the time of his death by the houses in London of John William Lubbock and Co., James Campbell and Co., and Messrs. Baring, Brothers, or any others that he may have to receive whatever, except in Spain; and he consented that probate so limited should be granted to Henry Edward Lynch, and that probate was prayed of the rest of the goods, chattels, and credits of the deceased within the province of Canterbury, to be granted to Henry Fallon.

Swabey and Lushington for Mr. Lynch. There is no instance of a person being appointed an universal executor in one and the same instrument in which another is an executor according to the tenor.

[430] Great care should be taken not to confound terms. The person may be universal executor; but the term general executor is unknown to the civil law. Mr. Lynch is regularly instituted heir; this appointment of itself, according to the civil law, makes him executor; he succeeds to all the rights of the deceased, and is consequently entitled to have the sole management of his property in England.

Jenner and Phillimore for Mr. Fallon. The heir of the civil law was necessarily vested with all the functions of executor. The term executor was not then known, it is the growth of a more barbarous age; with us in England even so late as Swinburne's time, no will, properly so called, could subsist without an executor, who unquestionably was analogous to the heir of the civil law. Modern practice has introduced a great change in this respect; and any dispositive paper is held to be a will whether an executor is appointed in it or not: but the appointment of an executor may be absolute or qualified—may be with or without restrictions, may be limited to particular effects, or to particular countries. Here the intention of the testator, in the same clause, ascribes different functions to his heir and to his testamentary executors; clearly pointing out that one was to inherit his property, the other was to have the general superintending of it. The Court will give effect to both terms.

[431] *Judgment*—*Sir John Nicholl*. This question arises on the will of Henry Lynch—an act of petition has been entered into in which the facts stated are, that the will was executed on the 10th of December 1819, in due form, and that the testator died possessed of very considerable property. Henry Fallon is appointed his testamentary executor, and Edward Henry Lynch, his nephew, his residuary legatee and heir. On the part of the nephew it is contended, and truly so far contended, that he is an executor according to the tenor for certain purposes; and further, that Mr. Fallon is only executor for the property in Spain. On the part of Mr. Fallon it is asserted that he is an executor in England as well as in Spain, except as to the specified parts of the property which are entrusted to Mr. Lynch.

The point in dispute is, whether Mr. Lynch is entitled to a general probate, or only to a limited probate.

This depends on the construction of the will itself, for the Court is from that to collect the intention of the testator. By the sixteenth clause he appoints Mr. Fallon testamentary executor in the first place; and, should he not be living, David Thomas Heming respectively of this city, merchant, to whom I give the power of testamentary executor in form for him in the first period of four months, to conclude and terminate this commission; at all events proceeding within that time to the sale of the house possessed by me in this city at the most [432] advantageous price, which he shall hold at the disposal and order of my heir Don Henrique Edwardo Lynch, as well as every thing else belonging to me.

What might have been the question if he had only appointed an heir, or if he had appointed an heir and a residuary legatee, are very different considerations from this, where a person is to hold property for the benefit of the heir. This will then appoints Mr. Fallon general executor; this would constitute him an universal executor: the appointment may be limited by other directions in the will; but they must be clear, either by express words or certain implication, to be limitations on the rights of the executor and the extent. In the subsequent parts of the will there is no express limitation; Mr. Lynch claims to be executor, according to the tenor of the will, of the property in England; he is made such by his appointment to such functions as necessarily imply that he is to act in that character; yet in a case of that sort the construction is *stricti juris*, and the intention of the testator is not to be carried beyond it.

Keeping this rule of interpretation in view, what has he directed, and what is the course of his bequests? The will is broken up into paragraphs.

The thirteenth is material: it disposes of property in the funds which he values at 33,000*l.*, and orders that it should be applied to the purchase of land in Ireland by the friendly aid of Messrs. Lubbock and Co.

[433] The fourteenth directs how the funds, or the lands purchased by the funds, are to be entailed; his nephew has only a life interest in them.

The sixteenth clause appoints a testamentary executor without any limitation as to his power.

It is material to consider that in the seventeenth and eighteenth clauses he gives his residue to his nephew after "every thing hereinbefore mentioned" has been carried into effect. By whom? Certainly by his testamentary executor; there is nothing to limit the testamentary executor, the residue was to go to his nephew after all was done. Is there any thing afterwards to extend the executorship to his nephew and heir? He is to collect his debts in certain places—but what has he to do with his property in the funds? it does not seem that he can be considered generally as his executor for the property in England. Mr. Fallon is generally executor for the property in England, Mr. Lynch to a certain extent for the property in England.

Not only is this the due course of construing the instrument, but it is perfectly natural that the testator should so have appointed it. He was willing to secure his property; and not having a high opinion of Mr. Lynch's habits of business, he devolved the general care of managing his property on Mr. Fallon.

Upon the whole, I am of opinion that Mr. Lynch is only entitled to a limited probate as executor, according to the tenor for the purposes pointed [434] out in the seventeenth and eighteenth paragraphs of the will, and that Mr. Fallon is to be considered as the general executor.

FAWCETT v. JONES, AND CODRINGTON AND PULTENEY. Prerogative Court, Hilary Term, January 31st and February 5th, 1810.—A citation taken out by the substituted residuary legatee in a will against the executors who had obtained probate, to shew cause why the probate should not be revoked on account of the residuary clause not being co-extensive with the instructions given by the party deceased.—The allegation founded on this citation rejected.

[Applied, *Thorne v. Rooke*, 1841, 2 Curt. 813. Discussed, *Von Stentz v. Comyn*, 1849, 12 Ir. Eq. R. 633; *Guardhouse v. Blackburn*, 1866, L. R. 1 P. & D. 113. Referred to, *Sullivan v. Sullivan*, 1870, Ir. R. 4 Eq. 461; *Harter v. Harter*, 1873, L. R. 3 P. & D. 20.]

Henrietta Laura Pulteney, Countess of Bath (wife of the Right Hon. Sir James Pulteney, Bart), died on the 14th of July, 1808, without issue, leaving a will dated

the 5th of November, 1794, in which Sir Thomas Jones, Bart., and Christopher Codrington, Esq., and John Kipling, Esq.,^(a) were executors, and a codicil dated 24th July, 1805.

Sir Thomas Jones and Mr. Codrington, on the 22nd of August, 1809, proved the will and codicil in the common form. On the 1st of July, 1809, a citation was taken out at the instance of Elizabeth Evelyn Fawcett (formerly Markham), the wife of John Fawcett, Esq., the substituted residuary legatee, against the executors, to shew cause why the probate should not be revoked on account of the [435] residuary clause in the said will not being co-extensive with certain heads and instructions for the said will, executed by the deceased on the 3rd of August, 1794, and a new probate taken of the said will and codicil, together with that part or clause of the aforesaid heads or instructions which respects the disposal of the residue of the deceased's personal estate, as containing together the true last will and testament of the deceased.

The probate was brought in; but afterwards on the motion of counsel was delivered out of the registry to the proctor for the executors, on an undertaking in acts of Court to return the same when required, such re-delivery of the probate being made without prejudice to the question at issue in the cause.

An allegation was brought in on the behalf of Mrs. Fawcett, which pleaded—

First. That the Right Hon. Henrietta Laura Pulteney, formerly Baroness and afterwards Countess of Bath (wife of the Right Hon. Sir James Pulteney, Bart.), the party in this cause deceased, departed this life on the 14th day of July, 1808, leaving behind her the said Right Hon. Sir James Pulteney, Bart., her lawful husband, but without any issue.

Secondly. That on or about the 23rd day of July, 1794, in contemplation of a marriage which was then about to take place between the said Henrietta Laura, then Baroness (afterwards Countess of Bath), and the said Sir James Pulteney (then Murray), Bart., certain articles of agreement were entered into between the said parties, where-[436]-by all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred to Richard Lord Viscount Chetwynd, of the kingdom of Ireland, Christopher Bethell, of Swindon, in the county of York, Esquire, and Osborne Markham, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs, executors, administrators, and assigns, upon trust, among other things, that they should make and execute such grants, assignments, transfers, surrenders, and other dispositions of the said real and personal estate, unto and to the use and for the benefit of such person and persons, and for such estate and estates and other interests, and subject to such powers, conditions, restrictions, and limitations, as she the said Lady Bath, at any time or times, and from time to time, after the solemnization of the said marriage, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by her in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament, in writing, or any writing in the nature of a will, signed by her, and attested by three or more credible witnesses, should direct, limit, or appoint, which deeds, wills, and writings, she the said Lady Bath was thereby, and by the said Sir James Pulteney, her then intended husband, empowered to make and execute as she should think fit, as if she was sole and unmarried.

Thirdly. That during the time when the articles of agreement, mentioned in the next preceding article, were in preparation, and before the execution [437] thereof; the said Lady Bath being of sound and disposing mind, gave verbal directions to John Kipling, Esq., then and now one of the six clerks of the Court of Chancery, who acted as her legal adviser, to prepare a new will for her (in the stead of one formerly made by him for her) which she intended to execute soon after the solemnization of her said intended marriage. That, pursuant to such directions so received from the said Lady Bath, he the said John Kipling did prepare an instrument in the nature of heads or instructions for a will, to be afterwards extended in legal form, which he delivered to the said Lady Bath for her perusal and consideration a short time before the celebration of her marriage with the said Sir James Pulteney, which took place on or about the 24th day of July, 1794.

(a) Mr. Kipling had not acted as executor, and after the commencement of this cause he appeared personally in Court, and renounced the probate and execution of the will.

Fourthly. That after the said John Kipling had so delivered the said heads or instructions for a will to the said Lady Bath, he attended her at several different times, for the purpose of adjusting with her the heads or instructions for her will; and after the same had been adjusted, such heads or instructions were fairly copied by or by the order of the said John Kipling, it being thought expedient that the same should be signed and executed by the Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months, immediately after her marriage, and before a will or testamentary appointment could conveniently be extended in legal form pursuant to such heads or instructions. That upon the last sheet of the fair copy so made of the said heads or [438] instructions, the said John Kipling caused to be written a memorandum, in the words following, to wit, "The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing, contained in six sheets, as and for my last will and testament, or testamentary appointment in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf; and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions." And soon afterwards the said heads or instructions were delivered by the said John Kipling to the said Lady Bath.

Fifthly. That the said Lady Bath, after receiving the said fair copied heads or instructions for her will, as mentioned in the preceding article, kept the same in her possession, and under her consideration for several days before she executed the same, and did with her own hand make some alterations therein. That the said Lady Bath, in her way to Scotland, paid a visit to Stokesley, in the county of York, the residence of the said Elizabeth Evelyn Fawcett, then Markham; and while there, to wit, on or about the 3d day of August, 1794, she, the said Lady Bath, being of sound and disposing mind, and having an intention to give effect to the aforesaid instrument, contained in six sheets of [439] paper, as and for her last will and testament, or testamentary appointment, did duly sign, seal, publish and declare the same, as and for her last will and testament, or testamentary appointment, in the presence of several credible witnesses, three of whom, at her request, in her presence, and in the presence of each other, did set and subscribe their names as witnesses thereto, in manner and form as thereon now appears; and she, the said Lady Bath, did give, will, bequeath, dispose, and do, in all things as therein is contained.

Sixthly. That in supply of proof refer to a paper writing annexed to an affidavit, made in this cause by the said John Kipling, dated 29th June, 1809, now remaining in the registry of this Court; and doth allege and propound the same to be and contain the very instrument pleaded in the next preceding article as having been executed by the said Lady Bath.

Seventhly. That the said Lady Bath, after having executed the said heads or instructions for her will, in manner hereinbefore stated, did transmit the same to the said John Kipling, accompanied by a letter in the words and figures following, to wit:—

Stokesley, 4th August, 1794.

Sir,—I send you by this day's mail coach the instructions for my will; I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself; as you will perceive I have made a very material alteration in the last [440] folio, which, of course, must be made also in the will.—I am, Sir, your obedient humble servant,

PULTENEY BATH.

P.S.—I beg you to direct your answer to Edinburg.

Which instrument and letter were duly received by the said John Kipling; and the party proponent doth further allege and propound, that the twenty-seventh and twenty-eighth lines from the top of the sixth sheet of the said heads or instructions pleaded and referred to in the preceding article, were obliterated and struck through in manner as they now appear, by the said Lady Bath, prior to the execution of the said instrument, being the alterations alluded to by her in the aforesaid letter.

Eighthly. That the said John Kipling, having received directions from the said

Lady Bath to cause the said heads or instructions for her will to be extended in proper legal form, and being himself at the time much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for the said Lady Bath pursuant and in conformity to the heads or instructions which had been so as aforesaid executed; and in consequence thereof, the said Mr. Holiday recommended for that purpose a draftsman, whom he had been used to employ, namely, Christopher Wightman, of the Temple, London, to whom some time in the beginning of the month of August, [441] 1794, the said John Kipling did deliver the heads or instructions for a will hereinbefore pleaded and executed by Lady Bath, in order that he, the said Christopher Wightman, might prepare a will, strictly conformable thereto, in proper legal form.

Ninthly. That soon after the premises mentioned in the next preceding article the said Christopher Wightman did, from the heads or instructions so delivered to him, prepare a draft of a will or testamentary appointment for the said Lady Bath; and having so done, he delivered the said draft to the said John Kipling for his perusal and approbation; and the same having been inspected by the said John Kipling, but the difference therein between the said draft and the said heads or instructions having, in fact, escaped his observation, he caused two fair copies thereof to be made for execution, which were delivered or transmitted to the said Lady Bath.

Tenthly. That soon after the two fair copies of the draft of the said will had been received by the said Lady Bath, she directed an alteration to be made by extending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the said testatrix, as in the event expressed in the said instructions of there being one only son; and further, to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, formerly Markham, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said [442] Elizabeth Evelyn Fawcett; but did not discover the omission and difference between the said fair copies and her original heads or instructions so executed by her as before pleaded, and in conformity with which she had directed the same to be prepared for execution. That the alterations so directed by testatrix were accordingly made in the residuary bequest by the said Christopher Wightman, or by his clerk, which rendered it necessary to take away some of the sheets of the said two fair copies, and to substitute other sheets in lieu thereof, in order to give effect to such alterations.

Eleventhly. That after the aforesaid two fair copies of the said will had been altered in manner mentioned in the next preceding article, the said Lady Bath being of sound and disposing mind, and having an intention to execute the same as and for her last will and testament, did, on or about the 5th day of November, 1794, duly sign, seal, publish, and declare each of the said two copies or parts of a will as and for her last will and testament in the presence of several credible witnesses, three of whom, in her presence, at her request, and in the presence of each other, did severally set and subscribe their names as witnesses thereto.

Twelfthly. That after the two parts of the will had been executed, as pleaded in the next preceding article, the same were sealed up in envelopes or covers; and immediately afterwards one part of such will was delivered to the said John Kipling, and the other part thereof was left in the possession of the said Lady Bath.

Thirteenthly. That in supply of proof of the [443] premises mentioned, and set forth in the preceding article, the party proponent prays leave to refer to the last will and testament of the said Lady Bath remaining in the registry of this court, upon which a probate issued on the 22d August, 1800, and doth allege and propound the same to be one of the parts of the will, so executed by the said deceased on the 5th day of November, 1794, being that part which was so as aforesaid delivered to the said John Kipling, sealed up, and which remained in his custody and possession so sealed up, until and at the time of the death of the said Lady Bath.

Fourteenthly. That at the time when the said Lady Bath so executed her said will, on the 5th of November, 1794, she apprehended and believed that the bequests therein contained, were in strict conformity with the heads or instructions which she had formerly executed, save and except in so far as she had directed the residuary bequest to be altered in manner as pleaded in the tenth article; and neither the said

John Kipling, nor the said Christopher Wightman, the draftsman, employed under him, had ever received any instructions whatsoever different from or other than the heads or instructions hereinbefore pleaded, and the said alterations in the residuary clause, as specified in the said tenth article.

Fifteenthly. That no omission in the said will, or difference between the said will, and the heads or instructions for which it was drawn, other than the alterations specified in the tenth article, was discovered during the lifetime of the said Lady Bath; but that since her death it hath been found that [444] the clause inserted in the said will, for disposing of the residue of the said deceased's personal estate, in the event which hath happened of her dying without leaving any issue, differs from and is not co-extensive with the clause in the instructions applying to the said residuary bequest in the same event, inasmuch as that by the said will the said Lady Bath, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, directed her trustees thereinbefore mentioned to apply her said residue, and the interest and dividends thereof, for the sole and separate use and benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and for the use and benefit of the issue of the said Elizabeth Evelyn Markham, in the case only of the said testatrix having one child living at the time of her own decease (as in and by the said will, reference being thereunto had, will more fully and at large appear) whereas, by such heads or instructions, the said testatrix ordered and intended her said trustees, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, to apply the interest of her said residue to the separate use of the said Elizabeth Evelyn Fawcett, formerly Markham, for her life; and after her death to her children and grandchildren, as she, the said Elizabeth Evelyn Fawcett, formerly Markham, should appoint, in the case of the default of younger children of her the said testatrix, meaning thereby whether such default of younger children arose from a total failure of issue of the said testatrix (which [445] is the event which hath happened), or by her leaving an only child, as in and by the said heads or instructions, reference being thereunto had, will more fully and at large appear. And the party proponent doth expressly allege and propound that such difference in the said will arose solely through the error and inadvertency of the said Christopher Wightman, the draftsman, employed to prepare the same, and from the said John Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the said heads or instructions.

Sixteenthly. That on the 22d day of August, 1808, a probate of the said will of the said deceased, bearing date the 5th day of November, 1794, with a codicil thereto bearing date the 24th day of July, 1805; but without the said heads or instructions for a will executed as aforesaid, on the 3d day of August, 1794, was granted under seal of this court to Sir Thomas Jones, Bart. (then Thomas Jones, Esq.) and Christopher Codrington, Esq., two of the executors named in the said will; a power being reserved of making the like grant to John Kipling, Esq., the other executor.

Seventeenthly. That the party proponent doth herein and hereby propound the said will of the said deceased, bearing date the 5th day of Nov., 1794, and the said instrument of instructions for the same, executed by the said party, deceased, on the 3d day of August, 1794, as containing together the true last will and testament of the said deceased, [446] to which there is a codicil, dated the 24th day of July, 1805.

Eighteenthly. That the said Lady Bath had through her life the most unbounded affection and friendship for the said Elizabeth Evelyn Fawcett, formerly Markham, who was her cousin, and brought up much with her in their youth. That such the said Lady Bath's attachment towards the said Elizabeth Evelyn Fawcett continued equally strong after her marriage with her present husband, John Fawcett, as it had been while she was the wife of the Reverend George Markham, Doctor in Divinity; and such her affection and friendship continued to the day of the death of the said Lady Bath, who frequently spoke of the said Elizabeth Evelyn Fawcett and her children, as being the principal objects of her testamentary bounty.

Burnaby and Daubeney, for the executors, opposed the admission of the allegation.

The question divides itself into two parts, first, whether there has been that omission in the will of the deceased, which it is now proposed to rectify; and, secondly, whether the Court would have the power to rectify it, should it be established.

In regard to the first ; if there be in fact no omission or defect in the testator's meaning, there can be no need for this extraordinary interposition of the Court. The will is not impugned upon any of the usual grounds on which wills are objected to in this Court ; is not contested on the ground of any fraudulent imposition practised on the deceased, or the want of capacity, nor on the ground of imperfection in the [447] substance of the instrument ; for if it were an imperfect testament the presumption of abandonment might arise, and we should be placed in a situation very different from that in which we now stand before the Court ; we should be called upon to support a paper presumed to be abandoned, by the aid of parol testimony introduced to establish the intention of the deceased, and not to resist the introduction of evidence for the purpose of making an addition to a regularly and solemnly executed paper.

With regard to the second question, whether the Court has the power to rectify an omission of this description, that must depend on whether parol evidence can be received to controul or vary, in any respect whatever, a will which is not impeached on any other ground. Before the Statute of Frauds it seems to have been a general rule that no parol evidence could be admitted to controul what appeared on the face of the deed or will, not only from the danger of perjury, but from the presumption that whatever the parties had at the time in contemplation was all reduced into writing, the last solemn act of the testator must be taken to be that which contained his intent, and his whole intent ; and no antecedent act can be considered as being any part of it.

In *Ulrick v. Litchfield* (2 Atk. 372) there was a doubt, on the face of the will, to whom the testatrix had left the residue of her property, and there was a repugnancy in the words of the will : but Lord Hardwicke refused to admit parol evidence ; and stated that there were only two cases in [448] which it ought to be admitted, either to ascertain the person where there are two of the same name, and where there has been a mistake in a Christian or surname, or in the case of a resulting trust ; he added, the case before him was not one of a resulting trust, but one in which it was attempted to resort to parol evidence to explain a doubt on the face of the will ; and he referred to the case of *Strode v. Russell* (2 Vern. 621) in which there was an appeal to the House of Lords. And Mr. Justice Tracy, who assisted Lord Chancellor Cowper on that occasion, was at first inclined to admit evidence to explain : but, upon more mature consideration, disavowed his first opinion, and was clear that it could not be admitted to supply the words of a will.

Afterwards, in *Blinhorne v. Feast* (2 Ves. sen. 28), Lord Hardwicke, referring to the case of *Brown v. Selwyn*, which had recently occurred in the House of Lords, appeared doubtful as to the propriety of receiving parol evidence even to that point ; for he says, "Since the case of *Brown v. Selwyn*, where the Lords rejected parol evidence, I have been extremely tender of admitting it in questions of this kind, though I never doubted it where it was to ascertain identity or in case of collateral satisfaction." And in *Nourse v. Finch* (1 Ves. jun. 344) Mr. Justice Buller says, "In a case of ambiguitas latens parol evidence may be admitted ; so in a case of fraud, perhaps of ignorance or mistake : but it does not follow that it ought to be allowed to prove the intent of any written paper, for that ought to be collected from the paper itself."

[449] In *Lord Walpole v. The Earl of Cholmondeley* (7 T. R. 138), argued in a bill of exceptions from the Common Pleas, Hilary Term, 1797, before the King's Bench, Lord Kenyon rejected parol evidence altogether, on the ground that there was no latent ambiguity, and that, in fact, if it was to be received, it would raise a difficulty which, perhaps, did not exist before. In that case a will made in 1752 was revoked by another will made in 1756 ; but there was a codicil made in 1776, which recognized the will of 1752 and appeared to revive it. There were strong circumstances to shew that the deceased did not mean to recognize the will of 1752, but that of 1756 : but there being nothing on the face of the will to raise a doubt, the Court rejected parol testimony altogether and pronounced for the will of 1752.

The practice in our Courts has been in conformity with the doctrines which result from these authorities, as in the case of *Lord St. Helens v. The Marchioness of Exeter* (Prerog. Jun. 27, 1805). A codicil referred to a will of the 10th Jan. 1798 ; no such will was found : it was held that there were latent circumstances requiring evidence to explain these, and therefore evidence was admitted.

In *Treacher v. Favell* (Prerog. Feb. 29th, 1804) a will, dated in 1790, referred to

a fact which had happened subsequent to that period. There was another subsisting will dated in 1793; it was clear the first will was not written in 1790: it was held an imperfect paper, and evidence was therefore admitted to ascertain the date.

[450] Upon the whole, the preliminary step is not made out; the Court cannot be satisfied of the necessity of an interposition: but even if this point were established, it would be a most dangerous precedent to admit this allegation which has for its object, after a lapse of 15 years, to supply an omission which may have been made by Mr. Kipling, but which can now be rectified by his evidence, and his evidence alone.

Stoddart and Jenner for Sir James Pulteney, pursued the same line of argument as the counsel for the executor. *Lord Cheney's case*, 5 Coke, 68. Buller's *Nisi Prius*, 297. *Castledon v. Turner*, 3 Atkyns, 257. *Lowfield v. Stoneham* (before Chief Justice Lee). *Cave v. Holford*, 2 Ves. jun. 604. And the case of Sir John Chichester's will (*Sandford v. Vaughan*, 1 Phill. Ecc. 128).

Swabey and Addams for Mrs. Fawcett. In opposition to this allegation, two questions are raised: first, whether there is a mistake, such as it is proposed to rectify; and undoubtedly, if there is not, there can be no reason for the interference of the Court: but we apprehend that it is impossible to compare these instructions with the will subsequently executed, and not to see that the draftsman has omitted that very contingency upon which the interest of Mrs. Markham and her children is directed by the instructions to vest; that being that after the death of the survivor of her father and her husband, the estates shall go to her younger children, and in default of such issue to Mrs. Markham and her children, which certainly [451] is not to be found in the will. There is a provision for all other contingencies but that—that is, the will does not provide for the event of her ladyship dying without leaving any younger child; and this is the omission we ask to supply.

We ask to be permitted to supply this by evidence which is instrumental as well as parol, upon the ground that the Court has not at present before it, by the instrument which has been proved, the genuine intention of the deceased, for that does not contain her whole and complete intention. We conceive, also, that if the evidence of which the allegation appears to be capable shall be thought sufficient in point of fact, that clause of the instructions which I have very recently read, in addition to the will, may be admitted to probate, without producing any contradiction to the will, as it at present stands; as also without the violation of any principle of law justly applying to a case under these special circumstances.

This necessarily leads to the second consideration, which is, whether, assuming that there is that omission or mistake for which we contend, and which it is proposed to rectify, the Court has the power to rectify it; for it has been argued that the Court does not possess that power: without wishing at all to deny the soundness of the cases cited from the books of another profession, we resist the application of those cases to this particular instance; and if search had been made into the decisions of the Prerogative Court, it would have been found that the same principle has been constantly acted upon, and as scrupulously adhered to, in the [452] decisions of that branch of jurisdiction over subjects of testamentary law, as in the Court of Interpretation. It has been derived by both jurisdictions from one and the same source; and we cite one decision to this effect, viz. the case of Mrs. Wenman. 200l. was given to a Mr. Clark to transmit to Mr. Wenman: Mr. Clark was about to undergo inoculation, previous to which he made his will and bequeathed this 200l. to Mr. Wenman. He recovered, and did not alter his will; but afterwards he gave the 200l. to Mr. Wenman—afterwards died, and his representatives sued for the 200l. under Mr. Clark's will. It was resisted on the ground of these circumstances: but they being all circumstances before the will, and being adduced merely to controul the construction of it by parol, Sir George Hay over-ruled it on the authority of *Selwyn v. Brown*, and many of those cases which have been cited, fully affirming those principles which equally prevail in all courts of construction.

But we are now before a court of probate, of which I apprehend it is the peculiar office to see that the testamentary paper should be such as the testator intends to take effect; for though no form is necessary, provided intention be expressed, yet intention, being the very essence of a testamentary disposition, cannot be dispensed with. Nor is the intention only necessary, but it constitutes and makes itself the will in all cases; and the evidence requisite to satisfy a court of probate what a testator intends, and what he does not intend, except in cases of nuncupation, that

is, as applied to all written testa-[453]-ments, is not to be reduced to certainty by any particular rules Courts can lay down. It will always depend upon the circumstances of each particular case, on which the Court will exercise a full discretion as to their result; and that parol evidence in a case of the present description is admissible, appears to be a position not admitting of a particle of doubt; are we not in the daily habit of admitting it to prove every paper of a testamentary nature? at the same time we know it is a general rule where it is to controul the construction of what appears upon the face of a will or deed, that it is admitted only to explain an uncertainty, and to rebut an equity before a court of equity; but in a court of probate it is of necessity more liberally indulged. It is indeed the principal evidence on which the validity of testamentary acts can be decided. When a paper is once established, and it is pronounced to be what it purports, Courts undoubtedly entertain a great deal of jealousy in suffering a party to travel out of the paper to ascertain a different sense from the immediate purport of the words, and then to enquire what is the meaning of the testator. But what is the business of this Court, but to find out the will of the testator, and whether the paper propounded as such is his will? how otherwise is it possible for the Court to decide, when two papers are propounded by different parties, which shall be received—it could not go on without proof dehors the will in order to discover to which the stamp of its authority is to be given; and it would be inconsistent to say you shall not in such cases [454] go into evidence of the fairness of the transaction, and enquire whether you have the whole will before you or not.

It has been admitted that where there is force, fraud, or incapacity, parol evidence may be admitted; but it is contended that it cannot be admitted to intrench upon a regularly executed act, because the Court is to decide upon intention, and wherever there is either force, fraud, or imposition, intention is wanted.

In like manner where there is a will which has been altered by change of circumstances, as by marriage, and the birth of a child, would not parol be admitted? And why would it be admitted there? Because there the Court decides on intention, on a presumption that the intention the testator once entertained had become altered. It may also happen that you have a later executed instrument, and an instrument, of an earlier date, remaining uncanceled; and there have been cases where by parol merely the testator has revived the one, and it has been on that evidence pronounced for as the true will of the deceased; that is from circumstances dehors the will, and by parol merely. And as nothing is to be admitted into the will which is not the intention of the testator, so whatever is found to be such must be admitted: and there have been many cases decided on solemn argument, wherein there being instructions or written proofs, those written proofs being corroborated by parol testimony, have afforded ground for pronouncing for the two papers together, and of supplying the omissions of parties as well as of expunging mistakes in written in-[455]-struments, when that which was inserted has been proved not to accord with the true intent of the testator.

In the case of *Bridge v. Arnold and Cranke* (Prerog. 1775) the words which were expunged had been inserted by error. The case was of this description: the surplus had been given in trust, and there had been incorporated by a mistake of the attorney these words, "for the benefit of the trustee," or rather, I believe it had been given to him for his own use and benefit, instead of "as a trustee;" and it was proved, the testator had given directions to insert those words "as a trustee." It was contended in that case, that parol evidence could not be admitted against what appeared to have been the words of the testator: but the Court said it was manifestly an error, and that the testator was ignorant of those words being inserted, and therefore they could not bind; and the Court directed them to be expunged, as my note says, "following the intention of the deceased."

Barton v. Robins, (b) which afterwards went to [456] the Delegates, was the case of

(b) The following report of this case, as far as relates to the proceedings in the Prerogative Court, is taken from a MS. in the handwriting of the late Dr. Swabey:—

Prerogative Court.

Barton v. Robins.

Dr. Wynne. Not sufficient evidence to support the will; eye-sight bad. Sarah Barton and Moore say not able to read. In point of law a will of a blind person not

an insertion by fraud. It was the case of an old woman who had nearly lost her sight, and the attorney who drew [457] the will had inserted the residue to himself. The old woman had some suspicion; she sent for the attorney, who made excuses for not coming; and she [458] never could obtain the will from him; he kept it back, under pretences of different kinds. The Court had no doubt, in that instance, as to the receiving parol evidence; and, on the evidence of these circumstances, ordered the clause of the residue to be struck out. These are cases in which clauses were expunged on parol evidence merely.

The case of *Damer v. Pechell and Others* (Prerog. 1778) appears to be precisely

good, unless all read. The evidence is—this will was not all read. Sarah Barton says, Can you read it?

Total deficiency of proof that Robins was appointed executor and residuary legatee. Swinburne on Blindness. Domat. Law in Code, 6th book, 22 tit. 8th law. Case of *Moor v. Pain*, in the Delegates. Blind man's will set aside for want of the form of reading over. Robins had disobliged her; evidence of four witnesses as to that.

Curia (Sir George Hay). A very special case; had very little doubt if it had not been for the evidence on the part of the next of kin, Moore, Barton, Beavan. Until the said Robins had done reading, heard nothing of an executor, Barton, and other legacies, Mrs. Beavan. Will begun, not finished; heard nothing but legacies. If they had not proved a part to have been read, it would have been incumbent on Robins to have proved the will to have been read over. *Parminster and Butler*, or *Butler against Parminster*, the whole will set aside, chiefly because the deceased being a paralytic, and not able to read it over, the contents were not known by the deceased or proved to be read over, and the writer was the residuary legatee. The ancient law, that the writer shall have no legacy not received here it is true: but then there must be an evidence that the contents are known. My opinion is, that the part not proved to have been read over will be void. A blind man's will established upon a proof that he knew the contents of the will, though not read over before the witnesses. I must look on the deceased as a person blind: incumbent upon Robins to shew he was executor or residuary legatee. Samuel Webb—That deceased said to Robins she desired to have a handsome funeral, but a single witness. Gaby says, The deceased said you will do the best you can. What are the collateral circumstances? That he should have a benefit? nothing more unlikely; not a tittle of evidence that she ever designed any favour to Robins, he being a stranger, an attorney, and nothing to shew intention to benefit him. Why did not Robins go on the 30th? the father went; not a word said by the father about his son being executor, or having the residue. A moidore given to Robins; it is a material circumstance. I can easily account why Robins should decline the moidore; but cannot why the deceased should press him three times, had she known or intended him to be her residuary legatee. In point of law the writer, who is benefited, must shew that the contents were known. No proof but Webb; that only as to executor; it would have done if he had not the residue. Pronounce for so much of the will as does not benefit the writer. Expunge the residue. Revoke the probate, and decree administration with will annexed to the next of kin. No costs. I put it for defect of evidence. There are suspicious circumstances in the case.

The decree from the minutes. Pronounced for the force and validity of so much of the will as relates to all the legacies bequeathed in the will, except the legacy of the residue to Henry Robins, the writer of the said will, and the appointing of him as an executor; and did also pronounce for that part desiring Mr. Robins to take care of the funeral; but did pronounce against the force and validity of so much of the said will as bequeathed the residue to the said Henry Robins and appointed him executor, and revoked the probate heretofore granted of the said will, and decreed the said deceased to have died intestate as to the residue of her personal estate; and decreed letters of administration with so much of the said will as is pronounced for only, omitting from the words "all the rest, residue, and remainder," in the seventh line, to be computed from the bottom of the said will, to the words "fully executed" in the fourth line, to be computed from the bottom of the said will, to be granted to Mary Barton, Holman's client, the cousin-german and next of kin of the deceased.

From this sentence an appeal was interposed to the High Court of Delegates, which on the 18th Nov., 1769, affirmed the sentence of the Prerogative Court, and condemned

similar to the present. Mr. Janssen had written instructions for his will, which he had given in his own handwriting to Mr. Robinson his attorney, in which there was a clause appointing his younger daughter residuary legatee. Mr. Janssen put this at the top: Mr. Robinson intending to put it at the bottom, in his hurry he passed it over, and omitted it altogether. Mr. Janssen, after inspecting the draft drawn out by Mr. Robinson, returned it to be engrossed, which was done accordingly, and he afterwards executed it. The executor was called upon to take probate of the instructions as part of the will, and Doctor Calvert pronounced for them as such. The cause was appealed to the Court of Delegates,^(d) who [459] thought the mode in which the sentence was given, including as it did the whole of the instructions, was not correct, but declared for the clause appointing the daughter residuary legatee, together with the last will of the deceased.

There is a case very similar to that which is much more recent, in this Court, of *Gerrard v. Gerrard* (Prerog. 1789) by her guardian. It is the case of a will of a Dr. Gerrard. A caveat had been entered by Mrs. Gerrard on behalf of the daughter, not as opposing the will, but submitting to the judgment of the Court whether certain words ought not to be introduced into the will on evidence of the intention of the deceased. The facts of the case were, that Dr. Gerrard died, leaving his widow and a daughter. That in June, 1787, he had written instructions for his will, and [460] delivered them to Mr. Morrell, an attorney, of Oxford; and that, towards the latter end of the month, he had written to Mr. Morrell, desiring him to insert his wife as residuary legatee: the term he used in his letter was, "my dear wife;" and it not being recollected at that time by Mr. Morrell what was her Christian name, a blank was left for it in the will. The testator altered the draft in some trifling particulars, and then transcribed it, but still he omitted to insert the name of his wife; and having transcribed it, he afterwards executed it. Two witnesses were examined. Mr. Morrell deposed that he knew the handwriting of the testator, and he proved the instructions and the letter from which he drew the draft; that he believed that he meant to make his wife executrix, and to give her the residue of his property that he had; and that he apprehended it must have been a mistake, and that the omission arose from his not observing the blank. It was also proved that the testator had subsequently stated that he had left his wife executrix and residuary legatee. The Court said it was impossible to prove any thing more clearly; and that as to its being said that if a man does not take sufficient care, he must abide by the consequences, the Court did not agree to that. The case of Mr. Janssen's will was

the appellant in costs. The Judges present were Mr. Baron Smythe,* Mr. Justice Aston, Dr. Ducard, and Dr. Bever.

(d) I am indebted for the following epitome of this case to an advocate of great experience in the Ecclesiastical Courts, from whom I have derived much information and advice in the compilation of these reports.

Delegates, 14 Feb., 1783. Mr. Justice Willes, Mr. Baron Eyre, Mr. Justice Nares, and Dr. Macham.

Blackwood v. Damer.

[Considered, *Thorne v. Rooke*, 1841, 2 Curt. 813. Not applied, *Guardhouse v. Blackburn*, 1866, L. R. 1 P. & D. 113.]

M. Janssen wrote with his own hand instructions for a will, in which he left the residuum to his youngest daughter, since married to the Honourable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days: the will was executed in due form—contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission: the other variations he supposed he had received verbal instructions to make.

The Court below had pronounced for the instructions as part of the will.

The Delegates decreed that the residuary clause should stand as part of the will, but no other part of the instructions.

* Mr. Baron Smythe is styled in the Court Book of the Delegates, the Honourable and Reverend Sir Sidney Stafford Smythe, Knight, one of the Barons of His Majesty's Court of Exchequer.

then cited; and it was said that in point of principle the cases were the same, but in point of evidence clearly they were not; and I think upon the letter, or one part of the instructions not having been propounded, it was said that the Court could [461] not pronounce for papers not propounded. But there have been cases of that sort: there was one case before Sir George Hay, where he pronounced for a paper, although it had not been propounded, and the Court, in this instance, under the authority of the case before determined by Sir George Hay, declared for the validity of a paper which had not been propounded.

There are other cases in the recollection of the Court: that of *Micklem v. Franklin* (Prerog. 1789), where the testator had executed a codicil, merely intending to revoke a single legacy which appeared to be written from inadvertency only on a wrong will, which his codicil purported to revive. On evidence as to the circumstances being gone into, and the Court being satisfied it was from error, and not with an intention to revoke that will, the Court pronounced for the codicil; and the will of 1786 was received, directly against the contents of the codicil of 1789, which was an executed instrument.

The case cited of *Lord Saint Helens v. The Marchioness of Exeter* (g) was one of the same [462] description. That was a mistake as to the draft of a codicil, which stated

(g) Prerogative Court of Canterbury.

Lord St. Helens v. The Marchioness of Exeter.

Judgment—Sir John Nicholl. An executed will and two codicils of the Marquis of Exeter are propounded. The will is dated on the 13th December, 1800; the first codicil on the 1st December, 1802; the second codicil on the 13th November, 1803.

The execution of these instruments is fully proved. The question arises upon the first codicil, which is all in the handwriting of the testator, and begins—"This is a codicil to my last will and testament, of the 10th January, 1798; and I do hereby ratify and confirm my said will." On the part of the executors it is alleged that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it is presumed has been destroyed, as it cannot be found. But the question is whether, being recited as a codicil to the will of 1798, the Court can pronounce it a codicil to the will of 1800, and can receive evidence to shew, in contradiction to the terms of the paper itself, that it was of a different date.

Undoubtedly this Court has the power, in some cases, of admitting parol evidence to prove intention. The rule laid down by Lord Bacon in his twenty-third maxim is, "Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur." In Bacon's Abridgment (p. 653) the case is put of a father having two sons, John and Thomas, the former of whom had died long before the making of the will, a fact well known to the father; and in the will he left a legacy to "John," the deceased son, instead of to Thomas, the living one; and evidence was allowed to be gone into to rectify this mistake. It is true that in this case a will bearing date January, 1798, had been made: but he afterwards married, and in 1800 made another will, and in 1802 a codicil to that will. The will of 1800 is found duly executed, and carefully preserved sealed up, with this codicil also. The will of 1798 cannot be found, and is to be presumed to have been destroyed by the deceased. What is to become of the codicil of 1802? It is recited to be a codicil to the will of 1798; and confirms that from which the deceased had manifestly departed by making another will: these, surely, are latent ambiguities which may let in evidence to shew intention. The evidence shews that he could not mean to revive the will of 1798; it appears that he clearly looked on the codicil of 1802 as that which should operate. Foulkes, who is principally benefited, appears to have been a person much in his favour: annuities are given, which the codicil recites, that Sims was in the habit of paying in his life.

He sent to his steward to send this codicil to him in London, and therefore he could not consider it as done away with by the destruction of his will; and having the copy of a codicil from his attorney, in which the recital was from a will of 1798, it was a natural ground for the mistake.

It is said that in the case of *Lord Cholmondeley v. Lord Walpole* (7 Term Rep. 749) the Court of Common Pleas refused parol evidence to explain intention, and that this was affirmed by the King's Bench. But in that case there was no error on the

itself to be a codicil [463] to the will of 1798, though intended by the testator to apply to a later will. I believe the former will no longer subsisted: there could be no doubt of the facts; they were facts which could be only supplied, and were supplied only by the testimony of Mr. Foulkes, his Lordship's solicitor, who was very much in his confidence. These cases are sufficient to shew that this Court, as a Court of Probate, is not bound to grant probate of every paper signed and attested without admitting parol testimony as to the fact which always refers to the intention of the deceased, as well as whether there is a fair execution by the deceased, or whether there may have been error or fraud.

[464] There is very little distinction in principle between the allegation which was admitted in *Janssen v. Pechell* and that now offered for your consideration; the prayer undoubtedly is not extended; I do not know that it was in the other case, I believe it was not. The citation was there to call upon the executors, to take probate of the will with the instructions: the Court pronounced only for the residuary clause in the instructions. Our citation asks for probate of the will, together with the residuary clause in the instructions. Undoubtedly we cannot go beyond that, but we are not obliged to go to that extent; and we probably shall ask the Court if we are urged to give our proof to pronounce for this in the manner I have before adverted to, and which will not interfere with the executed will except so far as to supply that which we contend is wholly omitted. We consider that executed will as containing provisions for other contingencies, but not as embracing this.

This insertion undoubtedly would not at all interfere with the power this lady enjoyed of disposing of her residue by will as a femme coverte; she must comply with the power given to her, and she must comply precisely. But we submit she will be found to have so complied by as many instruments as she shall have made, if they are deeds or wills, in the presence of a certain number of witnesses; her power of testacy then is not restricted. But it has been said there is an obstacle not at all to be got over in the case, for there is in the will a clause of revocation. It will be sufficient to reply that in Mr. Janssen's will there was a [465] clause of revocation, and that can operate only so far as it was intended to revoke, and no further. The instructions, very fortunately in this case, appear to have received the solemnity of an act of execution, as well as the will, which is a strong part of the case, because we ask nothing to be taken in connexion with the will except what arises upon the face of those executed instructions; and it may be here remarked that the authority cited from Swinburn appeared a special authority for one act only, and not to apply to an authority so large as that of Lady Bath.

It is said that, considering the different occasions on which these fair copies were before her ladyship, and that she made some alterations in the residuary clause after those fair copies had been communicated to her, she must have perceived this, and that having perceived it, and having executed the will, she must be considered as having adopted it in the state in which it stands: we argue, from the very tenor of those alterations made, that she meant not to restrain, but to enlarge, the beneficial interest which she had originally intended, to Mrs. Markham and her family, by her instructions, and that she never varied from those instructions, except with an intention to increase it; and as to suppose that she might overlook it, I think that is not going a great way, when my learned friends and ourselves find no little difficulty, comparing the one instrument with the other, in saying what has been provided for and what has not. With respect to the draft being extended from the instructions, as it is contended to be in legal form, all these long additions and am-[466]-plifications being added, as to the distinctions between different children, in whom property was to vest, at twenty-one or marriage, or in case of survivorship, have led, most probably, to this omission, and that her ladyship should not perceive, when Mr. Kipling did not

face of the paper; there was a perfect will remaining, and a codicil referring to that will. The evidence would have gone to establish another will.

Here the case is very different; the will to which the codicil refers does not exist, and the subsequent marriage made it highly proper that there should be another will. Having endorsed this a codicil to his will; having sent for it about two months before his death, and kept it with his will; I think there is just and legal ground for the Court to presume that he intended it for a codicil to the will of 1800, and to pronounce for it.

perceive, the omission of this particular clause is not that at which this Court would express any very great surprise.

It has been said the Court ought to lean, since the statute of distributions, in favour of the husband, in cases of this kind: that is an observation, I think, of no very great weight; for the Court will have no leaning but that of the law, and the leaning of the law is to follow the intention of the party. That it was not the intention of Lady Bath to give her husband more than a life interest is clear and manifest upon the will itself: there is no occasion to travel out of the instrument to discover that; for the very last clause she has added shews it. Supposing Mrs. Markham to die without leaving any issue whatever, she then inserts an only child of her own, whether son or daughter; the insertion seems merely to exclude (if there should be such a child) the brothers and sisters of Mrs. Markham; but if there shall be no such child, she then gives that interest which Mrs. Markham and her family would have to the brothers and sisters of Mrs. Markham; and the very postponing the interest of an only child to the event of this lady dying without leaving any issue appears to me to create an inference too strong to fail of its effect as to the intention of this lady, and to shew that her intention of leaving this property to Mrs. Mark-[467]-ham applied equally to that event which has taken place, she using the term "younger children" only in that part of her instructions because no eldest whatever had ever been mentioned; and it appearing from the whole tenor of that instrument that an eldest was not at that time at all in her contemplation, the testatrix knowing, or at least thinking, that an elder child would be amply provided for by other means.

We trust, upon the whole, on the authority of *Janssen v. Damer*, *Gerrard v. Gerrard*, and the several other cases wherein it has appeared that the Court has exercised the power, not only of supplying facts, but of remedying the mistakes as well as the frauds of parties, that we are entitled to ask the admission of this allegation.

Judgment—*Sir John Nicholl*. The question in this case arises upon the will of the deceased Lady Bath, who died in 1808. The will is dated on the 5th of November, 1794, and the codicil on the 25th of August, 1805. Probate of the will and codicil was taken out by the executors named in the will. That is called in nearly twelve months afterwards; and the executors are cited to take a new probate of the will and codicil, and of some executed instructions, as together containing the will of the deceased. The circumstances of the case are very fully stated in the allegation, which has been given in. That allegation states—First. That Lady Bath died on the 14th July, 1808, leaving behind her Sir James Pulteney, her lawful [468] husband, but no issue. Secondly. That articles of agreement were entered into in contemplation of a marriage between Lady Bath and Sir James Pulteney, whereby all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred, to certain trustees, who should make such grants, assignments, and so on, as Lady Bath should from time to time after the solemnization of the marriage direct by deed or will, executed by her, and attested by three or more witnesses. Thirdly. That while these articles were in preparation, and before the execution of them, Lady Bath gave verbal directions to John Kipling, Esq., of the six clerks' office, who acted as her legal adviser, to prepare a new will for her. It appears that she had executed one previous to the marriage: but she gave directions for another which she intended to execute soon after the solemnization of the intended marriage. That pursuant to these directions Mr. Kipling did prepare an instrument in the nature of heads or instructions for a will which was delivered to Lady Bath a short time before the marriage, the marriage taking place upon the 24th of July, 1794. Fourthly. That Mr. Kipling afterwards attended Lady Bath several times to adjust the instructions; and after the same had been adjusted they were fair copied by order of Mr. Kipling, it being thought expedient that they should be executed by Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months immediately after her marriage, and before a will or testamen-[469]-tary appointment could conveniently be extended in legal form, pursuant to such instructions. That upon the last sheet of the fair copy Mr. Kipling caused a memorandum to be written in the words following:—"The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing,

contained in six sheets, as and for my last will and testament, or testamentary appointment, in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf, and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions."

The articles go on to plead "that soon afterwards these instructions so prepared were delivered to Lady Bath. Fifthly. That Lady Bath kept the instructions under consideration for several days, and in her own hand made several alterations therein. That on her way to Scotland she paid a visit at Stokesley, in the county of York, the residence of Mrs. Elizabeth Evelyn Fawcett, then Markham; and while there on or about the 3d day of August, 1794, signed, sealed, published and declared, the said instructions as her last will and testament, or testamentary appointment, and the execution was attested by three witnesses." [So that this instru-^[470]-ment is attested in the manner required by the power. If there were any defect in that respect, of course it would be fatal: but it was executed according to the power.]

The sixth article refers to these instructions.

The seventh then goes on to plead "that Lady Bath, after having executed the said instructions for her will, transmitted the same to Mr. Kipling, accompanied by a letter, as follows:—

"Stokesley, 4th August, 1794.

"Sir,—I send you by this day's mail coach the instructions for my will. I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself, as you will perceive I have made a very material alteration in the last folio, which of course must be made also in the will.—I am, Sir, your obedient humble servant,

"PULTENEY BATH.

"P.S.—I beg you to direct your answer to Edinburgh."

The article goes on to allege "that the two lines 27 and 28, from the top of the sixth sheet, were obliterated and struck through in the manner they now appear prior to the execution of the instrument" [that being the alteration alluded to in the letter, which was only interposing certain persons between Mrs. Markham's issue, and her brothers and sisters, and therefore not material to the ^[471] present consideration, except for the purpose of shewing that the testatrix had paid particular attention to her disposition of this residue]. Eighthly. That Mr. Kipling having received directions from Lady Bath to cause these instructions for her will to be extended in proper legal form, and being himself much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for Lady Bath in conformity to the instructions which had been so executed; and he accordingly recommended his draftsman, Mr. Christopher Wightman, to whom, some time in the month of August, 1794, Mr. Kipling delivered the instructions in order to prepare a will in strict conformity thereto. Ninthly. That Mr. Wightman did prepare a draft, and delivered it to Mr. Kipling for his perusal. That the draft was inspected by Mr. Kipling; but the difference between the draft and the instructions escaped his observation; and he caused two fair copies thereof to be made for execution which were delivered or transmitted to Lady Bath.

[The draft of the will is brought before the Court, and it appears to have undergone a very careful revision; there are alterations in various parts, and particularly in this, which I should apprehend to be in the handwriting of Mr. Kipling himself.]

The tenth article is important. "That after the two fair copies of the draft of the will had been received by Lady Bath she directed an alteration to be made by extending the bequest of the residue of her personal estate for the benefit ^[472] of Mrs. Fawcett, then Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the testatrix, as in the event expressed in the instructions of there being one only son; and further to bequeath the said residuary personal estate in default of issue of the said Elizabeth Evelyn Fawcett, then Markham, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett; but did not discover the omission and difference between the said fair copies and her original instructions so executed by her. That the alterations so directed by the testatrix were accordingly made in the residuary bequest by Mr. Wightman, or his clerk, which rendered it necessary to take away some sheets of the two fair copies and to substitute others.

"Eleventhly. That after the fair copies had been altered, they were executed by Lady Bath, on the 5th of November, 1794, and attested by three witnesses.

"Twelfthly. That the parts were sealed up in envelopes, one delivered to Mr. Kipling, and the other to Lady Bath."

Here are then fresh instructions given by the deceased herself, founded upon a consideration and an accurate observation of this draft of the will itself, and especially referring to the disposal of the residue. It is said that the fresh instructions were given as well in the event of there being only one daughter, and no other child of her the testatrix, as in the event expressed in the said instructions of [473] there being only one son. Now I see nothing in these instructions as to the event of there being only one son. Nothing of the sort is here introduced, and therefore there must have been some previous instructions given in some way or other as to this event, for it does not form a part of these instructions; and if the Court pronounces for these instructions in conjunction with the other, it pronounces for them without those intervening instructions, which may have very materially varied the former instructions.

The thirteenth article refers to the will in the registry of this Court on which probate was taken, being the part which remained in the custody of Lady Bath.

The fourteenth pleads "that when Lady Bath executed the will, she apprehended it was in conformity to her instructions, except as she had directed the residuary clause to be altered, and that neither Mr. Kipling nor Mr. Wightman had ever received any instructions whatsoever, different from or other than the executed instructions" [but of that I must observe the Court can only be furnished with the parol evidence of these persons, speaking to what passed fifteen years before they can be examined. Yet it is quite clear that there were some intermediate instructions].

The fifteenth pleads "that no omission in the will, or difference between the will and the instructions from which it was drawn (other than the alterations specified in the tenth article), was discovered during the lifetime of Lady Bath: but since her death it has been found that the clause [474] inserted in the said will for disposing of the residue of her personal estate, in the event which has happened of her dying without leaving any issue, differs from, and is not coextensive with, the clause in the instructions applying to the said residuary bequest in the same event, inasmuch as by the will Lady Bath, after the death of her father and her husband, and of the survivor of them, directed her trustees thereinbefore mentioned to apply the residue and interest for the separate use of Mrs. Fawcett, and for the use and benefit of her issue, in the case only of the testatrix having one child living at the time of her own decease: whereas by the instructions she ordered and intended her trustees, after the death of her father and husband, to apply the interest of her residue to the separate use of the said Mrs. Fawcett for life, and after her death to her children and grandchildren, as she, the said Mrs. Fawcett, should appoint, in the case of the default of younger children of the testatrix; meaning thereby, whether such default of younger children arose from a total failure of issue of the said testatrix, or by her leaving an only child" [now to this part, pleading her intention and meaning, parol evidence alone can be introduced]—"that such difference arose solely through the inadvertency of Mr. Wightman, the draftsman employed to prepare the same, and from Mr. Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the said heads or instructions.

"The sixteenth article pleads, that on the 22d [475] of August, 1808, probate of the will and codicil, but without the instructions, was granted to Sir Thomas Jones and Christopher Codrington, Esq., two of the executors named, a power being reserved of making the like grant to Mr. Kipling. The seventeenth, that the will and instructions are now propounded as containing together the true last will and testament of Lady Bath. The eighteenth, that Lady Bath had through life the most unbounded affection for Mrs. Fawcett, formerly Markham, who was her cousin; that her attachment continued equally strong after Mrs. Fawcett's marriage with her present husband, as it had been while she was the wife of the Reverend George Markham; and such her affection and friendship continued till the day of the death of Lady Bath, who frequently spoke of Mrs. Fawcett and other children as being the principal objects of her testamentary bounty."

This is the substance of the allegation which is offered to the Court; and the application certainly does seem, in its first complexion, to be one of rather an alarming sort. Here is a will regularly executed in the most formal way, in duplicate, by a person in good health and of perfect capacity, proceeding with great deliberation, paying great attention to the instrument itself, eleven years afterwards executing a codicil, and not dying till fourteen years after the will is made; yet, upon an alleged variation between the instructions and the executed instrument, and upon an averment, which is to be supported by parol evidence alone taken [476] fifteen years after the transaction, suggesting that such variation was not made by any directions received from the deceased, nor with her privity or knowledge, but through mere error and oversight of the drawer, and of the confidential solicitor, and of the testatrix herself, is the Court to be called upon to pronounce for the instructions as a part of the will. This, I say, is alarming, because certainly it would be dangerous to open a door to parol evidence in order to establish such a case. If, however, the law does warrant and enjoin it, the Court has only to obey.

Many authorities have been referred to by the counsel on both sides, and many cases have been quoted; and the present question, being one of very great magnitude in respect of property, has been very elaborately argued. It may not be necessary for the Court to restate many of those cases. It will be sufficient to extract the leading principles applying to this consideration.

I apprehend it is a general leading principle that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents and the effect of the instrument; and that he intended to give that effect to it. In order to decide, in general cases, what is the effect and construction of an instrument, you can only look to the contents of the instrument itself. If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument; but I shall not now enter into the distinction between *ambiguities latens* and *ambiguities patens*. But if [477] a will speaks clear of all doubt, no parol evidence can be admitted to construe it.

Another principle equally clear, and which may be comprehended partly in the former, is that a person by executing a will supersedes the instructions and the draft of that will. The will itself so declares; it states itself to be the last will and testament; and the testatrix has stated that she revokes all other wills; therefore, *prima facie* where any difference exists between the instructions or draft and the executed will, you must adhere to the last instrument, the will; and it must be presumed that the deceased has either expressly directed, or at least adopted and allowed, such alteration.

The Courts have only deviated from those presumptions where some ambiguity arises upon the executed instrument. There exists no very material distinction in principle between the Court of probate and Courts of construction, so far as respects the present point.

In the case of *Matthews v. Warner* this Court did in the first instance refuse to admit extrinsic evidence; and in that it was confirmed by the Court of Delegates, both Courts holding that upon the face of the testamentary paper the instrument was perfect and complete; that there was no ambiguity; and therefore evidence that the testator did not intend it to be his will could not be received. But the instrument in that case, though signed by the testator declaring it to be his will, was described at the head of it as "a plan of a will;" and was also indorsed Plan of a Will: it was also writ-[478]-ten on a piece of office paper, which was ruled over with red lines; and the Court of review, being of opinion that it was a case in which there was an ambiguity, namely, whether the instrument had been executed by the deceased as a will, or merely authenticated as instructions from which a will should be prepared, did admit extrinsic evidence; and the decision of the courts below was reversed, it appearing by such evidence that the deceased had no idea several years afterwards that it would operate as his will.

In the case of *Lord Cholmondeley v. Lord Walpole* the codicil expressly referred to a will by date. The deceased had executed a subsequent will, and a doubt was suggested to which of the two wills the testator meant to refer: but the Court of King's Bench was of opinion that there was no ambiguity, and rejected parol evidence.

In the case of *Lord St. Helens v. The Marchioness of Exeter* the codicil referred to a

will not existing; therefore there was an ambiguity, and parol evidence was admitted in that case.

I must here observe that in the Court of probate there must be some ambiguity not upon the construction but upon the factum of the instrument—not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument; whether the codicil was meant to republish a former or a subsequent will; whether the residuary clause was fraudulently introduced without the knowledge of the testator (for fraud of course would go to the foundation of the will); whether the residuary clause [479] was accidentally omitted, as in the case of *Janssen v. Damer*; whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Matthews v. Warner*; these are all questions of ambiguity upon the factum of the instrument. But where an instrument has been subscribed by a person of full testamentary capacity, the instrument carefully read over by that person, and repeatedly considered, and where no ambiguity whatever appears upon the face of the instrument, it must be considered whether in any case of that description the Court has admitted parol evidence; and if it have, whether it was not under circumstances establishing the error clear of all doubt.

In this case it is not suggested that there is any ambiguity in the executed will; and what the exact clause is which has been omitted has not, I think, been very clearly pointed out to the Court: but it is proposed that almost the whole of the residuary clause, as it stands in the instructions, should be taken as a part of the will. The residuary clause in the will is to this effect: After the death of the deceased's father and husband, the testatrix gives the residue of her fortune to her daughters and younger sons; and if there shall be an eldest or only son, and but one such daughter or younger son, then she gives the whole to that daughter or younger son. The time of payment is then provided for, the period of vested interest is provided for, the maintenance and education of younger children are all provided for; and she goes on then to state what shall be done if she has but one child, and this is the stringent part [480] of the residuary clause. "In case she shall have but one child living at the time of her decease, be the same a son or a daughter, or in case she shall have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years; or in case she shall have two or more daughters, and no son or sons living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years, and without having been married; or in case she shall have both sons and daughters, and all but one being a son shall die under twenty-one years, or being a daughter shall die under that age and unmarried, then she leaves the residue to Mrs. Markham and her children; and if Mrs. Markham has no issue, or her issue die before their having acquired a vested interest, then the property is left to the testatrix's only son or her only daughter: but if they shall have died, and Mrs. Markham also shall have died without any issue, then it is bequeathed over to the brothers or sisters of Mrs. Markham and their executors."

Now upon the executed instrument itself it is not contended that there is any ambiguity in respect of its effect. If there be any ambiguity upon the executed instrument, the Court of construction is the proper tribunal to decide upon that ambiguity, and to admit or reject parol evidence for the purpose of explaining it: for that Court has quite as extensive powers as this Court to receive evidence to explain whatever is ambiguous upon the face of the will itself. But it has been contended [481]-ed, and so the case is put, that an ambiguity is raised by looking at and comparing the instructions given for this will with the will itself: and the instructions which are referred to are in these terms—After giving it to her father and her husband, then after the death of the husband, "then to assign and transfer the principal and all accumulation of interest among her younger children equally to sons at twenty-one, and to daughters at twenty-one or marriage; and in default of such issue, that is, in default of younger children or daughters, to apply the interest to the separate use of the said Elizabeth Evelyn Markham, for her life, and after her death, to her children: and in default of such issue to the surviving brothers and sisters of Mrs. Markham;" between which clauses there is a subsequent interposition of the only son of the deceased. Now the ambiguity, if any, is an ambiguity in these instructions; there might be some doubt whether they are not precisely the same.

It has been contended by the counsel, who oppose this allegation, that they are precisely the same; and the Court must presume that Mr. Wightman in drawing the will from these instructions, and Mr. Kipling in perusing this will as drawn from these instructions, and the deceased in perusing and executing the will as prepared from these instructions, did understand them to be precisely the same. I, however, incline to think there is a variation between them, because the instructions would seem, upon the more literal interpretation of them, to convey the [482] residue to Mrs. Fawcett, in case there were no children at all, for it is given to her provided there are no younger children; and if there are no children at all, there are no younger children: whereas in the will it is given in the event of there being one son, and her dying and leaving one son, and so on: but if there is an ambiguity at all, it is in the instructions, for they have been obliged to plead in the tenth article that thereby she meant and intended to give this residue to Mrs. Fawcett and her family, in the event of there being no younger children, whether that arose from there being no children at all, or from her leaving only one child.

But the matter does not rest here; for it is pleaded in the tenth article that, "After giving these instructions, and the instrument being prepared, the drafts were sent to Lady Bath, and she directed an alteration by extending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett and her issue, to take effect as well in the event of there being only one daughter and no other child of her the testatrix, as in the event expressed in the said instructions of there being one only son; and further to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett." Why then it is quite clear from this account that supposing there was [483] any difference in the residuary clause between the will and the executed instructions, yet that after the residuary clause had been prepared, the matter had been reviewed and reconsidered by her, and those very directions for the preparation of the residuary clause had been extended, and changed and altered by her; that subsequently to the bequest of the residue in default of Mrs. Fawcett's issue to her brothers and sisters, she had substituted an only son of her own; and had gone further, and introduced an only daughter of her own, provided she left no other child; and that then she went on to provide for the case of her dying without issue, and Mrs. Markham dying without issue; so that the whole of this was revised and reconsidered, and new-moulded by her after the draft of this will had been submitted to her consideration.

Now various conjectures may be formed in respect to the subject: perhaps the probability is that it was a matter of oversight by the testatrix herself, and Mr. Wightman and Mr. Kipling. But can the Court in a case of this description decide upon probability and conjecture as to what was the intention of the testatrix, when it appears most clearly that she had the whole matter submitted to her own consideration, and gave these additional instructions? If there was any variation, what is the Court to presume? The Court can only safely presume, and can only safely allow it to be asserted, that this variation was a variation adopted by the deceased, or directed by her, or at least approved by her; it could not safely permit it [484] to be asserted that the whole of this was contrary to the intentions of the deceased, and was all a complete oversight on her part unless on circumstances amounting to the most clear demonstration that such were not the real intentions of the deceased—and that it happened either by some fraud practised upon her, or by some manifest omission on the part of the persons with whom she advised.

Among the cases which have been quoted, that which appears to come nearest the present case is certainly that of *Damer v. Janssen*; for the other cases have been very satisfactorily distinguished from the present by the learned gentlemen whom I have just heard. In the case of *Bridge v. Arnold*, where a part was expunged, that appears to have been on the ground of insanity, or the want of satisfactory proof of instructions given by a testator having capacity. *Barton v. Robins* was a case of fraud. The case of *Micklem v. Franklin* was upon the constructive revival of a former will. The other case I would also shortly notice is *Gerrard v. Gerrard*—there the will had an ambiguity upon the face of it: the words of the will were, "I appoint her executrix and residuary legatee." No name appeared to which the pronoun "her" referred: but, by admitting the instructions and receiving parol evidence, it was clear the words,

"my dear wife," had been omitted in writing over the will, and therefore parol evidence was admitted to explain the ambiguity in the will itself. But the case of *Damer v. Janssen* is principally relied upon to lay a ground for the admission of the [485] present allegation; and it is for the Court to consider whether it goes the whole length—and that cannot be considered without stating that case pretty much at large.

[The Judge then stated circumstantially the allegation in the case of *Damer v. Janssen*.]

This is the case of *Damer v. Janssen*, in which the parties were allowed to go into proof by this Court, and the superior Court, the Court of Delegates. In that case there was shewn a clear manifest omission of one entire important clause, and in respect to the construction of which there was not the slightest ambiguity whatever. Even upon the face of the instrument there did appear something of an ambiguity with respect to the contents, for there was a total omission of any disposal of the residue—and a total omission of a provision for one of the deceased's daughters. It should seem, therefore, from the paper itself, that something had been omitted: but still more was there an appearance of an omission when the paper was compared with the former executed will; because in the former executed will there was a residuary clause, and that residuary clause was in favour of this omitted daughter: again, the omission yet more strongly appeared, by comparing the will with the instructions for the will, which were found in the *escritoire* of the deceased, inasmuch as there was in those instructions this residuary clause in favour of the youngest daughter; and it was not ticked off in the same manner as the other legacies were when the draft was copied: therefore, taking those papers together, there was [486] a strong appearance of some omission, as well as some ambiguity, upon the face of the will itself.

In the next place the proof did not depend upon mere parol, but primarily on a paper, namely, the instructions, written by the deceased himself. There was no doubt what he intended by that paper: but the intention of the deceased in respect of the disposition was further supported by circumstances establishing the facts beyond all possibility of doubt, namely, that the eldest daughter had been provided for; that there was a former will leaving the residue to the youngest daughter; that there were instructions to the same purport, these instructions containing the residuary clause, but not in the usual place; that all the legacies were ticked off, but the residue was not. There was also a probability, from the deceased being in haste and ill health, and the paper being merely sent to him, when trusting to what was done by his confidential solicitor, the omission might have escaped his notice; the declarations of Mr. Robson, the solicitor, *recenti facto* to his partner Mr. Scrase, and the declarations of the deceased himself at Bath to Mr. Scrase confirmed the whole, and presented such a body of evidence that the Court might perhaps safely under the circumstances of that case admit the extrinsic evidence.

There is also another important distinction, that between the giving of the instructions to Mr. Robson and the execution of the will by the deceased, there were not any intermediate instructions whatever given by him by which he could have directed this omission of the residuary [487] clause. And yet, as I have always understood, notwithstanding all these circumstances, there was considerable hesitation entertained in the first instance as to the decision upon the point, and whether the Court could admit evidence of such an averment against the execution of the formal instrument; the presumption of law being so strong, as has been already stated, that where a person in full possession of capacity solemnly and formally executes an instrument, he must be presumed, and must be taken, to know the contents and effect of that instrument. The Court in that case did admit evidence. It is the only case which has happened in this Court with which I am acquainted that at all approaches the present; and the Court is to consider whether it comes up to it.

Now in the case I am here called upon to consider, the very instructions which are attempted to be introduced are in themselves in some degree ambiguous. The instrument which is executed does not appear to be ambiguous. And what the Court also relies upon as distinguishing the one case from the other is that, between the giving of these instructions and the execution of the will here are fresh instructions given, and here is a draft of the will submitted repeatedly to the deceased, and the deceased's attention is very fully drawn to this part of the will. She considers it and reconsiders it, and directs respecting it over and over and over again; nay, at the very time of the

execution of the will here is in the residuary clause itself an interlineation made in respect of the contingencies upon which Mrs. Faw-[488]-cett was to take the residue ; that interlineation is made both in the will and the duplicate by Mr. Kipling himself ; and is noticed by the deceased herself, for the deceased herself applies her initials to it.

How then is it possible that the Court can, with any degree of safety, admit parol evidence, to shew that this variation which had taken place between the instructions and the will, supposing any variation to exist (for I am taking the argument in that shape) was not directed by the deceased, or if she did not direct it, that she did not understand and approve it? yet all this is to be established by the recollection of Mr. Kipling to be examined 15 years afterwards. Supposing that the precedent of *Damer v. Janssen* did lay a foundation for the Court to admit proof for the purpose of supplying a clear omission by oversight ; yet the circumstances by which that omission was to be established are so very different in their nature and quality from the present, that it does not form a sufficient precedent. Even that case was considered to have gone to the utmost length to which the Court could go, with any degree of security ; and this Court cannot presume to extend it : if it is to be extended, that must be left to the greater authority and wisdom of a superior tribunal. It is much safer for this Court, consisting of a single individual, and acting with all due humility and diffidence, to adhere to the plain broad landmarks of the law : it rarely happens that a general rule of law is broken in upon for the relief of a particular case, that that breach of [489] the general rule is not found to be afterwards attended with infinite mischief. Here is a will most carefully prepared, most formally executed, not only by a capable, but by a very attentive testatrix ; her attention specially directed to this clause, over and over again ; and the Court must presume, I think, that the effect which this clause will have was that effect which the deceased intended it should have, or at least that proof to the contrary cannot safely be admitted ; I cannot find a sufficient precedent for the admission of parol evidence, under such circumstances ; and I think its admission would introduce a most alarming insecurity in the testamentary disposition of all personal property. Upon these grounds, and sincerely hoping that this case may be submitted to the decision of a superior tribunal (which probably it will from its great importance), I shall in the first instance think it my duty to reject the allegation.

[490] FAWCETT v. JONES, CODRINGTON, AND PULTENEY. High Court of Delegates, Hilary Term, 1810.

(An appeal from the Prerogative Court of Canterbury.)

Judges' Delegates.—Mr. Justice Lawrence, Mr. Justice Le Blanc, Mr. Baron Wood, Dr. Arnold, Dr. Ogilvie, Dr. Edwards, and Dr. Dodson.

Before the Court proceeded to hear the argument in the grievance the three following articles were tendered as additional to the allegation rejected by the Court below :—

First, whereas, in the tenth article of the allegation given in behalf of the said Elizabeth Evelyn Fawcett (formerly Markham) is alleged and pleaded, "That after the two fair copies of the draft of the will had been received by the Lady Bath, she directed an alteration to be made, by extending the bequest of the residue of her personal estate to and for the benefit of the said Elizabeth Evelyn Fawcett, and her issue, to take effect, as well in the event of there being one only daughter, and no other child of the said testatrix, as in the event expressed in the instructions of there being only one son : " and further, to [491] bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her, the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Fawcett. Now the party proponent doth allege that the same was pleaded through error and misinformation at the time, for after two fair copies of the draft of the will had been made for execution (as pleaded in the ninth article), the same were forwarded by John Kipling, or by his clerk, to Lady Bath, at the Countess of Aneram's at Lewbattle Abbey, near Edinburgh, where she was expected to be, but she had in fact quitted that place before the packet containing the two copies of the will arrived ; and such packet remained with Lady Aneram unopened, until sent for by the deceased.

Secondly, that on the 20th Sept., 1794, John Kipling being at Overstone in Northamptonshire, received a letter from Lady Bath, dated from Wansford, 20th Sept.,

1794, requesting him to meet her at Northampton, on the evening of that day on business. That John Kipling accordingly went to Northampton on the evening of the 20th Sept.; at which time, or on the next morning, Lady Bath gave him verbal instructions and directions to make an alteration in her will, being one of the alterations pleaded and set forth in the tenth article; and he then wrote, in pencil, a memorandum in his pocket-book in the words following, viz. Will to be altered eldest son and her brothers and sister; and the party alleges that the deceased had not, at that time, nor did she ever see, the draft of [492] her will, and she had not then received the fair copies of the draft forwarded to her for execution. That she directed John Kipling, at this interview, to write to the Countess of Ancram to send him the parcel in which the said copies were enclosed; and the parcel was accordingly returned by Lady Ancram, and received by John Kipling, or his clerk, on the 2d of October following, without having been previously opened; and on the 8th of the same month the said fair copies of the will were, by the direction of John Kipling, delivered to Thomas Bainbridge, then a clerk of John Kipling's, to Christopher Wightman, in order that the alteration so directed by the deceased might be made therein. That such alteration was accordingly made by Christopher Wightman, or his clerk, in the manner pleaded in the tenth article of the allegation; and thereupon, in the copying such altered part of the said will, and several of the sheets in each fair copy of the will were on the 13th of Oct. taken therefrom, and four other sheets containing the said alteration were written and substituted in their stead.

Thirdly, that on the 13th Oct. John Kipling, being at Overstone, sent a letter to the deceased, who was then in London, or soon expected to be, on her way to the Continent, wherein, referring to the very alteration pleaded in this and the preceding article, he expressed himself in the words following:—The will and duplicate having been returned by Lady Ancram, the alteration which your ladyship suggested placing an only child of yours, being a son, after the bequest of [493] the residue to Mrs. Markham and her children, but before Mrs. Markham's brothers and sisters, has been made; and the will and duplicate may be executed whenever it is agreeable to your ladyship, in the presence of Mr. Bainbridge and two other witnesses. That the two copies of the will altered in manner as pleaded in the preceding article were sent by Mr. Bainbridge to the deceased shortly after the 13th of Oct.; and she, the deceased, had never before seen any copy or draft of the will. That the deceased soon afterwards gave further directions to Mr. Bainbridge for a further alteration in her will, by making the bequest of the residue of her personal property to Elizabeth E. Fawcett and her issue, to take effect, as well in the event of there being one only daughter, and no other child of her, the said Lady Bath, as in the event of there being one only son, being the other part of the alteration pleaded in the tenth article; and the deceased expressed himself desirous that the alteration should be made in great haste, as she was about to depart for the Continent; and thereupon the draft of the will was immediately re-delivered by Mr. Bainbridge to Christopher Wightman; and the last mentioned alteration was accordingly made therein in the handwriting of Christopher Wightman, or of his clerk; and in consequence thereof several of the sheets in each fair copy were on the 27th October taken therefrom, and six new sheets containing the last mentioned alterations were written and substituted in lieu thereof; and the fair copies of the will, after being so altered, were on the 27th [494] November delivered by Mr. Bainbridge to the deceased.

Dr. Swabey in support of the additional articles. Although generally, in an appeal from a grievance, the case is to be heard *ex iisdem actis*, yet this rule is subject to exceptions; and there is no difference whether fresh matter is introduced on the application of the party or *ex officio*.

There was a case lately in the articles, *Watson v. Faremouth*, an appeal from the Consistory Court of Exeter, for nullity of marriage by reason of affinity. The citation which was taken out, and the libel which was admitted in the Court below, stated no interest in the party prosecuting the suit. The Judge in the Arches Court, finding upon enquiry that the parties had an interest, gave them leave to plead that interest in the superior Court.

Under the authority of that case we are not precluded from adding those articles to the allegation.

Every Court has three modes of dealing with a plea: first, to admit it *modo et forma*; secondly, to reject it; thirdly, to reform it, or send it back to be reformed.

Sir Arthur Pigott *contra*. It is necessary, before we proceed, to understand whether the additional articles can be opened. It is an appeal from a sentence below, and there is obvious danger in admitting this amendment to the allegation which was there debated. The case cited is especially different from this; it was necessary that the party proceeding should have an interest. The ascertaining, therefore, whether there was [495] an interest or not would go to the merits of the case, and be a preliminary step to the discussion of it.

The Court decided to hear only on what was done by the Court below.

July 7.—Sir Arthur Pigott, Mr. Leach, Dr. Burnaby, and Dr. Daubeney (counsel for the executors), and Sir Samuel Romilly, Dr. Stoddart, and Dr. Jenner (counsel for Sir James Pulteney) argued in support of the sentence of the Court below.

July 9.—Mr. Richards, Dr. Swabey, Dr. Addams, and Mr. Heald (counsel for Mrs. Fawcett) *contra*.

July 16.—Sir Arthur Pigott and Dr. Burnaby were heard in reply.

The Court affirmed the sentence of the Court below.

[496] *PATRICK v. PATRICK*. Consistory Court of London, Trinity Term, May 16th, 1810.—The absence of consummation of the marriage no bar to a divorce.

This was a suit brought by the husband against his wife for adultery. The adultery was fully proved: but the evidence did not prove consummation of the marriage. The general result of it seemed to be that the woman would not allow consummation, and immediately eloped with the adulterer.

Burnaby for the wife mentioned this circumstance: but did not feel that it authorized him to press it in objection to a sentence of divorce.

The Court pronounced for the divorce without hearing the counsel in support of it.

N.B.—The words usually introduced into the sentence declaring the consummation to have been proved were omitted in this sentence.

[497] *IN THE GOODS OF LAURENCE CRUMP, Deceased*. Prerogative Court.

Laurence Crump died in March, 1801, having made a will, and appointed three executors—his brother Thomas Crump (who died in his lifetime), and John Page, and John Wilmot, who survived him.

The testator by his will bequeathed the residue of his estate and effects to his said executors, in trust to invest the same in their joint names, in the purchase of government securities—to apply the interest and dividends, not exceeding 150*l.* per annum, to the maintenance and education of his daughter, Ann Crump (then a minor), till she either married or attained her majority; and to invest the surplus, in the interim, in the purchase of the like government securities, to accumulate with, and become part of, the residue. Upon Ann Crump's marrying or attaining her majority, the executors were directed to pay the whole interest of the residuary estate, with the accumulations, to her for her sole and separate use during her life, and the [498] principal at her death to her appointees by deed or will.

In March, 1801, probate was taken by the two surviving executors, who proceeded thereupon to execute the trusts of the will; and, upon Ann Crump's attaining her majority, commenced paying her the whole interest of the residuary property. Ann Crump subsequently married John Bott: but continued to receive the interest and dividends annually from the various government securities that constituted the residue of Mr. Laurence Crump's estate, up to October, 1817.

In November, 1817, Mr. Page died, leaving his co-executor Mr. Wilmot still surviving. Mr. Wilmot's state of mind and body had been such from paralytic affection as to render him incapable either of receiving the interest or dividends himself, or of executing the necessary legal instruments to enable any other person to receive them for him. Mrs. Bott had consequently been precluded from receiving any portion of the interest or dividends on the residuary property for more than three years, there being no sufficient legal representative of Mr. Laurence Crump's estate, by reason of Mr. Wilmot's continued incapacity, who could receive and pay her such interest or dividends.

J. Addams, upon due proof, by affidavit, of the special circumstances proved, applied to the Court to decree administration (with the will annexed) of the goods and chattels of the deceased (limited so far as concerned the right and title of Mrs. Bott to the interest and dividends which had then arisen and become due, or which

should thereafter arise [499] and become due, on the several sums invested in different government securities that constituted the residue of the deceased's estate) to Mrs. Bott, for the use and benefit of Mr. Wilmot, the surviving executor and residuary legatee in trust, during his life and incapacity.

Per Curiam. Administration with the will annexed is prayed on the part of the residuary legatee, and not opposed by the next of kin to enable him to receive the dividends, during the life and incapacity of Mr. Wilmot, the only surviving executor. No inconvenience can result from the grant. Mrs. Bott has alone a beneficial interest in the property; it will be merely a power to receive the dividends to which she is entitled; if the authority is not granted, the party has no remedy. The only difficulty is, that the application is rather a novel one. In this case the executor has no beneficial interest; and it is not to be expected that a committee will be appointed by his family merely to benefit this party.

Upon the whole, I think I may grant administration with the will annexed as prayed: this is not revoking a former grant supplemental to it, and to carry into effect the real object of the testator's will.

[500] *ARKLEY v. ARKLEY.* Consistory Court of London, Hilary Term, Feb. 12th, 1821.—Cruelty is not a bar to a charge of adultery, but may be pleaded as introductory to the history of an adulterous intercourse.

This was a suit brought by a husband against his wife for a divorce by reason of her adultery. All allegation was now offered on the part of the wife, in which cruelty and adultery were pleaded on the part of the husband.

Swabey and Lushington. It is not competent to the party in this case to plead cruelty; if established, it would be no bar to the suit.

Jenner contra. It is not offered in bar to the rest, but as introductory to the further history of the case.

Judgment—Sir William Scott. The allegation pleads that after Charlotte Goodwin came to live in their service, the husband began to quarrel with his wife, and so conducted himself towards her as to endanger her life; and that during the confinement of the wife the adulterous intercourse with Charlotte Goodwin commenced.

[501] This is pleaded as introductory to the history, and is not liable to the objection taken: it shews that the affections of the husband were alienated by the introduction of this woman into the family. Cruelty is certainly not a bar to adultery: but in this view it is admissible.

THE OFFICE OF THE JUDGE PROMOTED BY LORD VISCOUNT MAYNARD v. BRAND AND PHILPOT. Consistory Court of London, Hilary Term, Feb. 21st, 1821.—A monition issued against churchwardens to repair and reinstate in its original form the spire of a church which had been destroyed by lightning.

This suit was promoted by Lord Viscount Maynard, patron of the living of St. Mary Thexted in Essex, and impropriator of the great tithes, against the churchwardens of the parish for refusing to rebuild or repair the spire of their parish-church.

On the 7th of July, 1820, articles were brought in: they pleaded—

That from time immemorial there had been and still was a parish and parish-church known by the name of St. Mary Thexted, in the county of Essex, within the arch-deaconry of Middlesex, and the diocese of London, with a tower at the west end, appendant to or forming a part thereof; and that until the 14th of June, and the 16th of December, 1814, when the same was blown down or destroyed, there was a spire built on and upon the said tower with a vane on the top of the same.

[502] That the said church tower and spire were all built of free stone in an uniform stile of architecture; that from the summit of the vane of the said spire to the ground floor of the said tower was a perpendicular height of sixty yards and one foot, the height from the spring of the said spire, from the tower to the top of the vane, forming thirty-three yards one foot of such whole height. That on the 15th of June, 1814, the upper part of the said spire, to the extent of about forty feet from the top, was injured by lightning, and the churchwardens and parishioners undertook the repairs thereof, and for that purpose raised a scaffolding: but not being able to complete the same before the winter came on, and by reason of the snow and ice which had accumulated on the said scaffolding, or of other defects which had taken place in the said tower, on the 16th of December in the said year the remainder of the said spire to within twenty-five feet of its junction with the said tower, was blown or fell

down upon the roof of the said church and much injured the same, and also the body of the said church. That the parish have repaired the body and roof, but refuse to rebuild the spire, although duly admonished thereunto at the archidiaconal visitation of the said parish, and often entreated and urged by Lord Maynard to do so.

On the 13th of December, 1820, an affirmative issue was given to these articles.

Phillimore and Addams moved the Court to admit the articles, and to monish the churchwardens to repair and reinstate the spire in its original form.

[503] Swabey contra. Though the churchwardens have given an affirmative issue, it does not follow that they have confessed all the matters pleaded in the articles. Lord Maynard the patron could have called upon the parties by a civil process, there was no necessity for a criminal proceeding of this description; and there are difficulties in rebuilding the spire which cannot be surmounted.

Phillimore, in reply, contended that the affirmative issue which had been given to the articles was conclusive as to the admission of the facts, and a bar to any argument in opposition to the relevancy of them.

Per Curiam. I shall certainly issue a monition to the churchwardens to repair the spire as prayed. An affirmative issue has been given: if there are difficulties which cannot be surmounted, reference must be made to the Court: but I have no reason to presume there are any such. The monition must go to repair and reinstate. But, for the protection of the churchwardens, they should be informed that they must make their rate before they commence their repairs.

I shall not give costs; I presume they are not pressed in this case.

[504] BAYLE v. MAYNE AND LAMBARD. Prerogative Court, Hilary Term, March 13th, 1821.—Allegation, pleading an unfinished and unexecuted paper, rejected.

Judgment—*Sir John Nicholl*. This is a question respecting a paper propounded as the will of Mrs. Grace Otway. The allegation pleads that the deceased died at Seven Oaks, that her personal property amounted to 4000*l.*, and that she had the power of appointment of 4000*l.* more; that she left three sisters, and three children of a deceased sister; that she wrote the paper propounded with her own hand; that it was deposited in a drawer a few days before her illness, and there found at her death.

The first consideration is, whether it is a perfect or an unfinished paper: it has hardly been maintained that if it is unfinished, the circumstances are sufficient to sustain it; the question has been made whether the deceased intended to do more to give it effect.

[505] The paper has been written at two different times—the first part relates to her funeral, and the executors.

In a subsequent part, written with ink of a different colour, a legacy is given in trust for her sister to the two executors. Here she stops, and nothing more is done.

It is hardly possible to consider that the deceased intended this to be finished: the first part is as much finished as the second, for there she stops and afterwards writes more: it is contrary to all reason and experience to suppose that she did not intend to do more; it is not signed nor dated, it disposes only of part of her property; it is torn at the bottom in an uneven manner; it may have been written ten years, for the paper bears the water-mark of 1811. Finally, it is thrown into an open drawer; such an instrument cannot be considered as a finished paper.

It is stated in the third article that she deposited it in an open drawer a short time before her death: this circumstance is pleaded to shew that she placed it in the drawer after her return to Seven Oaks. In the beginning of November she was taken ill, confined to her bedroom, and never came down stairs again: the conclusion from this fact is the same as from the face of the paper; and she puts it in a drawer either with pieces of tape or with filberts, and in a drawer to which the servants had access; she either must have considered it as an abandoned paper, or as the inception of a mere memorandum.

My opinion is most decided that she did not consider this as her will, her whole conduct confirms [506] this: she was down stairs till the 20th of November; she then took to her bed, and since then there has been no reference to this paper. Nothing in any degree tends to confirm the idea, that she considered this as an instrument to operate after her death.

I have no doubt in rejecting this allegation; it is for the benefit of all parties that I should reject it in the first instance.

[507] CHETTLE v. CHETTLE. Arches Court, Easter Term, May 19th, 1821.—In a suit for adultery solicitation of chastity not proved by the adverse party; and if proved might be doubtful whether it could be considered as a bar to a sentence of divorce.

By letters of request from the Commissary Court of Surrey.

Judgment—Sir John Nicholl. This is a suit for adultery, brought by a grocer of Grantham against his wife. The marriage is proved to have taken place in 1804. The adultery is charged with a young man of the name of William Marshall, in 1819. A clandestine intercourse is proved for some time; it is also clearly proved that on one occasion they slept together at an inn, and that they have since cohabited at two places. There is no doubt as to the identity; and I have no hesitation in saying that adultery is sufficiently established, and that the husband is entitled to a sentence, unless the wife can prove something in bar.

She has pleaded, first, condonation, which has not been relied upon by the counsel; and, secondly, recrimination. Many circumstances of cruelty have been alleged: but the Court has been of opinion in many cases that cruelty forms no defence in [508] a cause of adultery; but where acts of violence, connected with other circumstances, have been pleaded, the adultery of the husband or wife has been admitted to proof.

It appears that these parties lived unhappily together: but there is no ground to say that there was either condonation or connivance. There were frequent quarrels and mutual jealousies arising chiefly from the violent temper of the wife. They agreed to separate on the 19th of August. A deed was executed which secured a certain allowance to her, provided she was not living in adultery. There is no ground to say that the husband was at all aware of the adultery at this period. They occasionally lived together afterwards; but the adulterous connexion was not then discovered: indeed, it was on questioning her during the last cohabitation, that he made enquiries, and discovered the fact. There is then no condonation; and if there had been, the subsequent adultery of the wife would have revived his right to proceed against her.

Next, as to the recrimination. The allegation charges adultery with Elizabeth Wake: but there is no proof of adultery with any one, or of improper attention to Elizabeth Wake. It is said there is proof of another description, viz. the solicitation of the chastity of different women; particularly of his servants. I have not heard a case stated in which, there being proof of adultery on the part of the wife, the mere solicitation of chastity by the husband has been considered a bar. But what is the evidence here? Mere hearsay. Nothing seen. Servants are produced: but, excepting two, none [509] prove any liberty taken with them. Jane Price says, that while she was in Mr. Chettle's service he, being evidently intoxicated, put his hand on her shoulder, and attempted to kiss her; she remonstrated and he apologized. This, although improper, is not a solicitation of chastity.

Mary Wilkinson was examined on the 10th of August, 1820, at which time the wife was living in her house in a state of adultery; which circumstance does not tend to entitle her to full credit: indeed, I doubt whether the evidence be admissible. She is not vouched to any fact, but examined on the general article; and on which the husband had not an opportunity of contradicting her evidence. She says he attempted to kiss her: but she lived in his service two years and a half after. She states that one evening after he returned from his club, he put his arm round her neck and kissed her, and that he did the same on another occasion; and that he scarcely ever saw her but he attempted to kiss her. He said he would come to her bedroom; she said she should cry out, and he did not come. To the seventh interrogatory she says, "he sometimes kissed her, and said she was a pretty girl; but he took no other liberties with her."

This was very improper; but the solicitation did not proceed beyond this: and I question whether it is such as could, under any circumstances, bar a husband from a divorce.

Foster v. Foster has been mentioned: nothing can be more different. There were doubts whether the doctrine held in that case was warranted: but the Court thought the husband was in great [510] measure the author of his own dishonour. There was gross neglect on the part of the husband, and the solicitations were such as strongly to infer that actual adultery had been committed. The wife had been exemplary in her conduct for ten years; she was carried to Lisle, and left there by the husband. During these ten years, he was using all means to seduce, almost to force, the maid-

servants. Three denied the adultery ; the fourth refused to answer. Whether that might have been sufficient to have entitled the wife to a sentence of separation on her part, might be doubted : but, under all the circumstances, the Court held the husband barred of his remedy, and I quite agree with the Court. There is nothing similar in this case.

I pronounce for the divorce.

[511] IN THE GOODS OF THOMAS ROBINSON, Deceased. Prerogative Court, Easter Term, March 13th, 1821.

Judgment—Sir John Nicholl. This is an application on the behalf of Richard Robinson against Barham, the residuary legatee for life, and administratrix with the will annexed, of Eliza Robinson, whilst living the universal legatee and administratrix of Thomas Robinson, to shew cause why such administration with the will annexed of Thomas Robinson should not be revoked, and the administration granted to him : in other words, the object is to put her on proof of the will.

This application is founded on an affidavit of Richard Robinson, that he was in New South Wales when the administration was granted ; that he did not hear of these proceedings till 1819 ; that he arrived in England in December of that year ; was soon afterwards taken ill and unable to make enquiries ; but that he has since made them, and finds sufficient ground for contesting the [512] validity of the will in question ; that Eliza Robinson is since dead ; that her will has been proved ; and he prays that Mrs. Barham may be called upon again to prove the will of Thomas Robinson.

There is no precedent in point to guide the Court with respect to this application : I must look therefore to general principles.

In the original cause a citation viis et modis was served at the Exchequer at Hull, where this person had his last residence before he quitted England ; and at the house he had occupied in that town, and on the pillars of the Royal Exchange at London. The party, therefore, used all due diligence. There is some difference between this service and a personal service : a personal service may conclude both the party and the Court ; but a service viis et modis is a constructive service, and concludes the party, but does not conclude the Court. The Court, on good and sufficient grounds, may open proceedings to get at the substantial justice of the case. What are the grounds which would warrant me in opening the case ? If there had been any fraud or contrivance, or collusion, in taking out the process, of course that would be sufficient, for no person should be allowed to take advantage of his own fraud.

It is admitted that the party was at Botany Bay ; but he must shew, first, that he was ignorant of the proceedings ; secondly, that he has used due diligence since he became acquainted with them ; and, thirdly, that he has a *primâ facie* case on the merits, and that justice would require the cause to be opened.

[513] Ignorance of the proceedings he has shewn, for he was at Botany Bay when they took place ; he has shewn that he came to England with due expedition, but not that he has used due diligence since his return. He says he was prevented by illness ; the expression, soon after, is vague ; again, an illness for several months is unsatisfactory : it is not set forth to have been such an illness as prevented him from employing a person to make the necessary enquiries : the fact, however, is that no notice was given to the other party till the 15th January, 1821, above a year after his return to this country. What happens in the meantime ? The executrix under the will administers to all the property, and dies. By her will she disposes of this property ; and it has now passed into the hands of third persons, who may be ignorant of all the circumstances relating to the making of this will. I think the complainant is barred by his own wilful negligence ; and the Court would run the risk of committing injustice if it allowed him to proceed : but if there was no negligence of this sort, the Court must look at the original case. It was not a mere *ex parte* proceeding ; the will was opposed by an uncle and two aunts ; the witnesses were cross-examined, and closely ; the proof was not merely formal. The plea was more than a common *con-didit* ; it pleaded affection for the party, and declarations in her favour ; five witnesses were examined ; the proceedings were in *pœnam* ; the evidence, therefore, was necessarily considered, and the proof was so clear and conclusive that the adverse parties and their legal advisers did [514] not employ counsel ; and they judged not unwisely, for the depositions satisfactorily established the case set up.

Against this, the affidavit states, "That he has received information from persons of credit who were not examined;" this is utterly insufficient for the Court to act upon; certainly the Court would always go as far as it has the power to make the forms of proceeding bend to substantial justice.

Looking at the principles which usually govern this Court, I am satisfied that I ought not to open this cause; and I reject the present motion.

[515] PARHAM v. TEMPLAR. (a) Arches Court, Easter Term, May 28th, 1821.—A proceeding against a curate for altering a seat in the body of the church without competent authority.—Error in the institution of the suit. Judgment of court below reversed.

[Discussed, *Phillpotts v. Boyd*, 1875, L. R. 6 P. C. 453.]

Judgment—*Sir John Nicholl*. In January, 1775, a faculty was obtained for new pewing the church of Ashburton, according to [516] a plan annexed. A seat was

(a) The following judgment, delivered by Sir W. Wynne in the Court of Arches, on the 22d of February, 1794, in a cause differing in features, but of the same family with the case here reported, affords an excellent specimen of the terseness of style and the soundness of principle which characterized the decisions of that learned Judge.

Drury v. Harrison.

Sir William Wynne. This is a suit for perturbation of seat, brought by Thomas Drury, an inhabitant of Allhallows, Bread-street, against Harrison, the churchwarden.

William Drury, the brother of Thomas Drury, came into the parish, carried on trade there, and had the pew in question; he continued till Christmas, 1790, in possession of the house and pew—for eight or nine years.

Thomas Drury, who had not been an inhabitant before, took the house of his brother, and carried on the business; he took possession also of the pew, i.e. he continued to sit in it, for he sate in it with his brother frequently while he was resident.

At a vestry in April, 1790 (there are not more than two vestries in the year), the pew became the subject of consideration. The witnesses do not agree how the mention of it originated; one says that he first spoke to Drury that if he continued the pew, he must pay five guineas; another that Drury mentioned it first. It is plain that, provided he would pay five guineas, no doubt was expressed by the churchwardens or others that he should continue. Whether Drury absolutely refused or put off the consideration, is not quite clear; but Smith, the churchwarden, entered into a negotiation with Butler, who agreed to pay the five guineas. Soon afterwards, Harrison (who had just been elected churchwarden) said neither should have it, but he would have it himself.

It has been argued that this was a vacant pew; that Harrison, as churchwarden, had a right to dispose of it, and to dispose of it to himself.

The question for the Court is, if there be any right in Drury to this pew.

The right is in the churchwardens, both in London and elsewhere, to dispose of pews; this is for convenience, and for the preservation of peace and quiet. But this right is not to be exercised arbitrarily; not without considering whether there be any legal or equitable right. If the churchwardens interfere to take away a seat and a fortiori to take it to themselves, the ordinary will interfere, as it would by a suit for perturbation of seat, although it were not originally meant for that purpose.

The strictest right, that of faculty, is usually granted to a family; there is no such right here, but the seating has been by the churchwardens, for the brother has been so seated.

The first fact is, that Drury was in possession of a house and trade in the same situation as his brother for ten years, which would be alone a very considerable circumstance.

In *Astley and Biddle v. Ripley*, 1774, Astley took a house at Mortlake, occupied it for forty years, and occupied a pew. The churchwardens said it was the custom to pay; he refused. The churchwarden placed another person with him; he brought a suit for perturbation of seat against the churchwarden. Sir George Hay thought he had made an improper use of his authority, and nonsuited the churchwarden; and directed that he should not sell the seats.

The only difference between the two cases is, that there was a longer occupation; but here there has been an occupation of nine or ten years; and it is exactly the same

reserved for a person of the name of Tozer; no other exclusive rights [517] were maintained. After the church was new seated, the pews were allotted by the churchwardens. [518] Each occupant was to pay a certain small sum as a pew-rate, which was to be applied to the repairs of the church. Whether this payment was strictly regular need not now be discussed: but it is clear that those who paid the pew-rate could have no exclusive right to the pews, as acquired either by faculty or prescription. At this period Mr. Dolbeare was churchwarden, and Mr. Eales sidesman; each took a pew on each side, or rather in front, of the reading desk and pulpit, and paid the same annual sum as the others.

By a plan annexed to the faculty it is perfectly clear that each of these pews was intended to form two pews by a division near the pillar; a door was left in the plan. Eales had a large family, and Dolbeare was a man of considerable property: the partition was omitted to be put up, and a sort of double pew was assigned to each. The site of the seat allotted to Mr. Dolbeare was that of the old reading-desk and pulpit, and a place where women came to be churched. Dolbeare had no fixed seat before. There is not the slightest evidence that by any clause in the faculty he had the possession of the seat allotted to him: it appears that he was not an unfit occupant of it from his respectability; though the number of his family did not entitle him to so large a seat, for he had a wife and only one daughter. Some time after this he removed to Plymouth with his family, and they all continued there till his death. During his absence other persons were placed in the seats; on the death of Mr. Dolbeare his widow returned to the parish, and placed herself in the seat; she sate there [519] with Mrs. Lloyd and another person, who paid the pew-rent. On the death of Mrs. Dolbeare, in 1816, Mr. Parham, who had married her only daughter and succeeded to her property, seems to have considered that he had a title to this seat. Tozer was resident in the parish: but from a misunderstanding had given up a seat in the chancel, and ceased to attend the church. In 1817 he returned, and wished to have a pew allotted to him; and it does not appear that any other pew was vacant, as the population had increased.

The affairs of the parish are managed by two churchwardens; one called the town, the other the country-warden. The usage seems to be that the town-warden is considered as the upper church-warden; he manages the pews and receives the rent. Whether this would give him a legal right, so considered, is not necessary now to be adverted to. The church was served by Mr. Templar, who had been there two years as curate; and, in order to accommodate Mr. Soper, he conferred with Mr. Abraham, the town-warden, and they thought the best way would be to take off part of the pew occupied by Parham and Mrs. Lloyd, and a small part of another pew, and thus make one pew out of the two for Soper. Mr. Templar solely gave the orders for this, and without any previous communication with Mr. Parham: but it does not appear that he did this out of spite or ill-will. Mr. Parham was offended, as he might justly be, from want of communication: he thought himself injured.

[520] After the transaction the parties all met at one of the churchwarden's

situation, if the brother's occupation be added to it. But it does not rest here, for he was a partner in a house of trade; the parish taxes and rates must have been paid by partnership accounts, and they considered him as a parishioner for the whole time.

In *Brook v. Owen*, 1718, the question was, who was bound to serve the office of churchwarden: and a partner in trade, lodging in another parish, was held bound to serve in the parish where his house of trade was. Considering himself a parishioner, he came to the churchwardens. A person may be a parishioner without inhabiting a house, if he occupy a farm.

This puts all question who is the more proper person to have the pew out of the case. The possession of the brother was the possession of himself; and the pew was not considered by the parish as vacant, but as an opportunity to get five guineas.

One of the witnesses says that Townend, the partner, sits there; he has a right so to do: that the warehouseman sits there; there is nothing improper in this.

Under all the circumstances the discretion of the churchwarden has been improperly exercised; it would have been so if he had placed another there; it has not a more favourable appearance that he did it for himself.

The person displaced had a right which the churchwardens had no right to disturb, and in which he must be quieted; and Harrison must pay the costs.

houses. The churchwardens said that Templar had acted wrong in not giving notice to Parham. Templar allowed candidly that he had acted prematurely in not first consulting Parham; and Parham, Jun., who was present, said, "Put the pew in its original state, and my father will think no more of it." This was declined, and the suit was instituted in the Court of the dean and chapter of Exeter.

The suit is brought and conducted in rather an extraordinary form, viz. as a criminal suit by articles, not as a civil suit for perturbation of seat. The citation is taken out against the Rev. John Templar, the curate of Ashburton, to answer to articles to be administered to him by virtue of the office of the Judge touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses for his having altered, or cause to be altered, a certain seat or pew in the nave or body of the church at Ashburton, belonging to Benjamin Parham, gentleman, whereby he has taken away and reduced the length thereof two feet two inches or thereabout, without the licence or faculty of the ordinary, or any other lawful authority whatever in that behalf; and also to shew cause why he should not be compelled and admonished to restore the said seat or pew in all respects to its former condition.

The articles are, for having without authority altered the pew, to the great injury and prejudice of Parham, but not in violation of the general law.

[521] The first article sets forth that Parham and his family had sat in the pew from time immemorial.

The second, that in December, 1817, he had made the alteration in question.

The third, that when the churchwardens were informed of the alteration they expressed their disapprobation at it.

The prayer is that the pew should be restored to its original state, and costs given against Mr. Templar.

Looking at these articles both as to the heading and averments, the object seems rather to be that of a civil suit to obtain redress and restitution of the seat; and it ought undoubtedly to have been proceeded in by a suit for perturbation of seat; but being brought as a criminal suit, it becomes subject to all the rules of a criminal suit. Here, however, answers have been called for to which the promovent is not entitled in a criminal suit.

The Judge of the Court below seems to have considered it in a mixed light, both as a criminal and a civil suit; he rejected both the sentences offered; by his interlocutory decree "declared that John Templar had improperly and without due authority divided the seat; enjoined him to restore it to its former situation, and to certify the same within the space of two months: but that the seat, when so restored, is not the exclusive property, or belonging solely to the family of the Dolbeares under whom the plaintiff claims, either by possession or from time immemorial or otherwise: but that the same might be allotted to the plaintiff and his fa-[522]-mily, and also part thereof assigned to any other family or persons, for the better accommodation of the parishioners, at the discretion of the churchwardens; and he decreed each party should pay his own costs."

From this sentence both parties have appealed: it would be extremely difficult to make these proceedings in any way regular: but I agree with the counsel for Mr. Parham, that it is the duty of the Court to overlook irregularities in the country jurisdictions, and to endeavour to get at the substantial justice of the case; there are, however, certain fundamental rules which it is impossible to neglect. Parham is the promoter of a criminal suit before the Court; his real object is to establish his own right, and his own exclusive occupancy; and he lays as the groundwork of the whole that he is entitled to the sole possession by immemorial prescription; and, if the party has interrupted such an occupation, he is guilty of an ecclesiastical offence.

Nothing can be so clear as that this claim has been wholly confounded. The counsel, as any person acquainted with the ecclesiastical law must have done, have been obliged to admit that no exclusive right has been established against the ordinary. I think he has not established any right as against the parish at large, or as against the churchwardens acting under the ordinary.

Dolbeare had no claim when the church was new seated beyond that of the rest of the parishioners: he was placed there, as others were, by the seating of the churchwardens, it being the clear law of [523] the country that the use of the pews belongs to the parishioners; pews are allotted to them by the churchwardens, subject to the

control of the ordinary: a seating of this kind by churchwardens does not give a permanent and exclusive right; it is not like a faculty, because it is liable to alterations as the circumstances of the parish may require. When church room is abundant, and the population is thin, persons of large property and large families may have large pews allotted to them, which afterwards may be taken away or diminished if circumstances are different—if their families become reduced in number, or the church room from increase of population becomes more wanted. The churchwardens may remove persons originally placed in seats or their descendants: but if they do so capriciously, or without just ground, the ordinary will controul and correct them. But the possessor has no exclusive right to the pew; an exclusive right can only be in virtue of a faculty, or by length of time which presumes a faculty.

Dolbeare's right does not stand on the most favoured ground; he was churchwarden, had a small family, and took a large pew. He placed himself in violation of the faculty: for it is obvious from the appearance of the plan that the space he took for his seat was intended for two pews. But there can be no doubt but that a mere possessory right ceases when the use and occupation cease, when the family which was in possession leaves the parish; and for this reason I interrupted the counsel when he talked of a possessory right. When the Dolbeare family removed to Plymouth, [524] all their right in the pew ceased. By an error as to the law (for this part of the law is little understood) the widow of Mr. Dolbeare, when she returned from Plymouth, took possession again of the pew as if it were a matter of right, but she was a mere intruder; the churchwardens might have removed her. She sate there in conjunction with Mrs. Lloyd and Mrs. Edwards; she might thus be considered as having acquired a kind of possessory right: but the utmost she could acquire would be the possession of a pew in common with other parties. No understanding with them could give her a legal right.

On her death Parham, by another mistake as to the law, took possession of the pew, as if he had an exclusive and prescriptive title to it. This was a misapprehension on his part; and might have been a ground for the churchwardens to have taken this pew for others, and to have put an end to such a claim.

Mr. Parham was a proper person to be placed in a part of this pew which holds twelve or fourteen persons; and when part of it had been taken off, there would have been ample room for himself and his family.

The Judge therefore was correct in the opinion he gave, that Mr. Parham was properly placed there, and that others might be there placed: but it is difficult to see how in a criminal suit it could be within the jurisdiction of the Court to pronounce such a sentence. What has Mr. Templar to do with this? How is he found to be respondent in such a case? He only prayed for his [525] dismissal from the suit. The whole proceeding is so confused it is difficult to set it right; the part which relates to Mr. Parham is substantially correct.

I am also to consider the sentence, so far as it ordered Mr. Templar to restore the pew to its former dimensions. I must look to the end for which the cause was instituted. Mr. Parham claims redress for a civil injury: the Court thinks he has established no right. Mr. Parham complains that Mr. Templar should have altered the pew without first applying to him. Templar admits he was wrong in this, and perhaps with this admission Parham should have been satisfied: but he prays that Templar should be compelled to restore the seat; the foundation of the criminal offence is the right of Mr. Parham. If that ingredient is taken out of the suit, can Templar be enjoined to restore the pew and to pay costs?

In a criminal suit the defendant is legally entitled to every favourable circumstance arising out of the course of proceedings; if Mr. Templar had invaded a right as described, he might perhaps have been proceeded against criminally. If he had altered the pew without competent authority, he might have been proceeded against for perturbation of seat. The course pursued is an assertion of right, which, not being proved, the foundation of the suit fails.

Suppose Mr. Templar to have altered a pew which only belongs to the parish, Mr. Parham had no right to resist this; the evidence shews that the alteration had the previous concurrence of one of [526] the churchwardens to whom the management of the pews was usually left. My attention has been directed by the counsel for the defendant to the evidence of the churchwarden (Abraham) in the third interrogatory; he says the alteration was made in his absence and without his order; and that he

blamed Ireland the carpenter for having made it: but that he did this because he thought the orders for doing this ought regularly to have come from him as churchwarden, and not on any other account; and that he did then, and does now, consider that such alteration was fit and proper to be made, and that he should now approve of making such alteration under similar circumstances.

Here is a seat capable of holding from twelve to fourteen persons, and one churchwarden and the curate consult how they can best make room for the accommodation of other parishioners; and they agree to take a piece from this and a piece from another pew; and after the approval of the churchwarden, but in his absence, Templar gives orders for carrying this into execution. Surely this alters the whole statement of the question, it is the joint act of the churchwarden and the minister.

The minister merely gives the order in the absence of the churchwardens. If the curate had acted contrary to the churchwarden, and the churchwarden had proceeded against him, the case would have been widely different. The Court would have pronounced against the curate, for he would have had no authority to alter the seats.

Taking it therefore as a case in which the mi-[527]-nister acted in concurrence with the churchwarden, I am next to consider whether, as the alteration has been made without a faculty, a suit can be maintained, as against an act done without lawful authority. It is not to be maintained that every little alteration of a pew, where no private rights are infringed, requires a faculty. No rights of the parish are infringed; the alteration is for the accommodation of the parishioners, and it is a very trifling one.

In important alterations, where parishioners are to be burthened with additional rates, it is highly proper, and indeed quite necessary, that a faculty should be applied for.(a)

In these times when the population of the country is so much increased; when large sums are granted by Parliament, and associations of private individuals are formed to provide enlarged accommodation; it would be too much to hold that a minister acting in concurrence with the churchwarden, with no private view but merely to accommodate [528] the parishioners, should not be able to make a trifling alteration in the seats of the church.

I think a faculty was not necessary, it was done with the concurrence, and not in defiance, of the churchwardens: if the alteration had disfigured the church, and the churchwardens had disapproved of it, or the parish objected to it, I should have felt myself compelled to have enforced the restoration of the pew.

At any rate this is not the offence charged in the articles, it is an offence of a different description. Upon the whole, therefore, I think that Mr. Parham has failed in proof of his articles; the right is not proved, the pew belongs to the parish, and the defendant is not guilty of the charges brought against him.

I reverse the sentence: but considering the irregularity of the Court below, and in order, if possible, to make the parties meet together without vindictive feelings, I am not disposed to give the whole costs: but I shall give 100l. nomine expensarum.

[529] NATHAN v. MORSE. Prerogative Court, Trinity Term, June 1st, 1821.

[Referred to, *Migneault v. Malo*, 1872, L. R. 4 P. C. 142.]

Hugh Morse died on the 12th of August, 1820, while he was in the act of dictating instructions for his will to William Christopher, his solicitor, in the presence of Mr. Isaac Joseph; he had proceeded as far as the clause which contained the appointment of the executor, when he was attacked by the seizure, which terminated his existence. Immediately after his death, Mr. Joseph requested Mr. Cappage to read over the instructions to him, which he accordingly did; and then Mr. Joseph

(a) Mr. Swayne, the other churchwarden, deposed that "Mr. Templar never consulted him on the subject; that when it came to his knowledge, considering it an improper act, he expressed his disapprobation thereof; and that, in conversation with Mr. Abraham his co-churchwarden on the subject, he also expressed his disapprobation of the matter to him, that any alteration should be made without first consulting the parties; when Mr. Abraham observed that he was sorry Mr. Templar should have done it, as he wished also to have consulted the party first, meaning the Parham family. Mr. Swayne, in answer to an interrogatory, described himself as warden for the country, and Mr. Abraham as warden for the town."

observed that he had omitted a legacy of 1000l. 3 per cent. consols to Elizabeth Nathan, for her own use, independent of her husband, upon which Mr. Cappage, recollecting that the deceased had directed this legacy to be given, immediately, in the presence of Mr. Joseph and another person, who was present, added the legacy which he had omitted.

"Instructions for the will of Hugh Morse, of King Street, Tower Hill, London, furrier, taken [530] this twelfth day of August, 1820. To his mother 1000l., 3 per cent. consols, for her to take the interest for her life; after her death 500l. stock, part of this sum, to the children of Elizabeth Nathan, the wife of Lewis Nathan, of Prescott Street, Goodman's Fields, pen-cutter, that shall be living at the time of his mother's death, share and share alike, to be paid to them as they respectively attain the age of 21, with benefit of survivorship, the interest to be applied towards their maintenance.

"To Catharine Williams, of Blackmoor Street, Clare market, two hundred pounds; and to her five children the sum of 200l. each.

"To the new synagogue in Leadenhall Street, the sum of 20l.

"To the Jews' hospital, Mile End, the sum of 5l.

"At the death of his mother, the remaining 500l. stock, part of the above 1000l. stock, to my nieces, the children of my late brother Moses Morse, to be equally divided between them.

"To his nephew, the son of the late Moses Morse, last named, the sum of 50l.

"The residue of my estate and effects I give to my executor, to be divided by him amongst the before named children of Elizabeth Nathan, wife of Lewis Nathan.

"Isaac Joseph, of Sams Coffee-house, executor.

"To his daughter, the before named Elizabeth Nathan, 1000l. pounds, three per cent. consols, free and independent of her husband."

Judgment—*Sir John Nicholl*. The facts are satisfactorily established. I have [531] no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor: but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to intention clearly proved, and reduced into writing in the lifetime of the testator, yet it has never held that any thing added to a will after death can be established. Death consummates the instrument; nothing can be added afterwards.

The last clause must be pronounced against, and struck out of the will.

I have no doubt of pronouncing for the will without it.

The Judge struck out the clause.

KOOYSTRA v. BUYSKES AND OTHERS. Prerogative Court, Trinity Term, 1821.—

If the surviving executor decline to take administration and there is no residuary legatee, the next of kin is entitled to it. If the next of kin decline it, the administration may be granted to a legatee or a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.

Maria Verbraggen, formerly of Woolwich, in the county of Kent, died at Enkhuysen, in Holland, on the 27th of May, 1791. She, conjointly with her sister Catherine Verbraggen, made and executed two wills; the one a general will, the other limited to her effects in England. In both these instruments Pieter Buyskes and Arnoldus Buyskes were appointed executors.

In December, 1803, the executors proved the limited will in the Prerogative Court of Canterbury; and on the 25th June, 1805, letters of administration-[532]-tion, with both the general and limited will annexed, were granted to John Groves, the attorney of the executor (who were resident at Enkhuysen), limited to the effects in England.

On the death of John Groves in 1805, letters of administration with the wills annexed were granted to John Thomas Groves, as the attorney of the executor, in his stead. John Thomas Groves has since died; and Peter Buyskes, one of the executors, is dead also.

May 3d, 1820.—An application was made to the Court on the behalf of Bartholomew Kooystra, for letters of administration, on the following ground, viz. that he was a legatee named in the general will, and also a creditor of the estate of the deceased; and further, that Arnoldus Buyskes, the surviving executor, was resident at Enkhuysen, and not likely soon, if ever, to come to England. That the deceased,

by her general will, made jointly with her sister, gave and bequeathed the residue of her property to the children left behind, and the descendants of the late Dame Petronella Verbraggen, and the children left behind by the Honourable Jan Lambertus Appellena whilst living, member of the council, and burgomaster of Enkhuysen. That diligent enquiry has been made after the person or persons entitled to the residue under the will. That advertisements had been inserted in the *Courier* newspaper in England, and the Dutch newspapers called the *Amsterdam Courant*, and the *Haarlem Courant*, which advertisements contained a notice of the residuary bequest in the will.

A decree has issued with usual intimation, under seal of the Court, against Arnoldus Buyskes, and [533] also the person or persons who might be entitled to the residue of the estate and effects of the deceased; and the customary proceedings being made, the decree with affidavits of the due service of it was returned into Court; and the Court was moved to grant the letters of administration to Bartholomew Koostra, no appearance having been given for any of the parties cited.

Per Curiam. You have given no notice to the next of kin; they are entitled if there are no residuary legatees. They certainly ought to have had notice: in foreign property of this description the Court cannot be too cautious in adhering to the principles of its practice.

If the surviving executor on notice declines to take the administration, there is an end of his claim: then you must go to the residuary legatee; and if there is no residuary legatee, to the next of kin.

I shall direct it to stand over till the next Court day, see what the difficulties are, and consider with the registrar how they may be avoided.

June 26th.—The motion was repeated, and the administration granted to Bartholomew Koostra.

[534] TURNER v. GIRAUD. Consistory Court of London, Trinity Term, June 29th, 1821.—Answers to a libel in a pew; cause directed to be reformed.

In a suit for a perturbation of seat, brought by Samuel Turner against Richard Hervé Giraud,

The third article of the libel pleaded—

That on a Sunday happening in the beginning of September, 1820, Richard Hervé Giraud went to the parish church of Sunbury; and without any lawful authority for so doing, intruded himself into the pew in question in this cause, and occupied the same during the time of divine service in the forenoon of that day.

The answer given to this article was as follows:—

To the third position or article of the libel this respondent answers and says he admits that on a Sunday, happening in the beginning of the month of September, 1820, and prior to Sunday, the 17th of that month, he this respondent went to the said parish church of Sunbury, and went with his family into the pew in question in this cause, and sat in and occupied the same during the time [535] of divine service, in the forenoon of that day: but he denies that he and his family so went into the said pew, or sat in or occupied the same without any lawful authority for so doing; for this respondent says that in the year 1816 he became possessed of a freehold estate, consisting of a capital messuage or tenement and four acres of land; and also of a farm, consisting of between forty and fifty acres of land, in the said parish of Sunbury; and which capital messuage, and the four acres of freehold land thereunto belonging, are now in his own occupation, but the farm this respondent hath let; and he has ever since been a parishioner and inhabitant of the said parish; and having in the month of July, 1820, completed the purchase of a certain other freehold estate in the said parish, late property of Edward Boehm, Esq., a part of which the mansion-house of the said Edward Boehm formerly stood; but which, prior to such purchase, had been pulled down. He, the respondent, was, on or about Sunday, the 29th day of the said month, duly and lawfully placed and seated in the pew in question in this cause by James Bean and James Graham Ruff, the then churchwardens of the said parish, being the pew formerly occupied by Edward Boehm, Esq., and his family, and which had always been appropriated since the erection thereof to the use of the owner and occupier of the estate and premises which the respondent had purchased; and this respondent thereupon gave up or relinquished the part of the pew in the said parish church of Sunbury heretofore used by him-[536]-self and his family, and which was insufficient for their accommodation; and this respondent says that he is now building a mansion-

house for his own residence on or near the site of the house formerly occupied by the said Edward Boehm, and is seized in his own right of other freehold estates in the said parish, and is rated for his estates and premises in the said parish at the sum of 293l. per annum.

Jenner and Phillimore objected to this answer as redundant, and consequently irrelevant.

Lushington *contra*. The ultimate question to be decided will be whether Mr. Giraud was placed in the seat by lawful authority; and the whole of this detail bears upon the point.

Per Curiam. It is charged upon you that you entered the pew without lawful authority; therefore you have a right to assert that it was with lawful authority: but a great deal too much is introduced into the answer; it might be commodiously abridged.

Lushington. This is a most material part of our case: it is necessary for us to shew there was a lawful authority consistent with due discretion. The purport of the answer is to set forth that Giraud was placed there by the churchwardens on good and sufficient grounds. That he was a person of property and respectability in the parish, and that there was a particular reason why he should be placed in that [537] individual pew, because he had purchased Boehm's house, to which that pew had always been appropriated.

Judgment—Sir William Scott. The third article of the libel states that the party proceeded against intruded himself and his family into the pew without any lawful authority. Perhaps the word lawful is pleonastical; because, if it were without authority, it was without lawful authority. In answer to this he has a right to say that he was seated there by authority: therefore, in the beginning of the answers he has correctly replied to the libel: but he goes on to state that in 1816 he became possessed of a freehold estate, and then that he afterwards purchased another estate. I cannot see the use of this; the party will have the whole benefit of this, by the sentence contained at the close of the answer, that he is rated for his estates and premises in the parish at 218l. per annum. That general fact shews that he is a proprietor. I do not want his history—when he purchased one estate and when another may be commodiously omitted. He goes on to state that he was placed by the churchwardens in the pew formerly occupied by Edward Boehm and his family; and which had always been appropriated to the use of the owner and occupier of the said estate and premises; that he is now building a mansion-house for his own residence on the site of the house formerly occupied by Edward Boehm.

Now, it is disclaimed that this is introduced in any way to establish a possessory title; but it may, [538] I think, be fairly enough stated as a consideration addressed to the discretion of the churchwardens. If a house have always had this pew, it may be a fair ground for the churchwardens to place the proprietor of it there. I think there is no objection to the admission of this: but all the history of his purchases may well be dispensed with.

The answers to the third article directed to be reformed.

[539] **TOCKER v. AYRE**. Arches Court, Trinity Term, 1821.—In a defamation suit the testimony of two affirmative witnesses outweighs that of several negative ones.

An appeal from the Consistory Court of Exeter.

Judgment—Sir John Nicholl. This is a suit for defamation brought by Mary Ayre. Two witnesses have been examined to prove the libel; an allegation has been given in by the defendant, on which three witnesses have been examined. The Court below held the libel proved, and gave the usual sentence with costs. It comes on here upon the same evidence as it did at Exeter.

I cannot agree that suits of this description between persons in the higher classes of society ought to be discouraged, and less attended to than suits of a similar description between persons in a low condition of life; on the contrary, in the higher classes of society acquiescence would be almost an admission of the charge; and as in those [540] classes female reputation is of higher importance and value to the person who possesses it; if an attempt be made to rob any one of that reputation, there is no other remedy, but reference to this Court, to which the law and constitution of the country has placed the cognizance of such offences.

The charge is, that the appellant said, "Ayre's sister was publicly kept by a man at Plymouth, and had a child by him." The words were spoken in mixed society amongst persons of a better state in life, and where the statement was likely to be injurious to the party.

It appears that the sister of the plaintiff had been defendant at the Assizes in Cornwall, and had successfully pleaded her own cause: this had been much discussed in the public prints, and had formed a general topic of conversation.

Two ladies, Mrs. Maclean and Mrs. Strachan, had called on a visit to Mrs. Twynam, who was on a visit at Mrs. Hambley's. During their call six ladies, and Mr. Tocker, the defendant, were together there, and engaged in a conversation on a paragraph which had appeared in the *Times* that morning respecting Miss Ayre's defence. It was said Mr. Ayre did not approve of it; and Tocker stated he would not have had a sister of his own appear so. Mrs. S—— and Mrs. —— observed they did not believe that Mr. Ayre had made any such observation: on this Mrs. Hambley began an attack on Mr. Ayre's sisters, ladies who were absent and resident at Hampstead: it is admitted that Mrs. Hambley defamed these ladies—she said that one of them had had a child—this has been softened as [541] having been mentioned as a mere report: but those who propagate such reports assist in the injury, and are parties to the defamation.

So far the witnesses do not disagree: but two witnesses upon the libel depose to a further conversation. Mrs. Short and Mrs. Maclean, they positively and affirmatively swear that in the course of this conversation Tocker said "that Ayre's eldest sister had been publicly kept by a man at Plymouth, and had had one child;" he was cautioned, he repeated that he knew it to be true. Nothing can be more direct and positive than the reiterated defamation of Mr. Tocker on this occasion. One witness observed that, from the confident manner in which he had spoken, he might be the father of the child: both the witnesses agree; and if they are to be believed, there is no doubt as to the proof.

How is it attempted to contradict this? Four other persons say they do not recollect it. Mrs. Lonme speaks to the best of her present recollection, Mrs. Twynam does the same: but Mrs. Lucy Hambley swears that Tocker only used the words she has deposed to, and did not mention either of the Miss Ayres.

How is the Court to weigh this evidence? In the first place, the rule of law is, that one affirmative witness outweighs several negative witnesses, because both may be true. Is there any thing to prevent both from being true here? The words may have been spoken, and some one present not hear or recollect them. There were six ladies and one gentleman present: there was much talking; there might be two conversations going on at the same time. Mrs. [542] Hambley might make some statements, Mr. Tocker others; there is no inconsistency in some hearing Mr. Tocker, and others not. No two report the conversation in the same words. No imputation is thrown in the way of discredit on the witnesses, persons possess different degrees of accuracy of recollection. There is no reason not to believe the two witnesses examined on the libel: they must be guilty of the grossest perjury if what they say is not true. They had no personal acquaintance with Miss Ayre, they gave friendly advice as peacemakers.

Thinking, as I do, that the evidence fully substantiates the charge, and that what is stated by the other witnesses does not amount to a valid contradiction, I am of opinion that the Judge at Exeter did right; and I affirm the sentence, and condemn the appellant in costs.

[543] WILSON v. WILSON AND OTHERS. Prerogative Court, Trinity Term, June, 1821.—Where a later will has been destroyed and a former will left uncanceled it has been a point much controverted whether the former will revives or not: it is a question of intention, and the intention must be collected from all the circumstances of the case. In the Ecclesiastical Court the *prima facie* of presumption seems to be against the revival.

Henry Clarke died on the 31st of December, 1820, aged upwards of eighty-three years. He had been in good health up to the 5th of December, when he was seized with a paralytic attack, which so much affected his speech that he was never afterwards able to articulate distinctly.

On the 15th of June, 1811, he executed his will in two parts; the one was very

nearly, but not exactly, a duplicate of the other. To the one a codicil was annexed, dated the 8th of July, 1816; to the other a codicil dated 22d of July, 1812; towards the end of 1816 he cancelled that part of the will to which the codicil of 1812 was annexed.

In 1817 he executed another will at the office of Messrs. Wilson, in Aldermanbury, which was attested by two clerks of the house, and which he carried away with him. After his death, enquiry and search were made for this will without effect. The uncanceled part of the will of 1811, and the codicil of the 12th July, 1816, were found in a tin [544] box, in which he kept his papers of consequence: but the string which had fastened the sheets together (there were five sheets) was untied, and the several sheets were scattered about the box. The cancelled part of the will, and the codicil annexed to it, and several wills and testamentary scripts were found also in the same box.

The personal property amounted to nearly 60,000l.

The uncanceled will of 1811, and the codicil of the 8th July, 1816, were propounded by Mr. Wilson, the executor, and opposed by the next of kin. The facts of the case were admitted in the answers of the parties contesting the suit, so that no witnesses were examined.

Lushington and Dodson argued in support of the will.

Adams and Phillimore for an intestacy.

The Court took time to deliberate.

July 4.—*Judgment*—*Sir John Nicholl*. In this case the Court has taken time to consider the arguments which have been urged in the course of the hearing; and it has taken the opportunity of again carefully inspecting all the testamentary papers which have been laid before it. It has done so, not from any great doubt affecting its own mind, but for the satisfaction of the parties concerned, the property at stake being of great magnitude; and after the best and most mature consideration which I have been able to give to the subject, the impression which was left on my mind, as formed originally upon the result of this case, [545] has been confirmed and strengthened by a subsequent consideration of it. The case comes on for hearing, amicably, between the parties, and on pleas given in upon both sides, and on answers taken to those pleas: but no witnesses have been examined on either side; there is, therefore, no conflicting evidence with respect to the facts of this case. The party deceased was a Mr. Henry Clarke, who died at a very advanced age upon the 31st of last December. About twenty-five days before his death he was struck with palsy; and from the effects of that attack he never afterwards became so recovered as to be of testamentary capacity. He left behind him a (a) brother and a sister, and the son of a deceased brother, and seven children of a deceased sister, who will be entitled in distribution, in case it shall be determined that the deceased is dead intestate. The amount of his property (all personalty) is stated to be from fifty to sixty thousand pounds. The deceased made several wills; one of them appears to have been made in the year one thousand seven hundred and ninety-seven, and has a codicil, dated (I think) in one thousand eight hundred and two; [546] another will is dated in one thousand eight hundred and seven; another in one thousand eight hundred and eleven; and there was another will in one thousand eight hundred and seventeen. The writing of these several testamentary instruments by the deceased himself, and his testamentary capacity at the several times of writing them, are fully admitted. These several papers (except the will of one thousand eight hundred and seventeen) together with several abstracts of them, or lists of legacies taken from them, and old cancelled wills, were found after the deceased's death in a tin box in his house. Three other papers of a testamentary nature, which are marked O, P, and Q, are, I think, duplicates of old wills; and were delivered by the deceased into the possession of Mr. Wilson, to be deposited in an iron safe in his house in Aldermanbury; and there they remained till after the deceased's death. The will of one thousand eight hundred and seventeen was

(a) Mr. William Clarke, his brother; Mrs. Hannah Wilson, widow, his sister; the Rev. Robert Clarke, the son of the Rev. Sloughter Clarke, deceased, the deceased's brother; and Henry William Gordon, Augusta Maria Hallee, widow, Charlotte Matilda Shire, widow, Henrietta Augusta Gwynne (wife of the Rev. William Gwynne), and Anna Maria Wallinger (wife of Mr. Joseph Wallinger), the children of Anna Maria Gordon, deceased, a sister of the deceased's.

not found after the deceased's death : but it is admitted that he executed such a will. The answers state that, "The said deceased on or about the month of June, in the year one thousand eight hundred and seventeen, called at the counting house of the respondent with whom he had many years before deposited several of his former testamentary papers, and at such time did produce to the respondent, in the presence of his late partner, Thomas Watson, and his clerks, a paper purporting to be a will, which he brought with him for the purpose of being executed ; and that he thereafter executed his said will [547] in the presence of Thomas Watson and his clerks, two of whom, James Rixan Oliver and Henry Watson, respectively signed their hands thereto."

He also admits that the said Thomas Watson, his late partner, was in the latter end of the year 1816, and during the greater part of 1817, in an ill state of health ; and that he died in the latter end of the year 1817. The execution, therefore, of this will of 1817, in the month of June in that year, is very clearly and distinctly admitted. The paper propounded is that which is marked with the letter A ; it is signed by the deceased, and is dated June 15th, 1811—the same date with another cancelled will, which is marked B. It is the paper propounded by Mr. Wilson, one of the executors named in it ; and it is opposed by the next of kin who maintain that the deceased is dead intestate.

For the more clearly understanding of this case, it may be proper thus to describe the several testamentary papers which are before the Court ; or rather, perhaps, the state in which they are.

The will of 1797, with a codicil of 1802, which is marked E, is crossed through ; and there is a memorandum at the end of it in the deceased's handwriting "expunged the whole of this will, July, 1807." The will of 1807 is marked C : that instrument is executed in the presence of two witnesses ; it is contained in five sheets of paper, and appears to have been carefully cancelled when the deceased executed a subsequent will in 1811. There is this memorandum on it, "Cancelled this will when I executed another dated the 15th June, 1811 ; the same being entirely written by myself, [548] and subscribed as witnesses to the same Mr. Joseph Yellowly and Nathaniel Clarke."

Q is an authenticated copy of the will of 1807 ; and was one of the papers which were deposited in the iron chest in Aldermanbury. So that from hence it appears that when the deceased executed the will of 1807, he cancelled that of 1797 ; and again, when he executed the will of 1811, he cancelled that of 1807.

A and B, as I have already mentioned, are both dated on the 15th June, 1811 : but from internal circumstances in paper A, which were pointed out in the course of the argument, it seems to have been originally written before paper B. Paper A is not cancelled : but the sheets that had been apparently attached together by a tape were found detached and separate from each other, though folded up together. In the margin of A there is an abstract of the different legacies which are contained in it ; and there are some notes also and explanatory observations, with respect to certain alterations in the body of the paper itself. There are, besides, several alterations and interlineations both in the body and towards the conclusion of this paper, mentioning the number of sheets it contained, which number appears to have been altered twice ; first, from four to five, and then back again to four. So that paper A appears to have contained at different times a different number of sheets. The first sheet, as it is at present introduced into the paper, has every appearance of not having been originally the first sheet : but it seems to have been since substituted.

[549] In a blank sheet at the end of paper A is a codicil revoking a legacy, which had been previously revoked in the third sheet of A by a marginal note. It is a legacy of 50l. to a female servant. That codicil is dated 8th July, 1816.

There is a similar revocation in paper B, and contained in almost the same words ; that is dated in 1811. In addition, there is an explanatory note written by the deceased, stating that he had very fully revoked such legacy. He says, "I consider I have expressed myself clearly, that the share of 200l. left to her husband, of which one moiety is my property, is not to be considered as a legacy to either of them" (meaning the husband or the wife). There is no date to this note. Now this writing on the blank sheet at the end of paper A, dated the 8th of July, 1816, is the latest date upon the instrument itself. But at what time it was that the several sheets of paper A were disconnected from each other, or when the new sheet was first written or substituted in that paper ; or when these marginal abstracts and observations were

made, there is no satisfactory proof to shew. These facts must be matter of conjecture; and I think, of conjecture only. Paper B is of the same date as A originally; and though written afterwards, in the first instance, and probably then only in substance a duplicate of the other; yet I think it had originally this important difference from A, that in paper B the residue is given solely to Mr. Sloughter Clarke; and in paper A the residue is given jointly to him and to his brother William. [550] In case of their death, in the lifetime of the testator, the residue is given to the son of Mr. Sloughter Clarke as the substituted residuary legatee.

How these important differences arose originally between these two instruments, and why both of them are of the same dates, it is impossible for us now to conjecture. The deceased was certainly a very old man; aged, I think, nearly eighty years. They might be perhaps owing to some accident, or they might be occasioned by some oversight on his part. There is abundant evidence to shew that paper B was written after paper A, as I have said. Paper B is carefully cancelled; at least the first, fourth, and fifth sheets are carefully cancelled. The second and third sheets do not appear. They have been destroyed; and it must be presumed that they have been destroyed by himself. The time at which this act of cancellation of paper B took place does not perfectly appear; and, in the absence of sufficient evidence, it would be vain even to conjecture in respect to that fact. Possibly it might have been at the time when the deceased executed the will of 1817. It might, however, for ought that appears to the contrary, have been at any other time. Upon the back of it there is a written memorandum: but that equally leaves the time unascertained. That memorandum is in these words, "These five sheets or four, as entered as parts of my will, are marked with my signature, taken off by myself; reserving only to direct an alteration to any future legacy I may think of."

[551] To this memorandum there is no date; and, therefore, it is not known when the act of cancellation took place.

Now what might be the effect of this cancellation, if there had been no subsequent will executed, seems quite unnecessary to decide, because there is a subsequent will executed, which I think places the thing quite sufficiently before the Court for its decision; for that subsequent will of 1817 revoked both these papers A and B.

Then the question comes, whether paper A has been subsequently revived in any way whatever?

The execution I have mentioned of the will of 1817, in its force and its effect, so long as it continues in existence, is a clear and distinct revocation of the paper A. The revocation of paper A, therefore, is not a matter of doubt, but of clear intention; and if that observation required to be strengthened by any other remarks, they might be easily found. But this execution of the will of 1817 is not done hastily, and as a transient intention; but deliberately and formally. He did not even rely on his own handwriting in the body of the paper, and his signature of the instrument, in order to give effect to that will of 1817, as he had before to the will of 1811. But he carried it to Mr. Wilson's, to execute it there in the presence of two witnesses; and they attested the act. If, then, the former will of 1811 had been executed in a manner equally regular; if it had remained in the most perfect state, instead of being pulled to pieces and altered and abridged in the margin, and interlined, as it now appears to have been; it [552] would still be completely revoked, so long as the subsequent will continued to exist. So long as that continued to exist, the intention of the testator to revoke the former will now propounded was by no means equivocal or doubtful; but perfectly distinct and decided. But this will of 1817 is not forthcoming. It was not found upon the deceased's death; and from the circumstance of its never having been traced into any other hands but the last that we hear of it being in, that the deceased, immediately upon its execution, put it in his pocket, and took it away with him, it must have been destroyed (it is to be presumed) by the deceased himself.

Now, of the time of its destruction there is not the least evidence whatever. Whether it was on the day after the will was made, or on the day after the deceased's incapacity commenced, or at any intermediate time between the one and the other of those events, there is nothing before the Court to shew. The time must be mere matter of conjecture. We have no declaration coming from the deceased himself upon the subject. We have no fact from which the time of such destruction is necessarily to be inferred. Mr. Watson, who was interested in that will, and who was probably one of the executors named in it (for he was an executor under the former will), dies

in the latter end of 1817. It may possibly, but not very probably, be that the deceased destroyed the will upon that event happening. I say it is possible, but not very probable; because, at the time when deceased executed the former will, it clearly appears from his [553] own handwriting that Mr. Watson was in a bad state of health; and the deceased himself mentions that probably that gentleman's life was no better worth than his own. It is not, therefore, very probable, I think, that the event of Mr. Watson's death should have induced the destruction of the will of 1817. Who was the residuary legatee named in the will of 1817 is not directly proved. The brother, Mr. Slougher Clarke, was the sole residuary legatee in paper B, which, as I have before remarked, was originally written subsequently to A. In paper A also he was named joint residuary legatee. Both these instruments are dated in June, 1811. Therefore it is to be presumed that he was interested in the residue of the will of 1817. It is stated that he died in April, 1820. That event, added to the death of one of the executors (Mr. Watson), which I have already mentioned, is not unlikely to have induced the destruction of this will by the deceased. But I state this of course as mere conjecture. It is not a fact upon which the Court is warranted in relying. The only fact is, that the will of 1817 not being forthcoming, it must be presumed to have been destroyed by the deceased. Then comes the consideration of what is the legal effect of that fact?

Is it to set up this paper A, which in its original state may not have been considered at all as his will, but was meant perhaps as a sketch of the will which was executed on the fifteenth of June, 1811, B being more formal than A, and in its altered state may have been only used as the draft for the will of 1817.

[554] Whether, by the destruction of that will of 1817 and other circumstances this paper A be revived or not, is the question which this Court has now to decide.

Now the legal presumption as to whether, by the destruction of a later will, the revival of a former uncancelled will is to be presumed, is a point that has been much controverted, but never very clearly settled. And perhaps the bare legal presumption upon such a case is not very material to be discussed. In the case of *Glazier and Glazier* (4 Burrows, 2512), so far as respects the disposition of lands, Lord Mansfield is reported to have said that the former will is revived. But the correctness of that report and the soundness of the doctrine there laid down have been a good deal questioned. In these Courts, as applies to wills respecting personalty, the presumption has been rather the other way, and against the revival of the former testament; it has been held that it requires some act to shew an intention of such revival. As far as my own opinion goes, I cannot help saying that good sense and the reason of the thing seem rather to favour the presumption as taken in these Courts. But the truth is, that in all these matters the legal presumption must grow out of something in evidence before the Court; and in fact a case can hardly by possibility be so destitute of all circumstances as to require a decision upon mere legal presumption, and nothing else. In the case of *Moore and Delatorre* (vol. i. p. 375), before the High Court of Delegates, I understand it was clearly held by that Court, that [555] whichever way the presumption of revival might be, still the intention was to be collected from all the circumstances of the case.

Now, if the Court is to collect the intention in the present instance from all the circumstances of the case, the intention to revoke this will, and the subsequent actual revocation of it by the will of 1817, being quite clear and unequivocal; the contrary intention to revive it remains to be shewn, as growing out of all the circumstances. Here, however, the intention to revive it is not supplied either by the paper itself, or by any parol declaration made by the deceased, or by any change in the condition of this party. If such intention is to be collected at all, it can only be collected in some of those other papers which were found in the deceased's possession. On the face of the instrument itself nothing appears; there is no memorandum, no recognition of it in any way subsequent to June, 1816; the subsequent will being, as we have seen, executed in June, 1817.

The other papers before the Court were found in company with this instrument in the deceased's tin-box. It was the habit of the deceased to make abstracts of his testamentary papers: these are lists of the legacies, for the most part, contained in the testamentary papers. He also had the habit of keeping old cancelled wills in his possession. There are a variety of them before the Court: but when some of them were written, how many times they have been altered and added to, and from what papers some of them have been extracted, must be almost entirely matters of conjecture.

[556] The papers F and L are abstracts of the will of 1807 ; and M seems to be no more than a list of the legacies, placed in different columns. Whether they are the legacies of that will, or of any other will, it is perhaps not very material to know.

Paper D is headed "legacies in my will dated the 15th June, 1811." That is written on the back of an old letter, and is on paper with the water-mark of 1810.

Paper I is of the same description. It is an abstract of the will of 1811, is on an old letter, and on paper also with the water-mark of 1810.

Paper K is another abstract of the will of 1811 : but the water-mark on that paper is 1815.

Paper G is also written upon the back of an old letter : but that letter is dated on the 3d July, 1816. A part of it is described "Extract of legacies in my will, dated June, 1811." That applies to the first and second columns. The third column and the fourth column are described, "Money devised by my will ; trust-money in the funds devised." These two columns are dated in 1818.

In paper A is an enquiry whether the deceased could alter the residuary bequests of his will by a codicil? whether there had not lapsed a sum of 500l. Reduced to Mr. H. Gorden, who appears to be a legatee in 1500l. by the will ; and the form of revoking such legacy is drawn at the end of the paper. But there is nothing to fix the date as to when this was written.

These are the several abstracts ; and two of them, G and H, have been particularly relied on. The fourth column of paper G, which I have [557] already mentioned, and which, folding back the letter, was perhaps the first part that was written of it, is intitled, "Extracts of my will (dated) in 1811." Hence, it is probable that it was written some time subsequently to July, 1816. For what purpose this paper was written must, like many other circumstances in this case, remain mere matter of conjecture. Whether it was preparatory to the new first sheet of paper A, or preparatory to a new will, or whether this first sheet in paper A was preparatory to the new will of 1817, does not satisfactorily appear. But it does clearly appear that the second and fourth columns of paper G were written before the first sheet of paper A ; and were originally an abstract of the first sheet of paper B, and possibly also of the first sheet of paper A ; because, perhaps, the first sheets of A and B were originally the same. The legacies are the same as in B, the cancelled paper : but they were afterwards altered, and made the same as they subsequently stand in paper A. For example : the first and second legacy are the same in both ; he leaves one thousand pounds to his brother, W. Clarke, and ten thousand pounds, three per cent. Reduced Annuities, to his brother, Mr. Sloughter Clarke. These are the same in both papers ; in papers A and B, and in the abstract. The third legacy is a legacy to his sister, Mrs. Wilson ; the interest of 2000l., and, after her death, the principal to her sons. Now in paper B that stands 5000l. ; so too it was originally in paper G. It is, however, in this abstract G, altered from 5000l. to 2000l. ; and now, in the first sheet of [558] paper A, it is restored to 2000l. ; so that paper G is originally an abstract of paper B ; it is then altered, and after that paper A is made.

The same observation applies to the new legacy, that to Mrs. Remington. In B it is 500l. ; in this abstract it was 500l. : but it is now altered in this abstract to 300l. ; and in the first sheet of A it is 300l.

The next legacy in this abstract is that to his nephew, Mr. Samuel Clarke, of 2500l. Navy 5 per Cents. That does not occur as the next legacy in the new paper A : but there is an intermediate legacy. There are two money-legacies of 1000l. to each of his two nephews, H. Wilson and W. Wilson : and these two intermediate legacies, which are to be found in the first sheet of paper A, are added at the end of this paper in a different ink and handwriting. This confirms my supposition that the abstract G is not made from paper A, but made before it, and that A was made from this. But this is more decisive with respect to the fifth sheet of paper A. In paper B (the original paper) there is 1500l. given to H. and W. Wilson, in trust for their sister, Harriet Newbury. In paper G that stood originally in the same way : then that is bracketed ; there is written opposite, "lapsed" (I suppose Mrs. Newbury died in the meantime). It is then interlined, "To her son Christopher Newbury, 500l. ;" this is just as it originally stood in paper B. But subsequently to this, paper A was written ; because there it stands only 500l. to Christopher Newbury.

These six legacies were contained originally in [559] the first sheet of paper B : that contains the whole of them ; but it is not an abstract of the first sheet of paper A.

On the contrary, this abstract shews that it was made preparatory to the new sheet, which has been made and substituted for paper A.

Other observations arise which tend only to confirm the fact that paper B was first written: then G is an abstract from that. Paper A, I should premise, is the first written of the whole: then paper B is written and executed. Both are dated in June, 1811. Then in 1816 the third and fourth columns of paper C were abstracted either from paper A or paper B (if they were both the same at this time), and after this the first sheet of paper A was added. If the Court were to indulge in conjectures, I should say that the most probable conjecture is, that this new first sheet was substituted at the time for the purpose of making preparation for that new will which was in part executed in the year 1817.

There is nothing to shew that the instrument A was ever used after the execution of this will of 1817; for if paper A was the draft of this new will, why then an abstract made in the year 1817 would more probably be the abstract from that new will of 1817. If transposing the draft for taking that new will (which to a person of eighty years of age was no doubt a matter of considerable difficulty, and required considerable time to effect), the leaving the date of this paper unaltered are all consistent with the several heads for the draft of this new will of 1817: if the Court could assume [560] this to be the fact, there is an end of all doubt upon the case. For no one would conclude that a testator destroying an executed will could by that act revive the mere draft of that will.

The other columns of paper G, I mean the first and second columns, have at the top of them the date 1818. Whether these are copied from an original paper of that date or not we have no satisfactory proof.

Paper H, which is partly only a duplicate of G, has the date of June, 1818, written at the top of it. "Extracts from my will dated June, 1818." But there is nothing to prove that they are not extracts of the will of 1817. There is nothing to shew that the will of 1817 was not in the legacies, or in most of them at least, conformable to the will of 1811. Even paper H, though it has some of the legacies omitted, possibly is also made from the wills of 1817; and for this reason, because the revoked and lapsed legacies which are contained in paper A are not included either in the first or second columns of paper G or paper H. For example—there is the legacy to Octavius (Clarke); that is not inserted in these abstracts, but it remains in paper A. The legacy to Mrs. Snarey is not to be found in this abstract. The bequest of the shipping to Mr. Wilson is not contained in it. The legacy to Mr. Dare is lapsed. The bequest of Saxon's debt is omitted. Now all these circumstances (as far as they make something of probability) tend rather to shew that this abstract, dated 1818, was made from the will of 1817, and not from the old will of 1811.

[561] If so (if that be probable) this abstract will not tend, in the slightest degree, to shew any intention to revive paper A after the destruction of the will of 1817. It will only tend to this inference: that the will of 1817 was not destroyed till after these two abstracts G and H were written.

It is observable that in neither of these papers G nor H, where they have the date "1818" affixed to them (for it is pretty satisfactorily shewn, I think, that the third column of paper G was written before paper A was altered), there is no mention whatever of who are the residuary legatees; and we have no evidence as to who was the residuary legatee appointed in the will of 1817.

Indeed it is evident that the mind of the deceased, at various times, fluctuated as to the disposition of the residue of his property. By the will of 1797, which is marked E, the brother, William Clarke, is the sole residuary legatee. In the will of 1807 the brother William, and the nephews Henry William, William, and Robert Clarke, are all four of them jointly declared to be such legatees.

In the will of 1811 paper A, which was first written, the brothers William Clarke and Sloughter Clarke are jointly residuary legatees. And in case of their death in the lifetime of the testator, the son of Mr. Sloughter Clarke (W. W. Clarke) is substituted as residuary legatee. In the will of 1811, marked B, which is more formally written than paper A, the brother, Mr. Sloughter Clarke, is the sole residuary legatee. When that will was cancelled there is, as I have before said, no proof: he might have left it uncanceled till he had formed a [562] draft for the will of 1817; and even till after he had executed that will. For here is, in his own handwriting, an inquiry whether he could alter the residuary disposition of his property by a codicil; it does

not appear when that codicil was written, however. Surely then it would require very satisfactory proof indeed to shew an intention on the part of the deceased to revive this important part of paper A (as to the residuary disposition intended by him to be made): which by the death of Mr. Sloughter Clarke will vest solely in Mr. William Clarke.

It is quite impossible to say what the purpose was for which the papers with the mark of G and H were written. Still less can we say that they were written after the will of 1817; and consider paper A as his operative instrument. All these markings and crossings off, and additional legacies of paper G (for there is an entire column in paper G tending to shew that it was meant to alter the legacies of the will of 1817); all these, I say, might be preparatory to a new will made in 1819; and if, by what there is in the lower part of the same paper, he meant to see what his property was, it might be for a new will to be made in 1820, after the death of his brother, Mr. Sloughter Clarke, who was deeply interested in the will of 1817; or possibly the deceased, who was very far advanced in life, might find the arrangement of his large property so difficult that he destroyed the will of 1817, and determined to let the law take its course in distributing his property among his family. True it is that all this is conjecture: but we have nothing [563] else left to guide us here; and I only mention this to shew how dangerous it would be to carry it any further. There being, then, no direct act of revival of paper A, either on the face of the instrument itself, or in any other document before the Court, that comes before it from under the hands of the deceased himself; I am next to inquire "whether there be any intrinsic circumstances in this case that shew he intended to revive and set up this will of 1811."

So far from it, the few circumstances that do arise bear just the contrary inference.

There is not the slightest change of condition on the part of the deceased tending to shew that he meant on that account to revive this paper of 1811. A circumstance of much consequence where the intention to revive a former will may be inferred from the latter will. Suppose that a person had made a will in favour of a wife; or in favour of one of his children in preference to the others, giving a large proportion to such wife or child of his property. Suppose he makes a subsequent will on some sudden anger or passion, that subsequent one cutting off his wife or child; and say that almost immediately afterwards he should be reconciled to them, and the subsequent will should be destroyed, the former one remaining uncanceled; and that for the remainder of his life the testator lives in entire harmony with the wife or child. Why, facts of this sort would leave no doubt in the mind of the Court that the deceased considered his former will to be revived, and [564] looked upon it as operative for the remainder of his life.

But here this will of 1817 is a deliberate act, more so than ordinary. That will the deceased had executed in the presence of witnesses. But he had not executed the paper of 1811 in the presence of witnesses. Why he destroyed the will of 1811 does not appear. This instrument of 1811, paper A (if, indeed, it was not intended for the copy of a former will, or for the mere will of 1817), is not left in any formal state, but just the reverse. The sheets are disconnected one from the other. It is left with marginal notes and alterations. One of the legatees is dead. One of the executors is also dead. The most important person connected with the document, Mr. Sloughter Clarke, is dead. He was the residuary legatee; and by his death the whole of this residue would go to his brother, Mr. W. Clarke. From the circumstance of Mr. Sloughter Clarke's being joint residuary legatee in paper B, and his son being appointed to succeed him in the event of his death, during the testator's lifetime, it would seem that that was the favoured branch of the family.

Under all these circumstances, to suppose that the deceased meant to revive this instrument (paper A), and intended these sheets of paper, without any alteration, to operate as his will, really appears to me to be the very height of improbability.

It is said that the deceased intended to die testate; and so he did for several years, for a very considerable portion of his life. But it is mere conjecture [565] that he did so after the destruction of his will of 1817; and more particularly after the death of his brother, Mr. Sloughter Clarke. But the question for the Court is not—whether he intended to die testate or not; but whether he meant to revive this instrument which is now propounded.

If he did not intend to revive it, there being no valid will, the law makes him dead intestate. Now from all the circumstances of this case (which I have alluded to, with

considerable minuteness, rather for the satisfaction of the parties concerned, than as thinking that the case itself is fraught with that degree of doubt and uncertainty which should make so minute a recapitulation necessary), I am by no means satisfied that it was the intention of the deceased to revive his will.

On the contrary, I think that the deceased did not intend this paper to operate as his will at all, and that I am bound to pronounce against it; and that, so far as appears to this Court, it was his intention to die intestate.

[566] THE OFFICE OF THE JUDGE PROMOTED BY ROSE v. LEE. Arches Court, Trinity Term, July 14th, 1821.—Letters of request from the rector of Lincoln College, in the University of Oxford, rejected; there being no sufficient proof that the rector of Lincoln College was entitled to exercise peculiar jurisdiction in the parish of Long Coombe, within the diocese of Oxford.

By letters of request from the rector of Lincoln College in the University of Oxford.

This cause was promoted by the Rev. Charles Rose, clerk, styling himself chaplain of the parish church of Long Coombe, which he alleged to be situated within the peculiar jurisdiction of the rector of Lincoln College, in the University of Oxford, against the Rev. Bartley Lee, clerk of the said parish of Long Coombe, concerning his soul's health, and the lawful correction of his manners and excesses: but more especially for interrupting the said Rev. Charles Rose in the performance of divine service, in the said church of Long Coombe, and also unlawfully, and without any just right, [567] continuing himself to perform divine service therein.

The articles were as follows:—

First. We article and object to you the said Bartley Lee, that his late Majesty, Edward the Fourth, sometime King of England, by his letters patent under the Great Seal of England, dated at Westminster, the 11th day of November, in the 18th year of his reign, being the year of our Lord 1478, did for him and his heirs grant licence to the abbot of the monastery of Eynesham, in the county of Oxford, and to the convent of the same place, that they might give, grant, appropriate, unite, and incorporate the said parish church of Long Coombe in the said county of Oxford, and then diocese of Lincoln, with the rights and appurtenances whatsoever (which said church was of the patronage of the said abbot and convent), to the rector or warden of Lincoln College in Oxford, and then diocese of Lincoln, and to the scholars or fellows of the same place and their successors, and to the said rector or warden, and scholars or fellows, and their successors, that they might acquire and receive the said church, with the rights and appurtenances whatsoever from the said abbot and convent; and the same church so appropriated might enjoy and hold to them and their successors, to the proper use of the said rector or warden, and scholars or fellows, and their successors for ever. So nevertheless that the said church should be sufficiently [568] served by a fit chaplain removeable at the will of the rector or warden of the college aforesaid for the time being, and without fine or fee, to be taken or paid to the use of the said King. And we further article and object to you the said Rev. Bartley Lee, that the Right Reverend Father in God Thomas Rotherham, by divine permission sometime Lord Bishop of Lincoln, and Lord High Chancellor of England, did by his public instrument and final sentence or decree, bearing date the 20th day of November, in the said year of our Lord 1478, by and with the consent of the dean and chapter of his cathedral church of Lincoln, and of the abbot and convent of the monastery of Eynesham aforesaid, in his diocese of Lincoln, and also of the archdeacon of Oxford, then in the said diocese of Lincoln, did in pursuance of the said letters patent or licence of his said Majesty King Edward the Fourth amongst other things, unite, annex, incorporate, and appropriate the said parish church of Long Coombe, with every its rights and appurtenances to the said rector, or warden and scholars of Lincoln College aforesaid, and their successors whomsoever in future, and to the said college itself; and grant the same to be possessed to the proper use of the said rector and scholars, and of the said college for ever. And the said bishop did grant to the said rector, or warden and scholars, that it should be lawful for them by themselves, or their lawful proctor, to enter [569] the said parish church of Long Coombe, so soon as the same should be vacant; and freely and lawfully to take and obtain corporal possession of the said church, and to retain and continue the same, and lawfully to receive and have the fruits, rents, and profits of the said parish church, and freely to

dispose of the same, the licence of the said bishop, or of any other whomsoever, not being thereupon otherwise had or obtained; and the said bishop did thereby give licence and authority. Provided always that the said church of Long Coombe should be properly and laudably served in divine offices, and in the administration of sacraments and sacramentals, by able and fit secular chaplains moveable, and to be removed at the will and pleasure of the said rector or warden, and his successors, as upon inspection of the records and statutes of Lincoln College aforesaid, to be produced at the hearing of this cause, will appear.

Second. Also we article and object to you the said Rev. Bartley Lee, clerk, that you being chaplain of the said parish and church of Long Coombe, and the Rev. Edward Tatham, Doctor in Divinity, rector of Lincoln College aforesaid, having a mind and desire, under and by virtue of the power and authority vested in him as aforesaid, to remove and dismiss you the said Rev. Bartley Lee, from being and continuing any longer such chaplain, did by a certain paper writing under his hand bearing date, at Lincoln College aforesaid, the 30th [570] day of November, 1820, give notice to you the said Reverend Bartley Lee, that he removed you from the said chaplainship of the said church of Long Coombe, and that he should immediately nominate and appoint some other person to officiate as chaplain in the said church and parish, and desired that you would not officiate any longer in the said church, of which paper writing a true copy was delivered to you the said Bartley Lee on or about the first day of December, 1820. And we further article and object to you the said Bartley Lee, that the said Rev. Edward Tatham did by writing under his hand bearing date the said 30th day of November, 1820, duly nominate and appoint the said Rev. Charles Rose, clerk, Fellow of Lincoln College aforesaid, to be chaplain of the said church of Long Coombe.

Third. Also we article and object to you the said Bartley Lee, that in supply of proof of the next preceding article we exhibit and hereto annex to be herein read and inserted, and taken as part and parcel hereof, two certain paper writings, marked No. 1 and No. 2; the said paper writing, marked No. 1, being the original notice of removal and dismissal of you the said Bartley Lee, from the said chaplainship of Long Coombe as set forth in the next preceding article, beginning thus, "I hereby give you notice as chaplain, commonly called curate of Long Coombe," ending thus, "Dated Lincoln College, the 30th day of No-[571]-vember, one thousand eight hundred and twenty," and thus subscribed, "Edward Tatham, rector;" the said paper writing, No. 2, being the original appointment of the said Rev. Charles Rose to be chaplain to the said church of Long Coombe, as also mentioned in the next preceding article, containing as follows:—"I hereby nominate and appoint the Rev. Charles Rose, B.D., Fellow of Lincoln College, chaplain of the church of Long Coombe. Edward Tatham, rector of Lincoln College, 30th of November, 1820." That the whole contents of the said two paper writings, and the subscriptions thereto, were and are of the proper handwriting and subscription of the said Rev. Edward Tatham, Doctor in Divinity, rector of Lincoln College aforesaid.

Fourth. Also we article and object to you the said Bartley Lee, that on Sunday the day of the month of December, 1820, the said Rev. Charles Rose, clerk, the chaplain of the said parish and church of Long Coombe, repaired to the said church at the usual hour of performing divine service therein in the forenoon; and proceeded to the reading desk in the said church, when no person was therein; and Thomas Bumpus, one of the churchwardens of the said parish, who had been named and appointed as such churchwarden by the said Bartley Lee, then prevented the said Charles Rose from going into the said reading desk. That the said Bartley Lee having soon [572] afterwards gone into the said desk, the said Charles Rose again proceeded to the said desk, and required and demanded to be admitted therein for the purpose of performing divine service, as chaplain of the said parish and church, but was unlawfully obstructed and interrupted by you, the said Bartley Lee, in the performance of such divine service. And that you the said Bartley Lee did then perform such service therein. And we further article and object that you have unlawfully, and without any just right, continued to perform divine service in the said church, and that you have caused a lock to be placed on the door of the pulpit therein which is kept constantly locked, and of which lock you have kept, and still keep, possession of the key.

Fifth. Also we article and object that you the said Rev. Bartley Lee were and are

of the said parish of Long Coombe, in the county of Oxford, and peculiar jurisdiction of Lincoln College in the University of Oxford within the province of Canterbury; and therefore and by reason of letters of request under the hand and seal of the said Rev. Edward Tatham, Doctor in Divinity, rector of Lincoln College aforesaid, exhibited to us the official principal of the Arches Court of Canterbury aforesaid and now remaining in the registry of this Court, were and are subject to the jurisdiction of this Court.

Sixth. Also we article and object that the said Rev. [573] Charles Rose, clerk, Fellow of Lincoln College aforesaid, chaplain of the said parish and church of Long Coombe, hath rightly and duly complained of the premises to us the official principal aforesaid, and to this Court.

Seventh. Also we article and object to you the said Bartley Lee, that all and singular the premises were and are true, public, and notorious; and of which legal proof being made, the party promovent prays right and justice to be effectually done and administered in the premises; and that you the said Bartley Lee, for your excess and temerity in the premises, may be pronounced, decreed, and declared to have incurred the penalty and censure of the law, and that you may be duly and according to the exigencies of the law corrected and punished for the same, and admonished to refrain from the like behaviour for the future.

The exhibits annexed to these articles were—

To the Rev. Bartley Lee.

I hereby give you notice as chaplain, commonly called curate of the church of Long Coombe appropriated, annexed, and united, with Lincoln College, in the University of Oxford, that I remove you from the said chaplainship under the powers which are vested in me by the statutes and authorities of the said college. And I further give you notice that I shall immediately nominate and appoint some other person to officiate as chaplain in [574] the said church and parish thereunto belonging. And I desire that you will not officiate any longer as chaplain of the said church. Dated Lincoln College, the thirtieth day of November, one thousand eight hundred and twenty.

EDWARD TATHAM, Rector.

I hereby nominate and appoint the Reverend Charles Rose, B.D., Fellow of Lincoln College, chaplain of the church of Long Coombe.

EDWARD TATHAM,

Rector of Lincoln College.

30th Nov. 1820.

Swabey, for the Rev. Bartley Lee, and in objection to the admission to the articles, stated that the Court had no jurisdiction, and could not receive the letters of request.

That if the jurisdiction existed, it would not belong merely to the rector of Lincoln College, but to the rector and scholars also.

That there was no instance of a benefice, which before the Reformation had been made over to any college or lay corporation, in which, whatever the terms of the appropriation might be, any cure could now be held *ad nutum rectoris*. That perpetual curacies, as well as curacies augmented by Queen Anne's bounty, required the licence of the bishop.

That no authority could be shewn for the removal of a parish priest, at the will of the patron from a parochial church which had the rights of [575] sepulture and baptism, and that it was so laid down in *The Attorney-General v. Brereton* (2 Ves. sen. p. 424).

Lastly, that this was an attempt to try a civil right in a criminal form.

Lushington contra. From the time of King Edward the Fourth the chaplain of Long Coombe has been appointed by the rector of Lincoln College without licence or constitution from the ordinary; the bishop has, by omitting to interfere, divested himself of any power of licensing and instituting or examining the competency of the clerk appointed to this cure.

The case of *The Attorney-General v. Brereton* merely goes to this, that a perpetual curate is not removeable at the pleasure of the person who appointed him; here the jurisdiction not being in the bishop must be considered as peculiar.

The forms of practice in the Ecclesiastical Court render it absolutely necessary that a case of this description should be put in the shape of a criminal proceeding.

Per Curiam. I am not aware that any clergyman of the Established Church can perform duty without a licence from the bishop: the rector of every parish may

appoint a curate, but that curate must be licenced by the diocesan. I know there are instances where curates do not apply for a licence: but they ought to do so.

I see nothing in any of the words referred to [576] which takes away the episcopal jurisdiction; and I have exceedingly strong doubts whether this place can be considered to have been erected into a peculiar jurisdiction exempt from the ordinary of the diocese. Unless that can be made out, I cannot entertain this cause.

Suit dismissed.

[577] JACKSON AND WALLINGTON v. WHITEHEAD. Prerogative Court, Trinity Term, July 11th, 1821.—An executor who had taken the oath of office and given in an appearance; a suit touching the validity of the will allowed to be dismissed, in order that he may renounce probate, and become a witness in the cause.

Ann Whitehead died on the 19th of Jan., 1821, leaving a will in which the Rev. Thomas Jackson and Algernon Wallington were nominated executors. On the 1st of February following Mr. Jackson and Mr. Wallington took the usual oaths, as executors: but before the probate passed the seal a caveat was entered; and on the 16th of Feb. an appearance was given for John Whitehead, a nephew and one of the next of kin of the deceased, who instituted proceedings to contest the validity of the will. On the 1st of March the executors were sworn to an affidavit of scripts; and shortly afterwards Mr. Wallington signified his intention of renouncing the probate and execution of the will, and releasing a legacy bequeathed by it, in order that he might become a witness in the cause.(a)

Judgment—Sir John Nicholl. The executors were sworn, and the probate was afterwards stopped by a caveat; after that an appearance was given for the executors, and after that an application was made to dismiss one of the [578] executors, in order that he might be examined. He is stated to be a material witness in the cause, as he received instructions from the deceased for the making of the will, and was present at the execution of it.

It is not to be denied that, in a great variety of cases, executors have been dismissed after proceedings have been had: but it is said that he has appeared in the cause as a party, and also been sworn as an executor; and these circumstances are considered as precluding him.

I have looked through a great variety of cases, and have not found any one in which the circumstance of a person having been sworn as an executor has ever been that on which the Court has refused to allow him to renounce, nor has it ever been made a material ground.

The only authority in any point is that in *Ventris*.(b) We well know that a single case connected with proceedings in this Court, reported so incorrectly as it seems to be, cannot be safely relied [579] upon; and at most it only decides that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship. Another question is whether, if he be dismissed, his evidence could be received. After looking through a great number of cases, I find none where the Court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious—that where a party has intermeddled, he has taken upon himself the burthen, and acquired the responsi-

(a) It was contended that having taken the oath of office, and given an appearance in the cause, it was not competent to the executor now to renounce the probate and execution of the will.

(b) A mandamus was prayed to the Ecclesiastical Court to grant the probate of a will, under seal, &c.

The case was: the executor named in the will had taken the usual oath, and then refused (but after a caveat entered), and another endeavoured to obtain, letters of administration. The executor afterwards came to desire the will under probate, and contested the granting of administration, which was adjudged against him, supposing that he was bound by his refusal.

And after an appeal to the Delegates this mandamus was prayed, and granted by the Court; for having taken the oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further authority, and the caveat did not alter the case.

Note.—The oath was taken before a surrogate, yet it was all one. 1 Vent. 335.

bility of an executor—that was the principle of the decision in *Haywood v. Bridges* (Prerog. 1767).

I think if he has not taken upon himself this burthen, the Court has authority to dismiss him. No injury can be derived to the adverse party from the want of his answers, because he may be cross-examined; his knowledge of the transaction may be sifted to the uttermost. On the other hand, a great injury might accrue to the other parties, who may be legatees, if this evidence be excluded. Innocent third parties may lose the whole benefit of their legacies; and the intention of the deceased may be defeated because the executor, before he knew of the caveat, had taken the oath of office. This would be great injury and injustice: and finding no ground on which an executor has been excluded from renouncing, except that of having intermeddled with the effects—which is not suggested in this instance—I am of opinion that Mr. Wallington is entitled to be dismissed.

[580] DIDDEAR, FALSELY CALLED FAUCIT, OTHERWISE SAVILL v. FAUCIT. Consistory Court of London, Trinity Term, July 13th, 1821.—Nullity of marriage by reason of false publication of banns not established.

Harriot Elizabeth Didear was born in July, 1789. In September, 1805, being resident with her parents at Margate, and employed as an actress in the company belonging to the Dover Theatre, she was married by banns in the parish church of St. George, Southwark, to John Faucit, an actor in the same company with herself. This marriage was clandestinely solemnized, without the knowledge of her father and mother, and in defiance of their repeated prohibitions. In the publication of banns, one of her Christian names, that of Elizabeth, was omitted, and the man was married by the name of Faucit, whereas his real name was stated to be Savill.

In Easter Term, 1821, a suit was instituted by the wife to annul this marriage, on account of the undue publication of banns.

It was in evidence that after the marriage Mrs. Faucit had informed her parents that “Mr. Faucit’s real name was Savill, though for some family reasons he used the name of Faucit.”

[581] As an actor he passed at the time by the name of Faucit.

Lushington and Dodson for the nullity.

Phillimore and Addams contra.

Judgment—*Sir William Scott*. This case certainly comes before the Court at a time and under circumstances which do not induce what may be called legal favor. It is the doctrine of all courts that every thing is to be presumed in favor of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved unless by some pressing obligations of law.

The marriage is of sixteen years’ standing: and though it was not approved of in its origin, it has had all the confirmation it could receive from intimacy with the family. The father kept up a friendly intercourse with the husband for a considerable time afterwards; the marriage has produced children, whose legitimacy is to be affected by this proceeding.

There are three or four circumstances I may lay out of the case. The want of consent to a marriage by banns is of no consequence; nor is the non-residence in the parish, as the law has provided that the domicile shall not be looked into.

It is attempted to be set aside on the ground of a false name; for, as to the interposition of the name of Elizabeth (which has hardly been made matter of observation), it has been justly denomi-[582]-nated a slight deviation, unless it had been attended by circumstances more indicative of fraud.

The objection is, that he was called Saville in the banns, whereas the name he was known by was Faucit. The act of Parliament requires the true name: the native name is *prima facie* the true name; at the same time the Court has thrown out that it is possible that a person may have assumed another name, so as to bring it within the description required by the statute. It is possible such a name may supersede the original native name.

In this case it is not very distinctly established what was the true name, and what the putative name. It is said to be the practice, and I believe it is, for actors to assume names, by which they designate themselves; it is said he went by the name of Faucit; this does not satisfy me that Faucit was the name by which he was universally known. Nothing points to Saville but his declaration that it was his

name, but that declaration was made at a time when he did not intend to commit a fraud. The publication took place in a populous parish, at a great distance from these obscure persons (for such they were); it is not likely there should be fraud in the use of it; and where there is no fraud, the Court is less disposed to pay attention to this sort of variation.

I am not satisfied with this as sufficient to lead to the conclusion that this was an invalid marriage; there was no intention of imposing a false name, no intention of deceiving the congregation. I [583] suppose he was known by no name whatever. The observation that if he had meant to deceive he would have practised on the other name is, I think, well founded; that was not disguised, except by the omission of the name of Elizabeth, by which she was not generally known, and that was accidental.

Which of the two was the true name of the man does not appear. I cannot pronounce for this nullity.

[584] *THOMPSON v. WALDRAM*. Prerogative Court, Trinity Term, July 18th, 1821.—A party benefited under a former will, which does not appear, cannot be admitted a contradicter to a subsisting will.

Judgment—*Sir John Nicholl*. The deceased is stated to have made two wills; and that Mr. Thompson was executor under one, and Mr. Nias under the other. The former will is not found: but it is alleged to have been in existence, and the executor producing a draft of it, prays to be admitted a contradicter to the latter will without propounding the first.

The will not being forthcoming, the presumption is that it was destroyed by the deceased; and a party under a former destroyed will is not at liberty to put a party on proof of a latter will, without offering an admissible allegation; if he denies the existence of the former will, the executor is bound to go on *pari passu*.

What are the circumstances brought forward in this affidavit? He has heard and believes the will was destroyed after the death of the testator; not a word by whom or when. On a further affidavit by [585] Mr. Nias, he says he has heard it was in the possession of the deceased uncanceled and unrevoked (if twenty witnesses were to state this it would be no evidence of the fact), and that she deposited it with the plate and other articles in a certain box in her bedchamber. Non constat, that he was told all this by Mr. Thompson: and if all this was reduced into an allegation the Court could not receive it. I think this affidavit does not propound a statement which justifies this proceeding.

On the other hand, there is an affidavit of persons speaking from their own knowledge, which repels all presumption of the will having been destroyed by any one but the deceased; particularly the affidavit of Brett, who was the subscribing witness under both wills.

No ground is laid for this application: if any person benefited by a former will is to be allowed to put an executor on proof of an existing will, a door would be opened to very vexatious litigation.

I cannot admit this party to be a contradicter.

[586] *THE MARCHIONESS v. THE MARQUIS OF DONEGAL v. CHICHESTER*. Consistory Court of London, Trinity Term, Aug. 8th, 1821.—Not competent to a party called upon to see proceedings in a marriage suit, to object to the jurisdiction on the ground that the party proceeded against has been unduly cited.

This suit was instituted by the Marquis of Donegal against the marchioness his wife, for the purpose of trying the validity of their marriage, which had been solemnized by licence in 1795.

A citation under the seal of the Court was issued against the Marchioness of Donegal, by being served on Mr. Blake her proctor, and by letters missive being left with him. This citation was returned on the second session of Easter Term, 1821, and an appearance was given by Mr. Blake for the Marchioness of Donegal, and a libel prayed. On the third session of Easter Term a libel was given in on behalf of the marquis, and the Judge, at the petition of the proctor of the marchioness, and on the notice of counsel, directed a decree to see proceedings in the cause, with the usual intimation, to issue against Arthur Chichester and [587] George Chichester, the lawful nephews of the marquis, and against Arthur Chichester, Esq. (now Sir Arthur Chichester, Bart.), and Edward Chichester, clerk, the next in succession, after the

aforesaid Arthur Chichester and George Chichester, to the titles and estates of the said Marquis of Donegal.

This decree was served upon Arthur Chichester, Esq., Sir Arthur Chichester, and the Rev. George Chichester, clerk. The two latter appeared personally in obedience to the decree, and appointed a proctor; but no appearance was given for Mr. Arthur Chichester the nephew of the marquis: the libel was then admitted. The Marchioness of Donegal's proctor confessed the marriage as pleaded, but otherwise contested the suit negatively; gave in an allegation setting forth the facts on which she relied to establish the validity of the marriage; and prayed that dame Elizabeth May, widow, and Mary Hyde Mundy might be examined *de bene esse*. The Judge upon argument allowed the application for the examination of Lady May, but rejected it as far as regarded Mary Hyde Mundy. On the same day, during the sitting of the Court, Sheppard appeared as proctor for Mr. Arthur Chichester under protest, which he asserted he would be ready to extend by the next Court, and prayed that no examination *de bene esse* might take place in the intermediate time.

The Judge refused to accede to this application for delay, and Lady May was examined *de bene esse* on the Marchioness of Donegal's allegation, [588] and on interrogatories administered to her on behalf of the Marquis of Donegal.

The validity of the protest was argued; it set forth that Mr. Arthur Chichester was unduly cited to appear in the cause; that no precedent could be found upon the records of the Consistory Court or of the Court of Arches, of any person under similar circumstances having either been cited to see proceedings of this description, or having been made a party to such a suit; and submitted that none of the proceedings had in this cause, nor the definitive sentence if the Judge should proceed to pronounce one, could be in law binding on the party cited: for it was not competent to the said party to have instituted a suit of this description against the Marquis or Marchioness of Donegal, for the purpose of having any marriage had between them declared null and void, when the alleged invalidity of such marriage was a breach of the marriage act. That inasmuch as it was not competent for Mr. Arthur Chichester to institute such a suit for his own advantage, so also he could not have claimed any right to intervene in the said suit for any alleged protection of his own interest, as no proceedings had in this Court between the Marquis and Marchioness of Donegal could be binding on him. The protest then went on to state that the proceedings carrying on in the suit between the Marquis and Marchioness of Donegal were collusive, and that the object of the suit was by contrivance and management to obtain a decree in favour of a pretended marriage; that the marriage took place on [589] the 8th of August, 1795, in pursuance of a licence procured by the Marquis of Donegal, in which it was stated that Charlotte Anna May was of the age of eighteen years and upwards, and a minor; and that Sir Edward May, Bart. (then Edward, May, Esq.), the then reputed father of Charlotte Anna May, calling herself Marchioness of Donegal, had also sworn to the affidavit to lead the licence, and to his consent as lawful father to the said marriage; that Sir Edward May lived many years after this; that in 1809 the invalidity of the marriage became matter of public notoriety, in consequence of a marriage being about to take place between George Hamilton Chichester, Esq., calling himself the Earl of Belfast, and the lawful son and heir of the Marquis of Donegal, and a lady of rank; which marriage did not take place in consequence of the invalidity of the alleged marriage between the Marquis of Donegal and Charlotte Anna May, falsely calling herself Marchioness of Donegal; that though the objections to the marriage were thus public, no steps were taken to try the validity of the same in this or any other Ecclesiastical Court till the 12th of May, 1821, when the citation was taken out in this cause.

The protest further alleged that the Marquis and Marchioness of Donegal had not separated, but still continued to live as husband and wife; that the whole proceedings were irregular and collusive; that no necessity existed for the examination of witnesses *de bene esse*; that the witnesses who must depose to the principal facts were resident in Ireland, and some of them entirely under [590] the influence and control of the Marquis of Donegal.

In reply to this it was stated on the part of the Marchioness of Donegal that it was competent for third parties having an interest to intervene in all suits of nullity of marriage for the protection of that interest; that such parties were liable to, and might be cited to see, proceedings in suits of that description; that if no exact pre-

cedent occurred of a party cited to see proceedings in a suit of nullity of marriage, where the alleged ground of such nullity was a violation of the provisions of the marriage act; yet that with reference to cases of a similar nature, and the general practice of the Ecclesiastical Courts, and with a view to the administration of substantial justice, the mere absence of such a precedent afforded no sufficient ground why the Judge should hold Mr. Arthur Chichester to be unduly cited. The answer then denied that the proceedings were collusive, or that it was the object of the suit by contrivance and management to obtain a decree in favour of a pretended marriage; and concluded by stating that the suit had been instituted by the marquis and defended by the marchioness, for the purpose of ascertaining the legal state and condition of themselves and their issue; and alleged that it was essential to the purposes of justice that the validity of the said marriage should be examined by a Court of competent jurisdiction, during the lifetime of persons capable of giving testimony of material facts respecting the same, some of whom are far advanced in age, and in very precarious health; that the marchioness was de-[591]-sireous that the proceedings and the examination of the witnesses should be had with the privacy and in the presence of Mr. Arthur Chichester, and other persons interested in the marriage, and for that purpose she now prayed the citation which had issued against them.

The reply of the Marquis of Donegal denied all collusion, and alleged that doubts having arisen respecting the validity of the marriage, measures had been taken to try the validity of the same, or questions depending on its validity; that accordingly bills in Chancery had been filed to perpetuate the testimony of certain witnesses, by the Earl of Belfast, as tenant in tail of certain estates possessed by the marquis in England, in November, 1819, 1820, in Ireland, in February, 1820, and 1821; that to such proceeding Mr. Arthur Chichester had been requested to become a party, and had refused so to do: and he further alleged, that before the institution of these proceedings, Mr. Arthur Chichester was informed that they would be instituted; and that this suit was instituted and carried on for the purpose of trying the validity of the marriage between the parties.

In reply to these statements a rejoinder was given in by Mr. Arthur Chichester, which set forth as evidence of the averment that Charlotte Anna May, falsely calling herself Marchioness of Donegal, had been continually for upwards of four years last past, and still was, resident in Ireland; that the citation in this cause issued on the 12th of May last, and that on the 14th of the same month the letters missive were shewn by the officer of the Court [592] to the proctor of the marchioness, who undertook to accept the service of them for the marchioness, and to appear and defend the suit; and that this citation was returned into Court on the 18th of May, and an appearance was immediately given; he further alleged that, in refusing to become a party to the proceedings in the Courts of Chancery in England and Ireland, he had acted under the advice of his counsel in consequence of the said proceedings not being calculated to bring the question at issue fairly before the Court.

Objection was first taken by Swabey and Lushington the counsel for Mr. Chichester, to the day on which the question was brought forward; the citation was to appear on the court-days and bye-days of the term, whereas this day was neither court-day nor bye-day. To this it was replied that it was upon an understanding and for general convenience that it was brought on on this day. The Court overruled the objection, and directed the counsel to proceed with their argument.

Swabey and Lushington for Mr. Chichester. The Marchioness of Donegal was not resident within the jurisdiction, and it was not competent to the court to try the question; she must be resident within the diocese, according to the statute of Henry 8 (23 Hen. 8, c. 9), and the 106th canon.

The party cited to see proceedings had no direct or immediate interest in the suit, he may be consequentially interested, but that is not sufficient; no one but a party interested in the bond of matri-[593]-mony can sue in a suit of this description. The marriage is pleaded to be void by the statute; the interest of Mr. Chichester is merely contingent: if this marriage should be void, the Marquis of Donegal might marry again and have issue, which would defeat the interest of this party. The suit was merely personal; if either party ever after publication dropped the suit, Mr. Chichester could not oblige them to continue it. On the death of either party the suit would abate. Mr. Chichester could not have intervened in a suit of this description, he cannot therefore be dragged into it.

After the death of either the Marquis or the Marchioness of Donegal new interests might arise, and then the validity of the marriage might be questioned; but *nemo est hæres viventis*: the question might arise on the grant of an administration: but such suits are not strictly matrimonial; the ecclesiastical jurisdiction is different in such suit; it is of a testamentary character. We deny that there is any precedent; the Court is to administer the law, not to make it; analogy is no ground for precedent. In the case relied on, *Dalrymple v. Dalrymple*,^(b) the question was respecting the validity of the marriage: the second wife intervened, she was immediately interested in the bond of matrimony.

So in the case of incestuous marriages, they are voidable only; a suit would be precluded after the death of either party.

So likewise, citations taken out in testamentary causes are different: those suits are against all the next of kin: there the interest is immediate and direct; the suit is not personal, but may continue after the death of either of the parties.

In addition to these objections we state collusion, and allege facts in proof of it.

Phillimore and Addams contra. The construction attempted to be put on the statute of citations and the 106th canon is erroneous: they were passed to prevent parties being harassed by vexatious suits, and compelled to join issue in such suits at a distance from their places of residence (Gibson, Cod. 1004, 1008. Hetley, 19. 1 Ventris, 61. 23 H. 8, c. 9); they were for the protection of the parties cited. In the present, the party cited has appeared and admitted the jurisdiction, this is sufficient; if there had been any defect as to jurisdiction it would have been cured by this appearance.

[595] It is not competent to Mr. Chichester to take this objection, but to the Marchioness of Donegal alone. If the question were to be gone into, Lady Donegal is sued as a married woman, and her husband's residence is her residence.

In *Tenducci's case* the citation was not served on the husband (the party proceeded against) till publication had passed in the cause: the party was abroad during the whole of the proceedings.

In *Lord Herbert's case* the party proceeded against had left the diocese within which the suit was instituted four months, but he having appeared and submitted to the jurisdiction, the Court held that this was sufficient to found the jurisdiction.

The cases of incestuous marriages are in principle the same; the Court allows a slight degree of interest sufficient to enable a party to bring a suit to annul them. *Dalrymple's case* is a recent instance of the introduction of a third party in a marriage suit.

There is no ground for the charge of collusion, the suit is brought to try the validity of the marriage, to ascertain the situation of the parties; and the call is made upon the parties mainly interested in annulling the marriage to be present and see the proceedings; and surely it is for the interest of all who wish the truth to be ascertained that the question should be examined and enquired into while the witnesses who were present at the transaction are alive. Surely also the parties can have no better mode of detecting collusion and fraud, if they really are apprehensive of it, than by bringing all the facts before a Court as accustomed as [596] this is to sift and examine questions of this description.

Addams and Burnaby for the Marquis of Donegal.

The Court took time to deliberate.

August 1.—*Judgment*—*Sir William Scott*. In the course of the proceedings in this

(b) *Dalrymple v. Dalrymple*, Consistory, July 6, 1811. Deleg. 19 Jan. 1814. In the Consistory, the husband and wife were the only parties. On the appeal to the Court of Arches an intervention was given for Laura Manners, describing herself as Laura Dalrymple, the wife of John William Henry Dalrymple, the appellant. On 18 Nov., 1811, an allegation was asserted on her behalf, and the Judge assigned to hear an admission thereof on the 4th of December. On that day her proctor prayed the assignation to be continued, which was opposed, and the Judge concluded the cause and assigned it for sentence the next Court day. From this decision an appeal was prosecuted to the High Court of Delegates, and there an allegation was given on behalf of the intervener, which was opposed and ultimately rejected.

The cause was heard before the Delegates on the merits on Jan. 19, 1814, and the sentence of the Consistory Court affirmed.

cause an objection has been taken to the citation : not that it is ill conceived, but that it has not been executed properly ; the objection is taken by the party called upon to see proceedings. The party cited in the cause might object to this ; but it is not competent for the party only cited to see proceedings to do so ; and if it had been, my opinion is, that the defect in the citation, if any, would have been cured by the appearance of the party. The stream of authorities flows in favour of this conclusion.

The citation seems to me sufficient. I overrule the objection to the jurisdiction : but I decide nothing as to the liability of Mr. Chichester to be called upon to see proceedings.

[597] DONEGAL v. DONEGAL. Vice-Chancellor's Court, Trinity Term,
August 4th, 1821.

In Chancery.

Application was made to the Lord Chancellor by Mr. Arthur Chichester for a writ of prohibition against the Judge of the Consistory Court of London ; and the question was argued at great length before his Honour the Vice-Chancellor.

Mr. Wetherell, Dr. Lushington, and Dr. Dodson were heard in support of the prohibition.

Dr. Phillimore, Dr. Addams, and Mr. Sugden contra.

Mr. Bell appeared for the Marquis of Donegal, but did not address the Court.

Judgment.—*The Vice-Chancellor*. This is an application made to this Court by Mr. Arthur Chichester, praying that a writ of prohibition may issue directed to the Judge of the Consis-[598]-torial Court of London, to restrain the Marquis of Donegal from proceeding in a suit instituted by him against the Marchioness of Donegal, for a sentence of nullity of marriage.

Now that this question is of great importance, not merely to the parties in this suit, but as a question that generally affects the practice and proceedings of the Court, must undoubtedly be admitted ; and that it is a question therefore that requires very due deliberation, must be undoubtedly admitted also. I am nevertheless disposed to state my opinion on the subject now. First, because it appears that the main purpose of the suit is to acquire the testimony of witnesses who are represented to be so aged and infirm that the loss of every day must be of the most material importance to the parties. Next, because this case has been so ably and so fully argued, that it must be the fault of the Judge if he does not now take the correct view of the subject. And, lastly, because the result of the elaborate arguments which have been so properly addressed to the Court have induced me to think, with a considerable degree of confidence, that the real question in this cause lies in a very narrow compass indeed, and which I think may be embraced without further delay.

In the month of May last the Marquis of Donegal applies to the proper officer of the Consistorial Court of the Bishop of London to issue a writ of citation against the Marchioness of Donegal, and that writ of citation lies before me ; and it there describes the Marchioness of Donegal as resident in the parish of St. James, Westminster, and it [599] calls on her to answer to the suit of the Marquis of Donegal for a sentence of nullity of marriage.

Now, if upon the face of this citation it had been represented that the Marchioness of Donegal was resident in Ireland, and out of the jurisdiction of this Consistorial Court ; then it would have been perfectly clear as a settled and sound principle, that whatever this Court might have done in the suit, it might at any time, and after any sentence, have been reversed, in respect of the want of jurisdiction apparent on the face of the record : but on the face of this citation there is no difficulty whatever. The fact stated there is, that the Marchioness of Donegal is resident within the parish of St. James, Westminster, and therefore consequently is within the jurisdiction of the Court. To this citation the marchioness appears, I think upon the 16th of May, two days after the citation issues ; and she not only appears to the suit, but she pleads to the suit ; and she states the nature of her case and the nature of the evidence by which she endeavours to maintain her case, namely, that she is the lawful wife of the Marquis of Donegal : by this appearance therefore, and by thus pleading what the nature of her case is, she does in fact admit that she is resident within the parish of St. James, Westminster : that she was not resident was within her own knowledge ; it was a fact within her own knowledge, and she does not take advantage of that

misdescription; and by taking no notice of it, and appearing, she admits that she is properly described as being resident within the parish of St. James, and consequently therefore within the local jurisdiction of the Court.

[600] After she has so appeared and pleaded, she is instructed by her legal advisers that this suit does not effectually determine a question so important to herself and children: as between her husband and herself it would determine the question: but the family estates and the family dignities will, if there be no legal issue of this marriage, descend to Mr. Arthur Chichester; and taking therefore the fact of the libel to be a fact of great importance to be tried, it was her interest to try it, not merely with her husband, but with that gentleman who might afterwards dispute it with her and her issue; as he claimed in respect of this being no valid marriage, and as the heir to the estates of this family. She was instructed, according to the form of proceeding in the Ecclesiastical Court, that she had a right to call him before that Court, for the purpose of trying it as a question, which involved in it a question, to which he was a party interested; and that as a party so interested he was to come before the Court; and under those instructions, which must be taken to be correct in point of law, whether the point of fact does depend on Mr. Arthur Chichester's interest or not, she does issue a citation, calling on Mr. Arthur Chichester to appear to the suit, in order that she may against him as well as against her husband, establish the important fact of her marriage. Mr. Arthur Chichester, on receiving this, appears: but he appears under protest; and he alleges by his protest, first, that he has no such interest in the question as ought to induce the Marchioness of Donegal to summon him as a party to the suit; and he next states that this is a collusive suit, [601] and that for this reason he ought not to be made a party to it. An answer, as it is called, is put in to his protest, and in that answer it is alleged, first, that he is a party, and that he ought to be a party, and that he has such an interest in the subject, which makes it fit that he should be cited in this suit. And next it is alleged that no collusion existed between these parties, or took place between the parties: but that the suit is instituted for the purpose of fairly trying the question at issue between them.^(a)

Mr. Arthur Chichester replies to that answer, and in his reply he introduces these facts; first, he says, in the answer given to my protest, it is alleged [602] that there is no collusion: now in point of fact the Marchioness of Donegal was resident in Ireland at the time of the institution of this suit, and had been so resident in Ireland for four years; and this citation to her was on the 14th of May, and she is made to appear on the 16th of May; and therefore, without collusion, it is impossible that a party resident in Ireland could appear in London in a suit only instituted two days before.

The general case came on in proper form, to be argued before the Judge of the Consistorial Court; and it appears, however, without entering into the general view of the argument, as to whether Mr. Chichester was properly cited with respect to his interest, there was a point which, if decided according to his allegation, would make all further consideration of his unnecessary, namely, a point arising out of his allegation—that the Marchioness of Donegal at the time that this suit was instituted was

(a) In the course of the argument the following observations fell from the learned Judge, with respect to the charge of collusion, which had been advanced against Lady Donegal.

“It has been stated at the bar that this is a case in which there has been a great deal of fraud and collusion. I think it is my duty to say that no question of collusion or fraud is before me; and that there is no evidence before me that amounts to a charge of collusion, there is evidence of concert and agreement: but it may be concert and agreement, as has been very properly stated, between the parties, for the purpose of having the questions, which are so important to the interests of this family, properly tried by a proper tribunal. It might, on the other hand, be a concert and agreement to impose on a Court of Justice false facts with a view to mislead the Court, which would be contrary to the truth and justice of the case; but if that was their object, it seems to me quite impossible that they should have instituted these proceedings in one of the highest tribunals in the country, and call before that tribunal a party who has the strongest interest against the judgment which they wish to obtain; these are the facts which appear to me extremely strong against any inference of collusion.”

resident out of the jurisdiction of the Court; though it is and must be admitted that it was not very regularly pleaded with a view to raise that point; and although it must be seen by reading the papers that it was rather introduced as an argument to shew collusion between the parties than as a substantive fact on which the parties relied, with a view to the principal question. Yet still it was considered to meet the general convenience of the parties in this suit, that all informality as to the form of the pleadings in fact should be waived, and that they should be taken as regularly pleaded, for the purpose of enabling the Judge to determine whe-[603]-ther it did constitute an objection which would prevent all further prosecution of this suit.

The learned Judge, in exercising his judgment on the question, has decided that it did form no objection to the further prosecution of this suit, and to that decision Mr. Arthur Chichester has lodged an appeal, an appeal to the next superior Court to the Consistorial Court of the Bishop of London.

I cannot enter into any consideration whether the learned Judge did, more or less, deliberately consider the subject; but the learned Judge has pronounced a judgment on it; and although in all cases the authority of the learned Judge who pronounces a judgment ought to weigh considerably; yet I am rather to trust to my own imperfect view of the subject treated before me, as it has been, on reasoning and upon general principle, than on the weight of any authority whatever: though if any authority could influence me against the effect of my own views, certainly no higher authority could be stated than that of the learned Judge who has made this decision.

The first question stated was, that Lady Donegal herself, notwithstanding the steps she had taken in the suit, was still at liberty to allege the want of jurisdiction in the Court. And that if she was at liberty to allege the want of jurisdiction of the Court, of necessity it was supposed to follow that Mr. Arthur Chichester would be at liberty to allege that want of jurisdiction; and it was further stated, and stated I believe principally from the Court it-[604]-self, that although it might turn out in the examination of authorities and principles that Lady Donegal herself was no longer at liberty to state an objection to the jurisdiction of the Court; that it did not therefore necessarily follow that Mr. Arthur Chichester might not still be at liberty to take that objection: but it would be a very serious and a very important question how far any submission to the suit, or any admission on her part of the facts stated in that suit, could conclude the rights of Mr. Arthur Chichester, who was not only an intervening party, but an intervening party against his consent.

Now the first and most important question is, whether Lady Donegal would be now precluded, if she thought fit, from taking an objection to the question of jurisdiction. The question of jurisdiction is of two sorts, the want of jurisdiction as to the subject of the suit, which never can be acquired, and the want of jurisdiction as to the locality of the parties in the suit: it is material to see what steps are had in the inferior Court. If it appears on the record that the inferior Court had never any jurisdiction on the subject, there is no proceeding in this Court, and no acquiescence of parties ever can maintain the judgment.

But the want of jurisdiction may proceed, not from the nature of the subject, but because one of the parties is not locally within the jurisdiction of the special Court; and although the Court then may have full jurisdiction of the subject, it has not jurisdiction over the party, in respect of the ab-[605]-sence of that party from the local district. That is the nature of this objection; it being admitted here, that on the subject itself the Court itself has full jurisdiction. And as to the question of the marriage between Lord and Lady Donegal, there is no objection: but the objection to the question being that, at the institution of the suit, Lady Donegal was not locally within the district, and therefore not properly before the Court.

It appears to me that it hardly admits of a question, that a Court of limited jurisdiction (I mean limited as an ordinary court is, perhaps to an archdeaconry, or a bishopric, or an archbishopric), and it is hardly necessary to observe on the plainest principle of the common law that, on a mere assertion of interest, such a Court can never have jurisdiction beyond its own local limits.

I conceive that it is not the statute of the 23d of Henry the 8th that created this objection: the objection is inherent in the nature of a limited jurisdiction.

The 23d of Henry the 8th seems to me to have had in view only to enforce the principle of the common law, by imposing a penalty and forfeiture against those who should act against its principles. It seems, by the recital of the statute itself, that it

had become necessary, in respect of the practice which had been adopted by the archbishop and others, and so the recital seems to import, in drawing within their superior jurisdiction persons who were not locally resident there.

I take that statute to be merely affirmative of the general principle of the common law and to give aid [606] to that principle of the common law by the enforcement of the penalty and the forfeiture. The canon law considers it in the same way, and considers it as declaring the principle of the common law; and it declares, namely, that he who, in respect of an office which has a limit and local extent as to judicial jurisdiction, is necessarily by the principle of the common law limited in that jurisdiction, according to the extent and locality of his office.

Therefore not placing any great value on any observation that arises out of the statute, but considering it as a general principle, I shall proceed to state the facts of the case.

Now that Lady Donegal might if she pleased, when this citation was served on her—that she might have appeared without waving her objection to the jurisdiction, is plain: because although there are not the same terms of pleading in the Ecclesiastical Court as there are in the Courts of law, yet the principle to some extent must prevail; and this party therefore must appear for the very purpose, or rather may appear (whether they must appear is a proper phrase, I do not stop to enquire), but a party may appear without waving an objection to the jurisdiction is quite certain, because she may appear as Mr. Chichester has done, under the protest with respect to that jurisdiction.

Lady Donegal might therefore, if she had pleased, have taken the objection when she was served with a summons, in which it was represented that she was resident in the parish of St. James, Westminster, as it seems now that she was not. She might [607] have stated, "That this suit is most improperly instituted against me in the Consistorial Court in London, I am not resident within the district of that Court, it is very true your citation alleges that I am locally so resident—that is not the fact: I protest against your jurisdiction, being a person not resident in the parish of St. James, Westminster; but being a person resident within the kingdom of Ireland—at Dublin or elsewhere."

Lady Donegal, however, does not think fit to take that objection; the objection is before her when she appears, not for the purpose of stating the objection, but she appears for the purpose of proceeding with the case and entering into the merits of the suit; and it is in fact an admission on her part that she is properly described as being resident within the parish of St. James, Westminster, and is within the jurisdiction of this Court in which the plaintiff desires to entertain the question.

Now it is said, notwithstanding this admission on her part of a fact, it then must be considered what the nature of the admission is, it is an admission by her of a fact which brings the case within the jurisdiction. It is said, notwithstanding, that she admits the fact which gives the Court jurisdiction: although she proceeds to the length not only of pleading and submitting her case to the consideration of the Court; yet she has a right to retire from that admission at any time before sentence pronounced; and that Lady Donegal in this case is not concluded, because sentence on the merits of the case not being pronounced, still she has a right to retire from the suit.

[608] If I had found that question concluded by authorities, whatever I might have thought of the reasons which had led to that conclusion, I must have been bound by them.

There is nothing so dangerous to the administration of justice as, because the principle of the authority does not appear to be present to the mind at the moment which induced the judge who decided that question to decide it in that manner, to go against it, and therefore it is always dangerous to disregard authorities. I am bound to say that no authority which has been cited to me to-day at all, as I consider it, touches essentially this question; that Lady Donegal or any other party who, admitting the fact which gives the jurisdiction to the Court, has a right to retire from an admission of that fact at any time before sentence.

No authority appears to me to go that length; there are expressions in that case in Carthew (p. 33) which would be consistent with such a statement of facts: but when you come to weigh all the expressions there used, my opinion is on that case that the weight of authority is the other way, and that what the Court there

means to decide is not that a party may retire at any time before sentence, but that a party can never retire who has pleaded and submitted to the jurisdiction. Taking this, therefore, as a question not prejudiced by authority, I am to consider it as a case standing on principle only. Now my learned friends whom I see around me know in a Court of law, and also in a Court of equity, that, though we have not precisely that point addressed to our consideration, yet every day we [609] have the point upon which necessarily the same principle comes to be decided. I state, without exception, as a general principle, that in Courts of equity as well as Courts of law, a party admitting a fact which does give jurisdiction to a Court, admitting it, and appearing and submitting to that jurisdiction upon general principles, and upon all analogies known to us, can never recede, or, as it is called in the Scotch law, resile from those facts and withdraw that admission.

My opinion, therefore, is that Lady Donegal is conclusively bound from any objection as to the want of jurisdiction, by the course she has taken in this cause. If, therefore, the right of Mr. Arthur Chichester to object to the question of jurisdiction is to depend upon the right of Lady Donegal, it will necessarily follow to be my opinion that as Lady Donegal is concluded from the objection, so Mr. Arthur Chichester must be concluded equally from the objection.

But then it comes to be considered this very important question ; namely, because Lady Donegal has concluded herself, has she therefore concluded Mr. Arthur Chichester, the intervening party? Now at first sight this objection appeared to me to be of very great weight ; and it appeared to me to be of great weight for this reason : Lady Donegal, like any other party, may admit, if she pleases, facts against her own interest, and by that admission may transfer the jurisdiction from a Court to which it does not correctly and legally belong ; she may certainly, if she pleases, do that. The provisions of the law are [610] made with a view for her benefit, and it is for the benefit of the suitors out of the jurisdiction that the law prevents inferior Courts from exercising that jurisdiction beyond its own limits, that persons may not be harassed by being called to contest questions out of the limits of their own local residence.

If a party therefore thinks fit to remove this advantage which the principle of the law, the canon law, the common law, and the statute law give her, she is at liberty to do so. But then if she chooses on her part to remove that advantage, can that prejudice the rights of a third person ?

It did therefore at first strike me to be very important to consider whether Lady Donegal's having waved this objection for herself, Mr. Arthur Chichester, a third person, could be prejudiced from that objection or her waver.

Now if it could be made out that Mr. Arthur Chichester could be prejudiced by her waving that objection, the conclusion that first struck my mind would necessarily follow : for it is utterly impossible that her acts could work an injury to third persons, if she thinks fit to wave a benefit which the Court gave her, and that that hurts a third person ; that cannot be.

When we come to consider the subject, the difficulty is to understand how the waver on her part can in any manner injure Mr. Arthur Chichester. If I could fancy any possible case in which the interest of Mr. Arthur Chichester would be prejudiced by this question being tried within the local jurisdiction of London, rather than the local jurisdiction where this lady was resident in Ireland, that would go a great way to determine my opinion in this case.

It is, however, because I cannot conceive on principle any prejudice which can arise to Mr. Arthur Chichester from this objection ; and therefore it does appear to me, on the best consideration which I can give the subject, that Mr. Arthur Chichester, as the intervening party, cannot relieve himself from that objection.

The jurisdiction of the Ecclesiastical Courts does not depend on the locality of the subject ; and if the jurisdiction of the Ecclesiastical Courts depended on the locality of the subject, then it is very plain that a party might be materially prejudiced from having a subject removed from one jurisdiction to another ; and it would be infinitely more convenient to a party with respect to the nature of the case, and the testimony he would bring on the case, that the suit could be instituted in the diocese of A. rather than in the diocese of B.

If therefore Lady Donegal, in such a case, transferred the jurisdiction from the diocese of A., where the Court had local jurisdiction in respect of the nature of the

subject, to B., I should be clearly of opinion that the intervening party could not be affected by her acts. It is perfectly plain that the Ecclesiastical Court has not jurisdiction with respect to the locality of the subject, but it depends entirely on the locality of the person.

Now if it depends entirely upon the locality of the person, I am to ask myself whether Mr. Arthur Chichester can be prejudiced in respect of this case, [612] if this question is to be tried in London rather than to be tried in Ireland, whether he can possibly be prejudiced by this being tried where he is himself locally resident, within the jurisdiction, or otherwise, the objection would be on him and he would not have to state that this suit is not to proceed because Lady Donegal is out of the jurisdiction: but that this suit is not to proceed because I am out of the jurisdiction, I am an intervening party, and I have a right to be heard by my interest in this suit; which in the result may materially prejudice me: and it must be tried where I am locally resident, and within that jurisdiction of the subject. But Mr. Arthur Chichester is within the jurisdiction of the diocese, and therefore that objection does not apply to him: it being, as I have stated, a case in which the jurisdiction depends, not on the subject, but on the locality of the person. So far from being an inconvenience to Mr. Arthur Chichester that this suit is instituted here, where he is locally resident; it may be convenient to him rather than that it should be elsewhere tried, if it could be elsewhere tried, where he was not locally resident.

It is therefore without entering further into the considerations which have been addressed to me on this subject, and confining my present view to the two present points; I have to declare that, neither on authority nor upon principle, can I hold that Lady Donegal is now at liberty to withdraw that admission of the fact on which the jurisdiction of the Court is founded. And I am further of opinion that Mr. Arthur Chichester, the intervening party, is bound by this admission to that jurisdiction, and that [613] he cannot be prejudiced by submission to it; and if his interests are in any manner affected, it is to his convenience and advantage, and not to his prejudice. It is therefore conformably to that view of the case that I understood that the quotations from Godolphin, Gale and other writers applied: the citation founds itself, and he cannot make an objection to the jurisdiction if the parties litigant have submitted to that jurisdiction.

Writ of prohibition refused.

[614] FORBES v. GORDON. Prerogative Court, Michaelmas Term, Nov. 14th, 1821.

—Imperfect papers established as codicils to a regularly executed will.

An allegation was given in on the part of Charles Forbes, Esq., the executor under the last will and testament of his uncle John Forbes, Esq., of New, in the county of Aberdeen, and of Fitzroy Square, in the county of Middlesex, which pleaded the following facts:—

First. That John Forbes, Esq., the testator in this cause, deceased, having on the 2d of May, 1820, made and duly executed his last will and testament in writing, did immediately after the execution thereof enquire of his solicitor, Mr. Julius Hutchinson, by whom the will had been prepared, whether any particular form of words would be requisite for the purpose of bequeathing legacies to relatives or friends: and upon being answered in the negative, so far as regarded absolute pecuniary bequests, he the said deceased then expressed his intention to make himself, at a future time, a codicil [615] containing bequests of that description. And that on or about the twelfth day of June, 1821, the said John Forbes called upon the said Julius Hutchinson, at his chambers in Lincoln's Inn, and delivered to him his aforesaid will, bearing date the second day of May, 1820, together with a paper writing being the testamentary paper or codicil now marked with the letter B; and he then mentioned to his said solicitor that he wished a new will to be prepared with such alterations to be made therein as were pointed out in the said paper writing marked B. And the said Julius Hutchinson, having read over the said paper of instructions in the presence of the said deceased, and observing that several of the alterations therein suggested would not be requisite, as the events and circumstances to which they referred were already provided for by his said will; he thereupon informed the said deceased that a codicil embracing the remainder of the wished for alterations would be sufficient. That the said Julius Hutchinson further observing that, by the said paper writing marked B, the bequest of the residuary estate as contained in the will was intended to be revoked, and not conceiving that complete instructions were contained in the

said paper writing for disposing of the same anew ; he asked the said deceased in what manner he wished the undisposed of residue to go to which the said deceased replied that " he meant it to go to his executors," adding that he supposed that would be the effect of the expressions used by him in the said paper of instructions ; for that having bequeathed the residue to his executors, they [616] would take the excess beyond what might be specifically bequeathed, or he the said deceased expressed himself in words to that or the like effect : but the said Julius Hutchinson did not commit the said deceased's explanation, in that behalf, to writing.

Secondly. That the whole body, series and contents of the said paper, writing, or codicil marked B, beginning and ending as is hereinbefore set forth, pleaded and referred to in the next preceding article, were and are of the proper handwriting of the said John Forbes the deceased in this cause.

Thirdly. That the deceased at the time of his delivering the aforesaid paper of instructions marked B to the said Julius Hutchinson, as before pleaded, was apparently in good health ; and having treated the subject as a matter to be attended to at his, the said Julius Hutchinson's, leisure, who had at that time occasion to go to the Continent upon particular business, the preparation of the said intended codicil was postponed by him as a business which might await his return ; previously to which the said deceased died suddenly, as hereinafter pleaded. That at the time of the said deceased's death the said original will and paper of instructions remained in the custody of the said Julius Hutchinson, for the purpose of his preparing a codicil, agreeably to the directions therein set forth.

Fourthly. That the deceased, who was at the age of seventy-eight years or thereabouts, was taken suddenly ill at his house in Fitzroy Square aforesaid, between nine and ten o'clock in the evening of the 20th day of June now last past, and died before [617] the following morning ; and on or about the thirtieth day of the said month of June, a search being made amongst his papers, the aforesaid testamentary paper or codicil marked A, beginning thus, "London, March 1st, 1821:" ending thus, "To the widow of my late nephew Thomas Forbes, I leave five hundred pounds," and subscribed by the said deceased on the three first pages thereof, was found in the left side of a writing table or desk in the dining room of the said deceased's house in Fitzroy Square, at which he usually wrote, and in which he kept his cash book and papers of value. That James Mindenhall, the butler of the said deceased, was in the habit of frequently going into his master's room to see whether he wanted any thing ; and did on the forenoon of the day of the said deceased's death, on entering the said dining room, observe the said deceased sitting at the aforesaid table or desk employed in writing, that he went near enough to the said deceased to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper : and that it was folded in the manner such paper usually is when written upon book-ways ; and the said deceased, on being so interrupted, did in the presence of the said James Mindenhall fold up the said paper, and put it into the left side of the said table or desk. And the party proponent doth allege and propound that when the said desk was searched as aforesaid, after the said deceased's death there was not any paper found therein which answered the description of that upon which the said James Mindenhall so saw the said deceased engaged in writing, except the aforesaid paper writing now marked A, pleaded and propounded in this cause, as a codicil to the will of the said deceased.

Fifthly. That the body, series, and contents of the paper writing marked A was in the handwriting of the deceased.

The following are copies of the testamentary papers propounded in this allegation.

A.

London, March 1st, 1821.

In the case of my inability to make a regular codicil to my will made and published on the second day of May, 1820, I desire the following to be taken as a codicil to, and as a further part of, my said will.

I revoke that part of my will wherein I bequeath in the ninth page thereof the residue of my personal estate to and among my grand nieces that may be living at the time of my death, and in lieu thereof, I will and bequeath to my grand nieces the sums that may fall into the residue on the death of such of my nieces as may die or depart this life without issue them surviving, to be paid to and divided among such of my grand nieces as may be in life at the death of every such niece respectively.

I desire my executors to give up to my tenants in Aberdeenshire the full half year's rent they may have to pay at the first term of Martinmas or Whitsunday, after my decease.

[619] As the ship "Bombay" is now on the last of her chartered voyages, my object in retaining an interest in her no longer exists, except in the event of her being chartered again on reasonable terms by the company, in which case I should be willing to make some sacrifice to get John Shepherd a command.

In case of the death of my cousin, the Reverend Thomas Gordon, and of my cousin the Reverend Robert Shepherd of Daviot, before me, I desire that the sum left to each of them by my will, may be divided equally among and between the widow and daughters of each.

I am the sole trustee to the marriage articles of Daniel Ross of Calcutta, with his late wife Elizabeth Forbes, its amount is 838l. 10s. 1d. in the consols, standing in the names of John Forbes, Charles and Michie Forbes, the husband has the interest during his life, and on his death it is to be divided among a large family.

I bequeath to my executors in trust five thousand pounds to be by them applied as donations to five of the hospitals supported by voluntary contributions, situate at or near the most public entrances into London, that admit of casualties at all hours of the day or night. I leave two thousand pounds to my executors in trust, for the purpose of building a bridge over the river Don, in Strathden, the situation to be chosen by them.

I bequeath the following legacies:—To Joseph Cotton, Esquire, of the Trinity House, [620] three thousand pounds; Major Daniel Mitchell, one thousand pounds; Mrs. Dorothy Morley, two thousand pounds; Miss Harriet Morley, one thousand pounds; Miss Caroline S. Patrick, one thousand pounds; to Lady Grant, the widow of the last Sir Archibald Grant, of Monymusk, I leave one thousand pounds; and to her five daughters, I bequeath to each of them five hundred pounds; to each of the three daughters of the late Mrs. Grant of Drunnnor, I bequeath five hundred pounds. To my remaining co-temporaries, John Forbes the comptroller-general, Gordon Forbes, and James Forbes of Seaton, I beg their acceptance of one hundred guineas for a ring each. To my old India friends, Edward Ravenscroft, Edward Russell Howe, James Smith, Thomas Wilkinson, William Page, John Morris, David Inglis, George Simson, Generals La Macquarrie and Benjamin Gordon, Alexander Gray, Paul Shewcroft, and Robert Henshaw, I request that each of them will accept of one hundred guineas as a mark of my regard. To my friend Alexander Tulloh, I leave one hundred guineas as a token of regard.

I leave my coachman and butler two hundred pounds each, over and above what they will be entitled to by my will.

I recommend Alexander Gray to be retained at a salary, to assist my executors in winding up my estate.

To William E. Montgomerie, son of my former commander Alexander Montgomerie, [621] Esq., of Annech Lodge, I bequeath five thousand pounds, for the esteem I bore his father, and the obligations I have been under to him.

I desire my executors to pay in five hundred pounds to the Middlesex hospital, as a donation from me.

To the widow of my late nephew (a) Thomas Forbes, I leave five hundred pounds.

B.

Personal Estate.

Omit altogether the exception of the ship "Bombay," which is repeated again in the page following.

Omit altogether the occupation of the house at Bellabeg by my niece Christian Stuart (since deceased) and place the provision for her daughter and son in its proper place.

Eleven lines in this page as marked thus "; to be omitted as unnecessary, as the individuals referred to in it are all of age.

It being evident that three of the four nieces there alluded to are past the age of childbirth; it is my meaning that at their death the principal sum from which they derive the annual income should be divided among the numbers of my great nieces that may be then alive, in place of making them my residuary legatees.

(a) This script was written on four sides of writing paper: the three first were signed by the deceased, the last was unsigned and not written to the end.

2d page,
bottom line

3d page.

4th page.

8th page.

necessary to decide. Possibly I might think that it is in a state that would leave it open to evidence: but it is a different question whether connected with circumstances, particularly those which passed at the execution of this will, and referring to the will, and being all in his own handwriting, and nothing at the conclusion to shew that more was intended, and the deceased himself not considering it as a regular codicil, it might not be considered as a complete paper. But the case is not left to this consideration. The paper begins thus: "In case of my inability to make a regular codicil to my will, made and published on the 2d of May, 1820, I desire the following to be taken as a codicil to, and as a further part of my said will." It is said that this is provisional and conditional: but the Court has in many instances decided that it means no more than "till I make a regular will, so long I adhere to this paper." At bottom of the first, second, and third pages he signs his name; he had not quite arrived at the bottom of the fourth page: it seems as if the paper was written at different times, from the different colour of the ink. The coachman and butler have legacies given them; and it is said that a similar notice being taken of them in B, shews an abandonment of A; to me it seems exactly the reverse, finding B would not do, he afterwards adds to the other codicil; this it may be [626] said is mere conjecture, but it is quite as good as the other conjecture.

Taking this paper under these circumstances, though not actually concluded, yet the signing at the bottom of several pages goes pretty strongly to shew that he had made up his mind as far as it went. Not being arrived at the bottom, he still kept it open in order to add from time to time any legacies he might wish to give; this is the natural construction, and slight evidence would satisfy my mind on this head.

Now what is pleaded in the fourth article could leave no doubt "that the deceased was taken suddenly ill between nine and ten o'clock of the evening of the 20th of June, and died before the next morning; that paper A was found in the left side of his writing desk in the dining room, at which he usually wrote, and in which he kept his cash book and papers of value; that James Mindenhall, the butler, going into his master's room to see if he wanted any thing, did on the forenoon of the day of the deceased's death, on entering the room, see the deceased sitting at the aforesaid desk, employed in writing; that he went near enough to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper, and folded in the manner such paper usually is when it is written book-ways; and the deceased on being interrupted, folded up the paper and put it into the left side of the desk; and that when the desk was searched after his decease there was not any paper found in it which answered the description of that [627] on which the butler saw the deceased writing, except the paper marked A." This description, as far as it goes, identifies the paper. It has been said that these circumstances will not be sufficient to identify the paper; I cannot anticipate what the evidence will be, but I must assume these facts to be true for the purpose of this discussion; and if a witness, beyond all exception, states these circumstances in a credible manner, it will, I think, bring up the case to the highest demand of the requisites called for by this Court: on the most strict interpretation of our rules, it would be entitled to probate.

Under all these circumstances I shall allow the whole allegation to go to proof.

Six witnesses were examined in support of this allegation, viz.: Julius Hutchinson, the solicitor; Thomas Hodgson Holdsworth, his clerk; Thomas Wilkinson, John Forbes Mitchell, Alexander Gray and James Mindenhall, the deceased's butler.

Judgment—*Sir John Nicholl*. In this case I have no sort of doubt. Two papers are propounded as codicils to the will of John Forbes; and though the Court went a good deal into the question, when the admissibility of the allegation was discussed: yet in a case of property of this magnitude, and where minors are concerned, I shall examine the question in detail, and with some degree of minuteness.

[628] The magnitude of the property does not vary the principles on which the question is to be decided. Cases of imperfect papers occur so frequently in these Courts, and the principles on which they turn are so familiar to us, that it is almost unnecessary to state them: yet it may be a satisfaction to the parties; and it is useful for the public that the Court should from time to time repeat and enforce those principles.

If a paper on the face of it is in legal construction imperfect and unfinished, evidence of intention is let in, and must be gone into; and it may be shewn, either that the deceased abandoned the intention he once had of giving effect to the paper, or that

he was in progress towards finishing it, and only prevented by the act of God from completing it. The presumption is against an imperfect paper, and the burthen of proof against the party setting it up; but the degree of presumption varies according to the state of imperfection in which the paper presents itself. In some instances it is so completely a mere memorandum that proof of intention cannot be made but by strong extrinsic circumstances; in other cases it is so nearly perfect—it has on the face of it such strong indications of testamentary intention, that slight circumstances are sufficient to outweigh the presumption against it. It may happen in some instances that it is a matter of legal doubt from the force of the instrument. A disposition of personal property in the handwriting of the deceased requires no formality to give it effect, if none is intended by the writer.

[629] Paper A professes to be a codicil to a regular will, it is described as a codicil, it is all in the handwriting of the deceased; at the bottom of three sides of the paper the deceased has signed his name; at the bottom of the fourth sheet, which is not finished, he has not signed his name.

On the face of the instrument the Court is of opinion that in legal construction and rational interpretation, it is imperfect and unfinished; and that evidence of intention must be gone into, either to shew that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. The amount of the evidence required must depend, not on one circumstance or one witness, but upon all the circumstances taken together.

The deceased lived in Fitzroy Square, he died suddenly at nearly seventy-eight years of age, left a fortune amounting to 350,000*l.*, which he had acquired as a merchant; his relations entitled in distribution were, a sister and several nephews and nieces; his extrinsic relations were great nephews and great nieces, and he had a number of friends. He made arrangements for the distribution of his real estates in Scotland in 1816: in May, 1820, he executed a long and formal will, disposing of considerable property, and appointing his executors trustees for the residue, which he bequeathed to his great nieces, intending to give further legacies as appears by a reservation in the residuary clause itself; this intention however does not depend on the formal (a) reservation in the residuary clause: the [630] deceased intimated his intention of making such a codicil to Mr. Hutchinson, his solicitor, on the day he executed his will.

This evidence lays a strong foundation of probability of intention as to any codicil appearing in the handwriting of the deceased on his death. On the 30th of June, ten days after his death, his friends met at his house, and the clause in page nine of the will attracting their attention, and something also mentioned by James Mindenhall, the confidential servant of the deceased, induced them to search for a codicil: they found it in a repository. But when had the deceased last a reference to this paper? incontestably within a few hours of his death; not only it was found uppermost in his desk, but it was lying on his banker's book, it must have been placed there after he had had recourse to his banker's book, in which he had that very morning entered the check he had given to Mr. Gray for 600*l.*—which check bears date the same day: so that on the very day of his death he had made this entry. Paper A is loosely put upon it, so that it must have been in his hands when he used the book. There is no reason whatever to doubt the correctness of the facts. In the afternoon of that day the deceased was better than he had been for some days: but about nine o'clock in the morning as he was coming out of the watercloset he was suddenly struck with death, and expired within an hour.

[631] Under these circumstances is there the least reason to presume that there was an abandonment of this paper, and not a continuance of intention which was only prevented by the act of God?

Another paper marked B is propounded, which was delivered to his solicitor on the 12th of June; it is argued that this shews an abandonment of A; but the whole of B is not of the character of the codicil the deceased proposed to make; B was for

(a) The reservation was thus expressed: "And as to all the rest, residue, and remainder, of my personal estate and effects, whatsoever and wheresoever, not herein-before otherwise specifically bequeathed or disposed of (except such part or parts thereof, as I shall or may give or dispose of by any codicil or codicils to this my will), give and bequeath the same," &c.

the purpose of making alterations in the will itself, not to substitute any papers in the place of A. This is the necessary construction that must be put upon B, the will was to be re-drawn to contain these alterations. There could not be the least inconsistency in adhering to A and to B. The deceased does not shew the slightest departure from his intention; when he comes to his solicitor he finds it not necessary to have a new will, but that a codicil would leave him at full liberty. It is dated March, 1821. It begins with stating "that, in case of his inability to make a regular codicil to his will (made and published on the 2d of May, 1820), he desires the following to be taken as a codicil to, and as a further part of his said will.

I cannot admit this to be a conditional codicil as pressed in argument.

The next clause relates to the residue; it has been observed that this alteration was not communicated to his solicitor: but, if the intention occurred, it is not improbable that he thought himself incompetent to such an alteration of his personal property; at the bottom of the first page he subscribes his name, the same on the two next; he [632] continues legacies on the fourth, but not quite to the bottom, and to that he does not sign his name.

What is the rational inference from this? that by signing at the bottom to the three first pages he had so far made up his mind: it is not a deliberative memorandum: he means by signing it to give it a greater degree of authenticity. Secondly, in going on and not reaching the bottom of the fourth page, the inference arises that the paper is still in progress; and when I understand that he has only given about 30,000*l.* out of 130,000*l.* to which the residue amounted, the probability is that he was deliberating, not as to what he had written, but as to what further he should give; this is confirmed by the appearance of the instrument. If my eye does not deceive me, several legacies are written at different times; some are rather in a different character of handwriting from the preceding bequest; the last legacy of all seems written in a different character, and with a different pen and ink.

This being the appearance of the paper so conformable to the codicil he had declared his intention of making when he made his will, though not finally completed, it has every appearance of intention that he meant to complete it; and I will not say that sudden death alone, and its being found in his repository, would not have been sufficient to entitle it to probate. But there is much further evidence; how is it found? it was his habit to write at a desk in the dining parlour, and his habit when interrupted to put papers at which he was writing into that desk; the evidence of Mr. Williams, of Mr. Gray, and Mr. Holdsworth goes to shew that on [633] opening this desk this paper was found uppermost in it: it is found exactly in the situation which leads to the confirmation of the inference; he wished the will of 1820 to continue as his will subject to these considerations. Mr. Hutchinson's evidence is complete.

The evidence and this paper lead me to draw these conclusions.

First. That when he carried B to his solicitor to have a new will made from it he had not the slightest intention of suspending A.

Secondly. That after his conversation with Mr. Hutchinson he adopted the suggestion of a codicil only, on the principle that no new will was necessary to make the alterations he proposed.

Thirdly. That this evidence comes out stronger than I had expected from the allegation, to shew that the directions given by the deceased were final; and the deceased having left his solicitor with full instructions to prepare the instrument, I apprehend by every rule of this Court the instructions are valid, remaining with the solicitor it was owing to his act alone, that the formal codicil was not prepared before the intervention of death.

What may be the effect of this codicil this Court cannot enquire into, it belongs to a Court of construction to do this. It is said the Court of construction cannot carry the intention of the deceased into execution; but there is no reason why if it should be so, in every other respect the paper, as far as it can be corroborated, shall not be carried into effect; the very clause in B [634] respecting the residue is a strong corroboration of A.

Indeed, with respect to A, I see no reason to doubt that he was employed on that paper on the day of his death, for there is no doubt of the identity of the paper. Whether he added to it or not on that day there is no direct evidence: but the fair result of all the evidence is that he did. On Tuesday Mindenhall swears he saw him

employed on this paper, he saw him with the pen in his hand. It is fully proved to me that on Wednesday he had this paper under his consideration; the circumstances all tend to the same conclusion. Forbes Mitchell strongly corroborates Mindenhall, and says that when the paper was first discovered there was a degree of freshness in the writing and colour of the ink which was passed away. We very well know that when ink is exposed to the air it becomes considerably blacker; his observation, therefore, does not apply to the present state of the paper, though there is still some difference in the appearance of the last sentence.

The whole of the evidence establishes the fact that the intention of the deceased went with this paper till his death: that it was in progress; and that the final completion of it was prevented by the intervention of death.

I have no doubt or difficulty in the case. The Court has been admonished of the necessity of adhering to its principles. No person can feel more strongly than I do the necessity of adhering to them: but to pronounce for these papers will be no departure from the strictest principles which [635] have at any time governed the Court. Whereas, on the contrary, to reject these papers would be to violate the most established rules, and to defeat the intention of the testator. Indeed, if I were to do so, I do not see how after this any imperfect paper could be carried into effect.

JONES v. BEYTAGH AND BEYTAGH. Prerogative Court, Michaelmas Term, Nov. 21st, 1821.—Letters of administration which had been granted to the executor of a creditor, rescinded before they had passed the seal, at the suit of the executor of a residuary legatee.

Henry Cuniffe died in 1810 leaving a will, in which John Wedderburn, Dominick Beytagh, and Henry Concannon, were appointed executors; and Dominick Beytagh and Henry Concannon residuary legatees. These several persons all died without taking out any probate or administration.

On the 24th of May, 1815, letters of administration of the goods of Henry Cuniffe, limited to substantiate proceedings in the Court of Chancery, were granted to John Williams, the nominee of Mary Jones, widow. In January, 1817, letters of administration with the will annexed, of the rest of the goods of Henry Cuniffe were granted to Mary Jones as a creditor of the deceased.

In January, 1821, Mary Jones died. On the 2d of April, 1821, a decree issued against James Beytagh, and Edward Beytagh executors under the will of Dominick Beytagh, calling upon them [636] to accept or refuse letters of the goods of Henry Cuniffe left unadministered by Mary Jones, or shew cause why the same should not be granted to Frederick Jones, the son and executor of the said Mary Jones. This decree was served on the executors, James Beytagh and Edward Beytagh on the 10th of April, and returned into Court on the 9th of May. And on the 16th of May, no appearance being given for the executors, letters of administration were decreed to Frederick Jones; when however they were taken to be sealed a caveat was found to have been entered in the seal-book against them.

An appearance was now given for the executors of Dominick Beytagh, and the Court was called upon to rescind the letters of administration.

Jenner for the executors. By a misapprehension of the solicitor directions were given to the proctor to enter a caveat instead of to oppose the grant of the letters of administration to Frederick Jones. This caveat was entered on the 9th of May, and the parties in Ireland had no knowledge of the proceedings till the letters of administration were granted. As they have not passed the seal the Court cannot hesitate to rescind the decree. Letters of administration are the right of the representative of the residuary legatee; practice has made this the law of the Court.

Swabey and Phillimore contra, for Mr. Frederick Jones. The grant is discretionary with the Court. Our parties have been put to great expense and inconvenience and the executors cannot be heard to [637] aver the laches of their own agent as an excuse for having suffered the proceedings to go on so long unopposed.

The Court rescinded the decree, and granted the administration to the representative of the residuary legatee, on his paying the expences incurred in taking out the decree.

GODDARD v. CRESSONIER OTHERWISE GODDARD. Prerogative Court, Michaelmas Term, Nov. 27th, 1821.—When a person entitled to an administration is resident abroad the Court will expect due notice to be given to him before it grants

administration to another party.—The mere service of the decree on the Royal Exchange will not be sufficient.

Maria Goddard died in the department of Oise in France in August, 1808, intestate leaving a widow. Application was now made for administration by the next of kin. The widow was stated to be resident in France, a notice had been served in the usual manner on the Royal Exchange.

Per Curiam. It must be understood that, where the person entitled to an administration is resident in France, the Court will expect something more than a service on the Royal Exchange. It will expect that due diligence shall be used to apprize him of the application.

[638] Under the circumstances of this case the deceased has been dead many years, and no application has been made by the widow, and the next of kin is equally entitled with her, though the Court generally gives it to the widow. I shall therefore grant the administration.

[639] LEE AND PARKER v. CHALCRAFT. Arches Court, Michaelmas Term, Dec. 1st, 1821.—Church rate not proved to be unequally laid.

Appeal from the Consistory Court of Winchester.

Judgment—*Sir John Nicholl*. This is an appeal from the Consistory Court of Winchester, brought by the churchwardens of Headley against John Chalcraft for subtraction of two church rates, one of one, the other of two shillings in the pound; the libel was admitted in August, 1818; an allegation was given in by Chalcraft, in which he pleads that the rates were unequal, that Chalcraft is rated higher than others, and particularly than Parker. Four witnesses were produced on this allegation in July, 1819, but they were not examined till January, 1821. Chalcraft has ex-[640]amined witnesses, and thereby pointed out the true point at issue; (a) the

(a) *Thompson and Sandford v. Cooper*. Arches Court of Canterbury, Easter Term, April 24th, 1799.—A church rate resisted on the ground of inequality. Objection overruled and the rate confirmed.

An appeal from the Dean and Chapter of St. Paul's.

Sir John Nicholl against the rate. This is to be determined as a poor rate. If one person is omitted enough is proved, and the rate ought to be quashed not amended.

The King v. St. Catharine's Gloucester, Douglas, 626. *The King v. Sandwich*, Douglas, 541. *The King v. Madder*, 1 T. R. 625.

Judgment—*Sir W. Wynne*. This is a business of confirming a church rate for the parish of Chiswick, commenced in the Court of the Dean and Chapter of St. Paul's, in whose jurisdiction Chiswick is. The rate is dated the 7th November, 1793; the churchwardens prayed confirmation of it; a caveat was entered; Joseph Cooper a parishioner appeared and objected to the rate; an allegation was brought in and admitted, and reformed on the 17th of May, 1794; a long time has been taken in the proof, they were not assigned to prove all facts till January, 1796: what was the reason of this delay is not explained, it is to be lamented in any cause, especially in such a one as this; but it has been truly said that is not to be objected to one party only—it could not have stood so long if pressed. It is asserted that it was to give another allegation, and, when given, that depended long before the Judge below gave his final opinion. On the bye-day of Trinity Term, 1797, it was admitted being first reformed. An appeal was brought. The Court was of opinion that some facts alleged were new; that in the new church rate there were different valuations; and that it was necessary to see how the churchwardens had conducted themselves. Many witnesses have been examined, ten on one plea, thirteen on the other. Interrogatories have been administered, but no allegation has been given in by the churchwardens, they rest entirely on the observations to be made on the proofs produced. It is extraordinary that it should be made matter of complaint that the cause should be heard on the party's own evidence. Out of thirteen special objections the counsel give up six, they rest on specific objections to six and on some general objections.

The first article pleads generally that the rate is unequally made—this is a truism, it must be equally made—no law is required—reason shews it must be so. The way to prove it will depend on the opinion and judgment of the witnesses they examine; and they are their own witnesses; there are only two, and one only of those is a parishioner, who think the rate unequal. Thirteen of their own witnesses verily

churchwardens produced witnesses on the third article of their libel as it is said, indeed I don't see on what other plea this could be produced; but it was quite evident what the question at issue was. Eight witnesses were ex-[641]-amined, the cause came on for hearing—and the Court pronounced that the churchwardens had wholly failed in the proof of their libel. I am of [642] opinion that the objection pressed, as to there having been no appeal, is not substantiated; and that the inhibition having been taken out within ten [643] days, which I am afraid is the practice, may be considered, together with the protest of appealing, as equivalent to an appeal.

[644] With respect to the other preliminary objections, it is the rule of the Court in all appeals from the country jurisdictions to endeavour to get at the substantial justice of the case, at least in all questions which regard a civil right; in criminal

believe that the churchwardens and parishioners have framed the rate in an equal manner according to the best of their judgment, and that it was considered as proper and reasonable by all except by Cooper and Perry. There was an appeal by Cooper against the poor-rate, in conformity to which this rate was made—it failed, the rate was confirmed, and he was condemned in 20l. costs.

It is objected that it does not appear whether the objection was taken by Cooper, certainly it does not: but there is a strong presumption, if there were two rates made conformably to each other, and apparently made by the same party, and he brought so much evidence that he made the case as strong as he could—if this were the same objection of inequality, it is hardly to be supposed that he would not take it.

Secondly. It is stated that divers parishioners were not assessed at all, though they were not paupers and rented premises of from 10l. to 13l. per annum. It is objected that it is clear in law that the parishioners have no power to make exemption; stating two cases, *The King v. St. Catherine's, Gloucester*, and another to shew it will void a poor rate. Most undoubtedly, *prima facie* the omission of a person bound to pay makes an unequal rate. It is broadly laid down I suppose in the report that the person omitted is equally liable to pay as another: but does it appear that it was ever laid down that no person on any account may be omitted because he is poor? Would it be to consult the interest of the parish by so doing? The evidence shews that they always have omitted persons not parishioners, not renting to the value of 10l. having many non-parishioners resident to cultivate garden ground who would be made parishioners. We are not to consider the policy or the humanity of the rule, but whether the parish may make such a rule for the advantage of the parish, for it may be prudent and for the benefit of the parish—it was not taken up on this occasion—it had been used for fourteen years—if they have a right to make such a rule, and I see no law against it, I think from what is said of the rule here that the church rate made according to the poor rate is just and prudent; but it is true also that the decisions applying to poor rates at common law are not binding in cases of church rate. The poor rates are a great, heavy, and constant charge, church rates are not so—they are seldom heavy, and there is no reason to be so precise respecting them. If there is an inaccuracy, and the Court sees nothing done out of partiality, or by which the parties are materially injured, it would not quash the rate. But the rule here I take to be perfectly legal and prudent.

How then do they prove that persons are omitted who ought to be rated?

Manham says he is a journeyman carpenter, rents to the value of six guineas, and is able and willing to pay, but it is shewn that he is a parishioner of Harrow and is within the rule.

Walham is within the same rule, he has specified several but does not attempt to prove any rent to any value. The witnesses are under-tenants—all poor—some receive donations from the parish—they are not capable of paying. Then this general article is done away with, for none are not rated who should be under the rule mentioned.

Penny's charge is next. Perry, who is not an inhabitant, would give more—he means in his opinion—Penny says he cannot speak with certainty—he thinks he was assessed at 30l. but raised to 40l. by the commissioners of the land-tax—he appealed, but could not obtain relief—as the commissioners said this could not reduce his assessment unless there was a reduction in the parish rates. They reduced theirs, and then the commissioners reduced their rate.

Thus he was rated at 40l., but obtained a reduction from the commissioners of the land-tax. They were responsible, and did not act without caution, but took the

cases it may be otherwise. If we were not to admit the irregularities which take place in the Courts below, the plaintiff could hardly ever succeed in obtaining justice before this tribunal.

[645] In the present case the true point is the unequal rating of the defendant, if he can make out that he was unjustly rated he will be entitled to the pro-[646]tection of the law. No answers are given in by him to the libel; instead of answers he gives an allegation, which I must consider *loco responsi*, in [647] which he recites the making of the rate, indeed even his own witnesses authenticate this by speaking to the handwriting of the persons signing it. The point therefore pressed as to there being no proof of the existence of the rate, or of the churchwardens being duly elected, is answered by this.

assessment of the parishioners as good ground to go upon. Has the Court then any ground to say that this is not a fair assessment, or that the parishioners would have altered it, if there had been no ground to go upon? It is a strong affirmation of the opinion the commissioners entertained if the parishioners acted upon it. This objection is, I think, completely refuted.

As to Sich and Co. who are brewers, they are rated for very considerable premises at 182l., it is said the value is 224l. The evidence in support of this is Clark, who says that at the time mentioned they were so rated, being charged amongst others for Fosley's tenement: but in the rate it is shewn that Fosley himself is rated—he was assessed 197l. to the other rate, which is further confirmation that the tenement was not then in the possession of Sich and Co. Sich gives an account of the manner in which he gave in his premises to the vestry; the principal objection was, that part was rated at 30l. instead of 46l. The answer is that 42l. was in part—that it was inhabited by poor persons, who being assessed, the parish found it difficult to get the rates: he therefore undertook to pay at the rate of 30l. for them; both he and the minister say that the arrangement was fair and profitable for the parish.

It is objected that in the poor rates the occupier must be rated, or they cannot see the circumstances of the case, and there may be ground for collusion. Supposing that in no case the poor rates could be so assessed, the rule would not apply so strictly to church rates; but that the parishioners assembled in vestry, if they see it advantageous, may not accept such an offer there can be no rule: there is no reason why they should accept it, if it is not an advantage—the vestry determined it to be so, and I think with good right, and that it was for the benefit of the parish.

There is no ground for the objection as to Sich.

It is said that Armstrong is rated at 66l., whereas the value is 70l. Perry states as he does to the other article, that he would give more. Wood is assessed to the house tax; the assessment is 70l. Armstrong says he has been a parishioner ten years—he bought an old house, which was assessed at 24l.—he built more, it was then assessed at 50l. or 51l. up to 1791, with a malt-house at 15l.; it was so assessed till Cooper became assessor of the land tax, and it was then assessed at 70l. for the house, though the malt-house was taken down: he appealed to the vestry—they reduced the assessment to 65l.—he was raised afterwards to 76l.—and was reduced on an appeal to 66l., and so assessed to the parochial taxes—he was afterwards assessed 70l. to the house tax, but did not think the object worth appealing.

Trebeck thinks he was fully rated. Williams says he was so rated at 66l. but then that there was a difference between this rate and an assessment to the King's taxes; but is there ground for the Court to say, because he was rated higher to the King's taxes, therefore the parish is wrong? I think they are better judges, and have perfect grounds to abide by their assessment.

Simpkin is said to be rated at 110l., instead of 150l. Perry would give 150l. Simpkin himself states the facts. The premises were let to Sir Francis Buller, who quitted them because the rent was too high. For nine months he endeavoured to get a tenant at 120l. or 110l. No one would offer more than 100l., and that for a boarding school. He then pulled down many large rooms and stabling for twelve horses, not as improvements; the court wall was rebuilt, for it fell down. He was assessed higher; he applied for relief, and the parish and the commissioners relieved him, paying 140l. for one year, which he was advised to do, and not to stand out. He did go himself and desire to be rated at 120l. because Sir Francis Buller was so rated, and

On both sides they produce witnesses simply confined to the question whether the party has been unduly rated, that is, whether Chalcraft is comparatively rated more than Parker or the other parishioners. In such a case as this I must take the presumption to be in favour of the rate, that it was necessary for the repairs of the church, and that it was generally equal, otherwise the minister and inhabitants would not have signed it.

The assessment of the parishioners to a rate of this description is the very object of their meeting in vestry. They assemble there with their minister at their head to consider this question. If Chalcraft did not resort to the vestry in the first instance, he neglected his duty; every person liable to be assessed ought to attend at the vestry. [648] Two rates are made by different assessments, and all I find is that this person has not paid his rate. It is said that the rate appears in many instances unequal: but it is in a slight degree; and if some witnesses are correct, this individual is the person who has been under-assessed; and we know that a parish will frequently under-assess an individual who is disposed to be litigious. If the rate is, as has been argued, generally unequal, the proper mode would have been to have entered a caveat against it. The practice of applying to the ordinary to confirm a rate is unfortunately often omitted. I must presume the rate was regularly enforced. The objection raised in the plea is not to the rate generally: but to the rating of this individual. The allegation itself takes an odd course, not that it was an unequal pound rate, or that his land was not worked according to the value of the rate taken: but that it is rated at less

would not have it said that he stood out and objected: but he swears that at that time the value was not more than 110l. which he could not get.

Whitham was surcharged by the assessors to the house tax. Whitham gives an account of what passed at the vestry when he was assessed. He was assessed at 18l. 10s. Settled at vestry at 28l. In 1792 he was assessed at 45l. He meant to appeal, but was prevented by illness. In 1793 he was assessed at 63l.; he appealed, but was not relieved; he attended at vestry—was put to question, and it was agreed that 45l. was a fair rate. He was so rated—he appealed again, and was reduced. Then the opinion of the parish is confirmed by the collector of the land tax, which is sufficient for the Court to say that the objection is not proved.

De Volle is assessed at 30l., 16l. for new stables, 8l. for grounds, these they plead to be of greater value. Besides the rent, 1500l. was paid for the surrender of a lease and improvements, and to conceal the true value and screen it from the assessors; the consideration was not to be inserted in the assessment: but by the advice and contrivance of Thompson it has been omitted and added to the appraisal of stock.

The new stables are stated to be of greater value; three witnesses have been examined as to this. Mary Atkins, wife of the former occupant, says she believes 30l. was reserved—she has no knowledge that 1500l. has been paid, an appraisal of stock, &c. was made, and it was understood that 1500l. was paid, which he received, but she understood that he gave part of it back. George Taylor, who appraised the stock, knows nothing of the 1500l. There could hardly be a lease out in two years, therefore the fact of the 1500l. is not proved; mere invention according to the evidence. That it was let for 30l. is proved when the rate was made; 42l. was paid afterwards: but could the parties foresee this? they had no grounds to consider it worth more than 30l.

With respect to the new stables there is much confusion, and witnesses do not seem clearly to understand it—all prove that they understood this same piece of land was let for 10l. It seems taken for granted he held the whole of the large stables; whereas it is clearly proved that he never did; he was at some time in possession of part, for which they suppose he paid 18l.; two other witnesses say that it was not to their knowledge in his possession then; how it appeared to the vestry they cannot tell; they have not produced De Volle, if they had, or any person present at vestry, it probably would have appeared. But there is no ground to pronounce that it was not a fair assessment, which was made by persons who appear to have acted with as much care and caution as the parishioners appear to have done, weighing all the circumstances which came before them.

As to the charge against Thompson of concealment, there is no proof of it whatever. I do think myself bound to pronounce on this objection as on the others, that it is utterly unfounded.

than Parker's, because one is rated at 13s., the other at 8s. 6d., an acre, the rate is not a correct rate; he should have brought evidence to shew what his farm was worth an acre, and what the other's farm was worth. As it is, he proves nothing. The number of acres is no proof of the annual value of the farm. As it is here stated, one farm seems to have had two, while Parker's had 92, acres of furze land. Independently of that, the evidence is only of the actual value in 1820, that is no proof of the actual value in 1813 or in 1818. One farm may have improved, and waste land may have been brought into cultivation, the other may be worn out or new land. Chalcraft's two farms are rated at [649] 85l. per annum, and stated to be about 135 acres. There is no attempt to prove they are not worth so much; nor any attempt to shew that the sum Chalcraft is called upon to pay is larger than his proportion ought to be to the general burthens of the parish; but the objection is confined to one point, that he is charged at a higher rate than Parker or that Parker was under-assessed; a ground of this kind must be most clearly made out to sustain the objection. It would be hardly possible to enforce any rate, if a person of a litigious spirit can select some one individual and say, I am rated at more than that individual, in such a case the defendant must make out the inequality in the clearest manner possible. The defendant has produced four witnesses to shew that he was comparatively over-rated: but their evidence goes to their opinion merely. On the other hand, eight witnesses are produced by the churchwardens, who are decidedly of a different opinion. And the Court is called upon to fix its judgment on the few against the many. It is said they are persons of greater skill; and generally it must be admitted persons of skill will outweigh numbers. It is said one of them is a surveyor; and I perceive he describes himself as a yeoman and a surveyor. I find on the other side a witness of the name of Harrison, who describes himself as having been for twenty years in the habit of valuing land; and I do not know why his opinion should not be as good as that of a professed surveyor. There is no ground on which I can sufficiently rely that one should outweigh the other. Opinions are against opinions. Eight as-[650]sent, four dissent; the weight of evidence is rather on the other side. The defendant has produced another piece of evidence, if evidence it can be called: how it got into the cause does not appear; viz. a poor's rate, in which it appears that Chalcraft was lowered from 85l. to 80l. per annum, and Parker raised from 170l. to 175l., this is no proof to me of a difference of value; they might have been lowered for peace or for a satisfactory compromise. But this assessment to the poor rate was in 1820, and furnishes no proof of inequality in 1813 or 1818: this ex post facto rate, therefore, will not establish the inequality of the two rates sued for.

I am of opinion that the defendant has failed in his allegation; and the result of the evidence has satisfied me that the rate was honestly and fairly made; and that the defendant not being able to justify the subtraction, the churchwardens are entitled to a sentence in their favour: I think that the Judge of the Court below did wrong; and that I am bound to protect the parish officers. On public grounds therefore I give costs against Chalcraft: but at the same time, for the sake of harmony, I should recommend the parish to enter into an arrangement with him respecting the expences.

This then is the case: This gentleman has taken upon himself to enter into the suit, not as injured himself, but on general objections on which it ought not to be considered; it appears that the parishioners in general, except himself and one or two more, are satisfied, and have reason to be satisfied, as they endeavoured to make the rate justly. I will not say that the opinion of the parishioners is a bar to the objections of any individual: but an individual who undertakes to make objections in such a case must be sure of his ground, and must prove his objections. In this case he has failed in his proof; and I should not do justice if I did not decree that he should pay the expences which the parish have incurred in the defence of this suit.

TABLE OF CASES IN VOLUME I.

	PAGE
Abbott <i>v.</i> Abbott, 2 Phill. Ecc. 578	1237
Ackerley <i>v.</i> Oldham, 1 Phill. Ecc. 248	974
Addams <i>v.</i> Kneebone, 2 Phill. Ecc. 124	1096
Agg <i>v.</i> Davies, 2 Phill. Ecc. 341	1164
Akerman <i>v.</i> Gybbon, 2 Lee, 510	422
Aleson <i>v.</i> Aleson, 2 Lee, App. 576	445
Alfray <i>v.</i> Alfray, 2 Lee, 547	435
Allen <i>v.</i> Allen, 2 Lee, 244	328
Anderson <i>v.</i> Welch, 1 Lee, 577	212
Andrew <i>v.</i> Raymond, 2 Lee, App. 571	444
Andrews <i>v.</i> Litton, 3 Phill. Ecc. 18	1245
Andrews <i>v.</i> Powis, 1 Lee, 242	90
Anonymous, 2 Lee, 542	433
Anthony <i>v.</i> Seger, 1 Hag. Con. 9	457
Appleby <i>v.</i> Appleby, 1 Lee, 135	50
Argar <i>v.</i> Holdsworth, 2 Lee, 515	424
Arkley <i>v.</i> Arkley, 3 Phill. Ecc. 500	1397
Arnold <i>v.</i> Earl, 2 Lee, 380	376
Arnold <i>v.</i> Earle, 2 Lee, 529	428
Atkinson <i>v.</i> Barnard (Lady Anne), 2 Phill. Ecc. 316	1156
Aughtie <i>v.</i> Aughtie, 1 Phill. Ecc. 201	961
Austen <i>v.</i> Dugger, 3 Phill. Ecc. 120	1275
Bagnall <i>v.</i> Downing, 2 Lee, 3	244
Baily <i>v.</i> Baily, 1 Lee, 536	198
Baker <i>v.</i> Russell, 1 Lee, 167	62
Balfour <i>v.</i> Carpenter, 1 Phill. Ecc. 204, 221	961, 966
Barclay <i>v.</i> Marshall, 2 Phill. Ecc. 188	1116
Bardin <i>v.</i> Calcott, 1 Hag. Con. 14	459
Barham <i>v.</i> Barham, 1 Hag. Con. 5	455
Barrow <i>v.</i> Barrow, 2 Lee, 335	360
Bartholomew <i>v.</i> Henley, 3 Phill. Ecc. 317	1337
Barton <i>v.</i> Ashton, 1 Lee, 350, 460, 533	129, 170, 197
Barton <i>v.</i> Robins, 3 Phill. Ecc. 455, n.	1382
Barton <i>v.</i> Wells, 1 Hag. Con. 21	461
Bates <i>v.</i> Gittens, 3 Phill. Ecc. 412	1368
Baxtar <i>v.</i> Buckley, 1 Lee, 42	17
Bayard <i>v.</i> Morphew, 2 Phill. Ecc. 321	1158
Bayle <i>v.</i> Mayne, 3 Phill. Ecc. 504	1398
Beaumont <i>v.</i> Perkins, 1 Phill. Ecc. 78	919
Beauraine <i>v.</i> Beauraine, 1 Hag. Con. 498	630
Beebee <i>v.</i> Beebee, 2 Lee, 546	435
Beever <i>v.</i> Beever, 3 Phill. Ecc. 261	1319
Bell <i>v.</i> Timiswood, 2 Phill. Ecc. 22	1066
Bennett <i>v.</i> Jackson, 2 Phill. Ecc. 190	1116
Best <i>v.</i> Best, 2 Phill. Ecc. 161	1107
Bethun <i>v.</i> Dinmure, 1 Lee, 158	59
Bigg <i>v.</i> Keen, 1 Lee, 124	46
Billingshurst <i>v.</i> Vickers, 1 Phill. Ecc. 187	956
Bird <i>v.</i> Bird, 1 Lee, 209, 345, 418, 531, 572, 621	78, 127, 154, 196, 210, 227

	PAGE
<i>Bittleston v. Clark</i> , 2 Lee, 229, 248	323, 330
<i>Blackmore v. Brider</i> , 2 Phill. Ecc. 359	1169
<i>Blackwood v. Damer</i> , 3 Phill. Ecc. 458, n.	1384
<i>Blaquiere v. Blaquiere</i> , 3 Phill. Ecc. 258	1319
<i>Boddicott v. Dalzeel</i> , 2 Lee, 294	346
<i>Bond v. Bond</i> , 1 Lee, 333, 354, 429	123, 131, 159
<i>Bond v. Faikney</i> , 2 Lee, 371	373
<i>Bone v. Spear</i> , 1 Phill. Ecc. 345	1005
<i>Bosworth v. Cradock</i> , 1 Lee, 337	124
<i>Bouchier v. Horngold</i> , 1 Lee, 515	190
<i>Boughey v. Moreton</i> , 2 Lee, 532	429
<i>Bowes v. Malpas</i> , 2 Lee, 358	368
<i>Bowzer v. Ricketts</i> , 1 Hag. Con. 213	529
<i>Boxley v. Stubington</i> , 2 Lee, 501, 537	419, 431
<i>Braddyll v. Jehen</i> , 2 Lee, 193	310
<i>Bradshaw v. Bradshaw</i> , 2 Lee, 270, 289	338, 344
<i>Bransby v. Haines</i> , 1 Lee, 120	45
<i>Breewood v. Calemberg</i> , 2 Lee, 368	372
<i>Breithwaite v. Hollingshead</i> , 1 Hag. Con. 470	620
<i>Brettell v. Wilmot</i> , 2 Lee, 548	435
<i>Bridgen's Case</i> , 2 Lee, 539, n.	432
<i>Briggs v. Morgan</i> , 2 Hag. Con. 324	758
<i>Briggs v. Morgan</i> , 3 Phill. Ecc. 325	1339
<i>Brisco v. Brisco</i> , 3 Phill. Ecc. 38, 206	1251, 1303
<i>Brisco v. Brisco</i> , 2 Hag. Con. 199	714
<i>Briscoe v. Bradish</i> , 1 Lee, 125	46
<i>Broome v. Ellis</i> , 2 Lee, 525	427
<i>Brotherton v. Hellier</i> , 1 Lee, 599	219
<i>Brotherton v. Hellier</i> , 2 Lee, 55, 131	262, 289
<i>Brouncker v. Brouncker</i> , 2 Phill. Ecc. 57	1077
<i>Brown v. Atkins</i> , 2 Lee, 1	243
<i>Brown v. Hallett</i> , 2 Lee, 418	390
<i>Browning v. Reane</i> , 2 Phill. Ecc. 69	1080
<i>Buckeridge v. Gooch</i> , 2 Phill. Ecc. 131	1098
<i>Buckle v. Buckle</i> , 3 Phill. Ecc. 323	1339
<i>Budd v. Silver</i> , 2 Phill. Ecc. 115	1094
<i>Burgess v. Burgess</i> , 1 Hag. Con. 384	590
<i>Burgess v. Burgess</i> , 2 Hag. Con. 223	723
<i>Burgis v. Burgis</i> , 1 Lee, 121	45
<i>Burn v. Farrar</i> , 2 Hag. Con. 369	773
<i>Burnell v. Jenkins</i> , 2 Phill. Ecc. 391	1178
<i>Burrell v. Eastlow</i> , 1 Lee, 159	59
<i>Burroughs v. Griffiths</i> , 1 Lee, 544	201
<i>Butler v. Butler</i> , 1 Lee, 38	16
<i>Butler v. Butler</i> , 2 Phill. Ecc. 37	1071
<i>Butler v. Dolben</i> , 2 Lee, 265, 312, 319	336, 352, 354
<i>Butler v. Robson</i> , 3 Phill. Ecc. 368	1358
<i>Cadogan (Lord) v. Cadogan (Lady)</i> , 2 Hag. Con. 4, n.	649
<i>Calamy v. Hyde</i> , 1 Lee, 423, n.	156
<i>Canning v. Sawkins</i> , 2 Phill. Ecc. 293	1149
<i>Cardale v. Harvey</i> , 1 Lee, 177	66
<i>Carolus v. Lynch</i> , 1 Lee, 13	6
<i>Carpenter (Lord) v. Shelford</i> , 2 Lee, 502	419
<i>Carr v. Marsh</i> , 2 Phill. Ecc. 198	1118
<i>Carstairs v. Pottle</i> , 2 Phill. Ecc. 30	1068
<i>Cartwright v. Cartwright</i> , 1 Phill. Ecc. 90	923
<i>Cartwright v. Clerke</i> , 1 Phill. Ecc. 122	933
<i>Caryll v. Knight</i> , 2 Lee, 142	293
<i>Chamberlayne v. Dart</i> , 1 Lee, 401	148

	PAGE
Chambers <i>v.</i> Chambers, 1 Hag. Con. 439	610
Chapman <i>v.</i> Guy, 2 Lee, 32	254
Chapman <i>v.</i> Whitby, 3 Phill. Ecc. 370	1356
Chettle <i>v.</i> Chettle, 3 Phill. Ecc. 507	1399
Chittenden <i>v.</i> Knight, 2 Lee, 559	439
Clark <i>v.</i> Clark, 2 Lee, 269	337
Clarke <i>v.</i> Douce, 2 Phill. Ecc. 335	1162
Clutton <i>v.</i> Cherry, 2 Phill. Ecc. 373	1173
Cole <i>v.</i> Corder, 2 Phill. Ecc. 106	1092
Cole <i>v.</i> Rea, 2 Phill. Ecc. 428	1189
Conran <i>v.</i> Lowe, 1 Lee, 630	230
Cook <i>v.</i> Cowper, 2 Lee, 388, 487, 504	379, 414, 420
Cooke <i>v.</i> Cooke, 2 Phill. Ecc. 40	1072
Cooper <i>v.</i> Allnutt, 3 Phill. Ecc. 165	1289
Cope <i>v.</i> Burt, 1 Hag. Con. 434	608
Cope <i>v.</i> Burt, 1 Phill. Ecc. 224	967
Cornish <i>v.</i> Cornish, 1 Lee, 14	6
Coussmaker <i>v.</i> Chamberlayne, 2 Lee, 243	328
Cox <i>v.</i> Goodday, 2 Hag. Con. 138	694
Cox <i>v.</i> Peck, 1 Lee, 557	205
Cox <i>v.</i> Rieraft, 2 Lee, 373	374
Cox <i>v.</i> Thompson, 1 Lee, 282, 529	105, 195
Cozens <i>v.</i> Helyar, 2 Lee, 556	438
Craig <i>v.</i> Lester, 3 Phill. Ecc. 189, n.	1297
Cremer <i>v.</i> Dakins, 2 Lee, App. 591	451
Cresswell <i>v.</i> Cosins, 2 Phill. Ecc. 281	1145
Crompton <i>v.</i> Butler, 1 Hag. Con. 460	617
Crump, In re, 3 Phill. Ecc. 497	1396
Cunningham <i>v.</i> Ross, 2 Lee, 272, 478	338, 411
Cunningham <i>v.</i> Seymour, 2 Phill. Ecc. 250	1134
Dabbs <i>v.</i> Chisman, 1 Phill. Ecc. 155	946
Dalrymple <i>v.</i> Dalrymple, 2 Hag. Con. 54, App. 1	665, 802
Dampier <i>v.</i> Colson, 2 Phill. Ecc. 54	1076
Davies <i>v.</i> Davies, 1 Lee, 444	164
Days <i>v.</i> Jarvis, 2 Hag. Con. 172	705
Dean <i>v.</i> Russel, 3 Phill. Ecc. 334	1342
Deardsley <i>v.</i> Fleming, 2 Lee, 98	277
Dearle <i>v.</i> Southwell, 2 Lee, 93, 119	275, 284
Denny <i>v.</i> Barton, 2 Phill. Ecc. 575	1236
Dent <i>v.</i> Dent, 1 Lee, 442	164
Devereux <i>v.</i> Bullock, 1 Phill. Ecc. 60, 77	914, 919
Dickenson <i>v.</i> Dickenson, 2 Phill. Ecc. 173	1111
Dickes <i>v.</i> Huddesford, 1 Phill. Ecc. 278, n.	984
Diddear <i>v.</i> Faucit, 3 Phill. Ecc. 580	1421
Dobbyn <i>v.</i> Corneek, 2 Phill. Ecc. 102	1090
Dobie <i>v.</i> Masters, 3 Phill. Ecc. 171	1291
Dobson <i>v.</i> Cracherode, 2 Lee, 326	357
Donegal (Marchioness of) <i>v.</i> Donegal (Marquis of), 3 Phill. Ecc. 586, 597	1422, 1426
Droney <i>v.</i> Archer, 2 Phill. Ecc. 327	1159
Drummond <i>v.</i> Hamilton, 1 Lee, 357	132
Drury <i>v.</i> Harrison, 3 Phill. Ecc. 515, n.	1401
Dunn <i>v.</i> Dunn, 2 Phill. Ecc. 403	1182
Dunn <i>v.</i> Dunn, 3 Phill. Ecc. 6	1241
Dyer <i>v.</i> Calwell, 2 Lee, 17, 120	249, 285
Eaton <i>v.</i> Bright, 2 Lee, 85, 161	272, 299
Ecclesiastical Courts in England (An Act for the better Regulation of), 1 Hag. Con. App. 24	646

	PAGE
Elliot <i>v.</i> Holwell, 1 Lee, 574	211
Elliott <i>v.</i> Gurr, 2 Phill. Ecc. 16	1064
Elme <i>v.</i> Da Costa, 1 Phill. Ecc. 173	952
Elwes <i>v.</i> Elwes, 2 Lee, App. 573	444
Elwes <i>v.</i> Elwes, 1 Hag. Con. 269	549
Emerson <i>v.</i> Boville, 1 Phill. Ecc. 342	1004
Evans <i>v.</i> Evans, 1 Hag. Con. 35	466
Evans <i>v.</i> Knight, 3 Phill. Ecc. 413	1369
Ewing <i>v.</i> Wheatley, 2 Hag. Con. 175	706
Fanshaw <i>v.</i> Verdon, 1 Lee, 625	229
Faremouth <i>v.</i> Watson, 1 Phill. Ecc. 355	1009
Fawcett <i>v.</i> Jones, 3 Phill. Ecc. 434, 490	1375, 1394
Fawkener <i>v.</i> Jordan, 2 Lee, 327	358
Fellowes <i>v.</i> Stewart, 2 Phill. Ecc. 238, 257	1131, 1136
Ferrers (Lady) <i>v.</i> Ferrers (Lord), 1 Hag. Con. 130	500
Fielder <i>v.</i> Fielder, 2 Hag. Con. 193	712
Filewood <i>v.</i> Kemp, 1 Hag. Con. 487, 494	626, 629
Filewood <i>v.</i> Marsh, 1 Hag. Con. 478	623
Finucane <i>v.</i> Gayfere, 3 Phill. Ecc. 405	1366
Firth <i>v.</i> Finch, 1 Lee, 437, 579	162, 212
Fitzgerald <i>v.</i> Fitzgerald (Lady Mary), 1 Lee, 649	237
Fitzgerald <i>v.</i> Fitzgerald (Lady Mary), 2 Lee, 228, 263, 312	323, 335, 352
Fleet <i>v.</i> Holmes, 2 Lee, 101, 140	278, 292
Florance <i>v.</i> Florance, 2 Lee, 87	273
Footo <i>v.</i> Richards, 1 Lee, 265	98
Forbes <i>v.</i> Burt, 3 Phill. Ecc. 196, n.	1299
Forbes <i>v.</i> Gordon, 3 Phill. Ecc. 614	1431
Forfar <i>v.</i> Heastie, 2 Lee, 299	348
Forster <i>v.</i> Forster, 1 Hag. Con. 144	504
Fownes <i>v.</i> Ettricke, 2 Lee, 257	333
Fox <i>v.</i> Gilbert, 2 Lee, 151	295
France <i>v.</i> Aubrey, 2 Lee, 534	430
Franco <i>v.</i> Alverenza, 1 Lee, 187, 659	69, 240
Frank <i>v.</i> Carr, 1 Lee, 403	149
Freeman <i>v.</i> Freeman, 1 Lee, 343	127
Friswell <i>v.</i> Moore, 3 Phill. Ecc. 135	1280
Gardener <i>v.</i> Johnston, 1 Lee, 358	132
Garnett <i>v.</i> Sellars, 1 Lee, 186, n.	69
Gascoyne <i>v.</i> Chandler, 2 Lee, 241	327
Gascoyne <i>v.</i> Priddle, 2 Lee, 48	259
Gaudey's Case, 1 Lee, 352, n.	130
Gibson <i>v.</i> Child, 2 Lee, 173	303
Gilbert <i>v.</i> Buzzard, 2 Hag. Con. 333, App. 167	761, 887
Gilbert <i>v.</i> Buzzard, 3 Phill. Ecc. 335	1342
Gilliat <i>v.</i> Gilliat, 3 Phill. Ecc. 222	1307
Girardot Buisseries <i>v.</i> Albert, 2 Lee, 51	260
Glen <i>v.</i> Webster, 2 Lee, 31	253
Goddard <i>v.</i> Cressonier, 3 Phill. Ecc. 637	1438
Goldsmid <i>v.</i> Bromer, 1 Hag. Con. 324	568
Goodall <i>v.</i> Goodall, 2 Lee, 264, 384	335, 378
Goodman <i>v.</i> Goodman, 2 Lee, 2, 109	243, 281
Gordon <i>v.</i> Eyre, 2 Lee, 262	335
Grace <i>v.</i> Calemberg, 1 Lee, 76	29
Grant <i>v.</i> Atkinson, 1 Lee, 168	62
Grant <i>v.</i> Grant, 1 Lee, 592	217
Grant <i>v.</i> Leslie, 3 Phill. Ecc. 116	1274
Green <i>v.</i> Mayo, 2 Lee, 521	426

	PAGE
Green <i>v.</i> Skipworth, 1 Phill. Ecc. 53	912
Greenstreet <i>v.</i> Cumyns, 2 Phill. Ecc. 10	1062
Griffiths <i>v.</i> Bennett, 2 Phill. Ecc. 364	1170
Grove <i>v.</i> Addis, 2 Lee, App. 561	440
Groves <i>v.</i> Hornsey (Rector, &c., of), 1 Hag. Con. 188	521
Guest <i>v.</i> Shipley, 2 Hag. Con. 321	757
H. M. Procurator General <i>v.</i> Stone, 1 Hag. Con. 424	604
Hackman <i>v.</i> Black, 2 Lee, 251	331
Halford <i>v.</i> Halford, 3 Phill. Ecc. 98	1269
Harford <i>v.</i> Morris, 2 Hag. Con. 423	792
Harley <i>v.</i> Bagshaw, 2 Phill. Ecc. 48	1074
Harris <i>v.</i> Bedford, 2 Phill. Ecc. 177	1112
Harris <i>v.</i> Harris, 2 Hag. Con. 148	697
Harris <i>v.</i> Harris, 2 Phill. Ecc. 111	1093
Harris <i>v.</i> Jones, 1 Lee, 174	65
Harrison <i>v.</i> All Persons in General, 2 Phill. Ecc. 249	1134
Harrison <i>v.</i> Rhodes, 1 Lee, 197	73
Harry <i>v.</i> Littleton, 1 Lee, 201	75
Haselfoot <i>v.</i> Haselfoot, 2 Lee, 477	411
Hawke (Lord) <i>v.</i> Corri, 2 Hag. Con. 280	743
Hawke <i>v.</i> Omnes, 2 Lee, 262	335
Hawkins <i>v.</i> Compeigne, 3 Phill. Ecc. 11	1243
Hay <i>v.</i> Mullo, 2 Lee, 273	338
Hay <i>v.</i> Mullo, 3 Phill. Ecc. 194, n.	1298
Hayes <i>v.</i> Watts, 3 Phill. Ecc. 43	1252
Hayward <i>v.</i> Dale, 2 Lee, 333	360
Heath <i>v.</i> Heath, 2 Lee, App. 562	440
Heath <i>v.</i> Watts, 1 Phill. Ecc. 82, n.	921
Hellier <i>v.</i> Hellier, 1 Lee, 281	104
Helyar <i>v.</i> Helyar, 1 Lee, 472	174
Hendren <i>v.</i> Shaw, 1 Lee, 51	20
Herbert (Lord) <i>v.</i> Butera (Dowager Princess of), 2 Phill. Ecc. 430	1190
Herbert <i>v.</i> Helyar, 1 Lee, 452, 539, 567	167, 199, 208
Herbert (Lady) <i>v.</i> Herbert (Lord), 2 Hag. Con. 263	737
Herbert (Lord) <i>v.</i> Herbert (Lady), 2 Phill. Ecc. 430	1190
Herbert (Lady) <i>v.</i> Herbert (Lord), 3 Phill. Ecc. 34, 58	1250, 1257
Herbert <i>v.</i> Wright, 2 Lee, 311	352
Herridge <i>v.</i> Bransey, 2 Lee, App. 563	441
Hervart <i>v.</i> Guise (General), 1 Lee, 160	59
Hibben <i>v.</i> Calemberg, 1 Lee, 558, 655	206, 239
Hibben <i>v.</i> Calemberg, 1 Phill. Ecc. 166	949
Higginson <i>v.</i> Colcot, 1 Lee, 138	51
Hill <i>v.</i> Bulkeley, 1 Phill. Ecc. 280	985
Hillier <i>v.</i> Milligan, 1 Lee, 398, 532	147, 196
Hillyer <i>v.</i> Milligan, 2 Lee, 8	245
Hodgkinson <i>v.</i> Wilkie, 1 Hag. Con. 262	546
Hoffman <i>v.</i> Norris, 2 Phill. Ecc. 230, n.	1129
Holden <i>v.</i> Holden, 1 Hag. Con. 453	614
Hollway <i>v.</i> Clarke, 1 Phill. Ecc. 339	1003
Holmes <i>v.</i> Holmes, 2 Lee, 90, 116	274, 283
Hooton <i>v.</i> Head, 3 Phill. Ecc. 26	1247
Hopper <i>v.</i> Davis, 1 Lee, 640	234
Horner <i>v.</i> Horner, 1 Hag. Con. 337	573
Hubbard <i>v.</i> Beckford, 1 Hag. Con. 307	562
Huet <i>v.</i> Dash, 2 Lee, 511	422
Hughes <i>v.</i> Cook, 1 Lee, 386	142
Hughes <i>v.</i> Herbert, 2 Lee, 287	343
Hughes <i>v.</i> Ricards, 2 Lee, 543	434
Hunt <i>v.</i> Sarell, 1 Lee, 589	216

	PAGE
Hunter <i>v.</i> Bulmer, 3 Phill. Ecc. 260	1319
Huntington <i>v.</i> Huntington, 2 Phill. Ecc. 213	1123
Hurley <i>v.</i> Ackland, 1 Lee, 573	211
Hurrell <i>v.</i> Hurrell, 1 Lee, 168	62
Hussey <i>v.</i> Andrews, 2 Lee, 143	292
Hutchins <i>v.</i> Denziloe, 1 Hag. Con. 170, 181	514, 519
Ingram <i>v.</i> Strong, 2 Phill. Ecc. 294	1149
Jackson <i>v.</i> Whitehead, 3 Phill. Ecc. 577	1420
Jarratt <i>v.</i> Steele, 3 Phill. Ecc. 167	1290
Jehen <i>v.</i> Jehen, 1 Lee, 273, 401, 568	101, 148, 209
Jekyll (Lady Ann) <i>v.</i> Jekyll, 1 Lee, 419	155
Jenkins, In re, 3 Phill. Ecc. 33	1249
Jenkins <i>v.</i> Bayley, 1 Lee, 568	209
Jenkins <i>v.</i> Moore, 2 Lee, 298	347
Jennens <i>v.</i> Beauchamp (Lord), 1 Phill. Ecc. 155	946
Jodrell <i>v.</i> Crop, 1 Lee, 284	105
Johnson <i>v.</i> Armond, 2 Lee, 387	379
Johnston <i>v.</i> Johnston, 1 Phill. Ecc. 447	1039
Johnston <i>v.</i> Parker, 3 Phill. Ecc. 39	1251
Jones <i>v.</i> Beytagh, 3 Phill. Ecc. 635	1438
Jones <i>v.</i> Jones, 2 Phill. Ecc. 241	1132
Jones <i>v.</i> Robinson, 2 Phill. Ecc. 285	1146
Jones <i>v.</i> Yarnold, 2 Lee, App. 568, 570	442, 443
Judger <i>v.</i> Mann, 1 Lee, 338	125
Kearney <i>v.</i> Whitaker, 2 Lee, 324	356
Keeling <i>v.</i> M'Egan, 1 Lee, 607	222
Keller <i>v.</i> Bevoir, 2 Lee, App. 563	441
Kemp <i>v.</i> Wickes, 3 Phill. Ecc. 264	1320
Killican <i>v.</i> Parker (Lord), 1 Lee, 662	241
King <i>v.</i> Gordon, 2 Lee, 139	291
Kinleside <i>v.</i> Harrison, 2 Phill. Ecc. 449	1196
Kirkhouse <i>v.</i> Fawkener, 2 Lee, 325, 331	357, 359
Kirkman <i>v.</i> Kirkman, 1 Hag. Con. 409	598
Kirkwall (Lady) <i>v.</i> Kirkwall (Lord), 2 Hag. Con. 277	742
Knight <i>v.</i> Cook, 1 Lee, 413	152
Kooystra <i>v.</i> Buyskes, 3 Phill. Ecc. 531	1406
L'Huile <i>v.</i> Wood, 2 Lee, 22	250
Lagden <i>v.</i> Flack, 2 Hag. Con. 303	751
Lagden <i>v.</i> Robinson, 1 Hag. Con. 501	631
Lamkin <i>v.</i> Babb, 1 Lee, 1	1
Langmead <i>v.</i> Lewis, 2 Phill. Ecc. 325	1159
Lascelles <i>v.</i> Lascelles, 1 Lee, 443	164
Last <i>v.</i> Brown, 1 Lee, 433	160
Laud <i>v.</i> Browne, 1 Lee, 10	5
Le Briton <i>v.</i> Le Quesne, 2 Lee, 261	334
Lee <i>v.</i> Chalcraft, 3 Phill. Ecc. 639	1439
Leggatt <i>v.</i> Leggatt, 1 Lee, 348, 408	129, 150
Leighton <i>v.</i> Leighton, 2 Lee, 356	368
Leith <i>v.</i> Cliff, 2 Phill. Ecc. 389	1178
Lethes <i>v.</i> Edsforth, 1 Lee, 462	171
Levy <i>v.</i> Lockart Gordon, 2 Lee, 297	347
Lewis <i>v.</i> Bulkeley, 1 Lee, 191, n.	71
Lewis <i>v.</i> James, 1 Lee, 612	224
Lewis <i>v.</i> Lewis, 3 Phill. Ecc. 109	1272
Lewis <i>v.</i> Owen, 1 Lee, 538	198
Liebenrood <i>v.</i> Lamson, 2 Lee, 558	439

	PAGE
Lilly v. Hardy, 1 Lee, 52	20
Lindo v. Belisario, 1 Hag. Con. 216, App. 7	530, 636
Line v. Harris, 1 Lee, 146	54
Linthwaite v. Galloway, 2 Lee, 414	388
Lloyd v. Beatniffe, 2 Lee, App. 561	440
Lloyd v. Lloyd, 2 Lee, 321, 523	355, 426
Lloyd v. Nevill, 1 Lee, 559	206
Lloyd v. Owen, 1 Lee, 434	161
Lock v. Lake, 2 Lee, 420	390
Loder v. Letsome, 2 Lee, 96	276
Loveden v. Loveden, 2 Hag. Con. 1	648
Loveden v. Loveden, 1 Phill. Ecc. 208	962
Lovekin v. Edwards, 1 Phill. Ecc. 179	953
Lovett v. Harkness, 1 Lee, 332	122
Loxley v. Jackson, 3 Phill. Ecc. 126	1277
Lucas v. Lucas, 2 Lee, App. 576	445
Lynch v. Bellew, 3 Phill. Ecc. 424	1372
Lyon v. Furness, 3 Phill. Ecc. 316	1337
Machin v. Grindon, 2 Lee, 335, 406	360, 385
Maidman v. All Persons in General, 1 Phill. Ecc. 51	911
Maidman v. Malpas, 1 Hag. Con. 205	526
Mansfield v. Shaw, 3 Phill. Ecc. 22	1246
Martin v. Robinson, 2 Lee, 397, 535	382, 430
Martin v. Wotton, 1 Lee, 130	48
Maskeline v. Harrison, 2 Lee, 258	333
Master v. Stone, 2 Lee, 339	362
Mayhew v. Mayhew, 2 Phill. Ecc. 11	1062
Maynard (Lord Viscount) v. Brand, 3 Phill. Ecc. 501	1397
Mayo (Lady) v. Brown, 1 Lee, 271, 570	100, 210
Mayo (Lady) v. Brown, 2 Lee, 391	380
Meddowcroft v. Gregory, 2 Hag. Con. 207	717
Meddowcroft v. Gregory, 2 Phill. Ecc. 365	1171
Mercer v. Morland, 2 Lee, 499, 506	418, 420
Methuen v. Methuen, 2 Phill. Ecc. 416	1186
Middleton v. Janverin, 2 Hag. Con. 437	797
Mill v. Blandford, 2 Lee, 487	414
Miller v. Sheppard, 2 Lee, 506, 520	421, 425
Millington v. Sorsby, 1 Lee, 525	194
Minty v. Gould, 1 Lee, 414	153
Moore v. De La Torre, 1 Phill. Ecc. 375	1016
Moore v. Hacket, 2 Lee, 86, 147	273, 294
Moore v. Moore, 1 Phill. Ecc. 406	1026
Moore v. Paine, 2 Lee, App. 595	452
Moore v. Smart, 3 Phill. Ecc. 190, n.	1297
Moore v. Stevens, 1 Lee, 409	151
Morgan v. Hopkins, 2 Phill. Ecc. 582	1238
Morris v. Darling, 2 Lee, 175	303
Mortimer v. Mortimer, 2 Hag. Con. 310	753
Moss v. Brander, 1 Phill. Ecc. 254	976
Murphy v. McCarthy, 2 Lee, 529	428
Murphy v. Mason, 1 Lee, 349	129
Musto v. Sutcliffe, 3 Phill. Ecc. 104	1271
Myddleton v. Rushout, 1 Phill. Ecc. 244	973
Napier, In re, 1 Phill. Ecc. 83	921
Nash v. Nash, 1 Hag. Con. 140	503
Nathan v. Morse, 3 Phill. Ecc. 529	1405
Naylor v. Stainsby, 2 Lee, 54	261

	PAGE
Neagle <i>v.</i> Cantillon, 2 Lee, 246	329
Newbery <i>v.</i> Goodwin, 1 Phill. Ecc. 282	985
Newell <i>v.</i> Weeks, 2 Phill. Ecc. 224	1126
Newham <i>v.</i> Raithby, 1 Phill. Ecc. 315	996
Nichols <i>v.</i> Nichols, 2 Phill. Ecc. 180	1113
North <i>v.</i> Barker, 3 Phill. Ecc. 307	1334
Norton <i>v.</i> Seton, 3 Phill. Ecc. 147	1283
Oliver <i>v.</i> Oliver, 1 Hag. Con. 361	581
Otway <i>v.</i> Otway, 2 Phill. Ecc. 95, 109	1088, 1092
Panchard <i>v.</i> Weger, 1 Phill. Ecc. 212	964
Parham <i>v.</i> Templar, 3 Phill. Ecc. 223, 515	1307, 1401
Parker <i>v.</i> Parker, 2 Lee, 382	377
Parkin <i>v.</i> Bainbridge, 3 Phill. Ecc. 321	1338
Parnell <i>v.</i> Parnell, 2 Hag. Con. 169	704
Parnell <i>v.</i> Parnell, 2 Phill. Ecc. 158	1106
Parsons <i>v.</i> Miller, 2 Phill. Ecc. 194	1117
Partington <i>v.</i> Barnes in Surrey (Rector, &c., of), 2 Lee, 345	364
Paske <i>v.</i> Ollat, 2 Phill. Ecc. 323	1158
Passmore <i>v.</i> Passmore, 1 Phill. Ecc. 216	965
Patrick <i>v.</i> Patrick, 3 Phill. Ecc. 496	1396
Patten <i>v.</i> Castleman, 1 Lee, 199, 387	74, 143
Pawlet <i>v.</i> Head, 2 Lee, App. 565	441
Peake <i>v.</i> Barne, 2 Lee, App. 587	449
Pearson <i>v.</i> Gamon, 2 Lee, 268	337
Pelham <i>v.</i> Newton, 2 Lee, 46	259
Pertreis <i>v.</i> Tondear, 1 Hag. Con. 136	502
Pettman <i>v.</i> Bridger, 1 Phill. Ecc. 316	996
Philipson <i>v.</i> Harvey, 2 Lee, 344	364
Phillips <i>v.</i> Alcock, 2 Lee, 97	277
Phillips <i>v.</i> Bignell, 1 Phill. Ecc. 239	972
Pickering <i>v.</i> Towers, 2 Lee, 401, 413	384, 388
Pierrepont <i>v.</i> Holbecke, 2 Lee, 252	331
Pipon <i>v.</i> Wallis, 1 Lee, 402	148
Pitt <i>v.</i> Pitt, 2 Lee, 508	421
Plunkett <i>v.</i> Sharp, 2 Lee, 35	255
Plunkett <i>v.</i> Sharpe, 1 Lee, 439, 623	163, 228
Pohlman <i>v.</i> Untzellman, 2 Lee, 319	355
Pool <i>v.</i> Pool, 2 Phill. Ecc. 119	1095
Portland (Duke of) <i>v.</i> Bingham, 1 Hag. Con. 157	509
Pouget <i>v.</i> Pouget, 2 Hag. Con. 142	695
Pouget <i>v.</i> Tomkins, 1 Phill. Ecc. 499	1056
Powell <i>v.</i> Burgh, 2 Lee, 517	424
Prentice <i>v.</i> Farrand, 1 Lee, 347	128
Prentice <i>v.</i> Prentice, 3 Phill. Ecc. 311	1335
Price <i>v.</i> Scott, 1 Lee, 12	6
Pringle <i>v.</i> Brown, 1 Lee, 123	46
Pritchard <i>v.</i> Dalby, 1 Hag. Con. 186	520
Proctor <i>v.</i> Proctor, 2 Hag. Con. 292	747
Procurator General (H. M.) <i>v.</i> Stone, 1 Hag. Con. 424	604
Prout <i>v.</i> Creswell, 1 Lee, 36	15
Pytt <i>v.</i> Fendall, 1 Lee, 381, 553	141, 204
Radcliff <i>v.</i> Venfield, 1 Lee, 272	101
Ramsay <i>v.</i> Calcot, 2 Lee, 322	356
Randall <i>v.</i> Collins, 2 Lee, 217	319
Raymond <i>v.</i> Watteville (The Baron de), 2 Lee, 358, 495, 551	369, 417, 436
Read <i>v.</i> Phillips, 2 Phill. Ecc. 122	1096
Reddall <i>v.</i> Leddiard, 3 Phill. Ecc. 256	1318

	PAGE
Redmill <i>v.</i> Redmill, 3 Phill. Ecc. 410	1368
Rees <i>v.</i> Harris, 2 Lee, 18	249
Rees <i>v.</i> Rees, 3 Phill. Ecc. 387	1361
Reeves <i>v.</i> Freeling, 2 Phill. Ecc. 56	1077
Reeves <i>v.</i> Glover, 2 Lee, 270, 359	337, 369
Reeves <i>v.</i> Reeves, 2 Phill. Ecc. 117, 125	1094, 1097
Reilly <i>v.</i> Rivett, 1 Phill. Ecc. 80, n.	920
Renault <i>v.</i> Saulnier, 1 Lee, 216	80
Repington <i>v.</i> Holland, 2 Lee, 106, 254	280, 332
Reynolds <i>v.</i> White, 2 Lee, 214	318
Rich <i>v.</i> Chamberlayne, 1 Lee, 134	50
Richards <i>v.</i> Richards, 2 Lee, App. 588	449
Richardson <i>v.</i> Claney, 2 Phill. Ecc. 229, n.	1128
Rickards <i>v.</i> Mumford, 2 Phill. Ecc. 23	1066
Riler <i>v.</i> Cosen, 2 Lee, 189	309
Riler <i>v.</i> Cousins, 1 Lee, 653	238
Riler <i>v.</i> Cozen, 1 Lee, 212	79
Roberts <i>v.</i> Roberts, 2 Lee, 399	383
Robins <i>v.</i> Wolseley, 1 Lee, 616	225
Robins <i>v.</i> Wolseley, 2 Lee, 34, 149, 421	254, 294, 391
Robinson, In re, 3 Phill. Ecc. 511	1400
Robinson <i>v.</i> Chamberlayne, 2 Lee, 129	288
Robinson <i>v.</i> Robinson, 2 Lee, App. 593	451
Rockell <i>v.</i> Youde, 3 Phill. Ecc. 141	1281
Rodd <i>v.</i> Lewis, 2 Lee, 176	304
Roper <i>v.</i> Roper, 3 Phill. Ecc. 97	1269
Rose <i>v.</i> Lee, 3 Phill. Ecc. 566	1417
Rowland <i>v.</i> Jones, 2 Lee, 191	309
Ruding <i>v.</i> Smith, 2 Hag. Con. 371	774
Rumsey <i>v.</i> Tizard, 1 Lee, 537	198
Ryan <i>v.</i> Ryan, 2 Phill. Ecc. 332	1161
Rymes <i>v.</i> Clarkson, 1 Phill. Ecc. 22	901
St. Helens (Lord) <i>v.</i> Exeter (Marchioness of), 3 Phill. Ecc. 461, n.	1385
St. John's, Margate (Churchwardens of) <i>v.</i> St. John's, Margate (Parishioners, &c., of), 1 Hag. Con. 198	524
St. Thomas's Hospital, Southwark (Governors of) <i>v.</i> Trehorne, 1 Lee, 126	47
Salmon <i>v.</i> Cromwell, 3 Phill. Ecc. 220	1307
Sandford <i>v.</i> Vaughan, 1 Phill. Ecc. 39, 128	907, 935
Satterthwaite <i>v.</i> Satterthwaite, 3 Phill. Ecc. 1	1240
Saville <i>v.</i> Morgan, 1 Lee, 431	160
Scott <i>v.</i> Rhodes, 1 Phill. Ecc. 12	898
Scrimshire <i>v.</i> Scrimshire, 2 Hag. Con. 395	782
Searle <i>v.</i> Price, 2 Hag. Con. 187	710
Seeman <i>v.</i> Seeman, 1 Lee, 180	67
Serocold <i>v.</i> Hemming, 2 Lee, 490	415
Sewell <i>v.</i> Twyford, 2 Lee, 150	295
Shand <i>v.</i> Gardiner, 1 Lee, 529	195
Shand <i>v.</i> Gardiner, 2 Lee, 135	290
Shaunessy <i>v.</i> Allen, 1 Lee, 9	4
Sheafe <i>v.</i> Rowe, 2 Lee, 415	389
Sheffield <i>v.</i> Ball, 2 Lee, 291	345
Sherard <i>v.</i> Sherard, 2 Phill. Ecc. 251	1135
Sikes <i>v.</i> Snaith, 2 Phill. Ecc. 351	1167
Sinclair <i>v.</i> Sinclair, 1 Hag. Con. 294	557
Smelridge <i>v.</i> Edgworth, 2 Lee, App. 577	446
Smith <i>v.</i> Corry, 1 Lee, 418, 432	154, 160
Smith <i>v.</i> Crofts, 2 Lee, 557	439
Smith <i>v.</i> Huson, 1 Phill. Ecc. 287, 306	987, 993
Smith <i>v.</i> Lovegrove, 2 Lee, 162	299

	PAGE
Smith <i>v.</i> Oram, 2 Lee, 256	333
Smith <i>v.</i> Pryce, 1 Lee, 569	209
Smith <i>v.</i> Smith, 2 Phill. Ecc. 67, 152, 207, 235	1080, 1105, 1122, 1130
Smith <i>v.</i> Smithson, 2 Lee, 415	389
Smith <i>v.</i> Watkins, 1 Hag. Con. 467	620
Snake <i>v.</i> Webb, 2 Lee, 411	387
Soilleux <i>v.</i> Soilleux, 1 Hag. Con. 373	586
Somerset (Duke of) <i>v.</i> Jacobs, 1 Lee, 423, n.	157
Spencer <i>v.</i> Hawkins, 1 Lee, 104	39
Stallwood <i>v.</i> Tredger, 2 Phill. Ecc. 287	1147
Stephens <i>v.</i> Webb, 1 Lee, 262	97
Stevens <i>v.</i> Webb, 1 Lee, 456	169
Stote <i>v.</i> Tyndall, 2 Lee, 394, 405	381, 385
Stratton <i>v.</i> Ford, 2 Lee, 49, 216	260, 318
Strauss <i>v.</i> Schmidt, 3 Phill. Ecc. 209	1304
Stretch <i>v.</i> Pynn, 1 Lee, 30	13
Stride <i>v.</i> Cooper, 1 Phill. Ecc. 334	1002
Sudyer <i>v.</i> Man, 1 Lee, 195	73
Sullivan <i>v.</i> Haydon, 1 Lee, 12	5
Sullivan <i>v.</i> Oldacre, 3 Phill. Ecc. 45	1253
Sullivan <i>v.</i> Sullivan, 2 Hag. Con. 238	728
Sullivan <i>v.</i> Sullivan, 3 Phill. Ecc. 45	1253
Sutton <i>v.</i> Drax, 2 Phill. Ecc. 323	1158
Sutton <i>v.</i> Smith, 1 Lee, 207, 275	77, 102
Tappenden <i>v.</i> Walsh, 1 Phill. Ecc. 352	1008
Tattersall <i>v.</i> Knight, 1 Phill. Ecc. 232	970
Taylor <i>v.</i> Cox, 1 Lee, 344	127
Taylor <i>v.</i> Diplock, 2 Phill. Ecc. 261	1137
Taylor <i>v.</i> Newton, 1 Lee, 15	7
Taylor <i>v.</i> Taylor, 1 Lee, 527, 571	195, 210
Taylor <i>v.</i> Taylor, 2 Lee, 85, 172, 240, 274	273, 303, 327, 339
Temple <i>v.</i> Walker, 3 Phill. Ecc. 394	1363
Tew <i>v.</i> Baines, 1 Lee, 15	7
Thomas <i>v.</i> Baker, 1 Lee, 341	126
Thomas <i>v.</i> Davis, 1 Lee, 170	63
Thomas <i>v.</i> Evans, 1 Lee, 104	39
Thomas <i>v.</i> Wall, 3 Phill. Ecc. 23	1246
Thompson <i>v.</i> Cooper, 3 Phill. Ecc. 640, n.	1439
Thompson <i>v.</i> Waldram, 3 Phill. Ecc. 584	1422
Thorold <i>v.</i> Thorold, 1 Phill. Ecc. 1	894
Timbrell <i>v.</i> Rice, 1 Lee, 471	174
Tocker <i>v.</i> Ayre, 3 Phill. Ecc. 539	1408
Tree <i>v.</i> Quin, 2 Phill. Ecc. 14	1063
Tregayle <i>v.</i> Mennell, 1 Lee, 14	6
Trevelyan <i>v.</i> Trevelyan, 1 Phill. Ecc. 149	944
Trotman <i>v.</i> Trotman, 1 Lee, 12	5
Turner <i>v.</i> Felton, 2 Phill. Ecc. 92	1088
Turner <i>v.</i> Giraud, 3 Phill. Ecc. 534	1407
Turner <i>v.</i> Hall, 2 Lee, 501	419
Turner <i>v.</i> Turner, 1 Hag. Con. 414	600
Turst <i>v.</i> Turst, 2 Lee, 92, n.	275
Verelst <i>v.</i> Verelst, 2 Phill. Ecc. 145	1103
Von Solendahl (Baron) <i>v.</i> Hampe, 1 Lee, 102	38
Wakefield <i>v.</i> Mackay, 1 Phill. Ecc. 134, n.	937
Wakefield <i>v.</i> Wakefield, 1 Hag. Con. 394	593
Walker <i>v.</i> Carless, 2 Lee, 560	439
Walker <i>v.</i> Walker, 2 Phill. Ecc. 153	1105

	PAGE
Waller <i>v.</i> Heseltine, 1 Phill. Ecc. 170	951
Walter <i>v.</i> Gunner, 1 Hag. Con. 314	565
Walton <i>v.</i> Rider, 1 Lee, 16	7
Ware <i>v.</i> Johnson, 2 Lee, 103	279
Waring <i>v.</i> Waring, 2 Hag. Con. 153	699
Waring <i>v.</i> Waring, 2 Phill. Ecc. 132	1098
Warwick (Earl of) <i>v.</i> Greville, 1 Phill. Ecc. 123	934
Watson <i>v.</i> Milward, 2 Lee, 332	359
Watson <i>v.</i> Thorp, 1 Phill. Ecc. 269	981
Welde <i>v.</i> Welde, 2 Lee, App. 578, 580	446, 447
Wescombe <i>v.</i> Dods, 1 Lee, 59	23
West <i>v.</i> Willby, 3 Phill. Ecc. 374	1357
Wetdrill <i>v.</i> Wright, 2 Phill. Ecc. 243	1132
Wheatley <i>v.</i> Fowler, 2 Lee, 376	375
Whinfield <i>v.</i> Watkins, 2 Phill. Ecc. 1	1059
White <i>v.</i> Driver, 1 Phill. Ecc. 84	922
White <i>v.</i> White, 2 Lee, 20	249
Whitmore <i>v.</i> Whitmore, 1 Lee, 30	13
Wilkinson, In re, 3 Phill. Ecc. 96	1269
Wilkinson <i>v.</i> Moss, 2 Lee, 259	334
Williams <i>v.</i> Bott, 1 Hag. Con. 1	454
Williams <i>v.</i> Wilkins, 2 Phill. Ecc. 100	1090
Williams <i>v.</i> Williams, 1 Hag. Con. 299	559
Wilson <i>v.</i> Brockley, 1 Phill. Ecc. 132	937
Wilson <i>v.</i> McMath, 3 Phill. Ecc. 67	1260
Wilson <i>v.</i> Wilson, 2 Hag. Con. 203	716
Wilson <i>v.</i> Wilson, 3 Phill. Ecc. 543	1409
Winchlow <i>v.</i> Smith, 1 Lee, 416, 651	153, 238
Winford <i>v.</i> Hellier, 1 Lee, 39, 137, 274	16, 51, 102
Wingfield <i>v.</i> Wingfield, 1 Lee, 340	125
Wise <i>v.</i> Johnson, 1 Lee, 600	220
Wood <i>v.</i> Wood, 1 Phill. Ecc. 357	1010
Woolley <i>v.</i> Green, 3 Phill. Ecc. 314	1336
Worsley <i>v.</i> Worsley, 2 Lee, App. 572	444
Wortley <i>v.</i> Mackenzie, 2 Lee, 410	387
Wright <i>v.</i> Rutherford, 2 Lee, 266, 292	336, 345
Wyatt <i>v.</i> Henry, 2 Hag. Con. 215	720
Zacharias <i>v.</i> Collis, 3 Phill. Ecc. 176	1292



LAW LIBRARY,
Sacramento County.

**LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES**

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 000 981 538 2

LAW LIBRARY,
Sacramento County.

